THE FIRST AMENDMENT BUBBLE

How Privacy and Paparazzi Threaten a Free Press

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1

An Introduction

Hulk Hogan, born Terry Bollea, is a professional wrestler. His bigger-than-life personality, halo of long white hair, and career that includes professional wrestling and reality television—both of which can be as far from real as can be—have made him an American icon.

They have also made him a media magnet.

In fall of 2012, Gawker, a website that boasts that its gossip today will make mainstream news headlines tomorrow, posted parts of a hidden camera video with audio of Hulk Hogan fully nude and engaging in sexual activity with a woman on a bed in somebody else's house. Approximately thirty seconds of the tape featured explicit sex. Gawker headlined the story "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe For Work, but Watch it Anyway."[1] At last count, more than four million people had, making the story the third most clicked on Gawker that year.

Then a judge ordered that the tape be taken down on privacy grounds.

Gawker grudgingly removed the tape, but left up its writer's full description, suggesting that both the video and its accompanying play-by-play essay were newsworthy and, therefore, constitutionally protected. "[T]he Constitution does unambiguously accord us the right to publish true things about public figures," a Gawker writer wrote, "[a]nd [the judge's] order requiring us to take down not only a very brief, highly edited video excerpt from a 30-minute Hulk Hogan [expletive] session but also a lengthy written account from someone who had watched the entirety of that [expletive] session, is risible and contemptuous of centuries of First Amendment jurisprudence."[2]

Whether Gawker is correct regarding the First Amendment and, if not, where the law should draw the line between free disclosure and legally punishable invasions is part of the larger question that this book explores. What legal and ethical restrictions exist, and should exist, regarding the publication of truthful news and information in today's privacy-interested yet overexposure society?

Gawker's interpretation of its First Amendment protection is not that ludicrous. Previously, law and social understandings had been premised on a certain bargain: Journalists were accorded broad latitude to decide for themselves what was sufficiently newsworthy and to publish accordingly. Individuals, in turn, were entitled to keep their private affairs to themselves and to guard against unwarranted intrusions unless they actively sought publicity or somehow became entangled in a newsworthy event.

This bargain rested on the assumptions that journalists could be trusted to regulate themselves through professional norms and standards, and that ordinary individuals would naturally take care to preserve their own privacy. On these assumptions, courts felt secure in construing the First Amendment broadly to favor truthful public disclosure by the press and to quash the temptation to second-guess the editorial judgment of journalists. The highly influential Restatement of Torts, capturing the prevailing sentiment under both common and constitutional law, helpfully defined news as any information "of more or less deplorable popular appeal" and stopped short only at the point of "morbid and sensational prying for its own sake."[3] With such a capacious definition, courts understandably rarely found a violation.

In recent years, however, there has been an erosion of both fundamental assumptions underlying this balance between press rights and personal rights. Journalism as a whole has become less reliably professional as its ranks have expanded to include push-the-envelope websites like Gawker and other new media—and even traditional media outlets have buckled ethically in response to intense competition. Evolving public tastes and market pressures have led to a melding of news and entertainment, reshaping programming decisions in ways that discourage self-restraint and encourage use of unfiltered, audience-generated content. Citing constitutional freedoms, reporters have welcomed or begrudgingly accepted free-wheeling websites and untrained bloggers within their protective First Amendment shield. At the same time, the sense of decorum or fear of social sanctions that once inhibited individuals from sharing intimate details of their private lives is giving ground to a stream of

confessional internet posts and reality television shows. Rapid technological advances, meantime, are accelerating both of these trends, making possible unprecedented new harmful intrusions and enabling their world-wide dissemination in an instant.

The result is that courts and other legal actors are beginning to rethink the balance between privacy rights and public interests in free disclosure. The deference that once shielded journalists from editorial control by the government is eroding as courts are showing a new willingness to limit public disclosure of truthful information. Increasingly, personal privacy seems deeply vulnerable and deserving of new, more potent protections, just as the expansive new practices and identity of media are stretching the credibility of journalism's claim to occupy a distinctive and privileged place in democratic life. The combined effect creates a sort of First Amendment bubble, in which constitutional protection for press and news media continually expands to the breaking point, jeopardizing future protection not only at the margins but also for the core.

This much is clear: the *New York Times*, in contrast, did not publish the Hulk Hogan sex tape on its website. Lending significant credibility to Gawker's motto about it sourcing mainstream news, however, the venerable newspaper published a graphic containing risqué celebrity tweets about it above a single short paragraph suggesting that the tape was "horrible" to watch but "delightful to discuss."[4] The fact that it did not publish or link to the tape was to be expected; today's mainstream media maintain privacy-based ethics provisions that would caution against such publication, even if a single journalist's internal ethics code would push for it, and even if its attorneys would approve such coverage. The fact that the *Times* published others' humorous tweets, however (including one that suggested that Hogan had already gone "one-on-one" with someone who was "faking it," another about him "finishing" without using wrestling moves, and a third commenting on Hogan's "performance"), reflects the pressure that mainstream publications feel in covering sensational stories published by other, less ethically bound publications. Today, even the loftiest of reads must fight for the four-million Gawker readers, and others who know of the Hulk Hogan sex tape, and wonder why mainstream publications have not reported on it in a significant way.

