



**UNITED STATES**

# **FACT-CHECKER LEGAL GUIDE**

**Fact-Checkers Legal  
Support Initiative**

**MLDI**  
Media Legal  
Defence Initiative

**REPORTERS  
COMMITTEE**  
FOR FREEDOM OF THE PRESS

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# INTRODUCTION

*By Reporters Committee for Freedom of the Press attorneys. Published August 2019.*

This guide is designed to provide an overview of key legal issues relevant to the work of fact-checkers. While this guide can help fact-checkers better understand their right to gather information and produce fact-checking reports and the legal protections available to them, it cannot and is not intended to take the place of specific legal advice from a licensed attorney in their jurisdiction.

## LIBEL

Libel occurs when a false and defamatory statement about an identifiable person is published to a third party, causing injury to the subject's reputation. A libelous statement can be the basis of a civil lawsuit brought by the person or group allegedly defamed.

There is no uniform law for libel. Each state decides what the plaintiff in a civil libel suit must prove and what defenses are available. However, constitutional law requires plaintiffs or prosecutors to prove fault before members of the media—which arguably includes fact-checkers—can be held liable for defamatory communications.<sup>1</sup> When a member of the press is sued, the court must weigh protection of a person's reputation against the First Amendment values of freedom of speech and expression. Generally, this requires an examination of six different legal elements—defamatory communication, publication, falsity, identification, harm and fault—as well as a number of defenses available to media defendants.

### *Defamatory communication*

A defamatory communication is one that harms another's reputation, exposes that person to hatred, ridicule, or contempt, lowers that person in the esteem of the community, or injures the person in his or her occupation. Defamation can take the form of libel (published or broadcast communication, including information published on a website) or slander (oral communication).

Courts generally are required to take the full context of a publication into account when determining whether the publication is defamatory. However, a headline, drawing, cutline or photograph taken alone can, in some cases, be libelous.<sup>2</sup>

### *Publication*

For purposes of a libel lawsuit, publication occurs when information is communicated or conveyed in any medium (e.g., in a newspaper, website, or broadcast) to someone other than the person defamed.

Members of the media can be held liable for the republication of a libelous statement made by another person or entity but quoted in a news article.<sup>3</sup> Letters to the editor and advertising that contain defamatory statements also can be the basis of a libel suit against the news publisher. (Comments posted to a website usually won't subject the news website to liability; however, see "Third-party postings" below.)

## *Falsity*

Libel plaintiffs who are public officials or public figures must prove that the allegedly libelous statements were false.<sup>4</sup> Private individuals suing for libel also must prove the statements were false if they involved a matter of public concern.<sup>5</sup> An altered or inaccurate quotation that damages the reputation of the person quoted can be considered false and therefore give rise to a libel claim.<sup>6</sup>

## *Identification*

Libel plaintiffs must prove that the allegedly defamatory publication refers to them; in other words, the statement must be "of and concerning" the plaintiff.

Governmental entities cannot bring libel claims, nor can members of large groups. However, if the statement at issue can be interpreted as referring to a particular person in a group, that person can sue. Also, if the allegedly defamatory statement pertains to a majority of the members of a small group, any member of the group has standing to sue.

A corporation may bring a libel claim if the allegedly defamatory statement raises doubts about the honesty, credit, efficiency or prestige of that business.

## *Harm*

The heart of a libel suit is the claim that the plaintiff's reputation was injured. In some states, harm does not need to be shown if the statements in question assert certain things: for example, that the plaintiff has committed a criminal offense (particularly a crime of moral turpitude, such as theft or fraud); that the plaintiff has a loathsome disease or committed adultery or fornication; or if the statement harms the plaintiff's professional character or standing. When any of these types of statements is involved, damage to the plaintiff's reputation may be presumed, depending on the specific state's law.

If the defamatory nature of the statements can be proven only by introducing facts that were not published as part of the original statements, a plaintiff usually must prove a monetary loss as a result of the publication to recover damages.

## *Fault (public officials vs. private figures)*

All plaintiffs must demonstrate that a member of the press—such as a fact-checker—was at fault in some way. The U.S. Supreme Court has recognized different standards for different types of libel plaintiffs, with public officials and public figures required to show the highest degree of fault.

Celebrities and others with power in a community usually are considered public figures. Politicians and high-ranking government personnel are public officials, as are public employees who have substantial responsibility for or control over the conduct of governmental affairs.

But determining if a person is a private or public figure is not always easy. In some instances, private and public categories may overlap. For example, a businessperson who has high visibility because of fundraising efforts in a community may not be a public figure for purposes other than the individual's community activity.

Under the standard adopted by the Supreme Court in the seminal libel case *New York Times Co. v. Sullivan*,<sup>7</sup> a plaintiff who is considered a public figure or official has a higher standard of proof in a libel case than a private plaintiff. The public figure or official must prove that the publisher or broadcaster acted with "actual malice" in reporting derogatory information. "Actual malice," in libel parlance, means the defendant knew that the challenged statements were false or acted with reckless disregard for the truth.

In determining whether actual malice exists, a court may examine a fact-checker's newsgathering techniques. Although carelessness is not usually considered reckless disregard, ignoring obvious methods of substantiating allegations could be considered reckless. However, even an extreme deviation from professional standards or the publication of a story to increase circulation do not in themselves prove actual malice.<sup>8</sup> While a failure to investigate facts does not necessarily prove actual malice, a "purposeful avoidance of the truth" may.<sup>9</sup>

Deliberately altering quotations will not constitute actual malice if the alterations do not materially change the meaning of the words the speaker used and are thus substantially true.<sup>10</sup> The U.S. Supreme Court has acknowledged that some editing of quotations is often necessary, but it has refused to grant blanket protection to all edits that are "rational" interpretations of what the speaker said.<sup>11</sup>

If the plaintiff is a private litigant, he or she must at least prove that the publisher or broadcaster was negligent in failing to ascertain that the statement was false and defamatory. Some states may impose a higher burden on private-figure litigants, especially if the story in question concerns a matter of public importance.

## *Defenses*

**Truth** is generally a complete bar to recovery by any plaintiff who sues for libel. Ensuring that any potentially libelous material can be proven true can avoid needless litigation.

**Fair report.** In most states, libelous statements made by others in certain settings often are conditionally privileged if the journalist, in good faith, accurately reports information of public interest. This privilege usually applies to press coverage of official proceedings or meetings such as court hearings and trials, legislative hearings, and city council meetings and related documents and official reports. To invoke this privilege, news coverage must be complete and accurate or a fair abridgement of what occurred in the official proceeding or report. It is advisable that fact-checkers explicitly attribute the information to the official source.

**Neutral report.** Although less broadly recognized, this privilege can protect the publication of newsworthy but defamatory statements made about public figures or officials by a responsible, reliable organization or person, as long as the statements are reported accurately and impartially. However, the privilege has been adopted in only a few jurisdictions and expressly rejected in others.<sup>12</sup>

**Third-party postings.** Internet publishers generally are not responsible for libelous information posted by their readers unless the publishers materially contributed to the creation of the libelous content. Section 230 of the Communications Decency Act of 1996 insulates providers of interactive computer services from liability. Thus, news sites that let readers post comments will generally not be liable for those comments.

