Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press

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INTRODUCTION

In 2006, Basil Marceaux of Soddy Daisy, Tennessee, filed a lawsuit asserting a "right to dictate what news was published or broadcast by local and national newspapers and television stations."[1] Marceaux had received some decidedly light-hearted press coverage in his successive campaigns for governor and senator,[2] and was apparently aggrieved that media outlets had declined to publish information he considered "newsworthy."[3] The Tennessee

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1. Marceaux v. Painter, No. E2006-0144-COA-R3-CV, 2007 Tenn. App. LEXIS 334, at *2 (Ct. App. May 24, 2007).

2. *See, e.g.*, Ken Whitehouse, *Want to Punch a Candidate?*, NASHVILLEPOST.COM, Apr. 10, 2006, http://www.nashvillepost.com/news/2006/4/10/want_to_punch_a_candidate (observing that Marceaux, in his 2002 campaign for governor, had questioned on his campaign website "whether a Democrat ought to be allowed to say the pledge of allegiance" and that "[h]e even went to court over the question"); *see also* Editorial, *Consider the Alternative*, MIDDLE TENN. ST. UNIV. SIDELINES, July 31, 2002, *available at* http://media.www.mtsusidelines.com/media/storage/paper202/news/2002/07/31/Opinions/Consider.The.Alternative-259960.shtml (describing Marceaux as "a Northern transplant with libertarian ideas").

3. *Marceaux*, 2007 Tenn. App. LEXIS 334, at *3. The court opinion affirming dismissal of Marceaux's complaint does not describe the information he sought to publicize. In a blog post dated May 2007, the same month in which the state court of appeals ruled against his claim, Marceaux professed a desire to "order God back in our government on national T.V." mass

Court of Appeals answered that "[t]o call this lawsuit frivolous would be an understatement."[4]

In 1990, a Washington, D.C., man named Abdul Amiri sued a television station in the nation's capital for "refusing to air certain stories felt by Amiri to be newsworthy," while choosing instead to air more sensational or frivolous fare, including "stories concerning incest or the suits worn by Jesse Jackson's sons."[5] District Judge Louis Oberdorfer ruled crisply that "Channel Nine's right to decide what news it broadcasts is indisputable."[6]

The courts were correct in finding no legal right of concerned citizens to control the news and the media's value judgments. But it overstates the point to assert that the news media's right to decide news content is beyond dispute. Increasingly, it is the province of the courts not only "to say what the law is,"[7] but also to say what the news is, or at least to share that responsibility with jurors who may have just as many complaints about news coverage as Marceaux and Amiri.

Quite aside from the remedy provided by defamation law for false reporting, tort law provides remedies against even accurate reporting when it invades personal privacy. In these cases, media defendants may argue that their reporting relates to something of legitimate public concern.[8] Accordingly, resolving tort claims brought by victims of unwanted news coverage inevitably invites judges and juries to make legal determinations of "newsworthiness," deciding what news is fit to print and, indeed, whether certain embarrassing or salacious disclosures really qualify as news at all.

Because court decisions defining news content obviously implicate press freedoms, tort litigation over newsworthiness also has a constitutional dimension. The common-law exemption for disclosures of private information found to be newsworthy is sometimes said to be required by the First Amendment.[9] The Supreme Court recently acknowledged that deciding when the government should be permitted to block or punish the reporting of truthful information is a task of considerable "sensitivity and significance."[10] In fact, the Court has repeatedly left open "whether truthful publication may ever be

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murder, http://agreatman.blogspot.com/ (May 30, 2007, 20:20).

4. *Marceaux*, 2007 Tenn. App. LEXIS 334, at *3.

5. Amiri v. WUSA TV-Channel Nine, 751 F. Supp. 211, 211 (D.D.C. 1990).

6. *Id.* at 212.

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

8. The Restatement of Torts notes that "[w]hen the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy." RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977).

9. *See, e.g.*, *id.* (noting that, on First Amendment grounds, "the Supreme Court [has] indicated that an action for invasion of privacy cannot be maintained when the subject-matter of the publicity is a matter of 'legitimate concern to the public'").

10. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) (citing Fla. Star v. B.J.F., 491 U.S. 524, 532–33 (1989)).

punished consistent with the First Amendment."[11]

For most of the past half-century, courts have resolved the tension between privacy and press freedoms by deferring heavily to journalists in determining newsworthiness. Partly out of First Amendment concerns and partly out of a sense of their own limited competence, judges have regularly declined to second-guess journalists' editorial decisions.[12] Indeed, under the standard doctrinal formulation of the privacy torts that emerged in recent decades, a media defendant's decision to publish a disputed news item became largely self-affirming that the item was newsworthy.[13] The deference to journalists was so encompassing that many commentators came to view the publication of private facts tort as obsolete and to regard judicial supervision of journalists' news judgment as altogether unmanageable.[14]

More recently, however, the modern position favoring journalists in legal contests over newsworthiness has come under new and mounting pressure.[15] First, growing anxiety about the loss of personal privacy in contemporary society has given new weight to claims of injury from unwanted public exposure.[16] Simultaneously, declining public respect for journalism—fueled by

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11. *Id.* at 529.

12. *See, e.g.*, Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989) ("Exuberant judicial blue-pencilling . . . would blunt the quills of even the most honorable journalists."); Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 668 (Ct. App. 1984) ("the privilege to publicize newsworthy matters . . . is . . . of constitutional dimension").

13. As the Restatement acknowledges in defining newsworthiness, "[t]o a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm." RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

14. *See, e.g.*, Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CALIF. L. REV. 1133, 1152, 1172 (1992) ("[T]he privacy tort formulated by Warren and Brandeis is now largely obsolete."); Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 426 (1996) ("[M]ost of private academia have pronounced dead the more than century-old tort of public disclosure of private facts."); Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823, 823 (1991) ("[E]ven this slim breath of life seems to be failing as many courts refuse to apply the tort or even reject it outright."); John A. Jurata, Jr., Comment, *The Tort That Refuses To Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 491 n.13 (1999) (suggesting that at least seven law review articles had recently declared the tort to be ineffective or very nearly dead).

15. *See, e.g.*, Robert E. Drechsel, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181, 194 (2000) ("During the past two decades in particular, journalists have found themselves targeted with a broad new range of actions . . . seeking recognition of new legal duties, remedies for new kinds of harm, and application of theories of liability not heretofore attempted in a journalistic context."); *see also* Patrick J. McNulty, *The Public Disclosure of Private Facts: There is Life After* Florida Star, 50 DRAKE L. REV. 93, 98 (2001) ("[R]eports of the demise of the public disclosure action have been exaggerated"); Jurata, *supra* note 14, at 510 ("[I]n the last five and one-half years, plaintiffs have been more successful than ever before in bringing a private facts claim.").

16. *See generally* ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 6 (2007); FRED H. CATE, PRIVACY IN THE INFORMATION AGE (1997) (discussing the substantial privacy issues presented by electronic networks); GRANT HALL, PRIVACY CRISIS: IDENTITY THEFT PREVENTION PLAN AND

a relentless twenty-four-hour news cycle, the blurring of news and entertainment programming, and celebrity gossip and rumor-heavy websites like TMZ[17] and Perez Hilton[18]—has weakened its claim to privilege.[19] Understandably, as Dean Rodney Smolla has observed, at a time when "privacy appears to be disintegrating all around us," the emerging "cultural mood is to retrench privacy and restrain the press."[20] In response, some courts have grown distinctly less deferential to journalism in privacy cases. Their willingness to assert their own determinations of the legitimate scope of news coverage marks a potentially significant shift in the relationship between the courts and the media.

The shift can be seen in court decisions recognizing new causes of action to protect personal privacy, opening additional pathways for holding the media liable for unwanted publicity.[21] It can also be seen in recent decisions that

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GUIDE TO ANONYMOUS LIVING (2006) (discussing growing threats to privacy and protections against them); JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000) (proposing solutions to recapture privacy lost due to legal, technological, and social developments).

17. TMZ, http://www.tmz.com.

18. Perez Hilton, http://www.perezhilton.com.

19. *See, e.g.*, Victor Merina, Celebrities in Journalism: The Ethics of News Coverage, POYNTER ONLINE, Jan. 22, 2004, http://www.poynter.org/content/content_view.asp?id=59603 (quoting experts who find celebrity coverage "horrifying," a reflection of society's "moral decay," and a cause of faltering political coverage). Dean Rodney Smolla has described the rise of celebrity news coverage as emblematic of "a period of deep cultural funk." Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1110 (2002).

20. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1097–98 (1999). There have recently been explicit calls for greater judicial scrutiny of sensational journalism. *See* Jessica E. Jackson, Note, *Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century Legal Transformation, and the Current Seizure of the American Press*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 789, 816 (2005) (suggesting that judges or legislators set specific limits on reporting, with clear repercussions for violators). As early as 1979, when the judicial tide still strongly favored journalism, Professor Thomas Emerson argued that privacy should be given greater weight when balanced against press freedoms, warning that "from womb to tomb" modern technology could ferret out and monitor everyone's affairs. Thomas I. Emerson, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 331, 360 (1979) (suggesting that an adequate law of privacy is "imperative for the future health of our society" and that "[t]he press is strong, healthy, and well-organized; the individuals whose privacy is at stake are scattered and weak").

21. In *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007), for example, the Supreme Court of Ohio recognized for the first time in the state a tort cause of action known as false light, a privacy tort repeatedly rejected by other courts in recent years as being too similar to defamation. The court conceded that judicial protection of privacy had been receding throughout much of the 20th century in recognition of the growing professionalism of the press. Today, however, "ethical standards regarding the acceptability of certain discourse have been lowered," the court reasoned, and "[a]s the ability to do harm has grown, so must the law's ability to protect the innocent." *Id.* at 1058–59. *See also* Meyerkord v. Zipantoni, 2008 Mo. App. LEXIS 1775, at *4 (Mo. Ct. App. Dec. 23, 2008) (recognizing the false light tort, citing *Welling* and agreeing that ethical standards have diminished while the Internet has lowered barriers to publication and publicity): Bursac v. Suozzi, 868 N.Y.S.2d 470, 480–81 (Sup. Ct. 2008) (rejecting the release of Internet press releases announcing drunk driving arrests because of "endless implications" of scope and permanency on

refocus the determination of newsworthiness away from the contemporary practices of editors and reporters and toward the standards suggested by journalistic codes of professional ethics.[22] The combined result is a growing willingness of courts to police the news judgment of individual journalists, holding them to the "best practices" idealized in professional ethics standards as interpreted by judges and jurors.

The trend has not gone unnoticed by journalists. Indeed, by late 2008 the Society of Professional Journalists (SPJ) amended the SPJ Code of Ethics to disclaim its use as a standard for liability, stating: "The SPJ Code of Ethics is voluntarily embraced by thousands of journalists . . . [and] is intended not as a set of 'rules' but as a resource for ethical decision-making. It is not—nor can it be under the First Amendment—legally enforceable."[23]

This Article charts the growing judicial assertiveness in defining the news and explains its important implications for the First Amendment and the ability of the press to fulfill its essential role in society. Part I describes the establishment of what might be called the modern position of judicial deference to journalists in legal determinations of newsworthiness since roughly the 1960s. It comprehensively surveys early publication of private facts cases, including often overlooked court decisions, and describes how strengthening legal protection for both personal privacy and freedom of the press inevitably set the two values on a collision course.[24] It also shows how courts initially resolved that tension by deferring to the press on First Amendment grounds. Part II considers the ways in which recent developments have exposed journalists to greater judicial oversight. It shows how a range of recent decisions have weakened judicial deference to journalists' news judgment, in part by tying understandings of newsworthiness to the aspirational ethics codes of journalists themselves.

Part III examines the nascent resurgence of the publication of private facts tort in the courts. In particular, it outlines the significant perils involved in shifting the power to define the news from working journalists and the

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the Internet compared with more traditional forms of reporting).

22. In *Conradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 397–98 (S.D.N.Y. 2008), for example, the court explicitly used several provisions of the Society of Professional Journalists Code of Ethics to find that NBC could be liable for certain reporting in its investigative program *To Catch a Predator*. Other examples are discussed in Part II, Section D of this Article.

23. SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS, http://www.spj.org/ethicscode.asp (last visited June 7, 2009). The language was inserted to make clear to the public, including judges and those who had contacted the SPJ to urge that it punish journalists for violating the code, that code provisions were not mandatory and entirely voluntary. E-mail from Andy Schotz, Chair, SPJ Ethics Committee (Mar. 14, 2009) (on file with author).

24. For a detailed look at the development of the law of privacy, including multiple early privacy cases beyond those with a news focus, see DON R. PEMBER, PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT (1972). Another excellent discussion of early privacy cases is contained in MORRIS L. ERNST & ALAN U. SCHWARTZ, PRIVACY: THE RIGHT TO BE LET ALONE (1962).

consuming public to judges and jurors. Finally, Part IV suggests a middle-ground approach in which courts determine the boundaries of legitimate reporting by asking whether professional journalists themselves consider a challenged report to be beyond the pale of professional judgment. Under this standard, liability would be assigned only if no reasonable professional journalist would have reached the same conclusion. This approach would neither defer reflexively to a defendant-journalist's own self-serving claims of newsworthiness nor invite lay judges or jurors to impose their own sense of propriety in news reporting. Instead, by requiring expert evidence of a professional consensus against disclosure, this approach would properly confine liability to genuinely outrageous cases while leaving journalists free to make their own judgments within the realm of reasonable professional disagreement.

I
FROM WARREN TO WATERGATE: THE RISE OF JUDICIAL DEFERENCE TO REPORTERS IN DEFINING THE NEWS

What now presents itself so obviously as a "sensitiv[e] and significan[t]"[25] clash between the legal values of privacy and press freedoms was not always so apparent. A century ago, when recognition of privacy as a legally protectable interest was only fledgling, and when constitutional and other safeguards of the press were less substantial, legal disputes arising from unwelcome public disclosures could be resolved without acknowledging a conflict. Without case law recognizing robust First Amendment protection for the press, courts often felt free to chastise reporters or editors who crossed the line of fair play in their news judgment.

Over the first half of the twentieth century, however, emerging tort protection for individual privacy eventually clashed with strengthening constitutional protection for freedom of the press. By the mid-1960s, guided in part by U.S. Supreme Court decisions emphasizing the overriding importance of a free press, most courts settled on a position that gave strong deference to journalists in drawing the line between protected news reporting and legally sanctionable invasions of privacy. This section explores that history.

A. The Emergence of "Privacy" as a Legally Protected Interest

"Privacy" is a heavily freighted word in American law. In *Griswold v. Connecticut*,[26] the U.S. Supreme Court famously used the term to describe a constitutional right of married couples to use contraception without fear of

25. Bartnicki v. Vopper, 532 U.S. 514, 529 (2001) (citing Fla. Star v. B.J.F., 491 U.S. 524, 532-33 (1989)).

26. 381 U.S. 479, 484 (1965) (discussing the various "zones of privacy" created by specific constitutional guarantees).

government surveillance or punishment. Since *Griswold*, privacy has come to encompass divergent interests in both "decisional" privacy—the right to make certain profoundly personal decisions, such as those concerning contraception, abortion, or marriage, free from government intrusion—and "informational" privacy—the right to control the public disclosure of highly personal information.[27]

A constitutional right of privacy traces its lineage to earlier expressions of concern for privacy. In 1890, Samuel Warren and Louis Brandeis published what would become a landmark article in the *Harvard Law Review* calling for explicit legal protection for personal privacy against unwanted private invasion.[28] The focus of Warren and Brandeis's concern was not government coercion, but the prying eyes of yellow journalists and gossip-mongers.[29] They decried what they viewed as a shocking erosion of respect for private repose, fueled by a sensational press that increasingly ignored the "obvious bounds of propriety and of decency."[30] They called on courts to use the common law to safeguard "some retreat from the world" and to provide a legal remedy through tort law against journalistic and other invasions of private life.[31]

Contrary to widely held assumptions,[32] legal notions regarding privacy did not originate with the Warren and Brandeis article.[33] Even before Warren and Brandeis's call for a new tort, some U.S. courts already recognized indirect legal protection for personal interests in privacy.[34] In the years following

27. *See* Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087 (2006) (discussing "the informational/decisional binary" in privacy law). For a comprehensive analysis of legal protection for information privacy, see DANIEL J. SOLOVE, MARC ROTENBURG & PAUL M. SCHWARZ, INFORMATION PRIVACY LAW (2d ed. 2006).

28. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). For an examination of some of the coverage of the Warren family that spurred the famous article, see Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage That Led to "The Right to Privacy,"* 2008 MICH. ST. L. REV. 35 (2008).

29. Warren & Brandeis, *supra* note 28, at 205.

30. *Id.* at 195–96.

31. *Id.*

32. It is often suggested that Warren and Brandeis effectively invented the "right to privacy" out of whole cloth in 1890. Reflecting the prevailing view, for example, the Court of Appeals for the First Circuit recently suggested that "the pedigree" of the common law's protection for privacy "can be traced with pinpoint accuracy" to Warren and Brandeis's 1890 article. Howard v. Antilla, 294 F.3d 244, 247–48 (1st Cir. 2002); *see also, e.g.*, Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902) (suggesting that the notion of a right of privacy originated in Warren and Brandeis's article).

33. *See* Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123 (2007) (tracing privacy protection to earlier legal safeguards for confidentiality); *see also* Amy Gajda, *Privacy Before* The Right to Privacy*: Truthful Libel and the Earliest Underpinnings of the Privacy Tort* (July 30, 2009) (unpublished manuscript, on file with author).

34. In *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304 (1825), for example, the court suggested a publication of private facts-like concern when it wrote that

> [n]o state of society would be more deplorable than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the

publication of *The Right to Privacy*, however, courts considered more explicitly whether to give privacy more direct and substantial protection.

Courts were initially skeptical toward legal claims against unwanted publicity,[35] though their doubts centered on the legitimacy of the particular privacy interest asserted rather than constitutional barriers to intervention. One court decided an early case in favor of the defendant publisher of a biography by basing its decision on the plaintiff's public-figure status, while at the same time suggesting that private persons would have more control over what was revealed in publications.[36] Two additional privacy decisions followed in which courts suggested that privacy could be protected under slightly different circumstances.[37] Concurrently, a New York court accepted privacy in a more forthright way when it ruled in favor of a plaintiff actor against a newspaper that had published a photograph of him as part of a public poll on his popularity.[38]

The two cases that may have had the greatest impact on privacy's early path came later. In 1902, the New York Court of Appeals refused to recognize a tort action for the unauthorized use of a young woman's portrait on a poster advertising flour.[39] While the court doubted the wisdom of providing a legal remedy, its concerns were based only tangentially on any potentially negative impact on the press and far more on its expected impact on the courts. The court warned that a general right to restrict use of one's image or identity would

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> public, in newspapers . . . not only for crimes, but for faults, foibles, deformities of mind or person, even admitting all such allegations to be true.

Id. at 312.

35. There was one surprisingly strong early victory for journalism. The California Supreme Court vindicated a *San Jose Mercury* reporter who wrote about a sensational divorce trial in violation of a trial judge's gag order. *In re* Shortridge, 34 P. 227 (Cal. 1893). Even though the trial court had found the reporter in contempt on grounds that suggested solicitude for the litigants' privacy rights—condemning press interest in divorce and similar cases with testimony of "a delicate or filthy nature"—the supreme court found press freedoms to be more important. *Id.* at 229.

36. Corliss v. E.W. Walker Co., 57 F. 434, 435 (D. Mass. 1893). The court, surprisingly, mentioned freedom-of-the-press concerns: "It would be a remarkable exception to the liberty of the press if the lives of great inventors could not be given to the public without their own consent while living, or the approval of their family when dead." However, a later decision in the case limited broad notions of press freedom, finding that private individuals, but not public figures, could control publication of photographs of themselves. Corliss v. E.W. Walker Co., 64 F. 280, 282 (D. Mass. 1894).

37. Murray v. Gast Lithographic & Engraving Co., 28 N.Y.S. 271 (Ct. Comm. Pleas 1894) (holding that a father cannot sue over his daughter's published portrait, though she may have a valid claim); Dailey v. Superior Court, 44 P. 458, 460 (Cal. 1896) (finding that prior restraint concerns preclude enjoining a play about a criminal defendant, although subsequent legal remedy may be permissible).

38. Marks v. Jaffa, 26 N.Y.S. 908, 909 (Sup. Ct. 1893) ("No newspaper or institution, no matter how worthy, has the right to use the name or picture of any one for such a purpose without his consent" because every person is "entitled to peace of mind, and [should not] be suspended over the press-heated gridiron of excited rivalry . . . .").

39. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902).

open the door to lawsuits not only against newspapers but also against neighbors for mundane insults or unflattering gossip.[40] If arbitrary lines were to be drawn, reasoned the court, the task should be left to the legislature.[41]

Nine years later, in a lawsuit directly involving journalism, the Washington Supreme Court similarly rejected any recovery for a victim of unwanted publicity.[42] *Hillman v. Star Publishing Co.* arose from a scathing 1910 newspaper article about the indictment of a local businessman—a "Big Real Estate Shark," in the words of the newspaper's headline—for fraud in connection with a land deal.[43] The newspaper report included a photograph of the man and his family. The developer's young daughter sued the newspaper through a guardian, contending that her privacy had been invaded and that she had been caused to suffer "'great shame, humiliation, and sense of disgrace.'"[44] While the *Hillman* court was more receptive to the plaintiff's claim of injury than the New York court, and readily acknowledged that the plaintiff had suffered "a wrong" deserving of a remedy,[45] like the New York court, it suggested that the remedy must come from the legislature.[46]

Thus, both the New York and Washington high courts rejected the plaintiffs' claims, finding no precedent to support recovery for intrusions on what both labeled "the so-called right of privacy."[47] But even though two earlier courts had cautioned that a First Amendment analysis would be appropriate in the journalism context,[48] both the Washington and New York courts suggested instead that the state legislatures were free to provide precisely the remedy by statute that the plaintiffs had sought under the common law.

The barrier to recovery in these cases, then, was not the interest of the public in accessing "newsworthy" information, but simply the lack of any clear basis in state law for vindicating the plaintiffs' personal privacy interests.

Accordingly, the New York legislature enacted a statute the year after the *Roberson* decision, making it unlawful to use, for trade or advertising purposes, "the name, portrait or picture of any living person without having first obtained

40. *See id.* at 545–46.

41. *Id.*

42. Hillman v. Star Publ'g Co., 117 P. 594 (Wash. 1911).

43. *Id.* at 595.

44. *Id.* at 595–96 (quoting plaintiff's complaint).

45. *Id.* at 596.

46. *Id.* at 595. "It is a subject for legislation," the court concluded, and to the legislative body an appeal might be so framed that in the future the names of the innocent and unoffending, as well as their likenesses, shall not be linked with those whose relations to the public have made them and their reputations in a sense the common property of men. *Id.* at 596.

47. *Id.* at 596; Roberson v. Rochester Folding Box Co., 64 N.E. 442, 443 (N.Y. 1902).

48. *See* Corliss v. E.W. Walker, 57 F. 434, 435 (D. Mass. 1893); Diener v. Star Chron. Publ'g Co., 132 S.W. 1143, 1149 (Mo. 1910) (finding that newspapers have guaranteed constitutional freedoms and hold a qualified privilege to report on matters of "live public concern," including the death of a child by automobile).

the written consent of such person."[49] In other states, courts moved to recognize broader privacy protection without waiting for legislative intervention.[50]

Additional cases made clear that the growing legal readiness to protect personal privacy had a broader reach than solely protecting against commercial misappropriation. In 1912, Kentucky's highest court upheld the right of parents to recover damages against a photographer who took unauthorized photographs of their deceased conjoined twins.[51] The court premised the parents' recovery partly on the peculiar content of the photograph at issue and the recognition that parents have a special legal interest in barring publicity of their children's remains.[52]

On similar facts, the Georgia Supreme Court found a right to recover not only against the photographer, but also against a newspaper that published the photograph.[53] The newspaper's liability, according to the court, flowed solely from its decision to publish private information that the plaintiffs did not wish disclosed, regardless of the potential news value of the story.[54]

While a few courts sided with defendant publishers in privacy-related cases in the 1920s and 1930s,[55] the weight of decisions during this period held

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49. Humiston v. Universal Film Mfg. Co., 178 N.Y.S. 752, 755 (App. Div. 1919) (quoting N.Y. CIV. RIGHTS LAW § 50 (1903) and describing the statute's 1903 enactment as a direct response to the Court of Appeals's 1902 decision in *Roberson*).