The law, meantime, is playing catch-up. It grew responsively in a decades-old world where journalism was credited with pushing democracy forward and where Supreme Court Justices wrote in their powerful opinions that law

that was too restrictive would chill journalists who needed significant breathing space to report robustly. Given that sort of legal and journalistic history, it is not surprising that the law today remains deferential. But the jurists who wrote and followed those words in their opinions had not faced a First Amendment-based argument that an explicit sex tape was in the public interest for its news value and therefore should be allowed to remain on a gossip website, no matter its celebrity star's apparent embarrassment and his wishes that it be taken down. Courts in such situations, then, are left with flowery pro-press language but a decreasing sense that such press deserves support. The Hulk Hogan case is not the Pentagon Papers case, one that involved the publication of information about war, after all; it involves an act so intimate that even the media-protective Restatement suggests that celebrities should be able to keep their sex lives private.

Abner Mikva, a retired judge who once sat on the federal appeals court for the District of Columbia, predicted that this would be our future, and that there would come an anti-media shift in the courts. He warned in a 1995 law review article that changes were afoot in First Amendment doctrine because of what judges perceived as an "irresponsible" press:

> I think that I can say 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. That sounds like a scary message for me to deliver. . . . I have been a judge for fifteen years, and now that I have taken off my robes, one of the first things I must say is: "Watch out! There's a backlash coming in First Amendment doctrine."[5]

That backlash and the resulting impact may well be here—and the Hulk Hogan case itself offers a circuitous example.

A New Newsworthiness

The Florida state court judge's order to Gawker to take down the Hulk Hogan sex tape was not the first or last legal proceeding arising from the publication of the video. Hulk Hogan had initially brought his claim to federal court, arguing that the court should suppress publication of the tape on invasion-of-privacy grounds. Gawker argued in response that it should be allowed to leave the tape up because, among other things, it showed a television star engaging

in sexual activity in a very human way, a contribution to public understanding that Gawker considered newsworthy.

Perhaps not as shockingly as it might otherwise be, given strong First Amendment protection for journalism, the federal district court judge sided with Gawker. The judge explained that he was hesitant to do anything that might violate constitutionally protected expression and refused to grant what he considered an unconstitutional prior restraint.[6] The court's analysis offered a window into the power of the press and the related danger of seeking celebrity today. It found that the sex videotape itself was newsworthy, in part, based upon Hogan's work as a reality television star:

> Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.

The court explained that strong legal precedent led it to defer to Gawker's editorial discretion in posting the explicit tape, quoting an earlier deferential court in a very different case that had held that "the judgment of what is newsworthy is primarily a function of the publisher, not the courts." Any other outcome, the Florida federal court implied in line with that earlier case, would cause Gawker to suffer a loss of First Amendment press freedom that, based on years of precedent, rightly trumps such an individual's privacy concerns. The decision to post the Hulk Hogan sex tape, it found, was "appropriately left to [Gawker's own] editorial discretion" and, in keeping with older legal precedent, the court refused to sit as a sort of superior editor and order that it be taken down.

That decision, if not completely surprising given strong legal precedent, was notable. It marked the first time that a court had decided that a plaintiff who would normally be protectively cloaked heavily in privacy—a man explicitly pictured nude and engaged in sexual activity in a video taken surreptitiously in a private bedroom—must defer to a proudly push-the-envelope news website that had decided that such information was appropriate for excerpted but otherwise unedited public viewing.

The decision also shows the lasting legacy of First Amendment jurisprudence built when the *New York Times* and news organizations of its kind were

the defendants who stood before the courts. To defer to a respected and generally respectful publication and its well-trained journalists took little effort when a story had real news value; protective language remains from the Pentagon Papers case, for example, when the *New York Times* successfully argued that it had the First Amendment right to publish a trove of documents on the conduct of a controversial war. In fact, when Hogan brought a second, copyright-based claim in federal court against Gawker, the court similarly rejected it, noting that even though the sex tape depicted "explicit sexual activity" and nudity against his wishes, "[t]he Supreme Court has repeatedly recognized that even minimal interference with the First Amendment freedom of the press causes an irreparable injury."[7] The court then cited as support for that principle two cases that involved unconstitutional prior restraints on crime-related news, traditionally among the most newsworthy of stories.

Some evidence in the Hogan case of the backlash of which Judge Mikva warned came when Hogan brought his privacy claims to a Florida state trial-level court. There, in contrast, the judge granted Hogan's request for a preliminary injunction and ordered Gawker to take the tape down. Gawker's attorney is quoted in the court hearing's transcript—published as part of a Gawker webpage titled "A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won't"[8]—as arguing that the judge was "not permitted to make an editorial judgment" about what news is publishable and what is not. But the court rejected that longstanding First Amendment argument and sided with what it said was the "public interest" in protecting the plaintiff's "private sexual encounter."

In doing so, of course, the court flatly rejected in spirit if not in language the federal district court's constitutional worries and that court's reliance on past Supreme Court precedent, lifting an individual's privacy, at least for the moment, above Gawker's strident and traditionally powerful First Amendment press freedom arguments.

This may have been a very good thing for individual privacy, but it was also a very, very bad thing for the press. After all, a decision admonishing Gawker and granting an extraordinarily rare preliminary injunction to a plaintiff on privacy grounds could well have had far-reaching effects for all media, even in cases involving different and perhaps far less heinous facts.