However, there are ways that this protection can be lost. For example, these news sites are not protected by Section 230 if, rather than merely permit third parties to post comments, the publisher's employees create the online posts in question, extensively edit the posts (so as to make the statements libelous), or incorporate the comments into subsequent news stories.<sup>13</sup> Moreover, a website publisher may lose protection when it requires users to answer questions with pre-populated responses and then publishes that information.<sup>14</sup>

Nevertheless, online publishers may still edit user-generated content, such as by correcting spelling, removing obscenity, or trimming for length, so long as these edits are unrelated to the illegality. In fact, Section 230 expressly permits online publishers to delete content it considers "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," while maintaining immunity.<sup>15</sup>

**Opinion.** Although less relevant to fact-checkers, it is worth noting that opinions are protected speech under the First Amendment. There is no separate privilege for opinions, but because factual truth is a defense to a libel claim, an opinion with no "provably false factual connotation" is still protected from suit.<sup>16</sup> Courts therefore examine statements of opinion to see if they are based on or presume underlying facts that are false.

**Consent.** If a person gives permission for the publication of the information, that person cannot later sue for libel. However, denial, refusal to answer, or silence concerning the statement do not constitute consent.

The **statute of limitations** for bringing libel suits varies from state to state. The time limit for filing a libel lawsuit generally starts at the time of the first publication of the alleged defamation. If the plaintiff does not sue within the statutory time period, the litigation can be barred.

Although a **retraction** is not usually considered an absolute defense to a libel claim, it may reduce the damages a defendant must pay if found liable for defamation. However, retracting or correcting too much could be seen as an admission of falsity, which could be used against

you in a libel suit. Before agreeing to publish a retraction, consult an attorney or contact the Reporters Committee for more information.

**Anti-SLAPP laws**, which permit early dismissal of lawsuits that chill the exercise of free-speech rights, may help fact-checkers and news organizations defend some libel suits. SLAPP stands for “strategic lawsuits against public participation,” and anti-SLAPP statutes protect those engaged in debate about controversial matters from lawsuits that would deter the exercise of their constitutional rights. Generally, anti-SLAPP laws apply to news organizations as well as individuals exercising their free-speech rights. For more information, see the Reporters Committee’s [guide on anti-SLAPP laws](#).

### *Product libel*

Fact-checkers who write about consumer products should be aware that their reports may be subject to product disparagement laws. In June 2002, a federal appeals court allowed a product disparagement lawsuit brought by Suzuki Motor Corporation to go forward against the publisher of *Consumer Reports* magazine.<sup>17</sup> The court found that there was sufficient evidence for a jury to find that the magazine rigged the results of automobile tests to give the Suzuki Samurai a “not acceptable” rating. A dissenting judge said the ruling created a standard for consumer reporting that intrudes on free expression.

A number of states have enacted statutes aimed specifically at restricting the “disparagement” of food products. These statutes generally authorize food producers to sue anyone who disparages a food product with information unsupported by reliable scientific data. ABC was sued under one of these laws in South Dakota for its 2012 broadcast, “Pink Slime and You.”<sup>18</sup> The report “discussed how bits of beef are removed from fat trimmings in a centrifuge, sprayed with ammonia gas, and added to ground beef and hamburger meat, which a whistleblower called ‘pink slime.’”<sup>19</sup> Beef Products, Inc. sued, alleging that ABC News had implied the processed beef was unsafe to eat. Facing the potential for triple damages of \$5.7 billion, ABC settled the case mid-trial.<sup>20</sup>

### *Criminal libel*

Fewer than half of the states have criminal defamation statutes. Some of those laws, though still on the books, have been invalidated by court decisions. Even in states where criminal libel laws exist, prosecutions under those statutes have virtually disappeared. Criminal libel laws are subject to the same constitutional requirements as civil libel law. Thus, a person charged with criminal libel of a public figure can be found guilty only if the allegedly defamatory statement is false and was made with actual malice.<sup>21</sup>

### *Enforcement of libel judgments from other countries*

In 2010, Congress passed the SPEECH Act, which stands for “Securing the Protection of our Enduring and Established Constitutional Heritage” and bars U.S. courts from enforcing foreign libel judgments that are not consistent with the U.S. Constitution.<sup>22</sup> The SPEECH Act sought to deter “libel tourism,” cases where people who do not live in a foreign country file suit

there to bypass defendant-friendly American defamation law. It protects American journalists who only have assets in the United States, although multinational media companies with assets in foreign countries are not immune from paying damages in those countries.

### *Practical pointers for avoiding libel suits*

Be sensitive about using words that connote dishonest behavior (e.g., “lie”), immorality, or other undesirable traits, whether in your published story or in comments in your notes. Remember that a judge may order you to produce your notes, drafts, and internal memoranda in connection with a libel trial.

Check sources thoroughly. Get independent corroboration whenever possible. A source could have a vendetta against the subject and willfully or unintentionally misrepresent the facts for his or her own purposes. Confidential sources, such as government employees, may disappear or recant in the face of a lawsuit. Don’t rely on someone else to be accurate.

Do not let your opinion about whether someone is a public figure or official color your decision to verify the accuracy of a story. Juries do not respond favorably to reporters who fail to confront their subjects with defamatory information and provide them with an opportunity to comment.

If your fact-checking work focuses on the courts, make certain you understand criminal and civil procedure and terminology. Be especially careful to restate accurately any information obtained about arrests, investigations, and judicial proceedings. Cite to the court record or official report to make clear the fair report privilege applies.

Be cautious when editing. Make sure the story does not convey the wrong information because of a hasty rewrite.

Watch for headlines and cutlines that might be defamatory even though the text explains the story.

Make sure news promos or teasers used to stir audience interest are not misleading or defamatory.

Do not use generic video footage or file photos when reporting on an activity that might be considered questionable.

Just because someone else said it does not mean that a news organization cannot be sued for republishing it. Check out any factual allegations contained in such statements as carefully as you would other statements in a news story.

If contacted by someone threatening a libel suit, be polite, but do not admit error or fault. Talk the case over with your editor, supervisor, or attorney immediately, and follow procedures established by your news organization. You can also contact the Reporters Committee for more assistance, particularly if you are an independent journalist.

# PRIVACY

Almost every state recognizes some right of privacy, either by statute or under common law, the traditional court-made law that U.S. courts adopted long ago from the English standards.

Invasion of privacy is considered a personal tort, aimed at protecting the individual's feelings—feelings often articulated by courts as “reasonable expectations of privacy.” Corporations ordinarily cannot claim a right of privacy, and surviving heirs generally cannot file suit on behalf of a decedent.

Public figures have a more limited claim to a right of privacy, at least in matters that might have an impact on their ability to perform their public duties. Past and present government officials, political candidates, entertainers, and sports figures are generally considered to be public figures.

Although private individuals usually can claim the right to be left alone, that right is not absolute. For example, if a person who is normally not considered a public figure is thrust into the spotlight because of her participation in a newsworthy event, her claims of a right of privacy may be limited in relation to that event.

A right of privacy can be violated by any means of communication, including spoken words. Privacy claims are usually divided into four categories: intrusion, publication of private facts, false light, and misappropriation. Not all states recognize all four categories.

## *Traditional types of claims*

### **Intrusion**

An intrusion claim is based on the offensive prying into the private domain of another and is the most common type of privacy claim against the news media. Fact-checkers could face liability if they violate a person's “reasonable expectation of privacy” in a way that is “highly offensive to a reasonable person.” Because the basis of the claim is the intrusion itself, an actionable claim may arise whether or not the information is subsequently published.

Intrusion claims against the news media often center on some aspect of the information-gathering process. This tort may involve the wrongful use of recording devices, cameras or other intrusive equipment. Trespass also can be a form of intrusion. In addition to potential liability for tortious invasions of privacy, state anti-paparazzi laws also may create statutory liability, sometimes both civil and criminal, for newsgathering that involves trespass or harassment.