50. In 1905, the Georgia Supreme Court expressly disagreed with *Roberson* and recognized a common law cause of action for the unauthorized use of a man's photograph in a life insurance advertisement. The court reasoned that no legislation was necessary because "[t]he right of privacy has its foundation in the instincts of nature." Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905).

51. Douglas v. Stokes, 149 S.W. 849 (Ky. 1912).

52. *Id.* at 850. "[E]xpos[ing] . . . to public view" the corpse of a child invades "[t]he most tender affections of the human heart," the court reasoned, and inflicts on parents a substantial legal injury. *Id.*

53. Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930) (the baby was born with his heart outside his body).

54. "The publication by the Savannah Press of the picture of the child showing its physical condition, and commenting upon the fact, is a trespass upon plaintiffs' rights of privacy," the court wrote in sustaining the sufficiency of the complaint. *Id.* at 195. It was not only intimate family matters that courts found could be the bases of valid privacy causes of action during this time of early privacy protection. The Louisiana Supreme Court found in 1913 that those who had signed a petition supporting a village's incorporation before then changing their minds could sue on privacy grounds after a newspaper published their names. Schwartz v. Edrington, 62 So. 660 (La. 1913). In 1927, a District of Columbia court found that a newspaper that had published a photograph of a woman overcome by gas fumes could be liable for invading her privacy. Peed v. Wash. Times, 55 Wash. L. Rep. 182 (D.C. 1927) (finding that otherwise, newspapers would have the right to invade homes and publish what they find inside). And that same year, Maryland's highest court upheld contempt proceedings against five reporters who disregarded a judge's order not to publish photographs of a criminal defendant, finding that "[t]he liberty of the press does not include the privilege of taking advantage of the incarceration of a person accused of crime to photograph his face and figure against his will." *Ex parte* Sturm, 136 A. 312, 314 (Md. 1927).

55. *See, e.g.*, Herrick v. Evening Express Publ'g Co., 113 A. 16 (Me. 1921) (holding that a mother had no valid claim when her son's image was mistakenly published to illustrate an article on another's death); Smith v. Surratt, 7 Alaska 416, 423, 426 (D. Alaska 1926) (competing news

newspapers and other related media responsible for privacy invasions with growing frequency. One court found a valid right to privacy when a former prostitute sued filmmakers for chronicling her life on film.[56] Another plaintiff overcame a motion to dismiss filed by the producer of an early crime re-enactment program that featured the plaintiff's story.[57] A third case involved a published photograph of the plaintiff's abdominal area, in which a doctor had left a surgical clamp.[58] In each case, the courts made little or no inquiry into the potential news value of the story. Instead, in these and a stream of subsequent cases stretching beyond the Second World War, the courts focused almost exclusively on the plaintiff's emotional injury, even though public interest in the topics was certainly what led to the disputed publications in the first instance.[59]

By 1942, fourteen states (plus the District of Columbia and Alaska, then a U.S. territory) recognized some form of tort protection for personal privacy, and the right of privacy had found acceptance in the American Law Institute's First Restatement of Torts.[60] Section 867 of the First Restatement provided that "[a] person who unreasonably and seriously interferes with another's interest in

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crews could cover Arctic expedition against explorers' wishes because the "enterprise itself is of [great] public interest," "news concerning it or its progress, is a matter to which the public is entitled," and "there can be no right of privacy adhering to it").

56. Melvin v. Reid, 297 P. 91 (Cal. Ct. App. 1931).

57. Mau v. Rio Grande Oil, Inc., 28 F. Supp. 845 (N.D. Cal. 1939).

58. Banks v. King Features Syndicate, 30 F. Supp. 352 (S.D.N.Y. 1939).

59. After the 1930s, courts also regularly sided with plaintiffs: a neighbor of Pulitzer Prize-winning author Marjorie Kinnan Rawlings, who found herself the basis for "a rather vivid and intimate character sketch" in a Rawlings work, *Cason v. Baskin*, 20 So. 2d 243, 247 (Fla. 1944); a man whose photograph had been published in a detective magazine in connection with a true crime story, *Reed v. Real Detective Publishing Co.*, 162 P.2d 133 (Ariz. 1945); a woman profiled in a newspaper story about a mysterious weekly rose delivery the court criticized as one not worthy of news coverage, *Sutton v. Hearst Corp.*, 90 N.Y.S. 2d 322, 323 (Sup. Ct. 1949) (holding that the alleged fact that a Norfolk florist has been filling a weekly order for delivery to plaintiff of a rose "is not current or past news which may be published without the consent of the plaintiff"); a girl whose photograph was taken at a "trivial accident" and used two years later to illustrate a general news article on accidents, *Leverton v. Curtis Publishing Co.*, 97 F. Supp. 181, 182 (E.D. Pa. 1951) ("It is not pretended that the picture had the slightest news value when the defendant got hold of it and published it two years after the event."), *aff'd*, 192 F.2d 974 (3d Cir. 1951); parents whose young daughter's divorce was recounted with dramatic embellishments in a Sunday newspaper magazine supplement, *Aquino v. Bulletin Co.*, 154 A.2d 422, (Pa. Super. Ct. 1959); a cab driver whose picture was published in a satirical article about her peers, *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305, 309 (D.D.C. 1948) ("Modern . . . media . . . has created novel situations" that create the need for privacy protection and "a photograph of a private person without his sanction is a violation" of the right to privacy); a couple pictured cuddling on stools as an illustration for an article about love relationships, *Gill v. Curtis Publishing Co.*, 239 P.2d 630, 633 (Cal. 1952) (finding that, while individual privacy is qualified by "the interest of the public in having a free dissemination of news and information . . . it shall not be so exercised as to abuse the rights of the individuals"); and a rape victim whose name was published in a newspaper, *State v. Evjue*, 33 N.W.2d 305, 312 (Wis. 1948) ("[T]here is a minimum of social value in the publication of the identity of a female in connection with such an outrage.").

60. Barber v. Time, Inc., 159 S.W.2d 291, 293 (Mo. 1942) (citing RESTATEMENT OF TORTS § 867 (1939)).

not having his affairs known to others or his likeness exhibited to the public is liable to the other."[61] Just as Warren and Brandeis had suggested in *The Right to Privacy*, the language was broad enough to cover actions taken by both the press and gossiping neighbors, and contained no hand-wringing over First Amendment concerns.[62]

Two decades later, with the publication of William Prosser's influential 1960 *California Law Review* article, *Privacy*, the right of privacy was firmly established in American tort law.[63]

B. The Growth of Strong Protection for Press Freedom in Privacy Cases

Despite the canonical place of the printing press in the story of American liberty and the explicit guarantee of a free press in the First Amendment, early courts often gave short shrift to claims of press freedom. Court opinions reaching back to the founding of the American republic often crackled with hostility to the press, and reporters and publishers routinely found themselves subject to legal sanction, even for indisputably truthful reporting or political commentary. Even when courts recognized the tension between privacy and press freedom, their opinions usually contemplated a relatively narrow range of conflict.

Eventually, the law shifted more significantly in favor of press freedom, helped along by scholars, the Supreme Court, and even, it seems, journalists themselves.

1. Recognition of Free Press Concerns

While early court decisions considering direct claims for personal privacy protection gave little heed to press freedom even when they ruled against a privacy plaintiff, courts eventually came to place very significant weight on press freedom in defining the scope of legal privacy rights. The primary vehicle

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61. RESTATEMENT OF TORTS § 867 (1939).

62. *Id.* The First Restatement did suggest that in privacy cases a "distinction can be made in favor of news items," but did not elaborate. *Id.* § 867 cmt. d. It also suggested rather chivalrously that courts consider in determining liability the plaintiff's gender, "station in life," and the previous level of privacy he or she sought in life. *Id.*

63. William Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Dean Prosser reviewed the growing and somewhat chaotic body of cases and identified four distinct privacy interests warranting judicial protection: (a) misappropriation of one's likeness or identity for unauthorized uses; (b) intrusion into one's seclusion; (c) public disclosure of highly private personal information; and (d) publicity that casts the subject "in a false light." *Id.* at 389. Prosser's formulation won broad acceptance in court decisions throughout the country, and became the foundation for the privacy section in the Second Restatement of Torts, for which Prosser himself was the Reporter. Today, virtually all U.S. jurisdictions provide a legal remedy for the invasion of personal privacy, with many embracing each of Prosser's four causes of action and most explicitly relying on the Restatement of Torts' definition for each of the four torts. *See, e.g.*, RICHARD A. EPSTEIN, TORTS 522 (1999) (noting the durability of Prosser's formulation and suggesting that the Restatement "decisively structures" privacy law).

for curtailing the reach of the privacy torts, and for protecting press freedom against judicial oversight, was an expanding conception of "newsworthiness" that effectively equated the "news" with what the public would care to know.

In *Pavesich v. New England Life Insurance Co.*, the 1905 Georgia Supreme Court decision that was among the first to consider a tort claim sounding in privacy, the court explicitly acknowledged that press freedoms appeared to be a "stumbling block" to robust privacy protection, but concluded that "legitimate" news reporting would rarely collide with valid privacy interests.[64] The court reasoned that public officials or others who thrust themselves into the public spotlight could be held to have waived their claim to privacy, thus obviating any conflict with press rights.[65] "[S]o long as the truth is adhered to," the court wrote, "the right of privacy of another cannot be said to have been invaded by one who speaks or writes or prints, provided the reference to such person, and the manner in which he is referred to, is reasonably and legitimately proper in an expression of opinion on the subject . . . ."[66] But this approach depended upon a judicial newsworthiness determination that the conduct of the press had been "reasonably and legitimately proper," a decidedly qualified characterization of press immunity.

A few other early decisions were notably deferential to journalism, especially in New York under that state's privacy statute, which barred the unauthorized use of "the name, portrait or picture of any living person" for purposes of advertising or trade.[67] In 1913, for example, the New York Court of Appeals upheld a judgment of liability against a motion picture company that had produced a film dramatically reenacting the story of a then-recent sea disaster in which a seaman aboard a sinking ship saved the lives of the crew.[68] The court found that the motion picture made an unauthorized commercial use of the seaman's name and likeness in retelling the story through actors.[69] However, the court suggested in dictum that a different result might have followed had the defendant simply retold the plaintiff's story in a more straightforward, journalistic fashion.[70]

Subsequent decisions by lower New York courts generally followed this dictum by holding the state privacy statute inapplicable to news reporting,[71]

64. Pavesich v. New Eng. Life Ins. Co., 50 S.E. 68, 73 (Ga. 1905).

65. *Id.* at 72.

66. *Id.* at 73-74.

67. Rhodes v. Sperry & Hutchinson Co., 85 N.E. 1097, 1098 (N.Y. 1908) (citing 1903 N.Y. Laws page no. 308).

68. Binns v. Vitagraph Co. of Am., 103 N.E. 1108 (N.Y. 1913).

69. *Id.* at 1111.

70. *Id.* at 1110 (suggesting that "[i]t would not be within the evil sought to be remedied by that act to construe it so as to prohibit the use of the name, portrait, or picture of a living person in truthfully recounting or portraying an actual current event as is commonly done in a single issue of a regular newspaper").

71. In 1919, for example, an intermediate appellate court in *Humiston v. Universal Film Manufacturing Co.* refused recovery against a company that had featured the plaintiff's name and

leading most New York courts to reject privacy causes of action when the information about the plaintiff was revealed in a journalistic or quasi-journalistic context.[72]

Other courts moved to recognize similar exemptions for news reporting in defining the scope of common-law liability. In some cases, courts justified a privilege for news reporting on the rationale that subjects of coverage had effectively waived their interests in privacy by voluntarily thrusting themselves into the public arena. In others, courts relied on the public's right to know to justify an exemption for news coverage of persons who found themselves caught up in newsworthy events, regardless of whether the subjects had sought

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photograph in a newsreel account of her role in solving "a famous murder mystery." 178 N.Y.S. 752, 754 (App. Div. 1919); *see also* Feeney v. Young, 181 N.Y.S. 481 (App. Div. 1920) (allowing suit to proceed against defendants who had filmed the plaintiff's Caesarian-section operation putatively for medical-education purposes but who then distributed the film to commercial movie houses as part of a film on childbirth). But the court concluded that it was implausible to think that the legislature had meant to penalize every unauthorized report by newspapers and newsreels, even though the newspapers and newsreels were profit-making enterprises. *See Humiston*, 178 N.Y.S. at 757–58; *see also* Colyer v. Richard K. Fox Publ'g Co., 146 N.Y.S. 999, 1001 (App. Div. 1914) (suggesting that legislature would have specifically "wipe[d] out this custom" of publishing photos in newspapers and magazines had it intended to do so).

72. *See, e.g.*, Levey v. Warner Bros. Pictures, 57 F. Supp. 40 (S.D.N.Y. 1944) (film based on life of George Cohen not actionable); Gautier v. Pro-Football, Inc., 107 N.E.2d 485 (N.Y. 1952) (privacy action based on plaintiff's televised performance at football half-time show not actionable); Kimmerle v. N.Y. Evening Journal, Inc., 186 N.E. 217 (N.Y. 1933) (newspaper story suggesting that criminal courted plaintiff not actionable); Goelet v. Confidential, Inc., 171 N.Y.S.2d 223 (App. Div. 1958) (gossip article about plaintiff's marriage not actionable); Molony v. Boy Comics Publishers, 98 N.Y.S.2d 119 (App. Div. 1950) (comic book based on plaintiff's heroic actions not actionable); Martin v. New Metro. Fiction, Inc., 260 N.Y.S. 972 (App. Div. 1932) (photo in detective magazine not actionable); Merle v. Sociological Research Film Corp., 152 N.Y.S. 829 (App. Div. 1915) (name of photo above building in documentary not actionable); Callas v. Whisper, Inc., 101 N.Y.S.2d 532 (Sup. Ct. 1950) (staged photo of young woman in bar not actionable); Koussevitzky v. Allen, Towne & Heath, Inc., 68 N.Y.S.2d 779 (Sup. Ct. 1947) (biography of plaintiff conductor not actionable); Kline v. McBride, 11 N.Y.S.2d 674 (Sup. Ct. 1939) (plaintiff's name in book about strike breaking not actionable); Lahiri v. Daily Mirror, 295 N.Y.S. 382 (Sup. Ct. 1937) (photograph of mystic in column not actionable); Middleton v. News Syndicate Co., 295 N.Y.S. 120 (Sup. Ct. 1937) (plaintiff "cigarette girl's" mention with photograph in column not actionable); Jeffries v. N.Y. Evening Journal Publ'g Co., 124 N.Y.S. 780 (Sup. Ct. 1910) (author cannot prevent newspaper from publishing his photo); Moser v. Press Publ'g Co., 109 N.Y.S. 963 (Sup. Ct. 1908) (privacy statute does not apply to news photo, because otherwise newspapers would be liable for privacy invasions daily); People v. McBride, 288 N.Y.S. 501 (Magis. Ct. 1936) (book on strike breaking not criminally actionable via statute). *But see* Redmond v. Columbia Pictures Corp., 14 N.E.2d 636 (N.Y. 1938) (golfer pictured in short subject film has valid claim); Blumenthal v. Picture Classics, Inc., 257 N.Y.S. 800 (App. Div. 1932) (plaintiff pictured momentarily in tourist documentary-like film has valid claim); Youssoupoff v. CBS, 244 N.Y.S.2d 701 (Sup. Ct. 1963) (plaintiff has valid claim based on television program about reenactment of his involvement in crime but news article and documentary distinguished); Schley v. N.Y. Journal, 99 N.Y.L.J. 34 (Sup. Ct. 1938) (statute violated because photograph used with article has only tenuous connection with article so only purpose was sale of papers); McNulty v. Press Publ'g Co., 241 N.Y.S. 29 (Sup. Ct. 1930) (political cartoon actionable because sold to other newspapers); Semler v. Ultem Publ'ns, Inc., 9 N.Y.S.2d 319 (City Ct. 1938) (plaintiff model's photo in *Silk Stocking Stories* magazine actionable).

attention. "There are times," wrote a federal court in South Carolina, "when one, whether willingly or not, becomes an actor in an occurrence of public or general interest."[73]

Thus, even innocent victims in crime dramas often became proper subjects of public interest, forfeiting their privacy rights.[74] Courts sided with journalists and against privacy plaintiffs who sued a newspaper for publishing a photograph of their daughter who had died in a car accident[75] and a mother who sued a newspaper that covered her son's fatal shooting.[76] In some cases, courts

73. Frith v. Associated Press, 176 F. Supp. 671, 675–76 (E.D.S.C. 1959) (holding that six men arrested for abducting and beating a high school band director had no legal right to suppress news coverage of the crime because "[t]he public had a right to know the facts"). *See also* Elmhurst v. Pearson, 153 F.2d 467 (D.C. Cir. 1946) (holding no privacy violation for a newspaper report on a man on trial for sedition who worked as a bartender in a hotel frequented by government officials); Bernstein v. NBC, 129 F. Supp. 817 (D.D.C. 1955) (holding no privacy violation when a man whose life—including convictions and later pardons for bank robbery and murder—was chronicled on a television program); Smith v. NBC, 292 P.2d 600, 604 (Cal. Ct. App. 1956) (holding that there is "current news value" in news events that have aroused past public interest, where a man whose false report to police three months earlier about a panther's escape was the subject of a radio report); Miller v. NBC, 157 F. Supp. 240, 243 (D. Del. 1957) (holding that while there should be no "unbridled appropriation of an individual's intimate history," the public also has a right to uncensored dissemination of newsworthy and entertaining information).

74. *E.g.*, Jones v. Herald Post Co., 18 S.W.2d 972, 973 (Ky. Ct. App. 1929) (holding that the victim of a savage street crime in Louisville who tried to save her husband from a murderous assault became "an innocent actor in a great tragedy in which the public had a deep concern"). Bystanders and others caught up in other sensational dramas similarly lost any claim to privacy, including a plaintiff featured in a photograph depicting her unsuccessful attempt to dissuade a woman from a suicide jump, Samuel v. Curtis Publ'g Co., 122 F. Supp. 327 (N.D. Cal. 1954). *See also* Jacova v. S. Radio & Television Co., 83 So. 2d 34, 36 (Fla. 1955) (rejecting privacy claim from a man shown outside a crime scene in a news broadcast); Reardon v. News-Journal Co., 164 A.2d 263 (Del. 1960) (rejecting a judge's privacy cause of action when a newspaper quoted his comment about corporal punishment at a youth services commission meeting, because of freedom of the press, public interest, and news value in article).

75. Kelley v. Post Publ'g Co., 98 N.E.2d 286 (Mass. 1951).

76. Abernathy v. Thornton, 83 So. 2d 235, 237 (Ala. 1955) (holding that plaintiff had no "right to be spared unhappiness through publicity concerning her dead son" in a newsworthy story); *see also* Rozhon v. Triangle Publ'ns, 230 F.2d 359, 361 (7th Cir. 1956) (rejecting a father's privacy claim over an article about his son's fatal drug overdose because the story was legitimate public news); Bremmer v. Journal-Tribune Publ'g Co., 76 N.W.2d 762, 762 (Iowa 1956) (holding an article about the murder of the plaintiffs' son and a photograph of his body a "top rank news story," and the photograph newsworthy); Jenkins v. Dell Publ'g Co., 251 F.2d 447, 452 (3d Cir. 1958) (rejecting privacy claim of a plaintiff whose husband's murder was featured in *Front Page Detective* magazine, because "[a]ny other rule would dangerously and undesirably obstruct the publication of patently newsworthy items by compelling the publisher to speculate as to the value judgments of a judge or a jury with reference to the kind of reader appeal the item offers"); Wagner v. Fawcett Publ'ns, 307 F.2d 409, 411 (7th Cir. 1962) (finding that an article about plaintiff's daughter's murder was publishable "current news"); Milner v. Red River Valley Publ'g Co., 249 S.W.2d 227 (Tex. Civ. App. 1952) (holding that "[t]he truth of the printed matter involved was a complete defense" where the family of a man whose indictment in a criminal investigation was mentioned in a news story on his traffic death brought suit); Hull v. Curtis Publ'g Co., 125 A.2d 644, 651 (Pa. Super. Ct. 1956) (upholding publication of police officers pictured during an arrest because "the right of privacy infringes upon freedom of speech and press

held that the loss of privacy associated with victimization could also be enduring. In *Smith v. Doss*,[77] for example, the daughters of a murdered man sued unsuccessfully on privacy grounds after a radio broadcast focused on the crime, even though the crime had happened many years before. The story remained of legitimate public interest, the court held, because it had become "part of the history of the community."[78] Other courts agreed that news stories could maintain their newsworthiness over a span of many years.[79]

In time, courts came to recognize a broader scope of legitimate public interest beyond crime-related stories. The South Carolina Supreme Court concluded in 1956, for example, that the birth of a child to a twelve-year-old girl and her twenty-year-old husband was a fitting subject of news coverage.[80] Additional cases expanded the type of facts in which public interest trumped the individual's right to privacy: a woman photographed with her chauffeur in an article titled "Principals in local divorce scandal";[81] persons listed as communists in the newspaper;[82] and a man whose picture illustrated an article reporting on the problem of financial hardship among retirees.[83]

Importantly, some courts effectively shifted the basis of the "newsworthiness" determination from the public's *need* to know to the public's *interest* in knowing. In an opinion that presaged the pro-journalism sentiments in later tort cases, a federal district court in New York in 1936 found that women who were filmed while exercising had no valid privacy cause of action because the film had news value.[84] The court wrote:

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and clashes with the interest of the public in the free dissemination of news and information, and that these paramount public interests must be considered when placing the necessary limitations upon the right of privacy"); Bradley v. Cowles Magazines, Inc., 168 N.E.2d 64 (Ill. App. Ct. 1960) (finding a mother has no valid privacy cause of action if she is not featured prominently in the news stories about the murder of her son).

77. 37 So. 2d 118 (Ala. 1948).

78. *Id.* at 121.

79. *See* Estill v. Hearst Publ'g Co., 186 F.2d 1017 (7th Cir. 1951) (prosecutor in photo with John Dillinger was newsworthy after fifteen years); Cohen v. Marx, 211 P.2d 320 (Cal. Ct. App. 1949) (prize fighter maintained his newsworthiness ten years later); Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963) (last convict whipped as punishment newsworthy after nine years); Schnabel v. Meredith, 107 A.2d 860 (Pa. 1954) (a man whose own slot machine arrest was mentioned in a later news story about a second gambling investigation had no valid privacy claim).

80. Meetze v. Associated Press, 95 S.E.2d 606, 610 (S.C. 1956) ("We regret that we cannot give legal recognition to Mrs. Meetze's desire to avoid publicity but the courts do not sit as censors of the manners of the Press.").

81. Thayer v. Worcester Post Co., 187 N.E. 292 (Mass. 1933) (rejecting the woman's privacy claim primarily because photograph was taken in public and not surreptitiously).

82. Johnson v. Scripps Publ'g Co., 18 Ohio Op. 372, 381 (C.P. 1940) ("[T]he rights of the public are paramount to the right of privacy of the individual, when the individual engages in conduct which vitally affects the public welfare and public concern.").

83. Truxes v. Kenco Enters., Inc., 119 N.W.2d 914 (S.D. 1963) (holding that the photograph of the plaintiff helped to illustrate an article that disseminated news of public concern).