In early 2014, privacy, in turn, suffered a loss. A Florida state appeals court reversed the trial court's decision and, in doing so, supported in part Gawker's claim that it could publish whatever truthful thing it wished regarding

celebrities. The court wrote that such "arguably inappropriate and otherwise sexually explicit content" could well be of legitimate public interest because it addressed "matters of public concern"—and that Gawker enjoyed the "editorial discretion" to publish the explicit tape. This court too blamed Hulk Hogan in large part for making his sex life of public interest, pointing to media appearances and—in a surprisingly broad critique that affects expression of a different sort—his autobiography in which he had written about an affair in a repentant and decidedly innocuous way.[9]

Should that reasoning stand as the case continues, it could well be that any public figure's private life in its most explicit sense will be fair game should the celebrity be seen as courting media interest or discussing personal relationships. The privacy implications for many are enormous.

No matter the outcome, the Hulk Hogan case exemplifies the clash between a bolder media and the privacy it can decimate. Consider this: Gawker's founder and owner, Nick Denton, boasted in 2014 that his website routinely published private information that an ethics-abiding newspaper would not and suggested that the crowd-sourced ratting out of anyone and the "spilling of secrets" including sex pictures would be healthy for most people.[10] Just a few months earlier, in contrast, U.S. Supreme Court Justice Sonia Sotomayor had written in her autobiography that with her ascent to the nation's highest court had come the "notorious," "profoundly disconcerting" and "overwhelming" experience of being suddenly propelled into the public eye, a life that brought with it what she called "psychological hazards."[11]

The one behind the computer keyboard with the power of the press, therefore, buoyantly works toward an end to privacy while the one behind the bench with the power to interpret that freedom considers privacy necessary for personal well-being.

It seems clear which power will ultimately triumph.

"There is still a tendency among members of the media to view the courts in somewhat romantic terms," constitutional law scholar David Pozen said in 2014, nearly twenty years after Judge Mikva's warning and within a few months of Gawker's claim that it had the right to publish whatever truthful information it wanted. "I'm not confident that remains a descriptively accurate view of the courts."[12]

Selfies and Our Current Conceptions of Privacy

The Hulk Hogan saga has an interesting and relevant twist. Just a few months after Hogan had successfully argued that the sex tape should be removed from Gawker, Hogan himself posted his own set of differently graphic pictures. According to news accounts, Hogan tweeted to his followers on the Internet that a radiator had exploded on his hand—and attached a photograph of the injury. "Would you like it rare?" he asked his Twitter readers, referring to his burned and bloodied hand.[13]

After receiving several complaints, Hogan took the images down. "I apologize for posting my burned hand photos," he wrote, "with all the feedback I now realize I really should take a moment before I make a decision [to tweet]." That a star who continued to defend himself in court against Gawker's desire to post his sexually explicit tape needs such a lesson seems inconsistent.

And yet, in a privacy sense, it is the story of many Facebook "friends," Instagram users, and Twitter tweeters and, therefore, has relevance here. As media invades privacy more often with resulting criticism and backlash from courts, many people continue to willingly share information about themselves online with little regard for their own privacy and the potential public response. Consider, as a second example, journalist Geraldo Rivera's Twitter self-photograph, taken in front of a bathroom mirror with a towel only slightly covering his groin, sent to followers in summer 2013. He later removed the photo, explaining that he had learned his lesson.[14] Congressmen Chris Lee and Anthony Weiner, each of whom sent into the world highly embarrassing photographs of themselves—colloquially known as "selfies"—and each of whom were outed by what might be called quasi-journalists (a term I will use here to differentiate them from more traditional, mainstream journalists) could have told him that.

We are, therefore, at a doubly interesting time in terms of privacy and media. As some courts seem to be growing more protective of privacy, weighing it above freedom-of-the-press and freedom-of-information interests, many individuals are protecting their own privacy less, sharing personal information with the world, oblivious that there are never-friends and former friends who might want to see it and publicize it. Privacy law scholar Anita Allen has rightly called this "the era of revelation."[15] At the same time that courts are grappling with press and privacy interests in graphic sex tapes, then, they also must consider the issue of whether a sex picture freely posted to

a limited group of people or even the world can and should ever again be private.

The answers are not easy. Consider, for example, the arguments in favor of a so-called right to be forgotten, an idea now codified as law in some sense in some parts of the world. At its most protective, such a concept creates liability for those who publish photographs and information that the subjects wish removed, even if the subjects had once willingly posted it themselves. Privacy law scholar Jeffrey Rosen has written that the right to be forgotten "represents the biggest threat to free speech on the Internet in the coming decade."[16] Those in favor argue that young people do silly things that can harm their reputations as they get older; fifteen-year-olds who post to certain friends on Facebook sexually graphic information or teens who post photos of themselves with hardcore drugs would likely want those photos suppressed should they ever decide to become a teacher, run for Congress, or apply to the FBI. Those who support the right to be forgotten or the related right to erasure argue that, indeed, the bell should be able to be unrung so that we have a chance to make mistakes when we are young and then change our lives for the better. As memories fade, the argument goes, so should reminders of indiscretion. There are those who support a similar law in the United States.

And there are many in the United States who might wish to avail themselves of the opportunity to unring the bell. A 2013 Pew survey found that the number of young people who post information about themselves on social media sites is growing. According to a Pew poll released in 2013, this is what young people share with their, on average, 300 "friends"—and, for a significant minority, the world:

- 91 percent post a photo of themselves, up from 79 percent in 2006.
- 71 percent post their school name, up from 49 percent.
- 71 percent post the city or town where they live, up from 61 percent.
- 53 percent post their email address, up from 29 percent.
- 20 percent post their cell phone number, up from 2 percent.[17]

Researchers also asked several new questions and the answers are similarly revealing:

- 92 percent post their real name to the profile they use most often.
- 84 percent post their interests, such as movies, music, or books they like.