The leading legal guide on the accepted definitions of torts (known as the Restatement (Second) of Torts) lists the following scenario as an example of a highly offensive intrusion for

which a reporter would be subject to liability: “A, a woman, is sick in a hospital with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A’s room and over her objection takes her photograph. B has invaded A’s privacy,” regardless of whether B ever publishes the photograph.<sup>23</sup>

### **Publication of private facts**

Publication of truthful information concerning the private life of a person that would be both highly offensive to a reasonable person and not of legitimate public interest is an invasion of privacy in some states. Liability often is determined by how the information was obtained and its newsworthiness, and varies from community to community, as offensiveness is a question for a jury to decide.

Revealing private, sensational facts about a person’s sexual activity, health, or financial difficulties can constitute an invasion of privacy. Public revelations about children, particularly their medical conditions and treatment, also may subject fact-checkers to liability for invasion of privacy.

Some considerations involved:

**Public spaces:** Reporting on news events that take place in public generally does not constitute invasion of privacy. Arrests are considered newsworthy and, therefore, the press is free to accurately report them. Even a couple’s intimate moment in public, captured in a photograph, is not actionable as long as a reasonable person would not consider the picture private. Courts usually find that individuals have no “reasonable expectation of privacy” when they are in public.

**Passage of time:** The newsworthiness of a private fact may be affected by the passage of time. Problems may occur when individuals who were once notorious but are now rehabilitated become subjects of historical commentaries that refer to their former crimes or indiscretions. Disclosed facts about both public officials and public figures are generally not subject to the passage of time rule.

**Community standards:** The sensibilities of the community must be considered when determining if a private fact should be reported. The right of privacy is not designed to protect the overly sensitive.

### **False light**

False light invasion of privacy occurs when information is published about a person that is false or places the person in a false light, is highly offensive to a reasonable person, and is published with knowledge or in reckless disregard of whether the information was false or would place the person in a false light.

Although this tort is similar to defamation, it is not the same. The report need not be defamatory to be actionable as false light. This type of invasion of privacy tends to occur when a writer condenses or fictionalizes a story or uses stock footage to illustrate a news story.

False light includes embellishment (the addition of false material to a story, which places someone in a false light), distortion (the arrangement of materials or photographs to give a false impression) and fictionalization (references to real people in fictitious articles or the inclusion in works of fiction of disguised characters that represent real people). Some courts may consider works of fiction constitutionally protected expressions even if they contain characters that resemble, or clearly were based on, identifiable individuals known by the author or creator.

### **Misappropriation**

The use of a person's name or likeness for commercial purposes without consent is misappropriation. Many states protect an individual from being exploited by others for their exclusive benefit. A person's entire name need not be used. If the person could reasonably be identified, the misappropriation claim probably will be valid.

However, since a fact-checking report constitutes news and is not for a commercial purpose, this tort likely has little application to fact-checkers. Use of a photograph to illustrate a newsworthy story is not misappropriation. Even if a photo is used to sell a magazine on a newsstand, for example, courts usually will not consider that use a trade or commercial purpose. Nevertheless, the line between news and commercial use is not always clear, and even photographs used to illustrate an article may create liability for misappropriation if the article has an overriding commercial purpose.

### *Defenses*

In addition to the argument that the plaintiff had no reasonable expectation of privacy, several considerations may provide defenses against a claim of invasion of privacy against a fact-checker.

### **Newsworthiness**

If the public has a legitimate interest in the story as it was reported, newsworthiness can be a defense to the charge of invasion of privacy. But if the report of legitimate public interest includes gratuitous private information, publication of those private facts may be actionable. The court may consider several factors in determining whether information published is newsworthy, including the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the plaintiff voluntarily assumed a position of public notoriety.

### **Consent**

If a plaintiff consents to the alleged tort, there can be no invasion of privacy. However, when seeking consent, a fact-checker should be sure that the subject has consented not only to an interview, but to the publishing or airing of the interview or photographs as well. When minors or legally incompetent people are involved, the consent of a parent or guardian may be necessary. A written release is essential for use of pictures or private information in advertising or other commercial contexts.

### **Truth**

Truth can be a defense, but only in false light cases. A litigant claiming false light invasion of privacy who is involved in a matter of public interest must prove that the news media intentionally or recklessly made erroneous statements about her. Truth is not a defense, however, to a claim based on the publication of private facts.

### **Statute of limitations**

The permissible time frame for bringing invasion of privacy suits varies from state to state. The time limit for filing a lawsuit generally starts at the time the alleged invasion of privacy occurs. If the plaintiff does not sue within the statutory time period, the litigation can be barred.

### **Public records**

If information comes from a public record, such as a birth certificate, police report, or judicial proceeding, the news media usually are not liable for reporting it. A news site can publish a list of people who have been granted divorces, for instance, when the information is derived from court records, no matter how embarrassing it is to the individuals. However, not all information kept by public agencies is considered part of the public record. Some states restrict the release of certain information, even though it is part of an official record, by sealing the files or restricting public and news media access to certain proceedings.

If the press lawfully obtains truthful information about a matter of public concern from government sources, however, the state may not constitutionally punish publication of the information absent the need to further a state interest of the highest order.<sup>24</sup>

Fact-checkers should use caution in relying upon “semi-public” documents that do not become official records, like, for example, a police detective’s notes that do not become part of the official police report. If a document relied upon by a fact-checker was found to be only semi-public, the fact-checker might not be protected from liability for reporting the information contained in it. The specific circumstances are important here. If, for example, the plaintiff reported the information to the police, a court may conclude that the plaintiff no longer had a reasonable expectation of privacy in that information.<sup>25</sup>

## *Surreptitious recording*

*Note: The below discussion is a broad summary of recording laws and hidden camera statutes, which vary from state to state. For specific information about each state, see the Reporters Committee's ["Reporter's Recording Guide."](#)*

You may record, film, broadcast or amplify any conversation if all parties to the conversation consent. It is also legal to record or film a face-to-face interview when your recorder or camera is in plain view. In these instances, the consent of all parties is presumed. It is almost always illegal, however, to record a conversation to which you are not a party, do not have consent to tape, and could not naturally overhear.

Most state laws on recording and filming provide for criminal penalties for violations, and many also allow the victims to sue for damages in civil court.

### **Recording statutes**

About two-thirds of states allow you to record a conversation to which you are a party without informing the other parties you are doing so. Federal wiretap statutes also permit recording of telephone conversations in most circumstances with only one-party consent.<sup>26</sup> However, about a dozen states forbid the recording of private conversations without the consent of *all* parties. In some states, the rules differ depending on whether it is an in-person, telephonic or electronic conversation. Additionally, the federal law and many state laws prohibit recording—regardless of consent—for an illegal purpose.

### **Interstate calls**

Before surreptitiously recording calls with individuals in other states, fact-checkers should know both their state law and the law in the state into which they plan to call. It may be difficult to determine which law applies to an interstate recording, so the safest strategy is to assume that the stricter state law will apply.

### **Disclosure**

In addition to penalties for the act of illegal recording itself, some states have additional penalties for disclosing or using the unlawfully acquired information. Some of these disclosure provisions only apply to those who disclose with the knowledge that the information was illegally recorded.

The U.S. Supreme Court, however, ruled in *Bartnicki v. Vopper* that the media could not be held liable for damages under the federal statute for publishing or broadcasting information that the media obtained lawfully from a source who had conducted an illegal wiretap. The recording related to a local union leader's proposal to conduct violent acts in the area. The Court ruled that any claim of privacy in the recorded information was outweighed by the public's interest in

a matter of serious public concern.<sup>27</sup> The Court did not indicate whether disclosure by the media under different circumstances would be legal.