84. Sweenek v. Pathe News, Inc., 16 F. Supp. 746 (E.D.N.Y. 1936).

> While it may be difficult in some instances to find the point at which public interest ends, it seems reasonably clear that pictures of a group of corpulent women attempting to reduce with the aid of some rather novel and unique apparatus do not cross the borderline, at least so long as a large proportion of the female sex continues its present concern about any increase in poundage. The amusing comments which accompanied the pictures did not detract from their news value.[85]

In 1940, and in seemingly direct contrast to the early *Hillman* case, the highest court in Massachusetts held that public interest in a news event should legitimately protect against a privacy lawsuit, adopting a surprisingly expansive conception of "newsworthiness" from a torts treatise: "There is no need to stop the propagation of news—even silly news—about people," the court wrote, "or to stifle curiosity—even vulgar curiosity—about a neighbour's affairs."[86]

That same year, the U.S. Court of Appeals for the Second Circuit controversially applied essentially the same principle, in *Sidis v. F-R Publishing Corp.*,[87] to uphold the right of *The New Yorker* magazine to publish a "merciless . . . dissection of intimate details of . . . [the] personal life" of a former child prodigy.[88] The court held that the article—though "a ruthless exposure of a once public character, who has since sought and has now been deprived of the seclusion of private life"—did not invade a legal privacy interest of the plaintiff because of its overriding news value:

> Regrettably or not, the misfortunes and frailties of neighbors and "public figures" are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[89]

The *Sidis* court reserved judgment on "whether or not the news worthiness of the matter printed will always constitute a complete defense" in privacy actions, but its holding indicated that it was willing to go further than earlier authorities, including Warren and Brandeis, in privileging the media's "limited scrutiny of the 'private' life of any person who has achieved, or has had thrust

85. *Id.* at 747–48. Similarly, in 1939, a California court held that a surviving husband had very little privacy to protect relating to a story about his wife's suicide due to public interest in the matter. Metter v. L.A. Examiner, 95 P.2d 491 (Cal. Ct. App. 1939). The court wrote that "news is said to have 'that indefinable quality of interest, which attracts public attention' [and is] a 'report of recent occurrences.'" *Id.* at 496 (quoting Associated Press v. Int'l News Serv., 245 F. 244 (2d Cir. 1917) and Jenkins v. News Syndicate, 219 N.Y.S. 196 (Sup. Ct. 1926)). *Id.* Therefore, the woman's husband could not bar coverage of the suicide, including publication of his wife's photograph. "Manifestly an individual cannot claim a right to privacy with regard to that which cannot, from the very nature of things and by operation of law, remain private," the court wrote. *Id.*

86. Themo v. New Eng. Newspaper Publ'g Co., 27 N.E.2d 753, 754 (Mass. 1940).

87. 113 F.2d 806, 807 (2d Cir. 1940).

88. *Id.* at 807–08.

89. *Id.* at 809.

upon him, the questionable and indefinable status of a 'public figure.'"[90] Importantly, the foundation of the court's judgment to open such persons' private lives to this scrutiny was not public *necessity* but public *curiosity*.[91]

By 1962, the Supreme Court of New Mexico went as far as finding no valid publication of private facts claim after a newspaper printed an article that mentioned a teenager's sexual assault on his younger sister.[92] The young girl sued for invasion of her privacy, but the court held that no reasonable jury could find other than that "the newspaper account . . . was accurate, newsworthy and exercised in a reasonable manner and for a proper purpose."[93]

As Dean Prosser explained in *Privacy* in 1960, tort protection against public disclosure of private facts, "slow to appear in the decisions," had begun to surrender to valid news, including "all events and items of information," even those regarding "matters of genuine, if more or less deplorable, popular appeal."[94] Although not every publication privacy case was decided in favor of the media in the 1950s and 1960s,[95] by 1972, Professor Don Pember expressed

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90. *Id.*

91. Eight years after *Sidis*, a federal district court in Minnesota ruled in favor of a newspaper that had reported on a divorce and child custody case, noting that "it cannot be controverted that there is a wide-spread interest in this very kind of news." Berg v. Minneapolis Star & Tribune Co., 79 F. Supp. 957, 961 (D. Minn. 1948); *see also* Chaplin v. NBC, 15 F.R.D. 134, 138–39 (S.D.N.Y. 1953) (holding that that actor Charlie Chaplin had no valid privacy cause of action against a celebrity gossip columnist who had broadcast surreptitiously gathered telephone conversations between Chaplin and the columnist, and Chaplin's butler and the columnist, because the broadcasts should be considered reports of general public interest and "courts cannot and should not pass judgment on the value of particular news items"); Buzinski v. DoAll Co., 175 N.E.2d 577, 579 (Ill. App. Ct. 1961) (rejecting a privacy lawsuit based on a magazine photograph of the plaintiff and his so-called "land yacht," a large recreational vehicle, because readers would have an interest in the RV, even though the plaintiff himself had avoided the limelight); Langford v. Vanderbilt Univ., 287 S.W.2d 32 (Tenn. 1956) (holding that a newspaper article about a libel suit did not invade privacy of libel plaintiffs because the lawsuit was newsworthy).

92. Hubbard v. Journal Publ'g Co., 368 P.2d 147 (N.M. 1962).

93. *Id.* at 148.

94. Prosser, *supra* note 63, at 392, 412. The American Law Institute, guided by Dean Prosser in his role as Reporter, would later adopt this exact language in defining newsworthiness in the Second Restatement of Torts. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

95. Most of the cases during this period that sided with plaintiffs were only somewhat related to publication privacy claims, although they all spring from news stories or quasi-journalistic endeavors. Ettore v. Philco Television Broad. Corp., 229 F.2d 481 (3d Cir. 1956) (holding that boxing match broadcast, as one of the "Greatest Fights of the Century," created valid privacy action because issue was property-rights related); Nappier v. Jefferson Standard Life Ins. Co., 322 F.2d 502 (4th Cir. 1963) (finding that rape victims named by implication in news story have valid privacy claim because statute creating liability upon publication trumped story's news value); Strickler v. NBC, 167 F. Supp. 68 (S.D. Cal. 1958) (holding that a man pictured in television drama praying during plane's emergency landing has valid privacy claim); Harms v. Miami Daily News, Inc., 127 So. 2d 715, 715 (Fla. Dist. Ct. App. 1961) (deciding that a woman whose name and telephone number were published in story suggesting that readers call to hear her "sexy telephone voice" had valid privacy claim because information was not of public interest); Patterson v. Tribune Co., 146 So. 2d 623 (Fla. Dist. Ct. App. 1962) (holding that newspaper's publication of court docket that included woman's drug addiction commitment proceedings

satisfaction that the "grave possibility of censorship of the press" posed by judicial newsworthiness determinations had not materialized because courts had instead substantially deferred to editors and readers in determining what should be considered valid news.[96]

2. Early Supreme Court Opinions and News Judgment

As demonstrated in the previous sections, most of the early cases did not tie newsworthiness to an analysis of journalists' First Amendment rights. Instead, these cases navigated the boundary between press and privacy rights as a matter of public policy under the common law.[97] However, a series of First Amendment rulings beginning in the 1940s by the U.S. Supreme Court helped significantly to shift the boundary between press and privacy rights in favor of public disclosure.[98]

The Court first touched on the constitutional issue in a case involving a detective magazine known as *Headquarters Detective: True Cases from the Police Blotter* and a New York criminal statute making it illegal to publish a magazine "principally made up of criminal news, police reports, or accounts of criminal deeds . . . of bloodshed, lust or crime."[99] The Court found the statute unconstitutional, and, in doing so, refused to make constitutional protection for news publishing dependent upon a judicial assessment of the importance of a periodical's content.[100] "Though we can see nothing of any possible value to society in these magazines," the Court wrote, "they are as much entitled to the protection of free speech as the best of literature."[101] This holding provided basic support for true-life crime coverage, the bane of countless tabloid victims of the future.[102]

The Court's 1964 landmark decision in *New York Times Co. v. Sullivan*[103] provided an even more important boost to journalists' claims of constitutional

created a valid privacy action).

96. PEMBER, *supra* note 24, at 168.

97. In *Sidis v. F-R Publishing Corp.*, 113 F.2d 806, 809–10 (2d Cir. 1940), for example, the court cited Warren and Brandeis's *The Right to Privacy* law review article and the Restatement in deciding for the *New Yorker* over the plaintiff former child prodigy who brought the privacy action.

98. *See, e.g.*, Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1387 (1976) ("Until recently, the question whether the first amendment restricts a state's power to protect individuals from public disclosures of private facts was very rarely raised in explicit constitutional terms.").

99. Winters v. New York, 333 U.S. 507, 508 (1948) (quoting N.Y. PENAL LAW § 1141(2) (Consol. 1941).

100. *Id.* at 511.

101. *Id.* at 510.

102. *But cf., e.g.*, Annerino v. Dell Publ'g Co., 149 N.E.2d 761, 763 (Ill. App. Ct. 1958) (suggesting that the magazine *Inside Detective* had overstepped the bounds of propriety by publishing a story about a crime involving the plaintiff and using her picture; the court found the coverage "not news reporting").

103. 376 U.S. 254 (1964).

privilege. The decision raised barriers to tort recovery against journalists for defamation by requiring plaintiffs who were public officials to show that any damaging falsehoods in news reports were made maliciously or with reckless disregard for the truth.[104] The Court rationalized constitutional protection for some false statements on the ground that freedom of expression requires "breathing space" and that vigorous public debate must tolerate even occasional falsehoods so that participants will not be afraid to speak.[105]

Four years later, in *Time, Inc. v. Hill*,[106] the Court even more directly addressed news value, both constitutionally and practically. In considering whether a family victimized by a notorious crime could recover from *Life* magazine for a factually flawed feature account years later, the Court began with a description of the invasiveness of the press that could have come straight from the pens of Warren and Brandeis: "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials."[107] Yet, whereas Warren and Brandeis hoped to bring the press to heel by expanding tort liability, the Court in *Hill* emphasized the importance of a free press. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized community," the Court observed, and "[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."[108] For the Court, the sacrifice of personal privacy in a media-saturated world was a small price to pay for the privilege of living in a free society.[109] "[B]roadly defined freedom of the press," the Court reminded, "assures the maintenance of our political system and an open society."[110]

In subsequent opinions, the justices questioned whether it was the courts' role to superintend the news judgment of the press. In 1971, for example, they emphasized the complexity of the reporter's craft by acknowledging that "[a] press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings."[111] In another case that same year, Justice Harlan stated in dissent that he wished "to avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print."[112]

Throughout the 1970s and 1980s, the Supreme Court continued to strengthen the hand of journalists. First, the Court supported newspaper coverage of highly secretive government information in *New York Times Co. v.*

104. *Id.* at 264, 280.
105. *Id.* at 272, 279–80.
106. 385 U.S. 374 (1967).
107. *Id.* at 388.
108. *Id.*
109. *Id.* at 389.
110. *Id.*
111. Time, Inc. v. Pape, 401 U.S. 279, 286 (1971).
112. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting).

United States.[113] Then, in *Cox Broadcasting Corp. v. Cohn*,[114] it absolved reporters from penalty when they published the name of a murder victim who had been raped. In 1976, it wrote that it was not the function of the Court to write a code of journalistic behavior.[115] In 1977, the Court held that a judge could not prevent a newspaper from publishing a story about a juvenile offender[116] and, in a similar case, the Court struck down a West Virginia statute making it a crime to publish the name of a juvenile offender.[117] The publication of truthful information lawfully obtained by media, the Court reasoned, could not be punished "except when necessary to further an interest more substantial" than the protection of juvenile offenders, an interest of concededly great importance.[118] Consistent with this rule, the Court in 1978 found that a newspaper could not be sanctioned for reporting on confidential judicial proceedings, finding that the public interest in monitoring the proceedings trumped any privacy concerns.[119] Similarly, in 1989, the Court ruled that a newspaper could not be held liable for publishing the name of a rape victim, despite the prohibitions of a state statute and the newspaper's own ethics code.[120]

Perhaps the most supportive language for media defendants in determining news content came in *Gertz v. Robert Welch, Inc.*[121] In *Gertz*, the Court was concerned that a legal test for defamation would force judges to decide which publications addressed issues of general public interest.[122] "We doubt the wisdom of committing this task to the conscience of judges," Justice Powell wrote for the majority.[123] That same year, in *Miami Herald Publishing Co. v. Tornillo*,[124] the Court found a Florida statute unconstitutional because it

113. 403 U.S. 713 (1971).

114. 420 U.S. 469 (1975).

115. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 550 (1976) (acknowledging that journalism standards vary from region to region).

116. Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311 (1977) (finding both *Cox*, 420 U.S. 469, and *Nebraska Press*, 427 U.S. 539, controlling).

117. Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).

118. *Id.* at 104. Curiously, the majority wrote that privacy was not an issue in the case, *id.* at 105, though Justice Rehnquist's concurring opinion made the argument that the "exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities," *id.* at 108 (Rehnquist, J., concurring). If, in fact, names of juvenile offenders are not generally released, privacy—or at least secrecy—would seem to be an issue.

119. Landmark Commc'ns., Inc. v. Virginia., 435 U.S. 829, 839 (1978) ("The article published by Landmark provided accurate factual information about a legislatively authorized inquiry pending before the Judicial Inquiry and Review Commission, and in so doing clearly served those interests in public scrutiny and discussion of governmental affairs which the First Amendment was adopted to protect.").

120. Fla. Star v. B.J.F., 491 U.S. 524 (1989).

121. 418 U.S. 323 (1974).

122. *Id.* at 346.

123. *Id.*

124. 418 U.S. 241 (1974).

"grant[ed] a political candidate a right to equal space to reply to criticism and attacks on his record by a newspaper."[125] In rejecting the statute, the Court found that it would unconstitutionally interfere with the news judgment of editors, writing that it was unclear "how government regulation of this crucial process can be exercised consistent with First Amendment guarantees."[126] Later, a Washington court interpreted *Miami Herald* to stand for the notion that "in order to uphold the circulation of ideas the editors of a newspaper must be free to exercise editorial control and discretion."[127]

The media did not win every privacy-related case in the Supreme Court. In 1969, for example, the Court upheld the Fairness Doctrine over arguments that it unconstitutionally forced broadcasters to give so-called "fair coverage" to both sides of a public issue.[128] In 1976, the justices ruled that a wealthy heiress would not be considered a public figure in coverage of her divorce case[129] and, in 1977, they sided with a human cannonball and against television news broadcasters in a case involving the right of publicity, upholding the man's right to practice his craft over the rights of broadcasters to televise it in its entirety without his permission.[130] However, the trend of decisions plainly favored press rights over privacy rights when the two came into conflict.[131] In fact, by 1977, the American Law Institute appended the Second Restatement of Torts with a "Special Note on Relation . . . to the First Amendment to the Constitution," alerting readers that recent constitutional precedents had cast doubt on whether "liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment."[132] The Restatement authors observed:

> It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course

125. *Id.* at 243.

126. *Id.* at 258.

127. Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1131 (Wash. 1997) (en banc).

128. Red Lion Broad. v. FCC, 395 U.S. 376, 394 (1969) ("It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern.").

129. Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

130. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1977).

131. "[W]hen the First Amendment and privacy have come into conflict in the past, most significantly in a long line of Supreme Court cases invalidating attempts to impose liability on the press for committing the tort of disclosure of private information, the First Amendment has universally triumphed." Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1155 (2005).

132. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

control.[133]

By the 1970s, then, legal protection for the freedom of the press to determine the content of news coverage had emerged in full bloom. From its frosty start at the time of Warren and Brandeis, the notion of broad legal protection for editorial discretion had gained a secure foothold in the common law by the time of Prosser's reformulation of the privacy torts in the 1960s. A decade later, it appeared that the common-law privilege had been largely subsumed into expanding First Amendment protection of the press, raising doubt over the very power of the courts to review the news judgment of journalists. What was "news" evolved from what the public needed to know to what the public wanted to know; indeed, it often appeared that the "news" was whatever reporters and editors said it was.

C. When Privacy and Press Collide: The Modern Position of Deference to Journalists in Defining "Newsworthiness"

Although some commentators acknowledged early on that protection for personal privacy would need to be qualified by the rights of a free press, most early court decisions did not directly address the conflict. Tort doctrine protecting privacy and constitutional doctrine protecting the press and free speech seemed to develop on separate but converging tracks during much of the 20th century. By the 1960s, however—with Dean Prosser's *Privacy* article in print and *New York Times v. Sullivan* invigorating and expanding First Amendment protection for journalists—privacy and press rights had each gained sufficient strength that the tension could no longer be ignored.

As the law developed, "newsworthiness"[134] emerged as an essential balance point between privacy and the rights of the press. First as a matter of common law and later as a matter of constitutional principle, courts recognized that newsworthiness entitled the press to publicize what otherwise might remain personal and private information.[135]

Early on, some courts showed significant self-confidence in reviewing the editorial judgment of journalists. Indeed, they sometimes appeared eager to educate journalists on the proper operation of newspapers and other media outlets. The U.S. Court of Appeals for the Second Circuit in 1963, for example, caustically scolded the *New York Times* for engaging in mundane local crime coverage:

> That *The New York Times*, a newspaper of international pre-eminence, devoted to extensive reporting of important current events, should find the raid of an open-air crap game in Stamford to constitute news fit to

133. *Id.* at § 652D cmt. d.

134. "Newsworthiness" is defined more fully in Section D, *infra*.

135. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Sidis v. F-R Publ'g Corp., 113 F.2d 806, 809 (2d Cir. 1940); Frith v. Associated Press, 176 F. Supp. 671, 675-76 (E.D.S.C. 1959); Reardon v. News-Journal Co., 164 A.2d 263, 266-67 (Del. 1960).

> print—and on the front page at that—is quite enough evidence by itself [to show bad faith]. It is irrefutable that this story was not as newsworthy as were its companion articles on the front page . . . .[136]

Yet, over time, the courts' understanding of what qualified as newsworthy progressively expanded and their readiness to impose their own assessments of news value retreated.[137] Whereas earlier court decisions tended to define newsworthiness in terms of the public's legitimate and proper need to know,[138] later opinions looked more heavily to the fact of the public's curiosity.[139] Guided by Supreme Court opinions casting doubt on the constitutional legitimacy of judicial oversight of news judgment, decisions in both state and federal courts appeared to coalesce around the idea that judges should defer heavily to journalists in defining the news. Increasingly sensitive to the risks of superimposing their own ideas of the proper boundaries of journalistic inquiry and commentary, courts came to accept that the conception of newsworthiness might be as flexible and expansive as the shifting demands of the consuming public.

In the 1970s and 1980s, then, courts sided more staunchly with media defendants and their determinations of newsworthiness. The Iowa Supreme Court wrote in 1979 that "[i]n determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community. Courts do not have license to sit as censors."[140] A second court wrote that, while it seemed that "art directors and editors should hesitate to deliberately publish a picture which most likely would be offensive and cause embarrassment . . . [nonetheless] '[t]he courts are not concerned with establishing canons of good taste for the press or the public.'"[141] And the Fifth Circuit suggested that "judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively" because "[e]xuberant judicial

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136. Hogan v. N.Y. Times Co., 313 F.2d 354, 356 (2d Cir. 1963); *see also* Metzger v. Dell Publ'g Co., 136 N.Y.S.2d 888, 890 (Sup. Ct. 1955) ("While *not a news report*, the article [about a gang beating] . . . may be said to be an attempt to portray the existence of a condition which indisputably is a subject of legitimate public interest.") (emphasis added); Aquino v. Bulletin Co., 154 A.2d 422, 427 (Pa. Super. Ct. 1959) (rejecting newspaper's claim of newsworthiness on the ground that its feature story "was in the nature of a story and not a news article": "[i]t was in a Sunday supplement and not in the news section; it was not written in the style of a news article; it was bedecked with an 'illustrated' drawing covering over half the page; although the basic facts of the article were admittedly true, the author embellished and fictionalized them . . . .").

137. *See, e.g.*, Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989) (rejecting judicial blue penciling in such cases).

138. *See, e.g.*, Sutton v. Hearst Corp., 90 N.Y.S.2d 322, 323 (Sup. Ct. 1949) (finding that a story on mysterious rose deliveries was not news).

139. *See, e.g.*, Carlisle v. Fawcett Publ'ns, 20 Cal. Rptr. 405, 414 (Ct. App. 1962) (recognizing that legitimate public interest attaches to certain persons in the public eye).

140. Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289, 302 (Iowa 1979).

141. Neff v. Time, Inc., 406 F. Supp. 858, 860 (W.D. Pa. 1976) (quoting *Aquino*, 154 A.2d at 425). In *Neff*, the plaintiff was pictured with his pants zipper down at a football game. *Id.* at 859.

blue-pencilling after-the-fact would blunt the quills of even the most honorable journalists."[142] This consensus, favoring strong deference to journalists' own judgments concerning newsworthiness, emerged as the modern position of the courts after the 1960s.[143]

A 1984 California case, *Sipple v. Chronicle Publishing Co.*,[144] dramatically demonstrated just how far courts had come in siding with journalists over privacy claimants. Risking his own life, former Marine Oliver Sipple had intervened to save the life of President Ford during an assassination attempt by Sara Jane Moore, knocking her gun away as she was about to shoot.[145] He was hailed as a hero.[146] Shortly after the event, newspapers began to report that Sipple was gay.[147] Sipple unsuccessfully sued for publication of private facts.[148] The court held that Sipple's sexual orientation was newsworthy because it helped to "dispel the false public opinion that gays were timid, weak and unheroic figures and to raise the equally important political question whether the President of the United States entertained a discriminatory attitude or bias against a minority group such as homosexuals."[149] The courts had come a long way from siding with two people pictured cuddling in public.[150]

To be sure, judicial deference to journalists was not universal. Some judges continued to side with plaintiffs, even during this period. A few courts hesitated to validate journalists' decisions to revive coverage of long-ago

142. Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989); *see also* Fletcher v. San Jose Mercury News, 261 Cal. Rptr. 699, 706 (Ct. App. 1989) (stating that the court refuses to act "'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists'" and rejecting plaintiff's argument based on failure to follow ethics standards) (quoting Tavoulareas v. Piro, 817 F.2d 762, 796 (D.C. Cir. 1987)).

143. Under this deferential approach, for example, a newspaper that identified a particular woman as having been sterilized during an earlier period of institutionalization was not liable for its report, *Howard*, 283 N.W.2d at 303; a woman fleeing a hostage scene and pictured wearing only a dishtowel could not successfully sue for publication of private facts because she was involved in a newsworthy crime story, Cape Publ'ns, Inc. v. Bridges, 423 So. 2d 426, 427 (Fla. Dist. Ct. App. 1982) (describing the event as "a typical exciting emotion-packed drama to which news-people, and others, are attracted"); and a story about an adoption, titled *Ex-Carny Seeks Baby Abandoned 17 Years Ago*, did not support a publication of private facts claim on behalf of the child or the adoptive mother because the human-interest story had news value, Hall v. Post, 372 S.E.2d 711, 722 (N.C. 1988).

144. 201 Cal. Rptr. 665 (Ct. App. 1984).

145. *Id.* at 666.

146. *Id.*

147. *Id.*

148. *Id.* at 667.

149. *Id.* at 670. The court noted some evidence that Oliver Sipple's sexual orientation was known within the local gay community. Nonetheless, *Sipple*'s readiness to uphold public disclosure of the plaintiff's sexual orientation, ordinarily a quintessentially private fact, on the very rationale that it was *irrelevant* to Sipple's involvement in a public incident is striking. The court's acceptance that the media might use facts about an individual's private life to educate the public about the very immateriality of those facts showed just how far courts had come from the days in which they sided with plaintiffs who argued that an article on love relationships had invaded their privacy.