- 82 percent post their birth date.
- 62 percent post their relationship status.
- 16 percent have set their accounts to show their location information automatically.
- 24 percent post videos of themselves.

What this means is that many young people reveal much about themselves online and, while 60 percent of the teens have set their accounts to "private," 40 percent had made at least part of their profile public. Another 60 percent had deleted or edited a post or photograph that they later regretted, which means that many of those items had already been published to the world.

Consider the related example of a high school student who in 2010 and 2011 openly posted on a college admissions forum where most posters remain anonymous, her full name, her high school, her Facebook web page, her desire to go to college at one of the top schools in the United States, her psychotherapy treatment for anxiety, that she liked to "party"—and, one time, the fact that she was at that moment driving eighty miles per hour on a highway and posting to the website at the same time because, as she suggested, she was bored. Right before she signed off of the forum, presumably forever, she had excitedly noted that a representative from her dream university had called her teacher to ask about her and, among other things, how she handled anxiety. Shortly thereafter, apparently learning about her honest and highly identifiable and informational posts on the forum, her college counselor ordered her to stop posting immediately. A Google search showed that she ultimately matriculated at a different college. Poignantly, she had responded to concerns that she had revealed too much about herself by explaining she had confidence that the website allowed people to remain anonymous.[18]

What the numbers and that story seem to show is that self-publishing teens believe that 300 "friends" will keep their secrets or that others simply won't be interested given their seeming insignificance among the world's billions of internet users. But in today's world, the teens who feel that way are sometimes wrong, and they could eventually become the strongest supporters of a right to be forgotten and, in years to come, the fuel for an even greater push toward privacy.

In 2012, as another more notorious example, just after President Obama was elected a second time, a Tumblr account calling itself "Hello There, Racists!" posted multiple tweets and Facebook posts from young people

around the country who were responding to the election's outcome. The posts were indeed offensive and racist and seemed meant for a small group of followers; "I hate black people. Go back to Africa where you belong" is part of an additionally hateful post that remained on Hello There, Racists! many months later.[19] Some readers of the racist tweets or racist posts had apparently sent helpful links to persons running the Tumblr account and, suddenly, what was meant for some became available to the world.

Many of the racist posters, however, were still in high school. One of them, a girl named Kayla, is pictured atop her racist post, smiling for the camera and looking all of fourteen. The Hello There Racists! Tumblr website gives her full name, the small town where she lives, the name of her high school, her boyfriend's full name, and links to her now-deactivated Twitter and Facebook accounts. On the remaining page of the now apparently dormant Tumblr, nearly twenty different young people are outed by name, location, high school, other identifiers, and their racist posts.

Eventually, those in mainstream media—whose ethics codes would likely have prevented such outings by name—took notice. A writer for Slate, for example, posted a piece she titled "Hey Internet, Quit Outing Kids for Racism"[20] and quoted another Slate contributor: "[T]hese sites are pinning kids like butterflies as permanent racists. These idiotic, repulsive remarks will follow them for years and have potential effects on their ability to go to college, to get jobs. We need to tread very lightly with the privacy of minors." As of 2014, the Hello There Racists! website remained online.

Or take as related examples those who have sent nude photographs of themselves to others before breaking off the relationships and those who have had such photographs stolen from computers or cell phones. Several so-called "revenge porn" sites publish those nude photographs. One, IsAnybodyDown, linked identifying information to some photos and offered prizes for help in identifying the people pictured in others. In an interview with the NPR program *On the Media* in 2012, the owner of the website explained that he believed that laws involving nudity in the United States should be changed, that he hoped nude photographs of everyone would be public in ten years, and that his website was a "progressive cause" in that direction. "These are not victims," he explained, "these are people who have decided to publically transmit their information" over the Internet. Important here, he also explained that he had always wanted to be a journalist and that, after a failed job search, the website was "a last resort."[21]

In these examples, mainstream media would likely have published the information differently, if at all. Ethics codes remind journalists to tread carefully in identifying young people in any story, let alone one where their posts could haunt them forever. And mainstream ethics codes would certainly prevent the worldwide publication of a nude photograph meant for one. Even if a mainstream journalist would want to include such information in a story, the newspaper's editors, following traditional newsroom ethics provisions on privacy, would not allow it.

One wonders what effect these sorts of websites have had on judges' perceptions of media and the value of privacy, given recent warnings about constitutional limits for irresponsible journalism. It is not too far-fetched to imagine that judges today would be pushed even further away from traditional constitutional protections. In other words, even though those websites might not be considered mainstream journalism, their activity could well create a greater paternalistic sense that we must act to protect privacy and a corresponding sense that media irresponsibility must be curbed.

The People and the "Press"

In September 2012, a reader wrote a letter to the editors of *Vanity Fair* in response to an earlier piece in the magazine on tabloid journalism. In the letter, she blamed many societal problems on media, suggesting that "[s]itcoms, reality shows, tweets, most contemporary print news, and broadcast news—infotainment—are responsible for [the] massacre of our brain cells, the English language, and what's left of our collective intelligence."[22]

The judges' opinions that favor privacy over press freedoms and plaintiffs over publications, then, reflect that opinion on a broader and more powerful scale: that media is spinning out of control, creating harm that is both individual and collective, and that something needs to be done about it legally before we suffer tremendous societal loss.