### **Hidden camera statutes**

Many states expressly prohibit the unauthorized installation or use of cameras in private places, which are considered where a person may reasonably expect to be safe from unauthorized surveillance. Several states have laws prohibiting the use of hidden cameras only in certain circumstances, such as in locker rooms or restrooms, or for the purpose of viewing a person in a state of partial or full nudity.

When the hidden camera captures audio in addition to images, the state's recording law will also apply to the recorded audio. Additionally, regardless of whether a state has a law concerning cameras or recording, undercover recording in a private place can prompt civil lawsuits for invasion of privacy, as discussed above.

### ***Right to be forgotten and online privacy issues***

European countries recognize a "right to be forgotten," which allows individuals to petition search engines and websites to remove past information about themselves from search results and the Internet. This concept is not recognized in the United States and is contrary to First Amendment principles that permit the news media to publish truthful information. Under U.S. law, take-down requirements usually only follow a successful libel suit, where the information has been found to be both harmful and untrue.

### ***Fact-checker's privacy checklist***

#### ***Content***

- Was the information contained in a public record? A semi-public record?
- Would publication of the information be highly offensive to a reasonable person?
- Have the facts been embellished with information of questionable accuracy?
- Is the information outdated and not obviously of current public interest, or has a current event revived its newsworthiness?
- Is the information important to the story?

#### ***Consent from the subject***

- Did the newsgathering occur in a public place? If it occurred in a private place, did you have permission to be on the premises and to interview or photograph the subject?
- If you are surreptitiously recording a private conversation and are in an all-party consent state, have you obtained consent from each party present?
- Is the subject an adult? If not, do you have parental consent?

- Is the person mentally or emotionally disabled and unable to give consent? Have you obtained valid consent from a guardian or other responsible party?
- Has that consent been revoked?
- Is the subject currently a private or public figure? Has the person's status changed over time?

### *What to do if someone threatens a lawsuit*

As in the libel context, if contacted by someone threatening an invasion of privacy suit, be polite, but do not admit error or fault. Talk the case over with your editor, supervisor or attorney immediately, and follow procedures established by your news organization. You can also contact the Reporters Committee for more assistance. Do not delete or destroy relevant materials.

## **OTHER NEWSGATHERING TORTS**

General laws that apply to all citizens usually apply equally to the press, so fact-checkers must stay within the bounds of the law when gathering and publishing the news.

### *Fraud and Trespass*

Subjects of news stories sometimes sue journalists for torts related to newsgathering activities, such as fraud or trespass. These claims have proceeded with varying success. In a case involving a hidden-camera investigation by ABC News that revealed a grocery chain's unsafe practices, a federal appeals court rejected a fraud claim but allowed nominal damages for claims of trespass and breach of the duty of loyalty. The court said that ABC News employees who gained employment with the grocery store and videotaped nonpublic areas of the store could be liable for only \$2 in damages.<sup>28</sup>

Journalists have also been criminally prosecuted for trespassing while covering the news. This usually happens while covering protests or other events that may cross onto private property. For more information about your rights at protests and how to avoid arrest, see the Reporters Committee's guide, "[Police, Protesters, and the Press.](#)"

### *Infliction of emotional distress*

Individuals sometimes sue the news media for emotional distress caused by the publication of embarrassing, truthful facts. However, in *Hustler Magazine v. Falwell*,<sup>29</sup> the Supreme Court ruled that public figures and officials may not recover for intentional infliction of emotional distress without demonstrating that the material in question contained a false statement of fact that was made with actual malice. The Court noted that editorial cartoonists and other satirists must be protected not only from libel suits, but also from suits claiming emotional distress, when caricaturing public figures or commenting on matters of public concern.

## *Contract claims*

The Supreme Court has held that the First Amendment does not protect journalists from breach-of-contract suits where a news outlet reveals a source's identity without the source's permission, after promising confidentiality.<sup>30</sup> The Supreme Court left it to the states to decide whether media organizations would be subject to ordinary rules of contracts and "promissory estoppel" (in which a court enforces a promise made to a party who relied on it to the party's detriment).

## **ACCESS TO COURTS**

*Note: This section provides an overview of court access law. However, these laws vary depending on the state and federal jurisdiction. For jurisdiction-specific information, review the Reporters Committee's "[Open Courts Compendium](#)."*

Court records can be a valuable source of information for fact-checkers. As a general matter, courtrooms and court records have traditionally been open to the public. However, when courts recognize reporters' rights to attend proceedings or review court documents, the rights are rarely absolute. Instead, the courts usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted countervailing interest in confidentiality. The standard the courts use in striking that balance depends on the source of the right. Courts have found that the media have a right of access to judicial records and proceedings under common law, the First Amendment and state laws.

Under common law—the traditional court-made law that U.S. courts adopted long ago from English standards—the public has a presumptive right to inspect and copy judicial records.<sup>31</sup> This right can only be overcome by "countervailing interests [that] heavily outweigh the public interests in access."<sup>32</sup>

The U.S. Supreme Court has also recognized a First Amendment right of access to attend criminal trials, including *voir dire* and preliminary hearings, and to obtain the related court transcripts.<sup>33</sup> The Court established a two-part test to determine whether the press and public have a First Amendment right of access to criminal proceedings and records.<sup>34</sup> First, courts must consider "whether the place and process have been historically open to the press and general public"; second, courts must consider "whether public access plays a significant positive role in the functioning of the particular process in question."<sup>35</sup> Courts have extended this "history and logic" test to establish a constitutional right of access to a broad range of criminal and civil court proceedings and records.<sup>36</sup>

When the First Amendment right of access applies, the Supreme Court has held that a presumption of disclosure requires courts to grant access unless specific, on-the-record findings

demonstrate that closure is “necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.”<sup>37</sup>

In criminal cases, courts issuing closure orders most often point to the defendant’s right to a fair trial by an impartial jury. However, general fear that publicity will jeopardize a defendant’s right to a fair trial is usually insufficient to close a criminal proceeding. In addition, judges consider closing proceedings to protect the privacy interests of witnesses or jurors or prevent the emotional trauma of testifying in public, particularly in sexual assault cases. And in civil cases, litigants often seek to conduct proceedings in secret or keep court records under seal, pointing to confidential business information, trade secrets, or other private matters. Even in these cases, however, the court must make specific, on-the-record findings to justify the closure, which must be narrowly tailored.

You have a right to oppose secrecy. Before closing the courtroom, a judge is generally required to hold a hearing on the need for secrecy and allow the public and press to argue against closure. If a compelling interest such as the criminal defendant’s fair trial right is at stake, the judge must consider alternatives to court secrecy, such as questioning prospective or seated jurors concerning their exposure to prejudicial information or sequestering the jury. The judge also must consider changing the venue of the trial, bringing in jurors from another part of the state, or postponing the trial until the effects of publicity have diminished.

A judge who determines that no alternative will work also must determine that secrecy will protect the party’s interest and must tailor the closure order to protect that interest without unduly restricting public access. Finally, the judge must make written findings supporting the closure decision. The U.S. Supreme Court has held that this is necessary so that an appeals court can evaluate the propriety of the closure.<sup>38</sup>

### *Practical pointers*

If you learn that a secret court proceeding is in progress or has already been held, try to determine:

- Who sought closure and on what grounds.
- The nature of the proceeding: civil or criminal and whether it is a trial, pre- or post-trial hearing or appeal.
- Whether the court held a hearing on closure and, if so, what findings the judge made justifying secrecy.
- Whether the proceeding is still going on. If possible, consult your editor about challenging the closure or contact the Reporters Committee.

