

6

Defamation and Privacy

What You Can't Say about Me

Gus Hurwitz

The laws of defamation and privacy are at once similar and dissimilar. Falsity is the hallmark of defamation – the sharing of untrue information that tends to harm the subject's standing in their community. Truth is the hallmark of privacy – the disclosure of facts about an individual who would prefer those facts to be private. Publication of true information cannot be defamatory; spreading of false information cannot violate an individual's privacy. Scholars of either field could surely add epicycles to that characterization – but it does useful work as a starting point of comparison.

Yet both defamation and privacy law look similar in relief. Purported information about an individual – be it true or not – is shared with others, and through that sharing the individual experiences (subjective or objective) harm. In both, the subject of speech by one party appeals to the courts for relief from perceived harm resulting from that speech.

Speech has greater potential to be perceived as harmful today than it did at any point during the twentieth century – the century during which the contours of both defamation and privacy law were principally defined. Today we live in an era of “cheap speech and big speech.” The cost of producing and publishing speech has never been lower and the scale of the audience for that speech has never been larger. At the individual level, idle speech about other people (e.g., gossip, rumors) has migrated from locker rooms and water coolers to X – words whose impact was historically limited in terms of private reach and duration have become public and persistent. At the public level, competition between media outlets – once limited to a few established media outlets but now including potentially anyone with an X account and an appeal to the political or prurient – creates a race to publish anything deemed newsworthy. And by virtue of coverage, the once minor, trivial, or private can be thrust into the public spotlight, at least for limited public purposes.

Contingent facts, those most likely to be made subject to public scrutiny through either process, are not likely to be clearly true or false. Rather, the process of their

publication is more likely relevant to how we, as a society, ought to evaluate the propriety and harmfulness of their publication. The chapters that follow explore both defamation and privacy law in this new era of cheap speech and big speech.

Lyrissa Lidsky leads things off with Chapter 7, “Cheap Speech and the Gordian Knot of Defamation Reform.” In her contribution, Professor Lidsky traces the development of defamation law alongside technology from the Restatement (Second) of Torts in 1977. As she says, “A lot has changed since 1977.” Lidsky tells us that “Today’s conversation is animated by concerns about the effects of cheap speech on the information ecosystem, with the critics asking if the constitutional strands of current defamation law tilt the scales too sharply in favor of free expression.” In particular, Lidsky assesses criticisms that Justices Thomas and Gorsuch have leveled at the First Amendment law of defamation – and she expresses skepticism about the reforms these Justices seemingly propose. But she also expresses sympathy for the idea that reform is needed, calling for “new remedies to better vindicate reputation and set the record straight, construct new incentives for journalists of all stripes to adhere to professionally developed standards for getting the facts right, and establish new deterrents to libel bullying.” In focusing on the reputational aspect of the defamation harm, Lidsky implicitly calls attention to the relationship between defamation and privacy harms.

In Chapter 8, “Defamation, Disinformation, and the Press Function,” RonNell Anderson Jones takes a deeper look at Justice Gorsuch’s suggestion that the Supreme Court reconsider *New York Times v. Sullivan*, “the foundational First Amendment precedent in defamation law.” In so doing she sounds a cautionary note. In the era of cheap speech it is easy to find criticism of institutional media publishing what amounts to disinformation. But the reality, Jones tells us, is more complicated: The institutional media are not our primary disinformation generators and distributors. To the contrary, they work hard to get things right and compete in terms of their ability to do so. Jones argues that overruling *Sullivan* would threaten media institutions’ ability to perform this costly and important function.

The next two chapters turn from defamation to privacy. Privacy harms differ from defamation harms because they typically stem from accurate but intrusive communications rather than false ones. But the emergence of cheap, platform-driven online speech has amplified privacy and defamation harms in a parallel way.

In her contribution, Professor Amy Gajda looks at the publication and changing uses of police mug shots. Mug shots, she explains, were based on a policy that “the public should know who’d been arrested and on what grounds and how they looked at the time of arrest in order to ensure that police had not battered them.” Historically, the local press might publish those mug shots they considered newsworthy. Today, a global audience can pick up digitized mug shots from public records websites. Gajda tracks recent developments in both state law and journalistic practice that attempt to narrow these photographs’ public circulation. She suggests that the trend toward privacy is likely to continue, and that “one’s entire criminal

past, including one's older mugshot, could one day come to be even more strongly protected on privacy grounds." Contextualizing this alongside the discussion of privacy, it is remarkable to observe heightened restrictions on the publication of speech that is both factual and based in government activity.

Where Gajda's chapter focuses on facts and speech created by the state, Professor Thomas Kadri's chapter considers privately compiled information, focusing on harms facilitated by data brokers. In the era of cheap speech, it is far easier to collect, process, and bundle information about people – and there is a surprisingly vibrant market for this information. Indeed, the data brokers who make up this market further lower the cost of obtaining information about individuals by scouring various sources – public and sometimes private – for published information. Kadri documents specific instances of harm that such availability of information can facilitate (including the murder of a stalking victim). His greater point, however, is the privacy harm that this inflicts generally by robbing us of the obscurity that we all implicitly and explicitly rely on in our day-to-day lives. The data broker business model is built on taking the possibility of obscurity – the general presumption that our day-to-day activities will be unobserved by others – away from us, at least without each of us undertaking concerted efforts to maintain it. As with the other chapters in this part, Kadri's contribution raises difficult questions about what rights individuals have to control the ways that information about them is used by others.