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Privacy, Ethics, and the Meaning of News

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Privacy, Ethics, and the Meaning of News

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Abstract

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Courts, John Marshall famously declared, must "say what the law is." Increasingly, however, as the *To Catch a Predator* case shows, courts are also called upon to say what the news is. When subjects of unwanted publicity sue for invasion of privacy or other torts, journalists commonly defend on the ground that the challenged disclosures were privileged as newsworthy. Traditionally, courts minimized constitutional concerns by deferring heavily to journalists' own sense of what qualified as news; that a story made the newspapers or the evening news was itself nearly conclusive that the topic was of legitimate public interest and therefore beyond the reach of tort law. Recently, however, courts have grown decidedly less tolerant. Driven by mounting anxiety over the loss of personal privacy generally and by declining respect for the press specifically, courts are increasingly willing to impose their own judgments about the proper boundaries of news coverage. Ironically, in the recent Texas case, an emerging tool used by courts to police news outlets is journalists' own codes of professional ethics. By measuring editorial decisions against gauzy internal ethics standards, courts give

the appearance of deference to the profession while aggressively scrutinizing editorial judgments. This Article demonstrates the growing threat to press freedom posed by these emerging trends. Part I places the conflict in historical context, showing how evolving legal understandings of privacy and press freedom set the two on course for a modern collision over “newsworthiness,” which was resolved initially by deferring to journalists’ editorial judgment. Part II explains how recent developments – including growing resort to journalists’ codes of professional ethics – have undermined judicial deference to journalism in defining the news. Part III examines the implications of the nascent resurgence of tort regulation of journalism, and Part IV concludes by suggesting that courts return to a more deferential approach in assessing “newsworthiness.” Specifically, it suggests that courts should have no power to punish truthful disclosures of private facts if journalists could reasonably disagree about the story’s legitimate news value.

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This Article demonstrates the growing threat to press freedom posed by these emerging trends. Part I places the conflict in historical context, showing how evolving legal understandings of privacy and press freedom set the two on

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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 successive independent campaigns for Governor and Senator,² and was apparently aggrieved that media outlets had declined to publish information he considered “newsworthy.”³

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¹ Marceaux v. Painter, 2007 Tenn. App. LEXIS 334, at * 2 (Tenn. Ct. App. May 24, 2007).

² See 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 (last visited July 9, 2007) (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”); *Consider the Alternative*, Middle Tenn. State Univ. Sidelines, July 31, 2002 (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 [and] on national T.V.” See *Arresting [sic] Cops and Judges for 18,464 Mass*

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The court's opinion left unstated the exact nature of Marceaux's beef with the press, but another court addressing a similar claim was more forthcoming. 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 [the claimant] 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."⁴

Both plaintiffs sought to use the courts to control the media's news judgment in shaping coverage. Unfortunately for both, their resort to the courts proved as quixotic as Marceaux's repeated resorts to the campaign trail: Courts were emphatic in dismissing both claims. The Tennessee Court of Appeals huffed that "[t]o call this lawsuit frivolous would be an understatement,"⁵ and, in D.C., federal judge Louis Oberdorfer pronounced crisply that "Channel Nine's right to decide what news it broadcasts is indisputable."⁶

The courts were plainly correct in finding no legal right of concerned citizens to control the news. The claims in both cases were baseless, even laughable. But it overstates the point to assert that the news media's right to decide news content is beyond dispute. It is the province of the courts "to say what the law is," as Chief Justice Marshall famously declared.⁷ But increasingly, it seems, it is also the courts' province 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, truthful reporting when it invades personal privacy. Media defendants may defend on the ground that the challenged reporting relates to something of legitimate public concern, including information that is deemed newsworthy.⁸ Accordingly, resolving tort claims by subjects of unwanted news coverage inevitably invites judges and juries to make

Murder at Road Stops, Mass Murder blog, at http://agreatman.blogspot.com/2007_05_01_archive.html (last visited July 9, 2007).

⁴ *Amiri v. WUSA-TV*, 751 F. Supp. 211, 211 (D.D.C. 1990).

⁵ *Marceaux*, 2007 Tenn. App. LEXIS 334, at * 3.

⁶ *Amiri*, 751 F. Supp. at 212.

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

⁸ The Restatement of Torts notes that "[w]hen the subject matter is of legitimate public concern, there is no invasion of privacy." Restatement (Second) of Torts § 652D, comment d (1977).

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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 has a constitutional dimension as well. The common-law exemption for disclosures of private information found to be newsworthy is, therefore, sometimes said to be required by the First Amendment.⁹ Deciding when the government should be permitted to block or punish the reporting of truthful information is thus a task of considerable “sensitivity and significance,” as the Supreme Court recently acknowledged.¹⁰ Indeed, the Court has repeatedly left open “whether truthful publication may ever be punished consistent with the First Amendment.”¹¹

At least 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. 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.¹² Indeed, the deference to journalists was so encompassing that commentators came to view the publication-of-private-facts tort as obsolete and to regard judicial supervision of journalists as altogether unmanageable.¹³

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, 528 (2001).