The most recent poll numbers seem to show that many Americans would agree that current law must become more responsively restrictive to changes in media. In 2013, the Newseum Institute's First Amendment Center released a First Amendment survey in which it reported that 34 percent of Americans today believe that the First Amendment goes "too far."[23] Relevant to the future of First Amendment freedoms, nearly half of younger Americans

aged eighteen to thirty believe that the First Amendment is too expansively protective.

A similar survey, done in 2005, focused more specifically on the press itself, asking respondents directly if the press had too much, too little, or just the right amount of freedom. Nearly 40 percent answered that journalists had too much freedom.[24] Even though that specific question was not asked in 2013, the 2013 results reflected a related sensibility: nearly half of those surveyed believed that journalists should give up their sources to make America safer, only 1 percent responded that Freedom of the Press was the most important freedom that Americans enjoy, and only 14 percent could name Freedom of the Press as a First Amendment right.

Recent opinion polls about the quality of today's journalism show a similar lack of enthusiasm for the press. A 2011 poll done by the Pew Center for the People and the Press showed that "[n]egative opinions about the performance of news organizations now equal or surpass all-time highs on nine of 12 core measures," including favoritism, political biases, and inaccuracies, that the Center has been tracking since 1985. In that same poll—and in contrast to older laudatory Supreme Court language about journalism's key role in democracy—42 percent of Americans reported that they felt that the press actually harms democracy (the same percentage said it helped). This was the first time Americans had answered the democracy question in such a negative fashion.

Perhaps this is because America's newsrooms are changing and seemingly moving away from traditional news coverage and story depth. Certainly the number of mainstream journalists continues to fall. The Pew Research Center's Project for Excellence in Journalism 2013 report found that newsrooms had lost 30 percent of their staff since 2000 and that two newspaper chains and eighteen individual newspapers had closed all of their foreign bureaus, with additional outlets trimming staff overseas. In Washington, D.C., too, the seat of government and a hotbed for stories of important public interest, the report showed that news organizations had also "drastically reduced their coverage."[25] Shortly after the release of the Pew report, the American Society of News Editors confirmed that in the one-year period from 2011 to 2012 alone, there were 2,600 fewer full-time professional editors working at newspapers in the United States.[26] And coverage seems to have been affected; Pew called it a "shrinking reporting power." Its report on journalism showed, for example,

that local broadcast news coverage of crime and trials had dropped from 29 percent of stories in 2005 to 17 percent of stories in 2012 and that politics and government stories had decreased from 7 percent to 3 percent. Meantime, coverage of "bizarre" stories and accidents had increased from 5 percent to 13 percent and weather, traffic, and sports news grew to 40 percent of a typical newscast. Such stories require less effort than would investigative pieces, for example.

What all this means is that now is a troubling time for the press not only in the courts, but also in the court of public opinion, reflected in the numbers just stated and in the letter to the editor linking media's decline with a decline in our collective intelligence. But the *Vanity Fair* writer made another important, albeit unintentional point. When she criticized media, she did so by lumping everything together in her condemnation, equating newspapers with reality television shows and sitcoms. The same phenomenon can be seen elsewhere, including a Huffington Post article from 2013 that condemned "media" for criticism that went too far and included in its examples the satirical humor newspaper the *Onion,* the sensational gossip website created by blogger Perez Hilton, Donald Trump, and the *New York Times.*[27] When 40 percent of Americans say that the press has too much freedom, they could well be thinking of media in a general sense: as much of Honey Boo Boo as Bob Woodward or as much of The Dirty, a website that seems to specialize in hypercriticism of women's bodies, as the *Los Angeles Times.*

In an article in a legal magazine about British tabloids accused of tapping into public figures' voicemail messages, as another example, the condemnation and calls for a change in legal response reached stateside. The behavior by the tabloids in England, the article noted, had changed perceptions that media in the United States are "the good guys" wearing white hats, as many law school classes portray them. Instead, as one constitutional law professor explained, the phone-tapping scenario should awaken all to "the political and social power of the media" with a reminder that "[t]he First Amendment has never been read to confer upon reporters and editors the right to break the law." Collectively, the article notes "[t]he news media, already faltering in both financial and social status in the post-Internet era, faces another hit to its overall reputation."[28]

In other words, many different types of publications in many different places come under the "media" umbrella today and attempting to define the "press" has become increasingly difficult. Today, in the United States alone, traditional

print journalism has morphed into broadcast news that has morphed into *60 Minutes* that has morphed into *Dateline NBC* that has morphed into real-life crime programming like *The First 48* or *Cops* that has morphed into *Bait Car* (a program depicting real-life incidents of car theft using hidden video) that has morphed into *Cheaters* (a program that follows people suspected of infidelity using hidden cameras) that has morphed into *The Real Housewives of New Jersey* and beyond. The point at which the publication's focus loses its journalistic value and is no longer "press" or "journalism" or even truly "real" is not clear—especially because each is supposedly nonfiction and is said to reveal at least some truthful information. Traditional news, then, may be suffering not only from its own troubles and its own news judgment, but also from the choices made by push-the-envelope reality programming that many find distasteful. All merge together as the "media" we condemn.