If you decide to seek access to the proceeding, to a transcript if the proceeding has concluded, or to court records, the simplest and most direct approach is to submit a letter to the judge.

Pointing out the procedural requirements mandated by the U.S. Supreme Court may be sufficient to convince the judge to reconsider the closure.

In addition to requesting access to future proceedings, you should ask the judge to make available transcripts of past proceedings and copies of any documents that may have been introduced as evidence. You might be able to convince the judge to give you the transcript because you were deprived of access to a hearing that should have been public.

On the other hand, if the judge has decided to go forward in secrecy, you will likely need assistance from a lawyer. Courts have said that the media may intervene in a criminal or civil case for the limited purpose of asserting their First Amendment rights.<sup>39</sup>

In addition to filing a motion to intervene, your lawyer might file a motion seeking a stay of further proceedings in the underlying case until the access issue is resolved.

If the judge denies the motion to intervene or, after hearing argument, continues holding closed proceedings, you may want to consider an appeal. A lawyer will be able to advise you on the best method of obtaining expeditious review of the decision. Contact the Reporters Committee if you or your news organization does not have an attorney.

## ACCESS TO GOVERNMENT RECORDS AND MEETINGS

*Note: This section provides a brief overview of federal and state public records laws. For more information about the federal Freedom of Information Act (“FOIA”), see the [FOIA wiki](#), a free and collaborative resource provided by the Reporters Committee, with contributions from other groups and users.*

*For help submitting and tracking your federal FOIA requests, you can use the Reporters Committee’s [iFOIA service](#).*

*For information about each state’s public records and open meeting laws, see the Reporters Committee’s [“Open Government Guide.”](#)*

Fact-checkers can gain useful information about government activity at the local, state, and federal level through examining public records or attending public meetings. All states, the District of Columbia, and the federal government have enacted “freedom of information” laws that guarantee access to government documents. Most states also have open meetings or “sunshine” laws that give the public the right to attend the meetings of commissions, councils, boards, and other government bodies. These laws vary from jurisdiction to jurisdiction.

Most open records laws are based on the presumption that everything is public, unless specifically exempted. Some states specify certain categories of information that always are public. Many exceptions to public access are subject to agency discretion, so you can always try to convince officials that it would be in the public's interest to release the requested information. In most states, only a few specifically designated types of records are required to be kept secret.

The number and kinds of exemptions vary from state to state, but state and federal laws usually have exemptions for:

- **Personal privacy:** Some states have specific exemptions for personnel, medical and similar files. In other states, more general exemptions for "privacy" apply.
- **Law enforcement and investigative files:** These may be exempt across the board, or may resemble the federal law, which permits information to be withheld only when some specified harm to the investigation or an individual involved would result from disclosure.
- **Commercially valuable information:** These exemptions usually protect from disclosure information provided by private companies to the government, such as commercially sensitive or trade secret information in licensing or contract applications.
- **Pre-decisional documents:** These exemptions are designed to allow staffers to debate alternatives frankly and openly before an agency reaches a final decision. Final agency action, however, rarely can be withheld from the public, and pre-decisional materials are sometimes available once the agency makes its final decision.
- **National security:** These exemptions are intended to protect from disclosure those documents that if released could potentially harm security interests. At the federal level, these are often documents containing "classified" information.
- **Attorney-client communications and attorney work product:** Exemptions generally exist to protect communications between legal counsel and government entities and attorney "work product" consisting of legal opinions or analysis.

# ACCESS TO PLACES

*Note: The below discussion is a broad summary on the news media's right of access. For additional information, see the Reporters Committee's ["First Amendment Handbook"](#) and ["Reporter's Field Guide."](#)*

A fact-checker's right to access and gather information in a place will depend on the kind of property to which access is sought. In general, most courts have ruled that the First Amendment provides the news media no greater right of access to property than that enjoyed by the public. Therefore, fact-checkers may not have the right to enter if the general public is not usually allowed in.

## *Public property*

Access to public property depends on its status as a public forum or a nonpublic forum.

A **public forum** is property that is publicly owned and open to the general public, such as a city park or sidewalk. State and local governments may not limit or deny the public or the news media access to public forums. Government officials may, however, impose reasonable time, place and manner restrictions, as long as those restrictions are content neutral and narrowly tailored to serve a significant government interest. For example, a city government reasonably could grant a parade permit that restricted a group from marching through the business section of town at rush hour. Nevertheless, courts have found that individuals have the right to photograph or record what occurs in such public forums, particularly the actions of police.<sup>40</sup>

Government property that is not generally open to the public as a forum—such as courthouses, jails, government offices, and city halls—is called **"nonpublic forum public property."**

Government agencies generally succeed in limiting news media access to these properties where they show that newsgathering would interfere with the normal operation of facilities. In addition, security measures may require background checks and security screenings of fact-checkers covering public facilities such as state capitols and city halls.

When publicly owned property—such as an auditorium or sports arena—is leased for nongovernment functions and operated in a commercial rather than governmental capacity, fact-checkers have no special right of access beyond that afforded to the general public.

## *Private property*

Fact-checkers usually will need permission of the property owner or public officials before entering private property, even to cover an ongoing news event such as a demonstration, a natural disaster, an accident, or a criminal investigation.

Some courts have drawn distinctions between private property used for a private purpose, such as a person's home, and private property used for a public purpose, such as a shopping center.<sup>41</sup> Some states treat the latter as a type of public forum.

### *Public schools*

Standards governing access to public school buildings differ by state. Generally, public school property is treated as nonpublic forum public property, and regulations that restrict access but are designed to minimize interference with normal school activities would be constitutionally permissible. Some states have laws or regulations that give individual school administrators the authority to deny members of the news media access to school grounds if their presence would interfere with school activities.

### *Prisons and prisoners*

While the public has a limited right of access to the prison system, the U.S. Supreme Court has consistently ruled that the news media have no right to insist on interviewing specific inmates.<sup>42</sup> Courts are generally deferential to prison officials' arguments that permitting specific interviews or access would affect prison security, the orderly operation of the prison, or other penological concerns.

But just as the news media do not have rights greater than the general public, they cannot be denied access that is granted to the general public. If prisoners are allowed to add whomever they choose to their visitor lists, for example, prisons generally should not stop them from including members of the news media, including fact-checkers, on those lists. They may, however, forbid fact-checkers from using cameras, recording devices, and writing implements if other visitors are not allowed to use them.

Further, state law or prison policy may allow reporters to interview specific inmates. Fact-checkers should check the regulations of the appropriate state department of corrections (or the Bureau of Prisons for access to a federal facility) to find the specific requirements for and limitations on interviews and visits. Policies vary widely from state to state, and corrections officials usually have considerable latitude in deciding whether a particular member of the news media may interview a particular inmate. Some states have regulations that are very specific regarding who is a member of the news media and what kind of access they can get, while others leave it to the discretion of the prison warden.

### *Election polling places*

Generally, the First Amendment protects the right to gather news outside of polling places. Although many states today have polling-place restrictions aimed to prevent voter intimidation and election fraud, courts have invalidated legislation that is aimed at preventing exit polling.

For more information, see the Reporters Committees’ [“2018 Election Legal Guide,”](#) which is also available in [Spanish](#).