150. Gill v. Curtis Publ'g Co., 239 P.2d 630, 635–36 (Cal. 1952).

crimes or other events, for example.[151] Some others ruled for plaintiffs on the ground that their exposure was entirely gratuitous to an otherwise valid news story,[152] or refused to overturn a jury decision against media on newsworthiness grounds.[153] The Idaho Supreme Court, for example, left open the possibility that journalists might be held liable for pointlessly humiliating a news subject.[154]

Perhaps the furthest any court went during this period to protect privacy against media exposure was a 1969 case in which inmates in a state hospital for the criminally insane were shown nude and in otherwise embarrassing detail as part of a documentary on the institution titled *Titicut Follies*.[155] Finding that the documentary needlessly invaded the privacy of the mentally ill subjects, the Supreme Judicial Court of Massachusetts restrained the documentary's distribution for nearly twenty-five years, permitting it to be viewed only by

151. *Compare, e.g.*, Bimbo v. Viking Press, Inc., No. 76-1423-S, 1981 U.S. Dist. LEXIS 12180, at *12 (D. Mass. May 14, 1981) (holding that plaintiff had a valid publication claim based on information in book about an alleged incestuous relationship), Conklin v. Sloss, 150 Cal. Rptr. 121, 123 (Ct. App. 1978) (holding that while crimes themselves retained newsworthiness, disclosing the names of criminals "serve[d] little independent public purpose"), *and* Hyde v. City of Columbia, 637 S.W.2d 251, 263 (Mo. Ct. App. 1982) (holding that publishing victim's name and address by media could serve as basis for negligence action), *with* Roshito v. Hebert, 439 So. 2d 428, 432 (La. 1983) (holding that reviving coverage of twenty-five-year-old cattle theft in newspaper was not a privacy invasion).

152. *See* Huskey v. NBC, 632 F. Supp. 1282, 1289–91, 1291 n.13 (N.D. Ill. 1986) (sustaining sufficiency of inmate's complaint that he was videotaped against his wishes while exercising in a prison cage, clad only in gym shorts, but leaving open that NBC might exonerate itself at trial by showing that the footage "was *necessary* to public exposure of improper prison conditions"); Daily Times Democrat v. Graham, 162 So. 2d 474, 477 (Ala. 1964) (finding "nothing of legitimate news value" in a photograph of a woman whose skirt was blown up in a fun house); Deaton v. Delta Democrat Publ'g Co., 326 So. 2d 471 (Miss. 1976) (accepting newsworthiness of a report on children labeled as mentally retarded, but finding that children's faces could have been blurred in news photo).

153. In *Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145 (S.C. 1986), the court refused to overturn a jury that found it not of general interest that a minor male had fathered a child. The result in *Hawkins* stands in contrast to the international media spectacle in 2009 that surrounded a 13-year-old British boy's claim to have fathered a child with his 15-year-old girlfriend. *See, e.g.*, Gregory Katz, *13-Year-Old Dad Called Sign of "Broken Britain,"* S.F. CHRON., Feb. 16, 2009, at A3. The boy's claim of paternity was later disproved, attracting another round of international publicity. *See* John Bingham, *Alfie Patten, 13, Is Not Baby's Father, Test Shows*, DAILY TELEGRAPH, May 18, 2009, http://www.telegraph.co.uk/news/uknews/5345999/Alfie-Patten-13-is-not-babys-father-test-shows.html.

154. Taylor v. K. T. V. B., Inc., 525 P.2d 984, 988 (Idaho 1974). A Boise television station had aired video of man's genitals and buttocks after his arrest during an armed stand-off with police. *Id.* at 985. The jury found that the news report invaded the man's privacy, based on instructions suggesting that "the public interest in a legitimate news broadcast about public or newsworthy personages or incidents would not justify a lurid or indecent treatment of the facts such as would outrage the community's notion of decency." *Id.* at 986. On appeal, the state supreme court reversed this judgment and held that recent United States Supreme Court decisions interpreting the First Amendment required stronger protection for journalists, sending the case back for a new trial to determine whether the station had acted with "malice" in airing the images. *Id.* at 987–88.

155. Commonwealth v. Wiseman, 249 N.E.2d 610, 613 (Mass. 1969).

select groups for educational purposes and forcing the filmmaker to add a note at the end of the film stating that conditions had improved at the institution.[156] The ban on general distribution was not lifted until 1991.[157]

Yet, notwithstanding this handful of decisions rejecting journalistic claims of newsworthiness,[158] the strong trend of court judgments during this period deferred broadly to the news judgment of journalists. Judges wrote that they feared acting as superior editors and worried about the constitutionality of second-guessing journalists' editorial decisions. The result was effectively to make journalists' own conception of newsworthiness the legal standard in privacy cases.

D. Journalism's Broad Conception of "News" as Law

Importantly, journalists' conception of newsworthiness is both variable and very broad. As one journalism professor explained to a court:

> When I teach freshmen journalists about what is meant by newsworthiness . . . [we] talk about the . . . quality that that person or that news event has.
>
> Is that news event going to have an impact on the people who read your newspaper or who watch your television station? Is it going to change their lives? Does it have the potential to change their lives? Is it something which is a public conflict? . . . .
>
> We talk about the news—the news value of locality . . . .
>
> We talk about the value of human interest, and many of the stories that most people think of as feature stories and human interest stories. They appeal to the characteristics of the human spirit.
>
> So when a journalist is making a decision about what is or is not news, there is always a very careful evaluation of each of those factors.[159]

Indeed, in journalism it is said that seven broad and subjectively defined terms generally help determine newsworthiness, each hinted at in the professor's testimony: impact, immediacy, proximity, prominence, novelty,

156. *See id.* at 618 (permitting viewing only by "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity").

157. William H. Honan, *Judge Ends Ban on Film of Asylum*, N.Y. TIMES, Aug. 3, 1991, § 1, at 12.

158. *See* Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Ct. App. 1983) (holding that whether it was newsworthy that a transsexual had been elected president of a community college's student body was a jury question); Capra v. Thoroughbred Racing Ass'n of N. Am., 787 F.2d 463, 464 (9th Cir. 1986) (finding in a related case that the newsworthiness of exposing the true identity of a family in the federal witness protection program was a jury question).

159. Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1143–44 (8th Cir. 1996). In the case, the judges relied on expert opinion on newsworthiness to find for the media defendant in a case based on minor party access to debate coverage. *Id.* at 1139.

conflict, and emotion.[160] The meaning of each of these terms can vary depending upon the reporter or the publication because "[s]mart journalists adjust to the tastes, reading habits, and news appetites of their readers,"[161] tempered by ethics restraints, and news decisions similarly depend upon "those who are deciding what is news, where the event and the news medium are located, the tradition of the newspaper or station, its audience, and a host of other factors."[162]

By 1977, the Second Restatement of Torts had effectively adopted this expansive conception of "news" in defining limits on media liability for invading privacy.[163] In commentary accompanying the provision on tort recovery for unwanted disclosure of private facts, the Restatement authors observed that recent Supreme Court precedent had broadened the scope of newsworthiness as a matter of First Amendment doctrine:

> Included within the scope of legitimate public concern are matters of the kind customarily regarded as "news." To a considerable extent, in accordance with the mores of the community, the publishers and broadcasters have themselves defined the term, as a glance at any morning paper will confirm. Authorized publicity includes publications concerning homicide and other crimes, arrests, police raids, suicides, marriages and divorces, accidents, fires, catastrophes of nature, a death from the use of narcotics, a rare disease, the birth of a child to a twelve-year-old girl, the reappearance of one supposed to have been murdered years ago, a report to the police concerning the escape of a wild animal *and many other similar matters of genuine, even if more or less deplorable, popular appeal*.[164]

The Restatement went on to specify that

> [t]he scope of a matter of legitimate concern to the public is not limited to "news," in the sense of reports of current events or activities. It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.[165]

The Restatement sets limits on newsworthiness by defining what does not qualify as legitimate news: information that "becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[166]

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160. *See* TIM HARROWER, INSIDE REPORTING 17 (2006).
161. *Id.*
162. *Id.* at 65.
163. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).
164. *Id.* (emphasis added).
165. *Id.* § 652D cmt. j.
166. *Id.* § 652D cmt. h.

The Second Restatement thus reflected that by the mid-1970s, court decisions had come to rest the standard of newsworthiness on "popular appeal," even popular appeal that some might find deplorable, rather than on any independent measure of the gravity or urgency of or need for the reported information. This modern position defines the "news" in a legal sense as essentially what journalists and editors say it is, so long as they are responding faithfully to the demands of an eagerly consuming and not particularly discerning public, and do not cross the faraway line of morbidity and specific sensationalism.[167]

As many plaintiffs learned, this standard imposed a nearly insurmountable barrier to liability and created a "seemingly limitless" newsworthiness privilege.[168]

II
TURNING BACK: THE NARROWING OF "NEWS"

With the establishment of the modern position favoring journalists in defining newsworthiness, journalism appeared to have won a decisive victory over tort limitations concerned with privacy. The drumbeat of First Amendment precedents seemed to signal the imminent adoption of a broad journalistic privilege to publish truthful information. Indeed, by the 1980s and early 1990s, some courts and commentators were openly wondering whether the development of modern First Amendment doctrine had rendered obsolete the tort of publication of private facts.[169]

Over the past decade, however, there has been a meaningful retreat of judicial deference toward journalism and, with it, the legal conception of what counts as news. Importantly, and ironically, a key device for effecting this retrenchment has been the professional ethics codes of journalists themselves.

A. Retrenchment of News in the Age of Tabloids

Three momentous public conflicts dominated the period in which courts settled on the modern position favoring deference to journalists in defining

167. "[T]he Restatement, and in fact almost all courts, interpret the 'legitimate public concern' requirement as insulating from legal liability news that is uncivil and 'deplorable.'" Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 1006 (1989); *See also* Steven Geoffrey Gieseler, *Information Cascades and Mass Media Law*, 3 FIRST AMEND. L. REV. 301, 314 (2005) ("As is often the case with the various Restatements, this concept [of newsworthiness] has been integrated into the common law.").

168. Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 187 (1979).

169. *See generally* Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291 (1983). In the article, Professor Zimmerman called publication of private facts a "phantom tort" that generated false hope for plaintiffs who rarely succeeded. *Id.* at 362.

newsworthiness: the Civil Rights Movement, the Vietnam War, and Watergate. Press coverage, sometimes courageous and pioneering, played a pivotal role in each. Television images of snarling police dogs attacking demonstrators in Alabama, coverage of the My Lai massacre and of daily body counts in Vietnam, and investigative reporting of the tangled corruption of Watergate shocked and ultimately mobilized the nation.[170] The rising public regard for the press during this period was epitomized by the lionization of the *Washington Post*'s Bob Woodward and Carl Bernstein in the 1976 film *All the President's Men*.[171] Not surprisingly, many of the landmark decisions expanding press rights during this era were linked to these events. *New York Times Co. v. Sullivan*, decided in 1964, grew out of a full-page advertisement defending Martin Luther King and denouncing police abuses in Montgomery, Alabama.[172] The Pentagon Papers case, *New York Times v. United States*, involved reportage on a top-secret study of U.S. military involvement in Vietnam.[173]

Recent years, however, have often been dominated by less complimentary images of the media. By popular consensus, today's "news" has been coarsened by a confluence of factors: (1) the expanding demand for content fueled by the spread of cable news channels and the twenty-four-hour news cycle; (2) the obsession with celebrities and the proliferation of print, broadcast, and Web-based tabloids; (3) the melding of news and entertainment programming through reality TV; and (4) deepening ambiguity over the identity and role of journalists with the advent of the Internet, blogging, and podcasting.[174] If Woodward and Bernstein's heroic sleuthing provided their generation's iconic media image, our own may well be the sprawling media encampment outside the gates of Paris Hilton's estate.

As the understanding of news has changed, public respect for the media has fallen. Gallup polls show a marked decline in public trust of the media and in the reputation of journalists generally.[175] The business pressures caused by

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170. For discussion of the role of television reports in shaping consciousness of segregation and racial justice, see, for example, William G. Thomas III, *Television News and the Civil Rights Struggle: The Views in Virginia and Mississippi*, SOUTHERN SPACES, Nov. 3, 2004, http://www.southernspaces.org/contents/2004/thomas/4a.htm.

171. ALL THE PRESIDENT'S MEN (Warner Bros. Pictures 1976).

172. 376 U.S. 254, 256–58 (1964).

173. 403 U.S. 713, 714 (1971).

174. Dean Smolla points to the following trends as helping to shape modern privacy law: a tabloid and paparazzi culture, an evaporating public/private divide, and news-entertainment reality television's focus on ordinary people. Smolla, *supra* note 20, at 1098. Professor Morant similarly blames tabloid publications, reality programming, homogenous coverage, corporate governance, and media monopolization. Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 624–25 (2005).

175. *See, e.g.*, Peter Johnson, *Trust in Media Keeps on Slipping*, USA TODAY, May 27, 2003, at 1D (reporting Gallup Poll results showing that "[t]rust in the media has dropped from 54% in mid-1989 . . . to a low of 32% in December 2000"); Timothy W. Maier, *News Media's Credibility Crumbling*, WORLDNETDAILY.COM, May 8, 2004, http://www.worldnetdaily.com/news/article.asp?article_id=38398 ("Americans rate the trustworthiness of journalists at about the

both media convergence and the increasing commercialization of journalism may be one reason.[176] The transmogrification of the news is certainly another. In a 2005 address to the Kansas Press Association, Carl Bernstein himself laid blame on the fact that "television news had been taken over by an 'idiot culture' that spends more time chasing celebrities than explaining life-changing events."[177] He pointed out that in the same week that Nelson Mandela returned from prison to help transform South Africa and an agreement was struck to reunify East and West Germany, Diane Sawyer inaugurated ABC News' *Primetime Live* by asking Marla Maples whether she experienced the "best sex [she'd] ever had" with then-boyfriend Donald Trump.[178] "For the first time in our history," Bernstein lamented, "the weird, the stupid, the coarse, the sensational and the untrue are becoming our cultural norm—even our cultural ideal."[179] Bob Woodward has similarly complained that the United States now boasts "a scandal press corps."[180]

By the early summer of 2007, the Ohio Supreme Court seemed to have caught the wave of anti-media sentiment.[181] Bucking what had been a long-term trend toward abandonment of a separate tort remedy for "false light" invasions of privacy, the court held that the recent coarsening of modern journalism called for an *expansion* of tort regulation of the media.[182] Privacy torts had first been suggested, the court wrote, during a period of yellow journalism. They had then been scaled back as journalism had become more responsible during the twentieth century through "formal training in journalism and ethics."[183] The court noted that journalism today is again spiraling downward, in part because of the ease of internet publication, and suggested the

level of politicians and as only slightly more credible than used-car salesmen."); Firefighters, Scientists, and Teachers Top List as "Most Prestigious Occupations," According to Latest Harris Poll (Aug. 1, 2007), www.harrisinteractive.com/harris_poll/index.asp?PID=793 (finding journalists to have among "[t]he lowest ratings" with only 13% support).

176. *See, e.g.*, Sandra Mims Rowe, *The New 'News' Media and Public Trust*, VA. NEWS LETTER, June 2000, at 1.

177. Dave Ranney, *Watergate Journalist Says Media Losing Public's Trust*, LAWRENCE J.-WORLD & NEWS, Apr. 16, 2005, http://www2.ljworld.com/news/2005/apr/16/watergate_journalist_says/.

178. *Id.*

179. *Id.*

180. HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET 135 (2001) (quoting Woodward). It is not only lightweight celebrity coverage that erodes public respect. Professors Clay Calvert and Robert Richards suggest additionally that there is a "growing but disturbing interplay of influence" between seemingly obsessive media coverage of events like Columbine and resulting legal actions that will harm First Amendment rights of the media in general. Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 HASTINGS COMM. & ENT. L.J. 215, 216 (2002). Professor Richard Reuben writes that many people today share a jaundiced view of media "and [media's] capacity to whip up a furor over the conflict of the day." Richard C. Reuben, *Beyond the Assumptions: News Reporting and Its Impact on Conflict*, 2007 J. DISP. RESOL. 143, 143 (2007).

181. Welling v. Weinfeld, 866 N.E.2d 1051.

182. *Id.* at 1058–59.

183. *Id.* at 1058.

need for courts to ratchet up once again their scrutiny of the press and quasi-press.[184] "[E]thical standards regarding the acceptability of certain discourse have been lowered," the court lamented, "[and] as the ability to do harm has grown, so must the law's ability to protect the innocent."[185]

In February 2008, a federal district court in New York admonished NBC News for its popular investigative television program titled *To Catch a Predator*.[186] The show highlights police arrests of suspected child sex offenders who enter a stranger's home where they believe they will meet a child for sex, only to be confronted by a reporter.[187] The court ruled that the sister of a man featured could go forward with a tort claim against the network based on an episode that targeted her brother, who committed suicide as police attempted to arrest him for soliciting what he apparently believed to be a thirteen-year-old boy online.[188] In rejecting NBC's motion to dismiss key claims, the court found that the show's journalists likely had violated several provisions of the Society of Professional Journalists' Code of Ethics, including those suggesting that reporters "show good taste," recognize that certain reporting "may cause harm

184. *Id.* I use quasi-press here to mean some bloggers and others who publish on the internet. While it is beyond the scope of this Article to offer a comprehensive definition of who qualifies as a "journalist" for all legal purposes, it is apparent that professional journalists have both a more developed news sense and more restrictive norms than many who write in the blogosphere, suggesting that a distinction between the two groups is appropriate under some circumstances. As Professor Daniel Solove has noted, "[t]he average blogger . . . isn't a journalist" but instead a diarist who does not follow any ethics code. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 24, 59 (2007). Professor Solove suggests that market forces help guide journalists' news decisions while amateur journalists do not have the same guiding pressure and implies that a distinction is appropriate for this reason alone. *Id.* at 78. This distinction—one noted by the Ohio Supreme Court when deciding to recognize false light as a privacy tort for the first time in Ohio—is especially appropriate in newsworthiness determinations within publication of private fact cases where courts will look to current news practices to help define news. If those news practices are limited to professional journalists and do not include quasi-journalists who push the envelope of privacy on the internet, privacy is given more protection. Law professor and prominent blogger Larry Ribstein seems to agree: "[F]or some types of harm [including privacy concerns], courts and regulators should distinguish nonprofessional bloggers from professionals" and delineate between bloggers "who seek to contribute in some way to public debate" and those who "engage in personal reflection." Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 189, 245 (2006). Distinguished journalism professor Phillip Meyer has even suggested the need for "certification" of journalists in order to distinguish competent journalists from "nonjournalists" with access to the internet. Phillip Meyer, *Certification of Journalists: Necessary for Our Times*, 2 ELECTRONIC NEWS 1, 2 (2008). For more on blogging in this context, see Danielle Keats Citron, *Cyber Civil Rights*, 29 B.U. L. REV. 61 (2009) and Paul Horwitz, *Or of the [Blog]*, 11 NEXUS 45 (2006).

185. *Welling*, 866 N.E.2d at 1058. The opinion echoes that of a dissenting justice on the Rhode Island Supreme Court in *In re Access to Certain Records of Rhode Island Advisory Committee on the Code of Judicial Conduct*, 637 A.2d 1063 (R.I. 1994). He warned that "tabloid journalism is becoming the rule rather than the exception" and suggested that journalism ethics gave "little assurance" of a turnaround. *Id.* at 1070 (Shea, J., dissenting).

186. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380 (S.D.N.Y. 2008).

187. *Id.* at 384–85.

188. *Id.* at 398.

or discomfort," and intrude into private lives only when there is an "overriding public need."[189] The court allowed what was in essence a publication of private facts claim, which ordinarily would have been barred by the plaintiff's death,[190] to go forward under the guise of intentional infliction of emotional distress.[191]

A federal trial court expressed similar concerns when it complained in a 2007 case involving media access to jurors' names that it was dealing with a much more aggressive media in which news had effectively become boundless.[192] In rejecting the media's request for access, the court wrote that today's bolder media "can, and unhesitatingly will, investigate jurors' lives" and force even reluctant jurors into the spotlight.[193] Reporters in 2007 will no longer politely accept a negative answer, the court suggested ruefully, unlike more decent reporters just fifteen years earlier.[194]

As hinted at in those recent opinions, public respect for journalists has declined, just as public anxiety over a broader loss of privacy in modern society has swelled.[195] Professor Solove has called this loss of privacy the Internet's dark side.[196] Relentless advances in technology, changing norms, and new initiatives in government surveillance since 9/11 have all contributed to a growing public sense that privacy is in peril. Professor Anita Allen notes that websites and public access television have pushed the contours of accountability in previously deeply private areas.[197] Importantly, Professor Kevin Werbach observes that the ubiquity of camera phones is already transforming the nature of the images that make their way into the media, as bystanders to news events or celebrity sightings are encouraged to serve as

189. *Id.* at 397–98 (citing SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 23).

190. Privacy claims generally die with the would-be claimant. RESTATEMENT (SECOND) OF TORTS § 652I (1977).

191. The case settled in June 2008 for an undisclosed amount. Matea Gold, *NBC Settles Suit Over Suicide*, L.A. TIMES, June 25, 2008, at C1.

192. United States v. Calabrese, 515 F. Supp. 2d 880, 884 (N.D. Ill. 2007).

193. *Id.*

194. *Id.* (suggesting that today's media would find a photograph or video of a juror declining an interview to be newsworthy). *But see* Morant, *supra* note 174, at 611 (offering some examples of media restraint based on ethics such as reporting on sexual assaults, election results, and national security, and concluding that ethics codes operate "internally and externally as self-regulatory mechanisms").

195. "[T]he profound proliferation of new information technologies during the twentieth century—especially the rise of the computer—made privacy erupt into a frontline issue around the world." DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 4 (2008). Indeed, a poll sponsored by the Freedom Forum found that 61 percent of the public was very concerned about personal privacy when asked about important issues facing Americans. Public Support for Government Openness Tempered by Privacy Concerns (Apr. 3, 2001), http://www.freedomforum.org/templates/document.asp?documentID=13566.

196. DANIEL J. SOLOVE, THE FUTURE OF REPUTATION 4 (2007) ("Information that was once scattered, forgettable, and localized is becoming permanent and searchable. Ironically, the free flow of information threatens to undermine our freedom in the future.").

197. ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY 35 (2003).

freelance photojournalists and paparazzi.[198] By the summer of 2007, Dean Erwin Chemerinsky, a constitutional law scholar whose work has often focused on press freedoms, had called on all courts to "rediscover Warren and Brandeis's right to privacy."[199]

B. Let Others Decide: A New Newsworthiness Determination

There is additional evidence that these twin developments—declining respect for journalism and growing anxiety over the loss of privacy—are weakening the modern position of deference to journalists in the legal definition of newsworthiness, especially in publication privacy cases.[200] A series of recent court decisions have sided with plaintiffs and retreated from the deference that had led prior courts to follow reporters and the consuming public in defining the boundaries of legitimate reporting. In doing so, several courts, like the Ohio Supreme Court in *Welling*, have pointed directly or indirectly to a concern for eroding ethics among journalists and quasi-journalists.[201] Others, like the New York federal district court in the *To Catch a Predator* case, have seized upon the news organizations' professional ethics codes to justify pushing reporting back into the boundaries of "responsible" coverage.[202] Journalists' own ethics codes, both as direct and indirect standards, have thus proved a convenient tool for imposing a narrower legal conception of "newsworthiness."

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198. Kevin Werbach, *Sensors and Sensibilities*, 28 CARDOZO L. REV. 2321, 2327–28 (2007). Werbach recounts, for instance, that

> [w]hen Dutch filmmaker Theo Van Gogh was stabbed to death in 2004 by an Islamic militant, the first person on the scene was a bystander with a cameraphone. He snapped a photo of Van Gogh's corpse with knives protruding from it. By the time professional journalists arrived, the police had covered the body. Major papers in Holland and throughout the world therefore used the amateur photo as the iconic image of the event.

Id. The *New York Times* has reported on the same phenomenon. Mireya Navarro, *Everyone Wants to be Taking Pictures*, N.Y. TIMES, Nov. 18, 2007, at ST8 (those attempting to photograph celebrities for possible future publication included "a teenager with a camera, an opportunist with a cellphone and even the waiter who once tipped photographers to celebrity sightings," intensifying "an already aggressive atmosphere").