A study released in 2013 showed this on a different but still very relevant level. The study's researchers created a news blog on which they posted a story about nanotechnology. They then posted what they called "rude" and "nasty" comments after the story—including suggestions by commenters that those who did not support the technology were "idiots" or "stupid"—and they exposed half of the sample group to that story and those comments. The other half of the sample group was given the same story with far more civilized comments after it. The rude comments, the researchers reported, actually changed the participants' interpretation and understanding of the news story, causing readers to believe more strongly in the technology. In other words, participants seemingly blended the news in the news item with comments that followed from their anonymous peers and read them as one. "This study's findings," the researchers wrote, "suggest perceptions towards science are shaped in the online blog setting not only by 'top-down information,' but by others' civil or uncivil viewpoints, as well."[29]

That study could well affect public perception of most mainstream journalism websites. The *New York Times*, for example, once reported that Tiger Woods had apologized to his then-wife for personal failings. The newspaper then left up as the first (perhaps defamatory) comment from a reader that "[s]he shouldn't have hit him so hard." This suggested that a blow from a golf club in Woods' wife's hand had given Woods a concussion that had led him to crash the car at the end of their driveway,[30] a gossipy allegation not covered in the story. A reader could then have unknowingly blended the comment with the reported information and remembered incorrectly that the newspaper

itself had engaged in what might be called tabloid journalism. Or a viewer may consider *Bait Car*'s coverage of car theft the equivalent of crime-related journalism, even though *Bait Car* uses a sometimes mocking tone, video from hidden cameras, and a microphone placed within the car. That difficulty in drawing a line, between facts and comments, and between journalism and quasi-journalism, is highly relevant in today's privacy cases.

The Prosecutor and His Privacy

One of the best recent examples of dissatisfaction with media in a broad sense and how it can affect privacy jurisprudence stems from the television program *To Catch a Predator*, a series aired on NBC as part of its *Dateline NBC* programming. Producers for *To Catch a Predator* worked closely with Perverted Justice, a group of concerned adults who pretended to be very young teens in internet chat rooms, awaiting what often turned out to be a graphically sexual come-on from a much older man. The "teen" would then suggest that they meet in person, the man would show up at a prearranged location (usually a house rented by NBC) often with condoms or alcohol, at which point the "teen," an actor, would quickly excuse himself or herself. As the program progressed, its host, Chris Hansen, would appear and would confront the man, asking him detailed questions about the explicit internet chats. As the uncomfortable conversation continued, previously concealed photographers and sound technicians would reveal themselves, swarming around the man in the kitchen, and Hansen would explain that he worked for NBC. At that point, the man usually would attempt to leave and waiting police would promptly arrest him.

William Conradt, a once-elected fifty-six-year-old county prosecutor from Texas who had unsuccessfully run for judge and then had returned to prosecution, was one of the men who chatted explicitly with a boy he thought was thirteen. Online, Conradt pretended to be a nineteen-year-old college student; unbeknownst to Conradt, of course, the thirteen-year-old boy was really an adult Perverted Justice worker. Over the course of several days, Conradt sent the boy explicit photographs, including at least one of a penis, and shared multiple graphic sexual descriptions and specific sexual desires with the boy, both in messaging and in phone calls.[31]

Conradt and the thirteen-year-old then agreed to meet. But Conradt failed to arrive at the house despite his assurances that he would. At that point, as

Perverted Justice would later explain on its website: "We began to notice that information was disappearing—Conradt was deleting profiles—and when we advised the police of this, they chose to act then on the information, as Conradt had already broken the law"[32] by communicating in such a manner with someone he seemingly presumed to be an underage child. NBC's journalists meantime had covered much of the interaction between Conradt and the child and had interviewed police about their decision to arrest Conradt. Some pundits would later criticize them for playing far too active a role in that attempted arrest.

After receiving a warrant, police officers and a SWAT team arrived at Conradt's home. The *To Catch a Predator* camera crew, including Hansen, also arrived. Most watched from the sidewalk and some recorded the police activity. But this arrest was not as easy as others: when the police entered Conradt's home, he shot and killed himself.

It is not known if Conradt had realized that journalists had outed him, if he even knew that journalists were somehow involved with his impending arrest, or if he realized that he would soon be featured on *To Catch a Predator*. Perverted Justice later posted on its website that police had found "a large child pornography collection" on his computers. Obviously, with police at his door, Conradt likely would have known or would have at least suspected that his chats and the lurid photographs he had sent days before had been made available to police and he also would have known that any child pornography in his possession would be discovered: he had prosecuted cases involving child sex abuse himself and understood the forensic investigation that was necessary for a solid case against a perpetrator. He also would have known that his arrest would be big news even if no journalists were there to record it because he himself had given interviews to media after similar arrests.[33]

But William Conradt's sister wanted NBC to pay for what she considered its misdeeds leading to her brother's suicide. She sued the network for invasion of privacy and intentional infliction of emotional distress on behalf of her brother's estate. By showing up at the arrest and by playing such an active role, she argued, NBC had invaded Conradt's privacy and had caused him great emotional harm that had led to his suicide.