## CONFIDENTIAL SOURCES AND INFORMATION

*Note: The discussion below is a broad summary on protecting confidential sources. For state-specific information, see the Reporters Committee’s [“Reporter’s Privilege Compendium.”](#)*

The use of subpoenas to force members of the news media to disclose their confidential sources and unpublished information significantly intrudes on a free press. Every state except two—Hawaii and Wyoming—recognizes legal protections for a member of the news media’s confidential sources, either through legislatively enacted “shield laws” or judicially-recognized privileges grounded in First Amendment principles. The situations in which these protections can be invoked, who can invoke them, and what they cover vary greatly by state and federal jurisdiction.

Some shield laws or privilege doctrines protect members of the news media from forced disclosure of their confidential sources, but not of unpublished material. Other laws provide absolute or qualified protection according to the type of legal proceeding involved (civil or criminal) or the role of the journalist in the proceeding (defendant or independent third party).

Shield laws also usually have specific limits on who qualifies for the protection. For instance, some of the statutes define “journalist” in a way that only protects those who work full-time for a newspaper or broadcast station. Fact-checkers should pay particular attention to whether their situation would be covered.

If a fact-checker refuses to comply with a subpoena after being ordered by a court to do so, the fact-checker may be held in contempt. However, since most states and federal jurisdictions recognize some form of a privilege protecting a journalist’s confidential sources (and often non-confidential sources), this happens rarely. Civil contempt can result in a fine or incarceration, which terminates when the fact-checker divulges the information sought or when the underlying proceeding is completed. Criminal contempt may be used to punish an affront to the court, such as a fact-checker’s obstruction of court proceedings by refusing to testify. Criminal contempt will result in a fine and/or jail sentence, but unlike civil contempt, the sentence is for a set period of time and does not end if a fact-checker decides to testify.

### *Practical pointers about subpoenas*

- A subpoena is simply a notice that you must provide certain documents or appear at a deposition or other court proceeding to answer questions. You must not ignore a subpoena. If you fail to comply with it, you could be held in contempt of court and fined, imprisoned, or both.

- Do not comply with the subpoena without first consulting a lawyer. As soon as possible, contact your in-house counsel. If you do not have in-house counsel and need help finding an attorney, contact the Reporters Committee’s [hotline](#).
- If you need financial assistance to help cover legal costs, you can apply to the [Press Freedom Defense Fund](#) ([pressfreedom@firstlook.org](mailto:pressfreedom@firstlook.org)).
- Never destroy the materials sought in the subpoena, as this could subject you to criminal and civil penalties.
- The Reporters Committee’s [Reporter’s Privilege Compendium](#) provides an overview of the legal protections that may be available in your state or jurisdiction. However, this guide must never be a substitute for legal advice.
- If you feel comfortable doing so, after discussing with legal counsel, report your subpoena to the [U.S. Press Freedom Tracker](#), which aims to document press freedom incidents in the United States.

## NEWSROOM SEARCHES AND GOVERNMENT SURVEILLANCE

### *Newsroom searches*

In 1978, the Supreme Court ruled that a warrant may be issued to search a newsroom or a reporter’s home if there is reason to believe that evidence of a crime will be found there. In that case, police searched a college newspaper’s newsroom for photographs identifying some demonstrators who had injured policemen.<sup>43</sup> The Court clarified, however, that when a search warrant could touch material protected by the First Amendment, like journalistic work product, the process for obtaining a warrant must be applied with “scrupulous exactitude.” *Id.* at 564.

In response to this ruling, Congress passed the Privacy Protection Act of 1980, which provides additional protections against searches and seizures of materials intended for publication.<sup>44</sup> The Act restricts the government from searching or seizing “any work product materials” or “documentary materials” from someone “reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”<sup>45</sup>

“Work product materials” are items created or possessed for the “purposes of communicating such materials to the public,” such as drafts of articles, outtakes or notes, that contain the mental impressions, conclusions, opinions or theories of the person who prepared the material.<sup>46</sup> “Documentary materials” are “materials upon which information is formally recorded,” such as photographs or audio and visual recordings.<sup>47</sup>

Law enforcement may only search for or seize *work product* material in two circumstances. The “suspect exception” is the most important and applies when law enforcement has probable

cause to believe that the person possessing the work product has committed an offense to which the materials relate, *but* the offense to which the materials relate *cannot* consist of the possession, communication, or withholding of such materials or the information contained therein.<sup>48</sup> The other exception is when there is reason to believe that the search and seizure of work product material is necessary to prevent death or serious bodily harm.<sup>49</sup>

With respect to other documentary material, law enforcement can use a search warrant under two more exceptions: when the use of a subpoena for the material could lead to its destruction, alteration or concealment, or when a court has ordered production under a subpoena, it has not been complied with, and all appeals have been exhausted or when there is reason to believe that further delay in an associated investigation or trial would threaten “the interests of justice.”<sup>50</sup>

If law enforcement officials violate any provision of the Act, a news organization may sue to recover actual damages. The minimum amount that will be awarded is \$1,000 and courts may award fees and costs.

Even though the Privacy Protection Act applies to government officials at all levels—federal, state and local—some states have laws providing similar or even greater protection. California, for instance, bars the use of search warrants to seize unpublished newsgathering materials in criminal investigations, without exception.<sup>51</sup>

If law enforcement officials arrive at a newsroom or a fact-checker’s home with a search warrant, fact-checkers should make clear that they are members of the press, intend to disseminate materials to the public, and are therefore protected by the Privacy Protection Act (in addition to the Fourth Amendment). Fact-checkers should also ask permission for a lawyer to examine the warrant. If the search proceeds, fact-checkers should record the scene. Although they may not impede the law enforcement officials, they are not required to assist the searchers.

If you can, consult an attorney immediately after the search is over about filing a lawsuit in either state or federal court. It is important to move quickly because you may be able to obtain emergency review by a judge in a matter of hours. If your organization does not have an attorney, contact the Reporters Committee’s [hotline](#) for assistance in obtaining one.

### *Federal news media guidelines*

In the early 1970s, the U.S. Justice Department faced a backlash over attempts to use subpoenas to force reporters to disclose work product and the identity of confidential sources. Those subpoena controversies led the Justice Department to adopt internal policies that made it more difficult for federal prosecutors to subpoena members of the news media.<sup>52</sup>

These news media guidelines remain an important protection for the press today and have been amended over the years to limit federal prosecutors' use of search warrants, court orders or subpoenas against news organizations; subpoenas to third-party service providers for telecommunications and business records ("third-party subpoenas"); and questioning and arrests of members of the news media.<sup>53</sup> The news media guidelines do not apply to "foreign intelligence" search warrants or subpoenas, which operate under a different legal framework, but the Justice Department has separate rules governing such search warrants or subpoenas incorporating some of the same protections.<sup>54</sup>

The news media guidelines include three key safeguards that limit when, why and how the Justice Department may investigate members of the news media. First, most search warrants, court orders and subpoenas to a member of the news media or for news media records from a third-party vendor require approval by the attorney general.<sup>55</sup> Second, prosecutors must ensure that material or records cannot be acquired from a non-media source before they can seek a search warrant, court order or subpoena.<sup>56</sup> And, third, with only limited exceptions, members of the news media must be notified before a third-party subpoena is issued to give the outlet time to challenge it in court.<sup>57</sup>

### *FISA warrants*

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA),<sup>58</sup> which created a legal framework separate from the criminal laws for searches and seizures in foreign intelligence and international terrorism investigations.