199. Erwin Chemerinsky, *Rediscovering Brandeis's Right to Privacy*, 45 BRANDEIS L.J. 643, 656 (2007) (suggesting that the publication of private facts tort "is in the most dramatic need of development" because of increasing abilities to access personal information).

200. ROBERT M. O'NEIL, THE FIRST AMENDMENT AND CIVIL LIABILITY 77 (2001) ("The quest for the protection of privacy reached unprecedented levels in the closing months of the twentieth century."). Bruce Sanford suggested more generally in 1999 that "the expansion of First Amendment rights has not just ground to a halt but is actually retreating." BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 151 (1999).

201. Contrast the Ohio court's language with this laudatory language from a 1984 North Carolina defamation case, one cited by the Ohio court: "Most modern journalists employed in print, television, or radio journalism now receive formal training in ethics and journalism entirely unheard of during the era of 'yellow journalism.' As a general rule journalists simply are more responsible and professional today than history tells us they were in that era." Renwick v. News & Observer Publ'g Co., 312 S.E.2d 405, 413 (N.C. 1984).

202. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 397–98 (S.D.N.Y. 2008).

Former Chief Judge of the D.C. Circuit Court of Appeals Abner J. Mikva, who also served as White House Counsel before the explosion of the Monica Lewinsky scandal, suggested that this retrenchment had started by the mid-1990s. He observed then that "a feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamation actions resulting from instances of irresponsible journalism."[203] The media should "[w]atch out," he wrote, because "[t]here's a backlash coming in First Amendment doctrine."[204]

A remarkable recent example of that backlash manifested itself in 2005 when a Washington newspaper published a story in its gossip column about a CNN assignment editor and named several men she had dated.[205] The woman sued in federal court in the District of Columbia for publication of private facts.[206] The court rejected a defense motion to dismiss.[207] In rejecting the newspaper's arguments, the court wrote that it was "unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column of a widely distributed newspaper,"[208] and, on that basis, concluded categorically that the plaintiff's "personal, romantic life is not a matter of public concern."[209] The outcome thus effectively refocused the inquiry into newsworthiness from the public's interest in knowing to the subject's interest in the public *not* knowing.[210]

That a court in 2006 concluded that publication of the regular stuff of gossip columns—the dating practices of quasi-celebrities[211]—could be legally

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203. Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. L. REV. 291, 296 (1995).

204. *Id.* Nearly 15 years before, Professor Arthur R. Miller had warned that as journalists push the envelope of responsible reporting, the same courts that had given the press broad freedoms could also take away those rights. PHILIP MEYER, ETHICAL JOURNALISM: A GUIDE FOR STUDENTS, PRACTITIONERS, AND CONSUMERS 89 (1987).

205. Benz v. Washington Newspaper Publ'g. Co., No. 05-1760, 2006 U.S. Dist. LEXIS 71827, at *2 (D.D.C. Sept. 26, 2006).

206. *Id.* at *24. Her lawsuit incorporated additional claims and a second defendant, a coworker whom she alleged had spread similar and much more graphic and false information about her. *Id.* at *1–2.

207. *Id.* at *27.

208. *Id.* at *25. This, even though the article itself had not mentioned sexual activity other than by somewhat obscure slang implication.

209. *Id.*

210. See also Siu v. Lee, 2007 WL 2956360, at *2, *7 (Cal. Ct. App. Oct. 11, 2007), in which a California appellate court found what it called "highly sensitive private financial information" regarding the plaintiff—including a bank record "bearing [his] signature specimen, his date of birth, and his mother's maiden name"—of no news value even though it illustrated a newsworthy story on an economic development group's management and disbursement of funds. Not all recent courts have agreed that such information is not newsworthy. *See* Valeriano v. Rome Sentinel Co., 842 N.Y.S.2d 805 (App. Div. 2007) (holding that a newspaper was not liable when it published a person's name, address, birth date, and social security number in the context of a newsworthy article).

211. The newspaper had reported, for example, that the plaintiff, a journalist in a position

sanctioned shows how far some courts have retreated from the modern position's deference to journalists' conception of "news" as encompassing even matters of "more or less deplorable, popular appeal."[212] The ultimate irony, of course, was that the plaintiff who invited the decision cutting back on judicial deference to the news judgment of journalists was herself an assignment editor, whose job it is to help define news and decide coverage in a newsroom.[213]

In another relationship-based case involving a newsworthiness analysis, *Winstead v. Sweeney*,[214] an appellate court reversed the trial court's grant of summary judgment for the media. The newspaper had published a feature article on "unique love relationships" in which the plaintiff's ex-husband was quoted revealing personal facts about his ex-wife, including that she had had several abortions and joined him in "swapping" partners with another couple.[215] Only the plaintiff's first name was used in the article, and she was not identified in any other way, but she contended that details made her reasonably identifiable to family and friends.[216] The trial court had ruled that the article and its personal disclosures concerning the plaintiff were "newsworthy" as a

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to influence the coverage of a national television news network, had dated a former coach of the University of Maryland men's basketball team. *Benz*, 2006 U.S. Dist. LEXIS 71827, at *4.

212. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977). The shift is particularly notable coming in decisions of the federal courts. In 1999, Professor Randall Bezanson had written that federal courts seemed to give the greatest deference to media. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 783 (1999).

213. There are other examples of this trend toward a narrowing of news. The year before the gossip column case, a Michigan court sustained a publication of private facts claim based on television news coverage of a young woman's hospitalization following a car accident. Stratton v. Krywko, No. 248669, 2005 Mich. App. LEXIS 23, at *20 (Ct. App. Jan. 26, 2005). The plaintiff argued that the broadcast had inadequately digitized her face, had included audio of a doctor's voice revealing both her first name and information that she was on an anti-depressant, and included fleeting images from medical records containing her name and address. *Id.* at *3–4. The trial court in the case had granted the television station's motion for summary judgment on newsworthiness grounds, but the appellate court ruled that a jury could find the information to be of no public interest given its personal nature, notwithstanding that it illustrated a story regarding the accident and emergency medical services. *Id.* at *15, *19–20. Inadequate digitalization is at the heart of additional, at least initially successful, publication of private facts cases. The Georgia Court of Appeals upheld a $500,000 jury award against a television station that had inadvertently aired seven seconds of an AIDS patient's face though it had promised to make him unrecognizable; the court found no news value in the identity of a particular AIDS patient. Multimedia WMAZ, Inc. v. Kubach, 443 S.E.2d 491, 494 (Ga. Ct. App. 1994). A few years later, a Florida court decided in favor of another plaintiff after a television station failed to keep its promise that a woman who had had a facelift would not be recognizable to the television audience during an interview. Doe v. Univision Television Group, Inc., 717 So. 2d 63, 65 (Fla. Dist. Ct. App. 1998). In both cases, the newsworthiness defense was surely undermined by the fact that the defendant outlets had themselves initially agreed to omit the disputed identifying information from their reports. *Id.* at 64; *Multimedia WMAZ, Inc.*, 443 S.E.2d at 711.

214. 517 N.W.2d 874, 878 (Mich. Ct. App. 1994). Fourteen years later, a Georgia court would similarly find that a book that contained private facts about the book author's friend—facts that apparently were so private that the court refused to republish them—were not matters of public concern. Smith v. Stewart, 660 S.E.2d 822, 833–834, 834 n.16 (Ga. Ct. App. 2008).

215. *Winstead*, 517 N.W.2d at 875.

216. *Id.*

matter of law, on the assumption that the state's appellate courts "would continue to follow the approach of the Restatement of Torts of providing broad protection for the press and its reporting of newsworthy information."[217] In reversing, the appellate court held that a jury should decide whether the personal details about the plaintiff were truly "of legitimate public interest."[218]

A 2001 California decision similarly considered whether identifying details included in an otherwise newsworthy story were worth the costs to the plaintiffs' privacy, and ultimately sided with the plaintiffs.[219] The court in *M.G. v. Time Warner, Inc.* found *Sports Illustrated* potentially liable for publishing, as part of a news story on coaches who sexually abuse young athletes, a photograph of a Little League team hit by such abuse.[220] The media defendants argued that the photograph, one apparently taken in public and given to team members' families, was newsworthy because it helped to show "visually that *any* child who plays sports could be placed in harm's way,"[221] but the court ruled that that the intrusion outweighed the value of its journalistic impact.[222]

An Illinois appellate court also upheld a publication of private facts claim over a newsworthiness defense when the *Chicago Tribune* published the words spoken by a mother to the body of her murdered son.[223] The woman knew that the reporters were near, as they had just asked her unsuccessfully for a statement.[224] The *Tribune* argued that the article focused on guns and gang violence, plainly subjects of legitimate public concern, and that the mother's words[225] gave a human voice to the tragedies of such violence.[226] The court

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217. *Id.*

218. *Id.* at 878.

219. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 507 (Ct. App. 2001).

220. *Id.* at 507.

221. *Id.* at 514.

222. *Id.* Similarly, a federal trial court in Washington, D.C., held that while child sexual abuse itself is a newsworthy topic, the sexual abuse of a particular child was probably not. Foretich v. Lifetime Cable, 777 F. Supp. 47, 50 (D.D.C. 1991) (girl in a notorious and highly publicized case that ultimately attracted congressional action had valid publication of private facts claim when videotape of her describing alleged sexual abuse aired nationally on cable channel's documentary).

The California court's decision not to defer to *Sports Illustrated*'s judgment concerning the news value of the Little League team photographs contrasts with a decision just three years earlier by the California Supreme Court. In *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 488–89 (Cal. 1998), the court ruled that television coverage of a traffic accident was newsworthy, deferring to reporters' assessment that graphic images of medical treatment and a victim's pleas of distress to medical personnel were important to the story. Even though *Shulman* held for the news defendants on the publication privacy claim, the court found that the journalists could be liable for the separate tort of intrusion into seclusion. *Id.* at 490-91. In this way, *Shulman* can rightly be seen as a transitional case, retaining principles of deference to journalists in disposing of one tort while advancing the emerging trend away from deference by exposing newspersons to tort liability under another.

223. Green v. Chi. Tribune Co., 675 N.E.2d 249, 251 (Ill. App. Ct. 1996).

224. *Id.*

225. The *Tribune* quoted her as saying:

"I love you, Calvin. I have been telling you for the longest time about this street thing."

disagreed. "A jury could find that a reasonable member of the public has no concern with the statements a grieving mother makes to her dead son," the court wrote, "or with what he looked like lying dead in the hospital, even though he died as the result of a gang shooting."[227] The court held that a jury should decide whether the reported scene was genuinely newsworthy.[228]

Finally, and perhaps most surprisingly given the nation's apparent appetite for celebrity news, a California appellate court in 1995 left it to a jury to decide whether the plaintiffs, actor Eddie Murphy's son and former girlfriend, had a valid publication of private facts claim based on a newspaper's disclosure of certain facts including the son's out-of-wedlock birth, the actor's child support payments, and the value of the son's trust fund.[229]

Recent court decisions have similarly refused to defer to journalists' determinations of newsworthiness or have questioned journalists' news judgment in other contexts.[230]

> "I love you, sweetheart. That is my baby. The Lord has taken him, and I don't have to worry about him anymore. I accept it." "They took him out of this troubled world. The boy has been troubled for a long time. Let the Lord have him."

Id.

226. *Id.* at 255.

227. *Id.* at 256. The decision tracked the reasoning in another case from eight years before in which a woman objected to having been identified by a newspaper as a witness to a crime. *See* Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556 (Ct. App. 1988). In that case, a newspaper intern reported the name of the person who had both discovered the body of a murder victim and had confronted the suspected murderer. *See id.* The court found that the name of a witness to a crime may not be newsworthy, even though the crime itself surely was.

228. *Id.* at 255. There are other examples. A Missouri court similarly held that a news report featuring a couple who attended a hospital gathering of parents who had used in vitro fertilization to conceive could be the basis for a privacy action despite the media's newsworthiness arguments. Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488 (Mo. Ct. App. 1990). A federal district court in California found a valid publication of private facts action when a television station aired video and audio from a domestic violence police call and a resulting domestic violence coordinator interview. Baugh v. CBS, 828 F. Supp. 745 (N.D. Cal. 1993). "While the Court finds the issue of domestic violence and [the plaintiff's] story to be newsworthy," the court wrote, "the court is not yet convinced that Plaintiff's personal involvement in an incident of domestic violence is newsworthy as a matter of law." *Id.* at 755. And another federal district court in California found that plaintiffs Pamela Anderson Lee and Bret Michaels had a valid publication of private facts claim in a case arising from a sex videotape, finding that the social value of the facts published and the depth of intrusion both weighed against any claim of news value. Michaels v. Internet Entm't Group, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998).

229. Hood v. Nat'l Enquirer, 17 No. 9 Ent. L. Rep. (Entm't Law Reporter Publ'g Co.) 3, 4 n.2 (Cal. Ct. App. 1995).

230. A 2007 Pennsylvania court sustained a publication of private facts claim outside a journalism context, finding that it was not a matter of public interest whether an adult female "plaintiff did nor did not have an intimate [consensual] relationship with . . . a Catholic priest" even though the defendants suggested that the relationship violated various employment policies and even though claims of sexual misconduct by priests, albeit it on a completely different, criminal level, had emerged as a major national news topic during the same period. Sharp v. Whitman Council, Inc., No. 05-CV-4297, 2007 WL 2874058, at *5 (E.D. Pa. 2007). That same year, a California court refused to open records in a shareholder derivative action to media, turning aside a claim of general newsworthiness. Mercury Interactive Corp. v. Klein, 70 Cal Rptr. 3d 88, 123 (Ct. App. 2007) ("The claim that the subject of the litigation may be newsworthy—in

What is remarkable about these cases is not so much their number, but their refusal to find newsworthiness even in circumstances in which the claim of public interest was so arguably compelling, with topics torn straight from leading headlines of the day. A mother's anguish over a son lost to gang violence,[231] child sexual abuse,[232] and even unconventional love relation-

effect, an argument that the public has a generalized right to be informed—cannot serve as a substitute for a showing of specific utility of public access to the information"). A New Hampshire court implicitly suggested in a defamation case that burglaries are not of public but of only private concern, *Thomas v. Telegraph Publishing Co.*, 2007 N.H. LEXIS 240, at *54 (May 1, 2007) ("the crimes to which the plaintiff has admitted (and those to which he has not) are not matters of public controversy"), and a Washington bankruptcy court refused to give media access to records in a bankruptcy proceeding because the debtor had argued that such access would give media private information including finances, his home address, and names of those who had helped him, *In re Thow*, 392 B.R. 860, 868–69 (W.D. Wash. 2007) (holding that "privacy interests . . . outweigh the News Media's right to report on proceedings in the nature of discovery" even though "viewers and readers have been following" the news story with extreme interest). Also in 2007, a Florida court opined that medical records obtained by news media "were of no obvious public concern." Post-Newsweek Stations Orlando, Inc. v. Guetzloe, No. 5D07-430, 2007 Fla. App. LEXIS 15709, at *11 (Fla. Ct. App. 2007). The court refused to uphold an injunction against publication, however. *Id.* at *17. A Connecticut court refused to strike a privacy complaint against a television news program that aired video taken inside a home. Lattanzio v. WVIT NBC-30, No. CV055000082S, 2007 Conn. Super. LEXIS 1660, at *23 (Conn. Super. Ct. 2007). And a New York court refused to dismiss a privacy lawsuit based on a model's photograph in a magazine's calendar of events because the court found that the news value of the events calendar was not readily apparent. *See* "Alex" v. Renegades Assocs., Inc., No. 118414, 2007 WL 2241645, at *2 (N.Y. Sup. Ct. 2007). Finally, that same year, a federal court evaluating a fair use defense to a copyright infringement claim found no significant news value in a copyrighted photograph of the September 11, 2001, crash of United Flight 93 in Pennsylvania, because more than one year had passed since the national tragedy. McClatchey v. Associated Press, No. 3:05-cv-145, 2007 U.S. Dist. LEXIS 17768, at *10–11 (W.D. Pa. 2007). Just a few years before these most recent cases, a federal trial court suggested that an investigative news story on actors' casting workshops might not be newsworthy at all because ABC itself had held the story for eight months and had not covered later public hearings regarding the structure of the workshops. Turnbull v. ABC, No. CV 03-3554 SJO, 2004 WL 2924590 (C.D. Cal. 2004). "As a result," the court wrote, "it is unclear whether there was really a tremendous public interest in reporting the story." *Id.* at *14. And in perhaps the most surprising recent example, another federal court refused to find newsworthiness in a matter arising from the Iraq war. In *Lowe v. Winter*, No. 06-1803, 2007 U.S. Dist. LEXIS 49962, at *6–7 (D.D.C. 2007), a Marine Corps officer who had been relieved of command of an attack helicopter squadron following an inquiry sued the Navy for providing information about his dismissal to the *Marine Corps Times*. The Navy's liability turned in part on whether the disputed information—faulting plaintiff for "aircraft mishaps that occurred under his command"—was "newsworthy," in which case disclosure would be permitted under federal statutes. *Id.* at *2, *6. Even though the information concerned leadership failure and aircraft accidents in the prosecution of a war whose viability was indisputably the most salient national issue of the day, the court held that discovery was necessary before a determination could be made as to whether the information was newsworthy. *Id.* at *6–7. In 2006, a federal district court was openly skeptical about journalists' news choices in a defamation case in which it compared the "convincing" public interest topic of consumer issues with news reports of "celebrity marriages and divorces, waterskiing squirrels, exploding whales, and national anthem singing tryouts," refusing to accept the media defendant's broad definition for "newsworthy." Englert v. MacDonnell, 2006 U.S. Dist. LEXIS 29361, at *20–21 (D. Or. May 10, 2006).

231. Green v. Chi. Tribune Co., 675 N.E.2d 249 (Ill. App. Ct. 1996).

232. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504 (Ct. App. 2001).

ships[233] are of obvious interest and significance or at the very least would seem to qualify as matters of "more or less deplorable, popular appeal."[234] Nor did the privacy interests in these cases seem unusually significant within the context of all publication of private fact cases. Certainly, they seemed no more powerful than the privacy interests found in past cases to be properly subordinated to news reporting, with facts that included sexual orientation, forced sterilization, and intimate life information about a man who had been noteworthy for a time as a child.

What accounts for the different outcome in these cases as compared to prior decisions, then, appears to be the law rather than the facts. Frustrated with the excesses of modern journalism, or more sensitive to the ongoing erosion of personal privacy in modern society,[235] courts today are striking the balance between press and privacy differently than did their predecessors.[236]

C. Bartnicki *and Beyond: A Changing Supreme Court?*

A significant sign of the shifting landscape comes from a recent Supreme Court decision that ruled in favor of journalists, but on strikingly narrow grounds. Earlier, a succession of First Amendment cases fueled mounting doubt about the constitutionality of *any* limitation on the freedom of the press to report truthful information on matters of public concern; the Court acknowledged but ultimately sidestepped the question of whether journalists might enjoy an absolute privilege to report truthful information under the Constitution.[237] In 2001, the Court had an opportunity to reach that question and hand journalists an absolute constitutional privilege, and yet the justices stopped pointedly short and appeared even to back away.[238]

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233. Winstead v. Sweeney, 517 N.W.2d 874 (Mich. Ct. App. 1994).

234. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

235. One author has suggested that judges themselves, including those serving on the Supreme Court, are becoming increasingly the subjects of news coverage and, therefore, may now be more sympathetic to plaintiffs in cases involving publication of private facts. Jared Lenow, Note, *First Amendment Protection for the Publication of Private Information*, 60 VAND. L. REV. 235, 251–52 (2007) ("[W]ith the private lives of the Justices' [sic] themselves becoming a topic of public interest, it would not be surprising if the Court became more and more sympathetic to casting the 'non-newsworthy' net over an increasingly wide area.").

236. Steven Gieseler has described the new balance struck by courts as "an ad hoc undertaking in which the definition [of news] fluctuates according to the 'experience, outlook, and even idiosyncrasies' of the decision-maker," whether judge or jury. *See* Steven Geoffrey Gieseler, *Information Cascades and Mass Media Law*, 3 FIRST AMEND. L. REV. 301, 319 (2005).

237. *See, e.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 532–33 (1989) ("Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily. . . . We continue to believe that the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep not more broadly than the appropriate context of the instant case.").

238. Even before 2001, Professor Robert O'Neil suggested that the Supreme Court appeared to be "realigning the balance between privacy and publicity in favor of the privacy interest," pointing to the Court's anti-media language in a police ride-along case. O'NEIL, *supra*

Bartnicki v. Vopper[239] arose from a radio station's broadcast of portions of a private cellular telephone conversation that had been illegally intercepted by a third party. The station broadcast the call because it involved a union official making threats of violence in connection with a heated labor dispute, clearly a matter of legitimate public concern.[240] The question for the Court was whether the station could be proscribed from broadcasting the information on the ground that it had been unlawfully obtained by a third party, or whether the First Amendment privileged the station in disclosing newsworthy information that it had itself lawfully obtained.[241]

The Court sided with the station, but only narrowly. The Court reiterated that "state action to punish the publication of truthful information seldom can satisfy constitutional standards,"[242] but it reaffirmed its "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."[243] Instead, the Court warned that "there are important interests to be considered on *both* sides of the constitutional calculus," given that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."[244] On the facts of *Bartnicki*, the balance tipped in favor of journalism because the subject matter of the news report was of such compelling public concern, and the claimant was himself an active participant in the public controversy.[245] "One of the costs associated with participation in public affairs," the Court reminded, "is an attendant loss of privacy."[246] Yet, although finding that "[i]n these cases, privacy concerns give way when balanced against the interest in publishing matters of public importance,"[247] the Court cautioned that a different balance might well be struck if the case involved disclosures of "domestic gossip or other information of purely private concern."[248]

Justice Breyer's concurring opinion, joined by Justice O'Connor, emphasized the narrow scope of the Court's holding.[249] "[T]he Court's holding does not imply a significantly broader constitutional immunity for the media," he wrote.[250] Indeed, Breyer suggested that legislatures might wish to take action to prevent certain privacy invasions in light of "continuously advancing

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note 200, at 80 (citing Wilson v. Lane, 526 U.S. 603 (1999)).

239. 532 U.S. 514 (2001).

240. *Id.* at 518–19; *see also id.* at 525 (accepting that "the subject matter of the conversation was a matter of public concern").

241. *Id.* at 517.

242. *Id.* at 527 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979)).

243. *Id.* at 529.

244. *Id.* at 533 (emphasis in original).

245. *Id.* at 525, 534.

246. *Id.* at 534.

247. *Id.*

248. *Id.* at 533.

249. *Id.* at 535 (Breyer, J., concurring).

250. *Id.* at 536 (Breyer, J., concurring).

technologies" that make it easier to eavesdrop in the bedroom and elsewhere.[251] He closed his opinion by warning against "adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility."[252]

Three dissenting Justices—Rehnquist, Scalia, and Thomas—would have gone further still. They warned that communications and surveillance technology had left society "in the uncomfortable position of not knowing who might have access to our personal and business e-mails, our medical and financial records, or our cordless and cellular telephone conversations," which "raise[s] significant privacy concerns."[253] In their view, First Amendment values plainly favored the "venerable right of privacy" and legal sanctions *against* disclosure in order to safeguard the intimacy of private communications.[254]

The narrowness of the media's victory in *Bartnicki*—notably providing a 5–4 coalition recognizing a privacy trump to media's First Amendment newsworthiness arguments—is both striking and, for journalists, potentially ominous. It could signal a turn at the Supreme Court in favor of personal privacy and against press freedoms.[255]

The Court's evident comfort in balancing the privacy interests of particular claimants against what it judged to be the public value of a disputed news story may well encourage lower courts to go even further in this regard.