Arguably, such claims would have been dismissed out of hand by courts in the past. Arrests—especially the arrest of a prosecutor, a public official, charged with the sexual solicitation of a child—are newsworthy. As early as 1931, the U.S. Supreme Court had written as much, crediting the press for reporting wrongdoing, especially the wrongdoing of public officials: "'The

importance of this [kind of reporting] consists, besides the advancement of truth[,] . . . [in providing means] whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs,'" the Justices wrote, citing historic language.[34] And the highly influential Restatement states specifically that *any* arrest is of legitimate public interest and, therefore, newsworthy.[35]

But, the federal trial court hearing the *Conradt* case decided that the intentional-infliction-of-emotional-distress claim was a valid one, and rejected NBC's call to dismiss the case.[36] It did so with surprisingly strong language and with surprising precedent. Initially, the court rejected the privacy claim but only because legal precedent meant that the right to sue for privacy invasions of such a sort dies with the plaintiff. The emotional distress claim, however, had no such restriction, and the court upheld it even though the claim decidedly sprang from the same privacy-related concerns.

First, NBC's actions, the court wrote with a decidedly and almost naïvely pro-plaintiff tone, caused a blurring of news and law enforcement that had harmed Conradt. "[T]o avoid public humiliation," the court wrote, "an otherwise law-abiding man was shamed into committing suicide, before he had been charged by any court, before he had any opportunity to be heard." NBC, in contrast, was in a "position of power" and should have known of Conradt's potential for emotional distress.

Second, the court focused on one of the necessary and most difficult elements to prove in any emotional distress claim: outrageous behavior on the part of the defendant, frequently defined as behavior that is utterly intolerable in a civilized society. In the *Conradt* case, the court found the potential for such outrageousness in NBC's journalistic choices and how it felt those choices compared with journalism ethics. "[T]he failure to abide by . . . journalistic standards may indeed be relevant" to the jury, the court wrote, and pointed to various provisions it had found within the Society of Professional Journalists Code of Ethics, provisions not mandatory but aspirational and voluntarily accepted by journalists as a guide for ethical behavior.[37] The *Conradt* court, however, used them as a demarcation point for liability, finding that they could be used to prove outrageousness of behavior, including the ethics provisions that suggest that journalists should:

- Recognize that gathering and reporting information may cause harm or discomfort.

- Show good taste. Avoid pandering to lurid curiosity.
- Recognize that private people have a greater right to control information about themselves than do public officials and others who seek power, influence or attention. Only an overriding public need can justify intrusion into anyone's privacy.

Any reasonable jury, the court wrote, could have found that the *To Catch a Predator* journalists had violated all three provisions "by failing to take steps to minimize the potential harm to Conradt, by pandering to [the American public's] lurid curiosity, . . . and by manufacturing the news rather than merely reporting it." Jurors, the court found in deciding that the case should continue, could well decide that "NBC [had] created a substantial risk of suicide or other harm, and that it [had] engaged in conduct so outrageous and extreme that no civilized society should tolerate it."

Many would agree that some of the journalistic procedures used by *To Catch a Predator* were distasteful; a well-respected journalism ethics organization, for example, criticized the program as "not good journalism."[38] But consider the implications of the court's decision, its readiness to sit as a kind of super-editor, and its reliance on ethics code provisions for news media today. First, any newsgathering and presumably actual news coverage that causes "discomfort" could well become the basis for an intentional-infliction-of-emotional-distress claim. Second, any time newsgathering and presumably actual news coverage fails in a judge's or jury's mind to "show good taste" and merely panders to "lurid curiosity," the subject of that news coverage will have a valid claim. Third, even someone who is a public prosecutor, a man who was once elected to his post and who had previously run for judge, should be considered a "private person" who has a right to "control information" about himself.

Finally, and perhaps most troubling, the court implied that a news item's newsworthiness should be determined by public "need" as opposed to public "interest"—and that the arrest of a public prosecutor on child sex solicitation charges would not necessarily fit into the former category. If the standard becomes one of "need," the definition for legally acceptable news becomes much narrower. Perhaps the public needs to know about matters involving government and schools and war and the environment and other weighty news items. But convincing a court that the public needs to know about arrests, members of Congress who send nude photos to younger Facebook friends, or even celebrity marriages would indeed be a challenge.

Conradt, therefore, turns traditional media law on its head by holding that coverage of a public official's arrest could indeed be the basis for tort liability because it potentially had made the public official feel bad. Not surprisingly, that legal outcome has also led to copycat cases in other jurisdictions, filed by men who had been outed on the *To Catch a Predator* series. Three of the claims were at least initially successful.[39] The *Conradt* case itself settled just after the trial court judge released his decision and, therefore, never reached a jury.

But even if such cases are eventually dismissed or eventually settled, they have the very real potential to change journalistic practices. A media attorney might now tell journalists to be cautious about reporting arrests, even an arrest of a public official. After all, there is good reason to be cautious if the liability standard is that a news item caused the subject "discomfort" or if it might be considered in bad taste or if there arguably is little public "need" for the information.

After the *Conradt* decision and its focus on ethics, the Society of Professional Journalists quickly moved to add a statement to its code in an attempt to ward off similar lawsuits: "The code is intended not as a set of 'rules' but as a resource for ethical decision-making," the statement reads. "It is not—nor can it be under the First Amendment—legally enforceable."

It is unlikely, however, that the same judges who criticize journalism as the sort of profession that will "not give up the value of sensationalism and the profit of the hunt and the smear" and who compare journalists to snapping jackals, motivated by sensationalism and newspaper sales[40] will abide by the SPJ's self-serving legal advice.

