

NEWSGATHERING AND THE LAW

THIRD EDITION

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Preface

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 resolve.¹

The book's middle chapters, which address the press's liability for newsgathering-related conduct, has 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

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