D. Judicial Use of Journalistic Ethics in Policing the Press

Recently, some lower courts have seized upon journalistic ethics for doing precisely that; they have tried to rein in journalistic excesses by employing the professional ethical standards of journalists themselves[256] to determine when a disputed story is not genuinely newsworthy.[257] In *M.G. v. Time Warner*, the

251. *Id.* (Breyer, J., concurring) (harkening back to *The Right to Privacy* and its concerns about a bullying news culture).

252. *Id.* at 541 (Breyer, J., concurring).

253. *Id.* (Rehnquist, C.J., dissenting).

254. *Id.* at 553–54.

255. Only three years after *Bartnicki*, the Court, in a Freedom of Information Act case with similarly ominous implications for media, suggested that family members have the right "to limit attempts to exploit pictures of the deceased family member's remains for public purposes." Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 167 (2004). The Court unanimously found that the phrase "personal privacy" in the Act included survivors' privacy after quoting the complaint of Vincent Foster's sister suggesting that if photographs of his suicide were released, "[o]nce again [her] family would be the focus of conceivably unsavory and distasteful media coverage." *Id.*

256. The codes of ethics are discussed fully *infra* Section III.A.

257. Professor Bezanson suggested in 1999 that this was the "most recently developing" approach to editorial judgment. Bezanson, *supra* note 212, at 830. A 1962 publication privacy case may have been the first to suggest that journalists have freedom but also corresponding responsibility, as suggested in their "self-governing code." Patterson v. Tribune Co., 146 So. 2d 623, 626 (Fla. Dist. Ct. App. 1962).

Little League case, for example, the court wrote that public policy favored non-publication of the disputed team photo, "as does the journalism profession."[258] It noted that two journalism experts had testified during preliminary proceedings that journalism standards and practices should have led the editors to blur the children's faces at the very least.[259]

In *Y.G. v. Jewish Hospital of St. Louis*,[260] a case involving a television report that included images of a couple that had conceived through in vitro fertilization, the court criticized news media "which fail or refuse to follow the traditional and modern canons of journalism."[261] Arguably, the apparently fleeting images of the couple on camera during a news story merely added quick visuals and were not morbid and sensational prying for its own sake, the Restatement's standard for non-newsworthiness. The court, however, invoked undefined "traditional and modern canons of journalism" to justify legal sanctions against the media's news judgment.[262]

The federal district court in the *Conradt* case against the *To Catch a Predator* television news program allowed the plaintiff's intentional infliction of emotional distress claim to go forward too, finding specifically that NBC's alleged journalism ethics code violations could support a jury finding of outrageous misconduct.[263] A court in the early stages of a privacy case in 2004 found for the plaintiff when part of the plaintiff's argument was that the ABC television network had failed to follow both "standard journalistic ethics" and its own ethics guidelines in a hidden camera documentary.[264] Outside the privacy context, the court made a similar reference to journalistic ethics codes in a Utah case in which media defendants were alleged to have enticed underage children to chew tobacco for inclusion in a news story.[265] The Court looked to the Society of Professional Journalists' Code of Ethics, noting that it was "instructive . . . that the code does not approve of such an activity."[266]

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258. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 514 (Ct. App. 2001).

259. *Id.*

260. 795 S.W.2d 488 (Mo. Ct. App. 1990).

261. *Id.* at 495 n.4 (noting that a similar concern was raised by Warren and Brandeis, *supra* note 28, at 196); *see also* KOVR-TV, Inc., v. Superior Court, 37 Cal. Rptr. 2d 431, 435 (Ct. App. 1995) (suggesting that television station may have used internal newsroom ethics determination in decision not to air videotape of children learning of murder-suicide next door).

262. *Y.G.*, 795 S.W.2d at 495 n.4.

263. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 384 (S.D.N.Y. 2008) ("NBC characterizes the series as 'an investigative news series' and refers to Dateline as a 'news program.'").

264. Turnbull v. ABC, No. CV 03-3554 SJO, 2004 WL 2924590, at *11 (C.D. Cal. 2004).

265. State v. Krueger, 975 P.2d 489, 492 (Utah Ct. App. 1999).

266. *Id.* at 497 n.11. The media defendants argued that they had not set up the video at all, and had used the video as part of the story because such images were "essential to television journalism." *Id.* at 497. California's Supreme Court in 2007 went so far as to use journalism standards against a scholarly researcher. Taus v. Loftus, 151 P.3d 1185 (Cal. 2007). In finding that the scholar's conduct, alleged misrepresentation, could "properly" be found "highly offensive" by a jury, the court cited three separate journalism ethics provisions limiting surreptitious newsgathering methods. *Id.* at 1223 n.22 (citing SOCIETY OF PROFESSIONAL JOURNALISTS, CODE

Journalism ethics codes are surfacing against journalists in additional cases still working their way through the court system. In a recent privacy-related case involving a newspaper's violation of a protective order, a case with obvious privacy implications, a federal district court wrote that "[*a*]*t this point in the litigation* there is no need to measure the actions of the conspirators against the ethics rules for journalists," suggesting the possibility that those principles may become relevant at trial.[267] In another interlocutory ruling, a court chastised privacy litigants for not following local court rules "in a lawsuit where the parties are parsing the rules and ethics of another profession (journalism)."[268] Additional court decisions appear to rely on equivalent ethics standards in rejecting the broader Restatement definition of news, even when they do not cite or compare the reporters' actions with ethics codes expressly.[269]

In a 1972 stockholder action, a court wrote that newspapers have an obligation to the public and that as part of that "important public interest . . .

OF ETHICS (1996), *available at* http://spj.org/pdf/ethicscode.pdf; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, CODE OF ETHICS OF PROFESSIONAL CONDUCT (2000), *available at* http://www.rtnda.org/pages/media_items/code-of-ethics-and-professional-conduct48.php; and Bob Steele, *When Might It Be Appropriate to Use Deception/Misrep-resentation/Hidden Cameras in Newsgathering?*, POYNTER ONLINE, Feb. 1, 1995, http://www.poynter.org/content/content_view.asp?id=866). Significantly, the court also noted that while it found the information at issue newsworthy, it wrote that "no profound or overriding public *need* . . . justified resort" to certain actions alleged to have been taken by the defendant, despite the fact that the defendant in the case was working on a major research project regarding the validity of repressed memory. *Id.* at 1223 n.22 (emphasis added).

267. *In re* Zyprexa Injunction, 474 F. Supp. 2d 385, 397 (E.D.N.Y. 2007) (emphasis added).

268. Tilton v. McGraw-Hill Cos., No. C06-0098RSL, 2007 U.S. Dist. LEXIS 1449, at *16 (W.D. Wash. Jan. 5, 2007).

269. In *Green v. Chicago Tribune Co.*, for example, the reporters' use of the grieving mother's words arguably might have violated a journalistic standard suggesting that journalists treat crime victims with respect in their stories and that privacy be invaded only when there is a need for the public to know, but the journalists' use of the mother's words seem far from "morbid and sensational prying into private lives for its own sake," especially given their powerful effect within the context of the story. 675 N.E.2d 249, 256 (Ill. App. Ct. 1996). Professor Bezanson recognizes this narrowing as well. Bezanson, *supra* note 212, at 781 ("Discomfort with the potential breadth of the newsworthiness inquiry is evident in *Green v. Chicago Tribune Co.*, where the court . . . defined 'newsworthiness' more narrowly."). The same might be said of the disclosures within the reports concerning the CNN editor's romances, the Michigan accident victim, among others. Professor Drechsel notes that the use of journalistic standards as a liability marker is rarely overt but still finds its way into analyses in media cases because of the "obvious linkage" between law and journalistic standards. Drechsel, *supra* note 15, at 193. Jeff Storey has noted a similar trend in defamation lawsuits. "[E]thical codes of national journalism organizations are rarely cited in appellate court decisions," he observed, but, nonetheless, "evidence about journalistic practices and procedures is frequently used by plaintiffs' attorneys." Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 481. He later suggested a similar trend in newsgathering torts. *Id.* at 489. This could be one reason why an early study of media cases and ethics standards found that written standards were used only very infrequently in litigation. Lynn Wickham Hartman, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 656 (1987).

[newspapers] must adhere to the ethics of the great profession of journalism," and that readers were "entitled" to "high quality" reporting.[270] In its time, when judicial deference to journalists in framing the news was near its peak, the decision was an outlier. Decades later, it appears to have been ahead of its time. In 1994, the same year Judge Abner Mikva warned of a coming backlash against the press, a second court counseled reporters that journalism ethics code provisions, including broad language about truth, fair play, and mutual trust, "accurately define the professionalism . . . [that] the public should demand" from a responsible media.[271] As they increasingly resort to journalism ethics codes in policing the limits of legitimate reporting, it appears that courts are increasingly electing to enforce those demands for themselves.

III
THE PERILS OF POLICING THE NEWS: THE LIMITS OF JUDICIAL AND JURY COMPETENCE

The recent decisions surveyed in the preceding Part of this Article reveal a trend with significant First Amendment implications: Courts are increasingly willing to question journalists' news decisions and to allow juries to second-guess journalists in defining the boundaries of legitimate reporting. Using professional ethics codes has a unique and obvious appeal for judges by offering the appearance of deferring to journalists' own standards, even while substantially narrowing their editorial discretion. Tying the legal standard of "newsworthiness" to judicial interpretations of professional ethical standards makes protection for journalists ultimately dependent upon the ability of judges and jurors to discern sensitively the nuanced norms of a field to which they can sometimes be frankly hostile.[272] As Professor Morant suggests, "[j]udicial officers and jurors have scant knowledge of the [journalism] industry and may be influenced by personal perceptions and stereotypes"; accordingly, "[t]he rules resulting from their deliberations would likely be awkward and overly

270. Herald Co. v. Seawell, 472 F.2d 1081, 1095 (10th Cir. 1972).

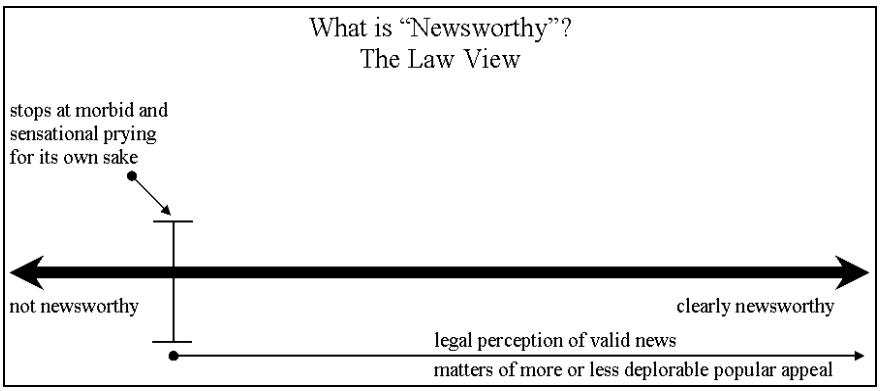
271. *In re* Access to Certain Records of R.I. Advisory Comm. on the Code of Judicial Conduct, 637 A.2d 1063, 1067 n.1 (R.I. 1994) (emphasis added). Relying on the ethics provisions, the court further commented that "[a] responsible news medium scrutinizes; it does not unjustly or irresponsibly incite a wildfire of insinuation." *Id.* at 1067.

272. One judge openly suggested "that the press adopt and be bound by an effective code of journalistic ethics," and that ombudspersons be established at news organizations, complaining that "[t]he basest, cruelest, vindictive and most irresponsible sadisms or distortions of the press subject it to no . . . control whatsoever." Sprague v. Walter, 22 Pa. D. & C.3d 564, 588-89 (Ct. Com. Pl. 1982). Another reason for judges' hostility could be that they often see shortcomings in media coverage of legal matters. "There is perhaps no area of news more inaccurately reported factually, on the whole . . . than legal news," largely because of reporters' ignorance. Pennekamp v. Florida, 328 U.S. 331, 371 (1946) (Rutledge, J., concurring). The roots of this hostility, in some measure, reach back to the founding of the Republic. *See, e.g.*, State v. Norris, 2 N.C. (1 Hayw.) 429, 429 (1796) ("The people in this country do not take for truth, every thing that is published in a newspaper."); United States v. Fries, 9 F. Cas. 826, 878 (D. Pa. 1799) (decrying a newspaper for using "the grossest, the most insidious practices . . . to warp your sentiments").

intrusive."[273]

A. Law and Ethics Standards for News

A substantial divide separates conceptions of newsworthiness found in ethical standards and the broader Second Restatement of Torts.[274] The Restatement reflects the modern position, prevailing until recently, in which the courts heavily deferred to the market-driven news judgment of working journalists. Its definition of news as encompassing all matters of "more or less deplorable, popular appeal," and stopping only at "morbid and sensational prying . . . for its own sake,"[275] proved a nearly insuperable barrier to plaintiffs seeking to impose liability for publication of private facts. A news continuum depicting the Restatement's deferential definition looks like this:



Courts following this standard have widely refused to hold journalists responsible for truthful reporting of allegedly private facts, emphasizing that

> [t]he test for determining newsworthiness is to be construed broadly, extending beyond "the dissemination of news either in the sense of current events or commentary upon public affairs" to include "information concerning interesting phases of human activity and embrac[ing] all issues about which information is appropriate so that individuals may cope with the exigencies of their period."[276]

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273. Morant, *supra* note 174, at 618.

274. The Restatement formulation is used here because of its repeated use by courts in publication of private fact cases. "The formulation of the Restatement (Second) of Torts . . . is widely relied upon by the courts . . . ." Zimmerman, *supra* note 169, at 299.

275. RESTATEMENT (SECOND) OF TORTS § 652D cmts. g–h (1977).

276. Lowe v. Hearst Commc'ns, Inc., 487 F.3d 246, 250–51 (5th Cir. 2007) (quoting Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980)) ("Given the broad interpretation of newsworthiness, particularly with regards to alleged criminal activity, an article describing the use of the legal system by prominent local lawyers in a way that could be described as blackmail is a matter of public concern. . . . [T]he newsworthiness of the story was enhanced by a discussion

The standard thus embraces journalism's own understanding that news has value both in terms of topic and timeliness.[277]

Contrast the breadth of that approach with the more restrictive definition of news suggested by some courts' readings of journalism ethics codes. There are multiple codes, including those of the Society of Professional Journalists (SPJ),[278] the Radio and Television News Directors Association (RTNDA),[279] and individual media outlets such as the *New York Times*[280] and National Public Radio.[281] These codes do not purport to fix standards of appropriate conduct for *all* journalists, though the SPJ code has a broad reach. Importantly, the wording of nearly all provisions in journalism ethics codes is suggestive rather than compulsory.[282] They are, in the words of Professor Logan, "gauzy generalities."[283] Indeed, the aim of the codes is not to dictate editorial decisions but to guide journalists by suggesting factors that should shape discretionary ethical calls regarding story coverage. The codes commonly recognize that responsible journalists may well come to different conclusions on any given set of facts even while applying the same standards, depending upon the community served, the news organization itself, and the journalist's internal ethical sense.[284] Even if an ethical standard appears on its face to oppose publication, codes typically acknowledge that there may be overriding reasons

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regarding the legal ethics . . . as well as by commentary from the prosecutor's office about its proposed response.").

277. *See, e.g.*, *In re* Associated Press, 162 F.3d 503, 506–07 (7th Cir. 1998) (noting that newsworthiness is fleeting and that to postpone a story may be to quash it altogether).

278. SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 23. Professor David Logan called the SPJ code "[t]he most influential." David A. Logan, *"Stunt Journalism," Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL'Y 151, 159 (1998).

279. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, *supra* note 266.

280. NEW YORK TIMES CO., ETHICAL JOURNALISM: A HANDBOOK OF VALUES AND PRACTICES FOR THE NEWS AND EDITORIAL DEPARTMENTS (Sept. 2004), *available at* http://www.nytco.com/ pdf/NYT_Ethical_Journalism_0904.pdf.

281. NATIONAL PUBLIC RADIO, NPR NEWS CODE OF ETHICS AND PRACTICES, http://www.npr.org/about/ethics/ (last visited June 16, 2009).

282. "The [early] canons were mostly statements of ideals and aspirations and contained no enforcement procedures for punishing code violations." Hartman, *supra* note 269 at 640. The provisions remain that way. The SPJ Code of Ethics repeatedly uses the word "should" and not the word "must." SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 23. Moreover, the code provisions cannot all be followed all the time because, as the SPJ Ethics Committee Blog notes, "SPJ's most cherished goals are often in conflict . . . ." Posting of Peter Sussman to Code Words: The SPJ Ethics Committee Blog, www.spj.org/blog/blogs/ethics/ (June 20, 2007, 23:53). The former president of the Society of Professional Journalists, Steve Geimann, told an audience of journalism educators in August 2007 that those who helped write the SPJ Code of Ethics intended it to be only "aspirational and inspirational," not mandatory. Journalism v. Journalist, Association for Education in Journalism and Mass Communications Panel, Washington, D.C. (Aug. 12, 2007).

283. Logan, *supra* note 278, at 159.

284. The Society of Professional Journalists' website, for example, explains that no set of rules could ever "apply to all the nuances and ambiguities of legitimate expression" and that "all journalism ethics is a balancing act between often conflicting responsibilities." Society of Professional Journalists, Ethics Answers: Frequently Asked Questions, http://www.spj.org/ ethicsfaq.asp (last visited June 16, 2009).

to go forward with the disclosure.[285] No hypothetical or real-life examples are given, lest they be used as markers for liability.[286] These standards of practice then are deliberately amorphous, subjective, and subject to claims of exigency.[287]

Yet, especially in the view of outsiders unfamiliar with the full range of competing considerations that must inform application of the ethics codes, the language of specific provisions can readily be construed to constrain news judgment more rigidly. In particular, taken out of context, code provisions pertaining to news value appear to be far more restrictive than the generous public curiosity standard embraced by the Second Restatement of Torts. Contrast the Restatement's broad allowance for coverage of private matters that are "of more or less deplorable, popular appeal" with the SPJ code's ethical provision: SPJ provides that "[o]nly an overriding public need can justify intrusion into anyone's privacy," and it urges that journalists "[s]how good taste [and] [a]void pandering to lurid curiosity," language the federal district court in New York recently seized upon in the case involving *To Catch a Predator*.[288] National Public Radio, too, suggests that "[o]nly an overriding public need to know can justify intrusion into anyone's privacy."[289] In the inherent conflict between public *need* and public *interest*, both then side with need, a narrower news standard than allowed by the Second Restatement. While mostly silent as to the precise balance point between privacy and news, the *New York Times* code suggests that reporters refrain from "inquir[ing] pointlessly into someone's personal life."[290] Similarly, the Radio and Television News Directors Association code suggests that broadcast journalists

285. The *New York Times*' ethics handbook, for example, warns that its provisions are not meant to be comprehensive or conclusive because "[n]o written document could anticipate every possibility"; it suggests that reporters turn to their editors for more seasoned judgment in interpreting and applying the guidelines. NEW YORK TIMES CO., *supra* note 280, at 5. A 2004 version of the NPR News Code of Ethics and Practices suggested explicitly that its purpose was "not to catch people up in a web of rules" but to "ensure that NPR maintains its reputation for fairness and integrity in coverage of the news." NATIONAL PUBLIC RADIO, CODE OF ETHICS AND PRACTICES (Feb. 25, 2004), http://www.media-accountability.org/library/USA_NPR_2004.doc. The latest NPR code suggests that its purpose "is to protect the credibility of NPR's programming by ensuring high standards of honesty, integrity, impartiality and staff conduct." NATIONAL PUBLIC RADIO, *supra* note 281.

286. The Society of Professional Journalists has explicitly rejected any fact-based opinions, out of concern that they would "be put to improper use" by lawyers. Society of Professional Journalists, *supra* note 284.

287. Indeed, Professor Clay Calvert suggests that even the once universally accepted goal of objectivity in journalism is no longer uncontested. *See* Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19 (1999) (criticizing a Washington Supreme Court decision that supported reassignment of a reporter based on her off-duty political activities, and lamenting that ethics ideals of neutrality and objectivity are now legal mandates in Washington state).

288. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 397–98 (S.D.N.Y. 2008) (quoting SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 23).

289. NATIONAL PUBLIC RADIO, *supra* note 281.

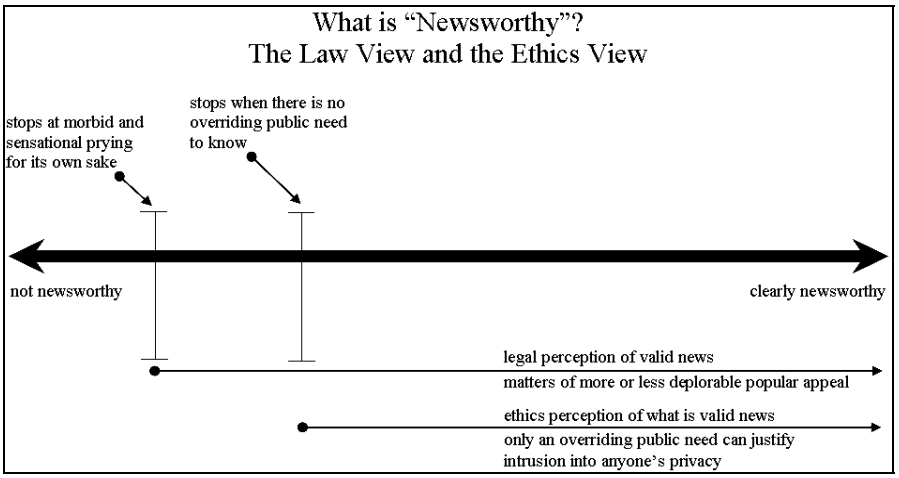
290. NEW YORK TIMES CO., *supra* note 280, at 8.

"[t]reat all subjects of news coverage with respect and dignity, showing particular compassion to victims of crime or tragedy," and "[e]xercise special care when children are involved in a story."[291]

Such ethics provisions, media attorney and author Bruce Sanford has written, serve as a strong voice of caution to journalists, even when the law would readily allow coverage:

> What the public does not see, however, is the editorial process that goes on in such situations . . . . Cynics assume that anything salacious in a court file can find a home on the air or in print. But people in newsrooms are cognizant of their power to exacerbate or magnify a person's pain or suffering. And they do not hesitate to beat up those of their colleagues who seem to be insufficiently mindful of the power of media to maim or wound.[292]

The graph below illustrates the difference between the Restatement definition for news and several ethics codes' definitions for news, revealing a distinctly tighter definition for news in journalism ethics codes:



Whereas the Restatement's standard defers to journalistic news judgment so long as an intrusion on privacy is not gratuitously destructive, the use of ethical standards invites courts to engage in a more fluid balancing of individual privacy interests and the public's overriding *need* to know.[293]

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291. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, *supra* note 266.

292. SANFORD, *supra* note 200, at 103. As another example of this weighing process, professor and former journalist Philip Meyer, author of the influential text *Ethical Journalism*, suggests to journalists that newsworthy stories are not always stories in the public interest and that they look to both before deciding to publish. MEYER, *supra* note 204, at 86.