The Blagojevich Decision and Beyond

What all of this shows—from the Hulk Hogan sex tape to teenagers' use of Facebook to push-the-envelope programming—is that we live in an age of over-exposure, at times bombarded with images and information once considered inappropriate for public consumption. Related changes in media—Gawker's decision to publish the tape, for example, or the *New York Times*' allowance of salacious comments after an appropriately ethical news story or *To Catch a Predator*'s close work with a vigilante group and police in arresting child sex predators—help fuel a sense that something must be done before all individual privacy is threatened and society as we know it crumbles. Now, journalists, whomever they are, seemingly cannot be trusted to make

the right news decisions, and, in turn, the First Amendment and other journalistic legal tools are proving not to be as effective a shield or sword as they once were.

The chapters that follow chart this new age. They first explore the past, when media was at its peak and powerful protections followed. They then look to the present, a time when state and federal courts alike seem to be changing the course of constitutional and other legal protections, many times in the name of privacy. They examine the trouble with media, both mainstream journalism that pushes the envelope in a seeming effort to compete, and far-from-mainstream publications with little internal or external ethical restrictions. Later chapters argue that, because of these media practices, because of our over-exposure society, and because many legal arguments made by media are wrapped in a First Amendment framework despite appalling underlying media wrongs, traditional First Amendment protections vital to a robust press are in danger. Finally, the book ends with a call for change both in the law and in media practices—and argues that that is the only way we can prevent the burst of what has become a fragile First Amendment bubble.

At this book's heart, accordingly, is the backlash that Judge Mikva warned of in the mid-1990s: that irresponsible journalism was leading to a perceived need for changes in media-protective First Amendment doctrine. A related decision from Judge Mikva's home state of Illinois seems an appropriate full-circle end to this overview chapter.

The underlying case[41] was the criminal trial of former Illinois governor Rod Blagojevich, charged with attempting to gain personal benefit from the nomination to a vacant U.S. Senate seat. Breaking with tradition, the judge hearing the case, James Zagel, decided that no jurors' names or identifying information would be released to media until after the verdict. Mainstream media, including the *Chicago Tribune* and the *New York Times,* however, argued that they had a First Amendment right to access to a criminal trial and that the judge had no justification for keeping the names from them. But Judge Zagel disagreed in an opinion that tightens the reins of the press in the name of privacy.

First, Judge Zagel noted the difference in technology today and what he called astoundingly ubiquitous social networking websites that have great capacity to insult and could well lead to jurors' worry that their privacy had been invaded. "There is little precedent involving the unique circumstances surrounding this case," he wrote, "against a relatively new backdrop of public

openness via blogs, electronic communication, and social networking sites." In doing so, he suggested that there would be a difference between the more controlled mainstream media that had filed the request and bloggers with different senses of ethics and decorum, including those who would use the trial simply "to be noticed." In response to assurances that the journalists would limit coverage of jurors if their names were released as requested, Judge Zagel explained that the mainstream journalists "do not speak for or represent all media" and suggested that some publishers would act differently.

Second, the judge had very real complaints about the mainstream press and about the "potential transformation" it had of turning jurors' personal lives into "public news." He grouped all media when he complained about modern, sometimes distasteful news judgment: "There is little emphasis today in media or entertainment on the notion of withholding judgment until all the facts are in," he wrote, pointing to a CNN poll from summer of 2010 of its viewers about how to stop the BP oil spill and a who-done-it poll from a so-called citizen journalism website regarding teenager Natalie Holloway's presumed murder. In contrast, the judge wrote, "[t]here seem to be few requests for public input on more obscure issues such as arms treaties and city parks," criticizing mainstream news judgment in a way that was utterly unnecessary to his underlying decision about the release of jurors' names.

Third, the press intervenors in the case attempted to cloak themselves with the First Amendment in a somewhat novel way that harkened back to journalism's golden age in which *Washington Post* reporters brought down a corrupt presidential administration. The press intervenors argued that if they were given the names of jurors in advance, they could then play a "watchdog" role in ferreting out wrongdoing by these jurors, presumably revealing conflicts of interest that the jurors had failed to identify to the court and serving almost as an investigative arm of the judiciary. The argument, a curious one given the judge's concerns about jurors' privacy, failed to impress the court.

Finally, it was clear that the judge's own sense of a loss of privacy contributed to his decision to protect the jurors. Throughout the opinion, Judge Zagel shared that his privacy had been invaded by phone calls, emails, and letters from the public springing from the case. "On one occasion," the judge wrote, "I was stopped on the street by a member of the public, who[m] I did not recognize, and advised" about what to consider in the underlying case. It is striking that the judge invoked his own experience of privacy loss in deciding to protect the jurors—this is surely happening in other media privacy cases

today but often goes unstated. It is also striking because this judge suggested broadly that public figures in business, politics, sports, and entertainment "overwhelmingly . . . avoid the public," even shunning social media; the judge's own sense of privacy, therefore, may well be stronger than that of many in the public eye who actively trade on their celebrity.

According to one journalist mentioned in the case, then, for nearly the first time in his thirty five years of experience in journalism, a court had refused to give jurors' names to media—and all very much in the name of privacy.

In that one decision, we see the shift toward privacy in the courts, the fallibility of the First Amendment arguments today, the distrust judges have regarding media and technology, how some push-the-envelope media can potentially ruin access for all, and how judges' own senses of privacy help shape law in cases put before them. In other words, the *Blagojevich* case shows the limits on news and information that arise today in our age of over-exposure and that privacy is winning out over traditional First Amendment arguments.

It was not always this way.