Administered by the Foreign Intelligence Surveillance Court, the "FISC," the law authorized investigators to use various forms of legal process, such as physical search warrants and wiretap orders, for foreign intelligence purposes. The law has been expanded over the years, and now permits the Justice Department to secretly search for and seize communications content and metadata under various statutory provisions. It is unlikely that FISA would be used directly against a member of the news media based on ordinary newsgathering activities. However, journalists who are in contact with or are reporting on individuals who are involved in activities related to foreign intelligence may have communications or metadata that are incidentally or inadvertently collected.

Foreign intelligence surveillance law is famously complicated. If you are involved in reporting that touches on intelligence matters, military activities, or federal law enforcement, and have questions about FISA and related laws, please contact the [Reporters Committee's hotline](#).

### *Practical pointers for protecting communications with sources*

- Note that "insider threat" programs within government agencies may track documents or data using various methods, such as print logs or watermarks. Remain

cognizant of such tracking methods when handling or publishing information disclosed from a source.

- Use encrypted communications apps, such as Signal, and set messages to auto-delete.
- Keep in mind that your phone, text, or email metadata may be seized without notice by the government, and if it is accessed as part of a criminal investigation, it may disclose the identity of unrelated sources.
- Think about your threat profile; if you're reporting on crime, national security, or international human rights, for instance, your communications are more likely to be intercepted or seized incidentally or inadvertently by government actors or criminals.
- Make sure your electronic devices are password-protected and that, when you travel abroad, you have logged out of your email and other apps used for communicating.

## PRIOR RESTRAINTS

*Note: The below discussion is a brief summary of the case law concerning prior restraint. For more information, see the Reporters Committee's ["First Amendment Handbook."](#)*

A prior restraint is an official government restriction of speech prior to publication. Prior restraints are viewed by the U.S. Supreme Court as “the most serious and the least tolerable infringement on First Amendment rights.”<sup>59</sup> The Court repeatedly has found that such attempts to censor the media are presumed unconstitutional.

Because the Court found in *Nebraska Press Association v. Stuart* that the “barriers to prior restraint remain high and the presumption against its use continues intact,” prior restraint orders are rarely upheld.<sup>60</sup> As a result, editorial decisions about publication of information the government deems sensitive are generally left solely to the discretion of news organizations.

Although the Supreme Court has indicated that, theoretically, publication of some information may be restrained to protect national security, it has never upheld a prior restraint on the news media. When *The New York Times* and *Washington Post* began publishing the Pentagon Papers, a study about U.S. involvement in Vietnam, and the government tried to stop publication, the Supreme Court refused to uphold prior restraints on the newspapers because the government had failed to make a sufficient showing of harm to national security.<sup>61</sup>

Law enforcement officials often tell members of the news media not to publish certain **information about crimes**—for example, the names of victims or witnesses, or the place where the crime occurred. Fact-checkers should be skeptical about admonitions not to publish, particularly when such officials have made the information readily available. Unless these

restrictions are authorized by a judge who has found a “clear and present danger” to the administration of justice, officials cannot order fact-checkers not to publish lawfully obtained information.<sup>62</sup> The decision to publish in such contexts is a matter of ethical considerations, not legal restraints.

Private individuals occasionally try to convince members of the news media to refrain from publishing information that might be embarrassing. Sometimes these people have sought court orders barring publication, though they are typically unsuccessful. Generally, courts are reluctant to issue prior restraint orders, particularly when the justification for them is merely that the material might be libelous or invade someone’s privacy. Fact-checkers, of course, could still be liable for libel or invasion of privacy after the information is published.

To the extent information is revealed in open court, it cannot be censored. For example, if jurors are identified in open jury selection proceedings, the court cannot restrain the press from publishing the identity of jurors because such information is part of the public record.

### *Statutory restraints*

Some states have statutes that make it a crime to publish the names of rape victims or the identity of a juvenile suspect. Journalists who break these laws are theoretically subject to fines and jail sentences.<sup>63</sup> State courts, however, have found some of these statutes to be unconstitutional, though not all.<sup>64</sup>

Although the U.S. Supreme Court has not held that these statutes are unconstitutional as written, it has ruled that states cannot punish members of the news media for publishing truthful information they have lawfully obtained from public records or official proceedings.<sup>65</sup>

### *What to do if ordered not to publish*

If someone requests that you not publish certain information, try to determine the motivation for it. For example, is an individual unduly sensitive to what she or he thinks you might publish? See if you can address those concerns without acquiescing to the demand. Remember, in most of these situations you can refuse the request and decide for yourself what information you will publish.

If you are threatened with prosecution under a statute that supposedly makes publication of the information a crime, ask to see the statute or get enough information so that you can obtain a copy of it yourself. If such a law exists and covers the kind of information you want to publish, consult an attorney about the constitutionality of the law or call the Reporters Committee. Make a reasoned decision about publication only after you and your editors have considered the legal ramifications of that decision.

If a judge orders you not to publish, take the order seriously. Ask for a copy of the order and consult your editors immediately. In these circumstances, three courses of action are open to you: obey the order, obey the order while challenging it, or violate the order as a means of testing its constitutionality. Your choice should be made with a lawyer's assistance.

If you elect to obey the order, file your objection to the order at the earliest opportunity and ask permission to appear with legal counsel to challenge the ruling. If the initial request to vacate the order is denied, or if you are denied the opportunity to be heard on your challenge, an attorney should be prepared to file an appeal for you. It is difficult to represent yourself in such an appeal, particularly because everything must happen quickly. Call the Reporters Committee for assistance in finding an attorney if you do not have one.

If you elect to challenge the order by violating it and publishing the information, the court may hold you in contempt. Even if the order is later found to be unconstitutional, you could be fined or even imprisoned.

# HARASSMENT

In the current climate, in which politicians and members of the public have targeted journalists and news organizations with verbal attacks, journalists have reported an increase in threats of physical violence and online harassment. For more information about these threats and assaults, see the Reporters Committee's "[Press Freedoms in the United States in 2018: A Review of the U.S. Press Freedom Tracker](#)."

Assaults and arrests of journalists occur most frequently at protests. For information on how to stay safe while covering protests and other events, see the Reporters Committee's guide, "[Police, Protesters, and the Press](#)," and [tip sheet](#).

To reduce the risk of online harassment, security experts advise taking precautionary steps to limit and safeguard your personal information online. It is much easier to prevent online harassment, such as doxing (the publication of personal information online) by taking these steps ahead of time. [Pen America's Online Harassment Field Manual](#) is a useful resource on this topic.

Fact-checkers should take seriously threats of physical harm and report them to an editor and to law enforcement promptly. Ideally, your editor can monitor, assess, and report these threats for you and relieve some of the mental strain associated with them. [CPJ's Journalist Security Guide](#) provides additional information on how to stay safe.