293. At least one court has recognized the divide between the legal and ethical standards governing journalists. *See* Mayes v. Lin Television of Tex., No. 3:96-CV-0396-X, 1998 WL 665088, at *17 (N.D. Tex. 1998) (noting that the plaintiff "attempts to hold [defendant] to a journalistic standard not mandated in the law which, in essence, would permit her to dictate the

There are significant risks of error and abuse in inviting judges to police journalists by enforcing ethics standards. For one, journalists' ethics codes are made up of intersecting and even opposing statements of value.[294] They suggest, for example, that reporters must respect a subject's privacy while simultaneously insisting that "any commitment other than service to the public undermines trust and credibility."[295] They suggest that reporters respect the "dignity and intelligence" of newsmakers and yet make their "first obligation" to the public.[296] They suggest that reporters "[s]eek [t]ruth and [r]eport it" but also "[m]inimize [h]arm."[297] Such internal tensions are unremarkable in documents meant to capture and credit a diversity of values. They are left unresolved by the codes precisely because the drafters contem-plated that news judgment would inevitably require sensitive attention to the facts of particular cases; the deliberate play in wording was meant to leave room for seasoned professional judgment.[298]

Inviting judges and jurors to exercise the same discretion in applying internal standards, however, risks a serious curtailment of First Amendment freedoms. No reporter would relish the thought of judges or jurors weighing whether the reporter had shown proper "compassion for those who [are] affected adversely by news coverage,"[299] as the SPJ Code requires, or had lived up to duties requiring reporters to "[a]void pandering to lurid curiosity," a standard recently applied to the *To Catch a Predator* journalists.[300] From the view-point of some news subjects, NPR's ethical mandate that its reporters "treat the people they cover fairly and with respect" no doubt appears significantly under-enforced. Adding to the confusion, the Radio-Television News Directors Association (RTNDA) code could be read to suggest that reporters purposefully disregard legal restrictions and thereby invite liability when reporting a story: "Determine news content solely through editorial judgment and not as the result of outside influence."[301]

The danger that jurists and jurors might wield the broadest, most idealistic journalistic standards, interpreted through the lens of their own values, to impose liability has already been realized, albeit in a defamation case. In a

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content of a news broadcast" and punish the reporting of truthful, though embarrassing, information).

294. "Ethical codes, which constitute codified norms of behavior, can apply awkwardly or inflexibly to problems that occur in different contexts. The resultant guidance . . . may be incomplete or inapplicable to discrete situations." Morant, *supra* note 174, at 612.

295. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, *supra* note 266.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 397–98 (S.D.N.Y. 2008) (quoting *id.*).

301. RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, *supra* note 266.

1996 California decision,[302] a court relied on extremely broad ethics provisions as support for its finding of media liability, including the guiding principles that "[t]ruth is [the] ultimate goal" of journalism and that journalists should "observe the common standards of decency."[303] The court aligned itself with the plaintiff's experts who testified that the journalists had fallen below the code-based acceptable standard of care, writing that the journalists had a duty to report the truth.[304] Professor Todd Simon had warned of this possibility as early as the mid-1980s:

> A given jury may decide that a reporter's duty is always to report accurately, or that news media defendants have a duty to conduct fruitless inquiries to search for truth. It might even consider it a journalist's duty to explain the journalistic process to persons who are likely to be affected by a story.[305]

B. Jurist, Juror, and Journalist: A Significant Divide

A fundamental danger with inviting non-journalists to weigh the merits of newsgathering or reporting against individual privacy interests is that even fair-minded judges and jurors often have only a limited understanding of the elements of effective journalism and how reporters work. Court decisions may direct juries to decide whether reporting a newsworthy story truly required journalists to disclose the identity or specific background facts about a human subject, for example, or may decide flat out that journalists could have reported a story in a less intrusive way without losing the story's effectiveness.

Face to face with a sympathetic privacy plaintiff, judges and jurors alike may be tempted to conclude that the newsworthy aspects of the story could have been told in a less invasive way. The Massachusetts court banning the documentary *Titicut Follies* did just this, opining that "[r]ecognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential."[306] Thirty years later, an Illinois court similarly chided *Chicago Tribune* reporters for including a grieving mother's words in their front page story. The jurors, the court held, "could find the . . . article . . . did not need plaintiff's intimate statements to [her son] or his photograph to convey the

302. The movement toward ethics as a legal standard was first suggested by commentators in defamation cases in which code provisions could be used to shield journalists against liability. Todd F. Simon, *Libel as Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 452 (1984) ("The issue of a journalist's fault is not within the competence of the lay jury unaided by evidence of journalistic practices").

303. Khawar v. Globe Int'l, Inc., 54 Cal. Rptr. 2d 92, 107 (Ct. App. 1996) (citing both the SPJ Code of Ethics and the American Society of Newspaper Editors Statement of Principles).

304. *Id.*

305. Simon, *supra* note 302, at 459. He found that ethics had "slipped into libel cases through the back door" via defenses such as neutral reportage and the fair report privileges because both reflect journalism practices. *Id.* at 470.

306. Commonwealth v. Wiseman, 249 N.E.2d 610, 617 (Mass. 1969).

human suffering behind gang violence."[307] The courts in the Little League case, the in vitro fertilization case, and others similarly suggested that disputed news stories could have been written without a focus on particular persons.[308]

Yet this injunction ignores what journalists understand about the powerful communicative effects of personalizing stories, giving voice directly to persons affected by a story's subject matter. The very reason newspaper stories and television and radio broadcasts rely so heavily on quotations and sound bites and so little on generalizations and charts is that personalization is so effective at reaching readers and viewers.[309] Moreover, as Professor Zimmerman suggests, a story that fails to name sources or persons "is properly subject to serious credibility problems."[310]

Understanding the value of personalization is not the only matter dividing journalists from many jurists and juries. There is also a fundamental misunderstanding about the literal and figurative mechanics of journalism. Professor Jane Kirtley was the executive director of the Reporters Commission for Freedom of the Press when she complained publicly about the divide: "'Judges don't appreciate the need for journalists to be independent, and they're not prepared to embrace the notion that journalists need legal protection in a wide variety of situations simply to be able to gather the news. They don't get it. They simply don't get it.'"[311]

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307. Green v. Chi. Tribune Co., 675 N.E.2d 249, 255 (Ill. App. Ct. 1996). For a newsgathering example, see Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996) ("A jury could determine that [the defendant journalists] harassed and invaded the [plaintiffs'] privacy not, as defendants claim, for the legitimate purpose of gathering and broadcasting the news, but to try to obtain entertaining background for their T.V. expose concerning the high salaries paid to executives at U.S. Healthcare.").

308. M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 514 (Ct. App. 2001); Y.G. v. Jewish Hosp. of St. Louis, 795 S.W.2d 488, 500–01 (Mo. Ct. App. 1990).

309. *See* BRUCE D. ITULE & DOUGLAS A. ANDERSON, NEWS WRITING AND REPORTING FOR TODAY'S MEDIA 31 (7th ed. 2003). The authors explain that quotations from those affected by a story can generate emotion, "provide vivid description," "bring a dull story to life," and "send tingles down a person's back." *Id.* at 89.

310. Zimmerman, *supra* note 169, at 356. Some courts have recognized the importance of this personalization technique. Judge and frequent author Richard Posner, for example, credited the potential impact of personalization over generalization and abstraction in evaluating the newsworthiness of a nonfiction book entitled *The Promised Land: The Great Black Migration and How It Changed America*. Writing for the Seventh Circuit in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993), Posner acknowledged that "it would be absurd to suggest that cliometric or other aggregative, impersonal methods of doing social history are the only proper way to go about it and presumptuous to claim even that they are the best way." *Id.* at 1233. To the contrary, he wrote, "[r]eporting the true facts about real people is necessary to 'obviate any impression that the problems raised in the [book] are remote or hypothetical.'" *Id.* (quoting Gilbert v. Medical Economics Co., 665 F.2d 305, 308 (10th Cir. 1981)). Fifth Circuit Judge Patrick Higginbotham acknowledged in an earlier privacy case that revealing the actual names of the persons involved rather than using pseudonyms made stories more effective, more credible, and less susceptible to fictionalization; the court rejected the plaintiff's claims that such personalization was unnecessary. Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 274 (5th Cir. 1989).

311. SANFORD, *supra* note 200, at 169 (quoting Professor Kirtley).

There are several additional examples that support Professor Kirtley's concerns. Two decades ago, the Supreme Court of Virginia strongly questioned common editorial judgments in deciding that a jury would be the best arbiter of journalistic practices in a defamation case: "Startling, sensational stories tend to sell more newspapers than dull, factual stories," the court wrote tersely, noting that profit is a motive even at "responsible newspapers."[312] The court reasoned that "there is an inherent conflict of interest when a journalist [who would testify] is required to draw inferences from news items" and suggested that under those dubious circumstances, a jury would be better able "to form an intelligent and accurate opinion as to whether a reporter should have conducted additional investigations."[313]

Another judge similarly criticized media defendants for not submitting to the bench "written canons of journalism ethics that [would] purport to justify [their] actions."[314] At the same time, the court rejected media defense experts on the ground that they would simply tell "war stories," stamp the defendants' conduct "with a seal of ethical approval," and take the place of the judge by instructing the jury on the First Amendment.[315]

A federal trial court in Maine similarly sided with plaintiffs and against the media in preliminary skirmishes in a newspaper defamation case.[316] The court rejected a defense motion for summary judgment because the reporter had sent a friend an email promising a "wiseass article" regarding the plaintiffs, a jocular boast of a type not uncommonly heard in newsrooms across the country.[317] The court wrote that such evidence, in conjunction with an alleged failure to follow journalistic standards, sufficiently supported the plaintiff's case to survive summary judgment.[318]

Similarly, in a New York case, the court suggested that journalism was a relatively simple process: reporters simply had to follow guiding professional principles and answer in each story the "elementary standards of basic news reporting," including "who, what, where, when, why, and how" and, if not, a jury could find that the reporters failed to meet "the more rigorous [and high-risk] standards of investigative reporting."[319]

Another court reviewed an article in a consumer magazine, pointedly and a bit naively "refrain[ing] from describing [the] article as exemplifying the very

312. Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32, 43 (Va. 1987).

313. *Id.* at 42-43. For additional examples from newsgathering cases, see Storey, *supra* note 269, at 490–91.

314. Cramlet v. Multimedia Program Prods., Inc., No. 80-C-1737, 1985 U.S. Dist. LEXIS 21704, at *7 (D. Colo. Mar. 15, 1985).

315. *Id.* ("Nothing in the record suggests that any generally accepted or written standards of journalism apply here. [So] Defendant is not entitled to a new trial based on the exclusion of evidence concerning journalistic standards.").

316. Norris v. Bangor Publ'g Co., 53 F. Supp. 2d 495 (D. Me. 1999).

317. *Id.* at 507.

318. *Id.*

319. Greenberg v. CBS, 419 N.Y.S.2d 988, 998 (Sup. Ct. 1979).

highest order of responsible journalism" despite chronicling the exhaustive, multiple layers of editorial review and fact-checking that took place before publication of the article, work that many journalists would consider to be of a high order.[320]

Finally, the Massachusetts Supreme Judicial Court in 2007 relied on the SPJ Code in upholding a plaintiff's verdict in a defamation case. It accepted testimony from a journalism expert who opined, according to the court, that "it is never considered permissible to . . . alter words within a quotation" and that "potentially explosive information should be verified by at least two independent primary sources before being published."[321] Yet both of these "principles" of journalism,[322] as the court called them, are far from rigid, universal rules of the craft. Reporters sometimes alter quotes when a speaker uses incorrect grammar or syntax so as not to embarrass the speaker.[323] Reporters will also sometimes report an important story without two sources when circumstances warrant, despite the ordinary place of the two-source rule.[324]

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320. Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982). The court described the process in this way:

> After testing the loudspeakers, [the reporter] prepared a rough draft of the manuscript . . . which was reviewed by an associate technical director. The Editorial department then reviewed this report and drafted the manuscript for publication. Among other editorial alterations, the department changed [some] words . . . . This manuscript was sent back to [the initial reporter] for 'line by line checking' and then forwarded to the associate technical director for his review. It was then returned to the Editorial Department. These same procedures were applied to galley proofs, second galley proofs, page proofs, and second page proofs.

Id. at 197.

321. Murphy v. Boston Herald, Inc., 865 N.E.2d 746, 765 (Mass. 2007).

322. *Id.*

323. The U.S. Supreme Court noted as much in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 514 (1991), when it wrote that reporters "by necessity" change certain quotes "at the very least to eliminate grammatical and syntactical infelicities." Journalism textbook authors agree: "Generally, most editors allow reporters to clean up grammar or take out profanities in direct quotations. The AP Stylebook says: 'Quotations normally should be corrected to avoid the errors in grammar and word usage that often occur unnoticed when someone is speaking but are embarrassing in print.'" ITULE & ANDERSON, *supra* note 309, at 91; *see also* MELVIN MENCHER, NEWS REPORTING AND WRITING 319 (2006) ("Many reporters cleanse the language of free-speaking sources before putting their quotes into stories. They also correct grammatical errors and ignore absurd and meaningless statements that are not central to the story.").

324. "Under competitive pressure, many news organizations have given up traditional rules such as having two sources of attribution . . . ." Kathleen O'Toole, *Journalists Discuss Clash of Ideals, Reality in Their Business*, STANFORD NEWS, July 2, 1997, http://news-service.stanford.edu/pr/97/970702journalist.html (citing Jan Schaffer, deputy director of the Pew Center for Civic Journalism). In the Associated Press *Broadcast News Handbook*, for example, author Brad Kalbfeld writes regarding sources: "suppose a senator's administrative aide tells you that the senator is about to resign, but asks that you not divulge his role in reporting the story . . . you [must] come as close as possible to telling the listener just why the source is believable." There is no mention of finding a second source. BRAD KALBFELD, ASSOCIATED PRESS BROADCAST NEWS HANDBOOK: A MANUAL OF TECHNIQUES & PRACTICES 90 (2001). *See also* Storey, *supra* note 269, at 474 n.63 ("[N]ewspapers frequently use information from single sources if they regard the source as especially credible.").

If there is this sort of fundamental misunderstanding and disconnect between *jurists* and journalists,[325] there is every reason to expect at least the same level of misunderstanding between *jurors* and journalists. Moreover, juries can also bring into the jury room a strong bias against constitutional protection for journalists. Polls show not only that Americans generally do not respect journalists, but that many Americans believe that the press is too free.[326]

Even under the best circumstances, content analysis is a "deeply problematic venture in the news setting."[327] Ethical standards, applied without the nuances supplied by interpretation and experience, are clearly an appealing device for a judiciary and public increasingly impatient with the excesses of a reality-television culture and a hungry twenty-four-hour news cycle. But making vague aspirational and internally conflicting ethical codes the foundation for tort assessments of "newsworthiness" carries a significant risk of sterilizing the news and hobbling the initiative of the press.

C. The Limited Utility of Journalism Ethics Codes

In the context of defamation actions, the Supreme Court has recognized that departures from journalism ethics codes provide an unacceptably thin basis for imposing liability on the press. Indeed, in *Harte-Hanks Communications, Inc. v. Connaughton*,[328] the Court held that even "an extreme departure from professional standards" was insufficient to establish liability for defamation against a public figure.[329] "Today," the Court wrote, "there is no question that public figure libel cases are controlled by the *New York Times* [actual malice] standard and not by the professional standards rule, which never commanded a

325. For additional examples of the judge-journalist divide, see Brian C. Murchison et al., Sullivan*'s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 60-65 (1994). Two commentators have suggested that the Supreme Court itself is similarly hampered, calling it "the Court's penchant to draw random assumptions about how the press actually operates." William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 177 (1994).

326. In one poll, respondents were asked, "Overall, do you think the press in America has too much freedom to do what it wants, too little freedom to do what it wants, or is the amount of freedom the press has about right?" The number of persons answering "Too much freedom" has ranged from 38 percent to 53 percent over the eight-year period from 1997 to 2005. FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2005 FINAL ANNOTATED SURVEY 1 (2005), http://www.firstamendmentcenter.org/PDF/SOFA.05.final.web.6.27.pdf. As another sign of a divide between jurors and journalists, only 16 percent of Americans surveyed in 2005 could name freedom of the press as one of the specific rights guaranteed by the First Amendment. *Id.* Public scorn and ignorance may help to explain the media's poor win-loss record in litigated defamation cases: Professor Simon writes that "[o]f the libel cases that go to trial, jurors rule against media defendants approximately 85% of the time." Simon, *supra* note 302, at 460 n.52.

327. Bezanson, *supra* note 212, at 854 ("News is not the accidental occurrence of content—or information or events or opinion—and therefore cannot effectively or accurately be judged by content alone.").

328. 491 U.S. 657 (1989).

329. *Id.* at 665.

majority of this Court."[330] The Court found that ethics code provisions could be "merely support[ive]" of an ultimate conclusion of malice based on other "clear and convincing proof" and warned that "courts must be careful not to place too much reliance" on factors such as ethics codes in discerning malice.[331]

If "extreme departure[s]" from ethics codes are an insufficient basis for imposing liability under defamation law—where false information is at the heart of the case—courts should be at least as wary of relying on ethics codes to punish truthful reporting under privacy law. In the early 1960s, Professor Marc Franklin suggested that "[t]he interest in compensating plaintiffs who suffer as the result of false statements can be no weaker, and is probably stronger, than the interest in compensating a plaintiff who suffers as the result of a true statement."[332]

Moreover, the Supreme Court has repeatedly stressed the importance of the search for truth as a rationale for First Amendment protection.[333] In *New York Times Co. v. Sullivan*, for example, the Supreme Court wrote that the First Amendment offered protection for an "unfettered interchange of ideas for the bringing about of . . . social changes,"[334] calling it a "national commitment" that public debate be "uninhibited, robust, and wide-open."[335] Tolerance of some inevitable erroneous statements, the Court explained, is necessary to ensure "breathing space" for free expression in pursuit of truth.[336] The Court warned that if libel law became too intolerant of falsity, *truthful* speech would be quashed; it quoted John Stuart Mill's admonition that even false statements help foster public debate because they bring about "the clearer perception and livelier impression of truth."[337]

The Court has made this clearer within the context at issue here. In *Herbert v. Lando*, the Court opined that it would hesitate to suggest that courts ask about editorial actions in newsrooms if such an inquiry would threaten suppression of truthful, rather than unreliable, information.[338] Yet a newsworthiness standard tied to judicial interpretations of journalism ethics

330. *Id.* at 666.

331. *Id.* at 668; *see also* Levesque v. Doocy, 557 F. Supp 2d 157, 171 (D. Me. 2008) (refusing to use professional standards to judge defendants' behavior in defamation case).

332. Marc. A. Franklin, *Inhibitions on Reporting of Fact: A Constitutional Problem in Privacy Protection*, 16 STAN. L. REV. 107, 140 (1963). He added that "[t]he arguments today that defamation actions unconstitutionally inhibit free expression can only strengthen the notion that the tort action for [publication of private facts] is similarly unconstitutional." *Id.*

333. Herbert v. Lando, 441 U.S. 153, 171–72 (1979) ("[S]ome error is inevitable; and the difficulties of separating fact from fiction [has]convinced the Court [repeatedly] to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material.").

334. 376 U.S. 254, 269 (1964).

335. *Id.* at 270.

336. *Id.* at 271–72.

337. *Id.* at 279 n.19 (citing JOHN STUART MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 15 (Blackwell 1947) (1859)).

338. 441 U.S. at 172.

codes would do just that: it would empower judges to police news judgment on a negligence standard even when there is no question as to the accuracy or reliability of the information published. Such a turn away from the broader definition of news suggested by the Second Restatement and the modern press-privacy position may encourage journalistic timidity and self-censorship.[339]

For some courts, of course, such as the Ohio Supreme Court in *Welling v. Weinfeld*,[340] this chilling effect is not an overlooked byproduct of tort doctrine: it is precisely the point of expanding liability rules. As courts embracing the modern position had long cautioned, the "uncertainty such decisions could create for writers and publishers" leads to "dangerous ground" for First Amendment values.[341] "[J]udges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively," one court warned more precisely, lest "[e]xuberant judicial blue-pencilling after-the-fact . . . blunt the quills of even the most honorable journalists."[342]

IV
BACK TO THE FUTURE: RESTORING DEFERENCE IN ASSESSMENTS OF NEWSWORTHINESS

This Article has shown that judicial deference to journalists in defining the news is in retreat. A decade or so ago, the prevailing view in the courts was that news was essentially whatever journalists chose to publish in response to the inquisitive demands of the consuming public.[343] The Supreme Court appeared to be on the brink of announcing an absolute First Amendment privilege to publish truthful information on matters of public concern; many judges and scholars were ready to write the obituary of the publication privacy tort.

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339. As Dean Chemerinsky has observed:

> [T]here are great dangers in allowing the courts to decide the legitimate interests of the people. In part, the difficulties concern notice to the press and the danger of chilling editorial judgment. The news media probably cannot know in advance how a court will evaluate the newsworthiness of the publication. On a more basic level, there are inherent problems in having judges decide what newspapers should find newsworthy.

Erwin Chemerinsky, *In Defense of Truth*, 41 CASE W. RES. L. REV. 745, 756 (1991). More recently, Chemerinsky has urged that courts rediscover the publication of private facts tort because of unprecedented ability and access "to learn the most intimate and personal things about individuals." Chemerinsky, *supra* note 199, at 656.

340. 113 Ohio St. 3d 464, 2007-Ohio-2451, 866 N.E.2d 1051; *see supra* notes 181 & 185 and accompanying text.

341. Dresbach v. Doubleday & Co., 518 F. Supp. 1285, 1290 (D.D.C. 1981); *see also* Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 475 (Tex. 1995) (Gonzalez, J., concurring) (noting that judges should not second-guess editorial decisions because "blue-penciling of news articles by judges or juries will have a chilling effect on the freedom of the press to determine what is a matter of legitimate public concern").

342. Ross v. Midwest Commc'ns, Inc., 870 F.2d 271, 275 (5th Cir. 1989).

343. RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977) (stating that news encompasses matters even of deplorable popular appeal).

Today, the landscape has changed. It seems to be ever more similar to the early years when courts routinely second-guessed journalists in privacy actions and when Warren and Brandeis urged judges to assume a broader role in policing the press. Courts are again increasingly following their own instincts and values in determining the proper boundaries of journalism, this time drawing explicit or implicit support from their reading of vague journalism ethics codes. The prospects for an absolute First Amendment privilege now seem vanishingly small after the Supreme Court's narrow ruling in *Bartnicki*, which emphasized the danger to legitimate privacy concerns of intrusive surveillance and snooping. Recent court decisions upholding privacy claims, and even embracing new privacy causes of action, show that the privacy torts are very much alive. As Professor Eugene Volokh observed in 2000: for First Amendment values, the "danger has materialized."[344]

In part, journalism has itself to blame for these developments. To the extent that some journalists have needlessly tested the limits of decency and good taste in pandering to base public appetites, they have made the entire press more vulnerable to public and judicial backlash.[345] The problem is compounded by disintegrating consensus over who qualifies as a "journalist" and whether the Jerry Springers, the "iReporters" of CNN, those who post updates to news stories through comment sections on news websites, and Tucker Max and his fellow internet diarists belong under the ever-widening tent.[346]

But greater self-restraint on the part of journalists cannot be a sufficient solution to the dilemma of aggressive judicial scrutiny of news judgment. The "news media" is now simply too expansive and diffuse to make universal self-

344. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1094 (2000).

345. Dean Smolla also suggests that press freedoms are inevitably "influenced by the degree of restraint and responsibility with which that freedom is exercised." Smolla, *supra* note 20, at 1138. Marc Franklin suggested as early as the 1960s that an alternative to government interference in news decisions might be "discretion and responsibility" on the part of journalists themselves. Franklin, *supra* note 332, at 146. Professor Morant wrote similarly that journalism codes of ethics promote self-restraint and a culture of responsibility within journalism and that "self-restraint remains the most viable and efficient means to ensure the media's functionality within a modern democratic society." Morant, *supra* note 174, at 599. He also suggests that media promote their own ethics provisions to increase public awareness of self-restraint mechanisms. *Id.* at 633–34; *see also* Storey, *supra* note 269, at 468 ("In truth . . . efforts at self-regulation such as Gannett's [ethics] Principles may be the only way to avoid judicial interference with the media's day-to-day operations. . . . [T]he media must pay more attention to ethics and fairness because that is what the public and courts increasingly demand.").

346. Indeed, the Ohio Supreme Court pointed to this consideration in justifying the need for expanded tort regulation of public disclosures. *See* Welling v. Weinfeld, 866 N.E.2d 1051, 1058–59 (Ohio 2007). Steven Geiseler also notes the "general lack of norms and ethics governing Internet (quasi-) journalism" and suggests that "the generally accepted canon of professional journalistic ethics is largely absent in cyberspace." Gieseler, *supra* note 236, at 328. Note 184, *supra*, explores the issue of bloggers a bit more fully.

regulation feasible. More fundamentally, a core constitutional problem with overzealous judicial scrutiny of news judgment is precisely that journalists will be unduly chilled in their willingness to gather and report the news. Placing the sole burden on journalists underscores rather than obviates the problem.