# ENDNOTES

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- <sup>1</sup> Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).
- <sup>2</sup> See, e.g., Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998).
- <sup>3</sup> See, e.g., Khawar v. Globe Int’l, Inc., 965 P.2d 696 (Cal. 1998), *modified*, No. S054868 (Cal. 1998), *cert. denied*, 526 U.S. 1114 (1999).
- <sup>4</sup> Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- <sup>5</sup> Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
- <sup>6</sup> See, e.g., Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).
- <sup>7</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
- <sup>8</sup> Harte-Hanks Comm’cns, Inc. v. Connaughton, 491 U.S. 657, 665–66 (1989).
- <sup>9</sup> *Id.* at 692.
- <sup>10</sup> See Masson, 501 U.S. at 517.
- <sup>11</sup> *Id.* at 518.
- <sup>12</sup> See, e.g., Edwards v. Nat’l Audubon Soc., Inc., 556 F.2d 113 (2d Cir. 1977) (adopting neutral report privilege). *But see* Dickey v. CBS Inc., 583 F.2d 1221, 1225 (3d Cir. 1978) (rejecting neutral report privilege).
- <sup>13</sup> Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016) (Section 230 immunity did not apply to Gawker at motion to dismiss stage where plaintiff alleged that Gawker had “encouraged and invited” the allegedly defamatory user comments; edited, shaped, and choreographed them; and employed some of the individuals who authored them).
- <sup>14</sup> Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).
- <sup>15</sup> 47 U.S.C. § 230(c)(2)(A).
- <sup>16</sup> Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).
- <sup>17</sup> Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 292 F.3d 1192 (9th Cir. 2002).
- <sup>18</sup> Susan Seager, *Why ABC’s ‘Pink Slime’ Settlement is a Red Flag for Free Press*, TheWrap (June 28, 2017), <https://www.thewrap.com/why-abcs-pink-slime-settlement-is-a-red-flag-for-free-press/>
- <sup>19</sup> *Id.*
- <sup>20</sup> *Id.*
- <sup>21</sup> See *Garrison v. Louisiana*, 379 U.S. 64 (1964) (holding that criminal libel laws are unconstitutional to the extent they permit punishment of statements that are true or made about public officials without actual malice); *Mangual v. Rotger-Sabat*, 317 F.3d 45 (1st Cir. 2003) (holding that Puerto Rico criminal libel statute that did not require actual malice to support liability was unconstitutional under First Amendment as applied to statements regarding public officials or figures).
- <sup>22</sup> *SPEECH Act celebrates one year anniversary, as its influence spreads overseas*, RCFP, <https://www.rcfp.org/journals/news-media-and-law-fall-2011/speech-act-celebrates-one-yea/>.
- <sup>23</sup> Restatement (Second) of Torts § 652B cmt. b, illus. 1.
- <sup>24</sup> See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the Supreme Court did not specifically identify what such a “state interest of the highest order” would be, but it found that the general interest in encouraging rape victims to come forward did not suffice.
- <sup>25</sup> See, e.g., *Scheetz v. The Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991).
- <sup>26</sup> Wire and Electronic Communications Interception and Interception of Oral Communications, 18 U.S.C. §§ 2510–2523.
- <sup>27</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

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- <sup>28</sup> Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999); *see also* WDIA Corp. v. McGraw-Hill, Inc., 34 F. Supp. 2d 612 (S.D. Ohio 1999) (refusing to award punitive damages in case against magazine found to have committed fraud in the pursuit of news), *aff'd*, 202 F.3d 271 (6th Cir. 2000).
- <sup>29</sup> Hustler Magazine v. Falwell, 485 U.S. 46 (1988).
- <sup>30</sup> Cohen v. Cowles Media, 501 U.S. 663 (1991).
- <sup>31</sup> Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597–98 (1978).
- <sup>32</sup> Doe v. Pub. Citizen, 749 F.3d 246, 266 (4th Cir. 2014).
- <sup>33</sup> Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (criminal trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (criminal trials); Press Enterprise v. Superior Court (“Press Enterprise I”), 464 U.S. 501 (1984) (criminal jury selection); Press-Enterprise Co. v. Superior Court (“Press-Enterprise II”), 478 U.S. 1 (1986) (criminal preliminary hearing).
- <sup>34</sup> Press-Enterprise II, 478 U.S. at 8.
- <sup>35</sup> *Id.*
- <sup>36</sup> *See, e.g.*, In re Wash. Post Co., 807 F.2d 383 (4th Cir. 1986) (sentencing hearings); Wash. Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (plea agreements); N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 298 (2d Cir. 2012) (collecting cases on right of access to civil proceedings and records and recognizing right of access to certain administrative hearings).
- <sup>37</sup> Press-Enterprise I, 464 U.S. at 510.
- <sup>38</sup> Press Enterprise II, 478 U.S. at 9–10; Gannett v. DePasquale, 443 U.S. 368 (1979).
- <sup>39</sup> *See, e.g.*, Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893 (7th Cir. 1994).
- <sup>40</sup> *See, e.g.*, Fields v. City of Philadelphia, 862 F.3d 353 (3rd Cir. 2017) (“[R]ecording police activity in public falls squarely within the First Amendment right of access to information.”).
- <sup>41</sup> *See, e.g.*, Marsh v. Alabama, 326 U.S. 501 (1946).
- <sup>42</sup> Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Wash. Post, 417 U.S. 843 (1974).
- <sup>43</sup> Zurcher v. Stanford Daily, 436 U.S. 547 (1978), *reh'g denied*, 439 U.S. 885 (1978).
- <sup>44</sup> 42 U.S.C. §§ 2000aa(a)-(b), 2000aa-5 to 2000aa-7.
- <sup>45</sup> 42 U.S.C. § 2000aa(a)-(b).
- <sup>46</sup> 42 U.S.C. § 2000aa-7(b).
- <sup>47</sup> *Id.* § 2000aa-7(a).
- <sup>48</sup> 42 U.S.C. § 2000aa(a)(1). That said, please also note that the offense *may* consist of the receipt, possession, or communication of information related to the national defense, classified information, or restricted information under the Atomic Energy Act as well as various child exploitation and trafficking laws. *Id.* In other words, law enforcement may use search warrants to seize work product in the investigation of national security “leaks.”
- <sup>49</sup> *Id.* § 2000aa(a)(2).
- <sup>50</sup> 42 U.S.C. §§ 2000aa(b)(1)-(4), 2000aa-7(a).
- <sup>51</sup> Cal. Penal Code § 1524(g); Cal. Evidence Code § 1070.
- <sup>52</sup> *See* Speech by Attorney General John Mitchell to the American Bar Assoc. House of Delegates on “Free Press and a Fair Trial: The Subpoena Controversy” (Aug. 10, 1970), <https://perma.cc/6D92-E97Q>.
- <sup>53</sup> *See* Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10.
- <sup>54</sup> *See* Gabe Rottman and Linda Moon, *How Foreign Intelligence Surveillance Law Applies to the News Media*, Reporters Committee for Freedom Press (Nov. 9, 2018), <https://perma.cc/B3UG-YP35>.
- <sup>55</sup> 28 C.F.R. § 50.10 (c)(1), (d)(1).
- <sup>56</sup> *Id.* § (c)(4)(ii), (c)(5)(ii), (d)(3).
- <sup>57</sup> *Id.* § (e)(ii).
- <sup>58</sup> Pub. L. No. 95-511, 92 Stat. 1783 (1978).
- <sup>59</sup> Neb. Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976).

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<sup>60</sup> *Id.*

<sup>61</sup> *N.Y. Times v. United States*, 403 U.S. 713 (1971).

<sup>62</sup> *See, e.g., Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (imposing damages on newspaper for publishing rape victim's name, which it had obtained from a publicly-released police report, violated First Amendment).

<sup>63</sup> *See, e.g., Fla. Stat. Ann. § 794.03.*

<sup>64</sup> *See, e.g., Dye v. Wallace*, 553 S.E.2d 561 (Ga. 2001) (finding a statute prohibiting the news media or other persons from naming or identifying rape victims unconstitutional). *But see Dorman v. Aiken Commc'ns*, 398 S.E.2d 687 (S.C. 1990) (holding that a statute that prohibits the publication of rape victims' names was not unconstitutional on its face).

<sup>65</sup> *Cox Broad. v. Cohn*, 420 U.S. 469 (1975).

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