Ultimately, it is essential that judicial scrutiny of news judgment be limited.[347] The first step is to realize the ways in which recent court decisions have in fact imposed upon journalists' news judgment.[348] Judges must become sensitive to the ways in which judicial reliance on professional ethics codes can amount to little more than substituting the personal sensibilities of judges or jurors for the professional judgment of journalists. Presently, some courts appear to believe that ethics codes provide a reliable means of enforcing journalists' own conception of newsworthiness. By understanding the fundamentally aspirational quality of most ethics codes, and by appreciating the way in which broad and conflicting standards are meant to afford significant latitude to journalists in crafting the news, judges can reduce the danger of their own unwitting overreaching.

Second, recognizing that a bright-line test for newsworthiness is unworkable,[349] courts should reframe their inquiries into journalistic news judgment in a way that is more genuinely deferential.[350] News organization liability should be confined to instances where journalists broadly agree that a challenged disclosure is beyond the pale of professional judgment.

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347. Professor Volokh suggested this in assessing the news value of a neighbor's criminal history:

> Judges are of course entitled to have their own views about which things 'right-thinking members of society' should 'recognize' and which they should forget; but it seems to me that under the First Amendment members of society have a constitutional right to think things through in their own ways.

Volokh, *supra* note 344, at 1091; *see also id.* at 1093, 1113 (arguing that in a free speech regime, one's reputation should primarily be molded by truthful information, rather than molded inaccurately through legal coercion to keep certain details from becoming public, and also arguing that "[e]ven offensive, outrageous, disrespectful, and dignity-assaulting speech is constitutionally protected").

348. *See e.g.*, Gieseler, *supra* note 236, at 333 ("[T]he best way to combat these inherent problems [within privacy between public interest and private interest] is simply to allow for and encourage an open dialogue on their existence . . . .").

349. *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1030 (2003). The impossibility of a single test is one reason the SPJ Code, as but one example, offers working journalists nearly forty separate provisions to help guide their news determinations. Each of the four main parts of the Code—Seek the Truth and Report It, Minimize Harm, Act Independently, Be Accountable—has multiple sub-provisions that help to define the main ideas. SOCIETY OF PROFESSIONAL JOURNALISTS, *supra* note 23.

350. Professor Zimmerman suggested that deference was the most appropriate and principled response to publication of private fact actions twenty-five years ago. Zimmerman, *supra* note 169, at 353 ("Although one could describe such deference to editorial judgment as capitulation, deference to the judgment of the press may actually be the appropriate and principled response to the newsworthiness inquiry. The press, after all, has a better mechanism for testing newsworthiness than do the courts. The economic survival of publishers and broadcasters depends upon their ability to provide a product that the public will buy.").

Under such a standard, the presumption would be that the defendant-journalist has made an acceptable professional judgment about the news and that there is a broad range of acceptable professional assessments of newsworthiness on any given set of facts. Liability then could not be imposed simply upon a judge or jury's "mere disagreement" with a journalist's news judgment and would not turn on whether a court finds the journalist's decisions "reasonable," or even whether the court believes the disclosures to be consonant with its reading of professional ethics codes. Rather the touchstone would be whether the journalists' own peers widely agree that she has crossed the line of acceptable professional judgment. In this way, the standard would be objective, but assessed through a filter of professional deference, one based on more than an independent reading of aspirational ethics codes.

The standard suggested here would require expert testimony concerning journalists' own understanding of their ethical and professional obligations. Ethical standards would thus be relevant, but court inquiry would properly be refocused on the professional judgments of journalists rather than journalistic instincts of judges and jurors. The test would not be whether judicial fact-finders concluded that the defendant-journalist's actions failed to live up to the highest aspirations of the profession. Instead, liability would follow only if a consensus of the defendant's own colleagues would conclude that her actions fell below the floor of minimal professional competence. Mere disagreement over the defendant's news judgment would mean no liability.

Two examples illustrate how this deferential standard would work in practice, and the difference that it might make in close cases.

In the *To Catch a Predator* case, a court following its own understanding of journalism ethics readily found potential liability in NBC's exposé of suspected child sex offenders;[351] yet refocusing the inquiry on whether journalists themselves would find NBC's news judgment to be professionally indefensible would almost certainly have produced a different outcome. In the district court's actual 2008 ruling, it drew heavily on its own reading of ethereal ethics standards to find NBC potentially liable for intentional infliction of emotional distress. Directly quoting the SPJ Code of Ethics, the court intoned that journalists must "[r]ecognize that gathering and reporting information may cause harm or discomfort," and that journalists should "[s]how good taste" in deciding what to broadcast.[352] In deciding whether a challenged broadcast comported with these expectations, the court's decision ultimately invited jurors to decide for themselves whether the defendant had "crossed the line from responsible journalism to irresponsible."[353]

351. Conradt v. NBC Universal, Inc., 536 F. Supp. 2d. 380, 398 (S.D.N.Y. 2008).
352. *Id.* at 397.
353. *Id.* at 383.

By contrast, liability would have been exceedingly unlikely if NBC's news judgment were tested against the professional judgment of other journalists.[354] Many journalists would see obvious news value in a story involving a prosecutor who had apparently committed a crime by communicating with and agreeing to meet for sex someone he thought to be thirteen years old.[355] Indeed, national outlets have widely covered other cases in which prosecutors have allegedly solicited minors for sex, and the public interest in such breaches of trust is obvious.[356] Most journalists, moreover, would recognize that reporters would want to be on-scene with the police in order to cover the story in the most accurate way,[357] a situation that the *Conradt* judge found distasteful and unnecessary.[358]

In court, the burden would be on the plaintiff to prove broad agreement among journalists that such a report was not newsworthy. NBC could have offered its own proof that peer journalists would find news value in the story, thereby negating testimony offered by the plaintiff. Even the judge in *Conradt*, in fact, admitted that the *To Catch a Predator* program had been lauded by

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354. The journalists against whose judgment the defendant's conduct would be measured would be practicing journalists, those who write for established newspapers, magazines, or websites, or who report for established radio or television stations. I use the word "established" to distinguish between working journalists and diarists or non-journalist bloggers who are unfamiliar with the practice and necessities of journalism.

355. Indeed, mainstream newspapers across the country carried the news that Conradt, a prosecutor and one-time elected district attorney who had himself prosecuted child sex-abuse cases, had been ensnared in an underage sex sting operation and had taken his own life as police attempted to arrest him. *See, e.g.*, Tim Eaton, *Prosecutor Kills Himself in Texas Sting over Child Sex*, N.Y. TIMES, Nov. 7, 2006, at A10; *Cops Say Prosecutor Caught in Online Sex Sting Kills Self*, ORLANDO SENTINEL, Nov. 7, 2006, at A10; *Prosecutor Kills Himself During Solicitation Sting*, SAN JOSE MERCURY NEWS, Nov. 7, 2006, at A6. Even if Conradt had not committed suicide, his arrest alone would have been news because it appeared to be a classic fox-guarding-the-henhouse story. After all, he was a government official supposedly committed to fighting crime, including crimes against children. Conradt himself had been quoted in earlier press coverage as the district attorney in a story about the pre-indictment arrest of a pre-kindergarten teacher on child sexual abuse charges. The arrest made news, of course, because the teacher was one whose job it was to help children, a parallel to Conradt's own situation years later. Bill Lodge, *Ex-Mabank Teacher is Named in Abuse Suit*, DALLAS MORNING NEWS, Sept. 22, 1993, at 31A. Even when the charge is not child sex abuse, the arrests of prosecutors routinely make news. *See, e.g.*, Sara Jean Green, *Prosecutor Arrested After Allegedly Having Sex in Qwest Field Bathroom*, SEATTLE TIMES, Oct. 25, 2006, http://seattletimes.nwsource.com/ html/localnews/2003323370_ webbathroom25.html.

356. *See, e.g.*, Paul Egan, *Child Sex Sting Nabs U.S. Prosecutor*, DETROIT NEWS, Sept. 18, 2007, at A1. Additional papers, including some in Alabama, Florida, Michigan, Texas, and Washington, covered the arrest.

357. In *Wilson v. Layne*, 526 U.S. 603, 613 (1999), the media ride-along case, the Supreme Court itself implicitly credited media coverage of police action as helping to inform the public about the administration of criminal justice. It is also basic journalism practice to cover an event in person whenever possible. *See, e.g.*, ROGER SIMPSON & WILLIAM COTÉ, COVERING VIOLENCE: A GUIDE TO ETHICAL REPORTING ABOUT VICTIMS AND TRAUMA 3 (2d ed. 2006) ("Reporters and photographers go to the scene, see the effects of violence, and report to the public.").

358. *Conradt*, 536 F. Supp. 2d at 383.

some.[359]

The same would hold true in cases where written ethics standards were not used explicitly but where courts punish journalists for their news judgment more generally. For example, in *Benz*—in which the court found no news value in a CNN producer's dating history—the plaintiff would have the burden to show that peer journalists would broadly agree that her social life, including the identities of her prominent dates, was not newsworthy. Here, too, it would be difficult to prove that reasonable practicing journalists would find that gossip columns involving public figures[360] or quasi-public figures[361] had no news value. Certainly, testimony or evidence of similar columns offered by the defendant would have informed the court that the public's appetite for relationship gossip stands at odds with the court's own news judgment that "plaintiff's personal, romantic life is not a matter of public concern."[362]

Most importantly, under the standard advanced here, if reasonable journalists merely disagreed about coverage, there could be no liability. Even if a challenged disclosure fell in the shadowlands of professional news judgment, condemned by some and defended by others, it would be immune from judicial sanction.

Such deference might seem extreme, particularly in light of the very real potential of journalistic inquiry to wound and the substantial public value of personal privacy. Yet narrow limits on liability are justified in a context in which the state is asked to punish the publication of truthful information. Such an outcome should be extraordinarily difficult in light of the guarantees of the First Amendment. This is true even acknowledging that a cost of this freedom will be to place a considerable range of press disclosures of debatable merit beyond the reach of public correction. Yet just as negligent false statements concerning public figures are tolerated in defamation law in order to ensure that legitimate criticism will not be chilled,[363] so some dubious judgment calls concerning truthful news coverage must be tolerated to guard against editorial timidity.

Similar forms of deference are used in other contexts where the judiciary recognizes that other actors have special constitutional authority to act. In these cases, judges often defer to judgments that are rational and made in good faith; such deference is justified by recognition of the judiciary's own limited competence with respect to the decisions at stake and the Constitution's

359. *Id.* at 398. *See also* Ouderkirk v. People for the Ethical Treatment of Animals, 2007 U.S. Dist. LEXIS 29451, at *65 (E.D. Mich. Mar. 29, 2007) (comparing favorably police undercover investigations and television investigative reports on *Dateline* and similar programs).

360. Such as the former basketball coach for a nationally-known college basketball team or a man the newspaper referred to as an "AOL millionaire." Benz v. Wash. Newspaper Publ'g Co., No. 05-1760, 2006 U.S. Dist. LEXIS 71827, at *5 (D.D.C. Sept. 26, 2006).

361. Such as a producer for CNN who is not generally shown on air.

362. *Benz*, 2006 U.S. Dist. LEXIS 71827, at *25.

363. *See* N.Y. Times v. Sullivan, 376 U.S. 254, 280–83 (1964).

assignment of primary authority elsewhere. Thus, the rational basis test used in constitutional challenges to ordinary legislative judgments not involving fundamental rights or suspect classifications defers to democratic political judgment when reasonable persons may disagree about the outcome.[364] Additionally, because the Constitution gives parents the liberty to make decisions about the upbringing of children, parental childrearing judgments ordinarily may be penalized by the courts only where they are so palpably unreasonable as to constitute abuse or neglect.[365] The test often used to determine the murky boundary between protected parental discipline and punishable abuse looks to whether reasonable parents could disagree over the propriety of the decision.[366]

More practically, courts have recognized the danger of relying on aspirational ethics codes to define the legal obligations of professionals in other contexts; even when reviewing the actions of realtors, engineers, and others whose judgments are not specially shielded from public oversight by the Constitution, courts have warned that tying liability directly to ethics standards risks penalizing high aspirations in a profession and intruding unreasonably on professional discretion.[367] These concerns take on heightened value in the context of the First Amendment, which "places a primary value on freedom of

364. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 452-56 (6th ed. 2000); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 75–77 (1997).

365. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (holding that state court may not override parental judgment concerning visitation with grandparents based solely on judge's disagreement with parents' judgment concerning children's best interests; instead, judges must give deferential "special weight" to parents' judgment); David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 715 (2001) (reading *Troxel* to afford "latitude for parental decisionmaking within some zone of reasonable disagreement"); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 833–34 (2007) (observing that, generally, "absent abuse or other forms of perceived family default, parents enjoy almost complete authority over their children at home").

366. *See, e.g.*, State v. Wilder, 748 A.2d 444, 452–53 (Me. 2000) (stating that "the issue becomes not whether the parent's action in physically controlling the child was unreasonable, but instead whether that parent's action or belief was grossly deviant from what a reasonable and prudent parent would do or believe in the same situation").

367. *See, e.g.*, Wollman Eng'g, Inc. v. Mactronix, Inc., No. 93-16069, 1995 U.S. App. LEXIS 8167, at *12 (9th Cir. 1999) (contrasting an aspirational code of ethics for realtors with precise contractual price terms); Bennett v. MIS Corp., No. 07-14005, 2008 U.S. Dist. LEXIS 67960, at *5 (E.D. Mich. 2008) (holding no civil action possible based on breach of industrial hygienists' code of ethics); Andropolis v. Red Robin Gourmet Burgers, Inc., 505 F. Supp. 2d 662, 686 (D. Colo. 2007) (noting that in business "a code of ethics is inherently aspirational; it simply cannot be that every time a violation of that code occurs, a company is liable . . . for having chosen to adopt the code at all"); Bernbach v. Timex Corp., 989 F. Supp. 403, 411–12 (D. Conn. 1996) (refusing to find liability based on engineering code of ethics, finding such a code polices the profession and cannot be the basis for common law duties); People v. Garson, 848 N.E.2d 1264, 1273 (N.Y. 2006) (differentiating between judge's mandatory rules of conduct and non-mandatory aspirational ethics code provisions in general); Rogus v. Lords, 804 P.2d 133, 136 (Ariz. Ct. App. 1991) (refusing to find liability based on realtors' code of ethics because it was "pledge of moral conduct" and not a contract).

speech and of press" over competing values of privacy and "risk of . . . exposure."[368]

The goal, then, is to articulate a standard that would insulate journalists' judgment from unrestrained second-guessing by others, while ensuring that judicial intervention remains available in cases of nearly indisputable misjudgment. Thus, in the context of parents' rights under the Constitution, for example, the Supreme Court has suggested that it is constitutionally impermissible for judges to substitute their own judgments about childrearing over those of fit parents on the basis of a "mere disagreement" about a child's best interests.[369] Instead, courts are constitutionally required to presume that parents are the best judges of their children's welfare.[370] Courts may override parents' judgment only if deferential review shows the parents' decisions to be plainly misguided.[371]

The standard advanced here would take a similar approach in limiting court oversight of journalists' constitutionally protected news judgment. Just as the Constitution recognizes a zone of discretionary decision making authority of parents that must be buffered from direct public oversight, so the First Amendment should be understood to buffer the news judgment of reporters and editors.

This approach to determining the boundaries of protected journalistic news judgment would bring privacy doctrine largely back in line with the Second Restatement of Torts and earlier First Amendment doctrine. It would protect the constitutionally appropriate "breathing space" for robust news gathering and reporting. If a news decision—concerning either *whether* to report a story at all or *how* to report it—is one over which journalists could reasonably disagree, courts should defer to the defendant news organization and refuse to impose liability.

Such a truly deferential standard would confine judicial intervention to the most egregious cases, significantly limiting the occasions when journalists could be held liable for truthful reporting.[372] Admittedly, the legal protection afforded to privacy claimants would shrink, but the protections would not

368. Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

369. *Troxel*, 530 U.S. at 68

370. *See id.*

371. *See id.* at 68–70.

372. Professor Solove's balancing test, in contrast, would favor privacy more often. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 562 (2006) ("Protecting privacy requires careful balancing, as neither privacy nor its countervailing interests are absolute values."); Solove, *supra* note 349, at 1007, 1029 (suggesting that courts not always defer to media because media norms do not always align with society's norms and that without legal intervention, media norms would necessarily shift toward sensationalism—"the media's dark underbelly").

373. *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1181 (2005) (cautioning that Professor Solove's balancing approach would "lead to inconsistent results through the processes of courts applying slippery standards on a case-by-case basis" and that "a nuanced right of privacy is unlikely to protect much privacy at all").

vanish. There will be occasions where disclosures offend broad journalistic consensus.

Further, truly deferential review would provide greater determinacy, which would help to answer concerns about the use of balancing tests in privacy cases.[373] It is true that this determinacy will come from tilting the balance against liability,[374] but liability for truthful publications should be rare indeed under the First Amendment.

Some may suggest a more simplistic route: that journalism respond to the legal trend by weakening journalism ethics standards to bring them in line with more expansive and permissive Restatement language. But many journalists would likely agree with Professor Solove, who suggests that today journalism's norms should be strengthened, not weakened.[375] Ethics standards in journalism have been rightly described as important "rivers of strength" within a troubled industry.[376] Weakening journalistic ethics codes simply to buy more leeway in litigation seems as misguided and futile as loosening medical standards to dodge malpractice liability.

Perhaps surprisingly, the alignment between journalists and privacy advocates has come at the highest levels of media: "If this is a time when the destructiveness and tawdriness of mass media hang like a curse over even the best-intentioned newspaper editors," the president of the American Society of Newspaper Editors told an ASNE meeting in 1998, "it is also a time when changing values and new media players should prompt us to seek higher ground."[377] Indeed, as bloggers and others with the capacity to invade privacy at a keystroke struggle to create their own norms, journalism ethics codes may provide a useful model. They encourage a respect for privacy even within the chaotic free-for-all of the blogosphere.

Harry Kalven's warning that "[i]t takes a special form of foolhardiness to raise one's voice against the right of privacy at this particular moment in . . . history,"[378] is surely as true today as when he wrote it more than four decades ago. And, yet, the danger posed to a free press from judicial oversight of news judgment is also undiminished. "We may not like the tabloidization of American culture," Dean Smolla has written, "but as long as the First Amendment remains a salient part of the conversation, there are limits to what

373. *See* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1181 (2005) (cautioning that Professor Solove's balancing approach would "lead to inconsistent results through the processes of courts applying slippery standards on a case-by-case basis" and that "a nuanced right of privacy is unlikely to protect much privacy at all").

374. Richards & Solove, *supra* note 33, at 176 (expressing concern that excessive judicial deference may "all but preclud[e] a plaintiff from ever making a successful claim").

375. SOLOVE, *supra* note 184, at 195.

376. GARDNER, *supra* note 180, at 179.

377. As recounted in SANFORD, *supra* note 200, at 196.

378. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

the law can do about it."[379]

CONCLUSION

The news for journalism is not all dire. Even today, most courts continue to side with the media in determining newsworthiness, sometimes even in cases involving deeply private disclosures.[380] But the emerging trend is towards a narrower and less predictable judicial conception of the news. An approach that relies on ethics codes which judges and juries often simply do not understand will pose increasing hazards as society grows more anxious about the loss of privacy.[381]

There are undoubtedly cases in which values of personal privacy outweigh news value. A federal trial court cautioned in 1990, in a ruling otherwise favoring a media defendant, that should a newspaper publish a list of those who had tested positive for AIDS in a community for no reason other than to titillate the public curiosity, it would not hesitate to find for an aggrieved plaintiff on privacy grounds.[382] Virtually all journalists would agree that such disclosures would be ethically indefensible and amount, in the defining phrase of the Second Restatement, to "morbid and sensational prying . . . for its own sake."[383]

Yet truly meritorious publication privacy cases are—and should be—rare. Respect for the First Amendment and the vital ability of journalists to pursue and report the news requires toleration of some instances of poor news judgment, just as the importance of robust public debate warrants toleration of some instances of false speech. In fact, news judgment in publication privacy claims warrants arguably even greater constitutional breathing space because it involves truth.

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379. Smolla, *supra* note 19, at 1110 (adding that newsworthiness "is thus the gatekeeper, and the gate to a plaintiff's recovery is often shut").

380. *See, e.g.*, Anderson v. Blake, No. CIV-05-0729-HE, 2006 U.S. Dist. LEXIS 8454 (W.D. Okla. 2006), *aff'd sub nom.* Anderson v. Suiters, 499 F.3d 1228 (10th Cir. 2007). There, the court found news value in videotaped images of an alleged rape, including the plaintiff's "naked feet and calves" and her alleged attacker's "upper torso, his arms and hands and his lower left leg." *Id.* at *5 & n.3. It also "depicted him moving above and around plaintiff's obscured body." *Id.* at *5. In affirming the tape's newsworthiness, the Tenth Circuit agreed that the use of the tape within the news story helped support the validity of other pending charges against the alleged attacker and that it added to the news story's "impact and credibility." *Anderson*, 499 F.3d at 1236. This decision, however, seems in direct conflict with one from California in which a court decided that the videotape of the start of an alleged sexual assault lacked news value. Doe v. Luster, No. B184508, 2007 Cal. App. Unpub. LEXIS 6042, at *16 (Ct. App. 2007) (holding that "[t]he privacy interest [the plaintiff] asserts here in her unconscious, naked body captured by [the defendant's] son on videotape without [the plaintiff's] consent as he repeatedly raped her bears no resemblance whatsoever" to the newsworthy facts involving a threatening phone call from the *Bartnicki* case).

381. Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 NOVA L. REV. 289, 322–23 (2002).

382. Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1534 (E.D. Pa. 1990).

383. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

In 2004, the *Willamette Week*, a weekly alternative newspaper in Portland, Oregon, reported that former Portland Mayor and Oregon Governor Neil Goldschmidt had had a sexual relationship with a fourteen-year-old girl during the late 1970s.[384] The next year, the newspaper won the Pulitzer Prize for that reporting.[385] Nonetheless, this important story was seen by some persons within the community as a purely private matter and an inappropriate topic for public attention, given that the relationship had occurred three decades before.[386] As more courts give non-journalists the power to impose their own sensibilities concerning "newsworthiness" in assigning tort liability, investigative stories like the prizewinning investigative news report in Oregon may never be published.

"Liberty of the press is in peril," the Supreme Court noted in 1974, "as soon as the government tries to compel what is to go into a newspaper."[387] The same is certainly true when the government compels what should stay out. To leave such decisions to juries made up of people like those who would oppose the *Willamette Week*'s story—or like Marceaux and Amiri, who each argued unsuccessfully that they had the right to dictate the news—portends a perilous future for both journalism and the First Amendment.

384. Nigel Jaquiss, *The 30-Year Secret*, WILLAMETTE WK., May 12, 2004, http://www.wweek.com/story.php?story=5091.

385. Rukmini Callimachi, *Portland Weekly Gets Pulitzer*, SEATTLETIMES.COM, Aug. 5, 2005, http://seattletimes.nwsource.com/html/localnews/2002231177_week05m.html.

386. One of the comments posted by readers after the story on the newspaper's website reads, "It's time to accept this for what it is: a terrible mistake that happened THIRTY YEARS AGO! People change . . . ." Posting of John H. to http://www.wweek.com/story.php?story=5091 #comments_view (May 12, 2004, 00:00). Another poster called those who criticized the former mayor a "lynch mob." Posting of Scales of Justice to http://www.wweek.com/story.php?story= 5091#comments_view (May 13, 2004, 00:00).

387. Miami Herald v. Tornillo, 418 U.S. 241, 261 (1974) (quoting ZACHARIAH CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS 633 (1947)).