¹¹ *Id.* (quoting *Florida Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)).

¹² 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 (2d) of Torts, § 652, *comment g* (1977).

¹³ Randall P. Bezanson, *The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1152, 1172 (1992) (“the privacy tort formulated by Warren and Brandeis is now largely obsolete”); Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. L. REV. 823 (1991) (even its “slim breath of life seems to be failing as many courts refuse to apply the tort or even reject it outright”); see Jonathan B. Mintz, *The Remains of Privacy’s Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L.

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More recently, however, the modern position favoring journalists in legal contests over newsworthiness has come under new and mounting pressure.¹⁴ First, growing anxiety generally about the loss of personal privacy in contemporary society has given new weight to claims of injury from unwanted public exposure.¹⁵ At the same time, declining public respect for journalism – fueled by the relentlessness of the 24-hour news cycle, the blurring of news and entertainment programming in the age of “reality TV,” and popular journalism’s transmogrification in many minds from public watchdog into celebrity-obsessed peeping tom – has weakened its claim to privilege.¹⁶ Some courts in response have grown distinctly less deferential to journalism in privacy cases (and beyond) and more willing to assert their own determinations of the legitimate scope of news coverage. As Dean Rodney Smolla has written,

REV. 425 (1996) (“most of private academia have pronounced dead the more than century-old tort of public disclosure of private facts”); John A. Jurata, Jr., Comment, *The Tort That Refuses To Go Away: The Subtle Reemergence of the Public Disclosure of Private Facts Tort*, 36 SAN DIEGO L. REV. 489 (1999) (suggesting that at least seven law review articles had recently declared the tort to be ineffective or very nearly dead).

¹⁴ This trend has been emerging for several years. Writing in 2000, Professor Robert Dreschel observed that “[d]uring the past two decades in particular, journalists have found themselves targets 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.” Robert E. Drechsel, *The Paradox of Professionalism: Journalism and Malpractice*, 23 U. ARK. LITTLE ROCK L. REV. 181, 194 (2000). See also Jurata, *supra* note ___; Patrick J. McNulty, *The Public Disclosure of Private Facts: There is Life After Florida Star*, 50 DRAKE L. REV. 93, 98 (2001) (“reports of the demise of the public disclosure action have been exaggerated”).

¹⁵ See generally JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (2001); FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* (1997); GRANT HALL, *PRIVACY CRISIS: IDENTITY THEFT PREVENTION PLAN AND GUIDE TO ANONYMOUS LIVING* (2006). Professor Anita Allen, describing the origins and entrenchment of privacy as “an enduring feature of American law,” suggests that “[e]xplicit privacy rights emerged in the 19th century in response to problems of unwanted publicity and physical intrusion; expanded in the 20th century in response to problems of unwanted surveillance and social control; and continue in the 21st century as reactions to consumer, corporate and governmental applications of information technology.” ANITA L. ALLEN, *PRIVACY LAW AND SOCIETY* 6 (2007).

¹⁶ See, e.g., Victor Merina, *Celebrities in Journalism: The Ethics of News coverage*, available at 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 called this “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).

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“[w]e live in interesting times, in which privacy appears to be disintegrating all around us”; in response, “[t]he cultural mood is to retrench privacy and restrain the press.”¹⁷ Media attorney Bruce Sanford agrees, observing that “[a] golden age that for fifty years saw the creation and expansion of a First Amendment right of the public to receive information has concluded.”¹⁸

The shift can be seen in court decisions recognizing new causes of action to protect personal privacy, opening pathways for holding the media liable for unwanted newsgathering and publicity.¹⁹ It also can be seen even more clearly in recent decisions redirecting the legal focus in determining newsworthiness away from the contemporary practices of editors and reporters and toward the standards suggested by codes of professional ethics.²⁰ The effective result is a growing willingness of

¹⁷ Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (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 N.D. 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 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. CIV. RIGHTS CIV. LIB. L. REV. 329 (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”).

¹⁸ BRUCE W. SANFORD, DON’T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 9 (1999). “Judges, dismayed by the media’s newsgathering practices,” Sanford wrote, “are cutting back on constitutional protections for the press. The ‘breathing space’ which Justice William Brennan once saw as essential for the press to report on public affairs is evaporating.” *Id.* at 8.

¹⁹ In *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007), for example, the court recognized for the first time in Ohio a tort cause of action for false light, a tort repeatedly rejected by other courts in recent years as being too similar to defamation. The Ohio 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 *infra* notes ___-___ and accompanying text (discussing *Welling* in greater depth).

²⁰ In *Conradt v. NBC Universal*, 2008 U.S. Dist. LEXIS 14112 (S.D.N.Y. 2008), for example, the court explicitly used several provisions within the Society of

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courts to police the news judgment of individual journalists, holding them to the “best practices” idealized in professional ethics standards, as those standards are understood by judges and jurors.

This Article charts the emerging trend and explains its important implications for the First Amendment and the ability of the press to fulfill its essential role within society. Part I describes the establishment of what might be called the modern position of judicial deference, which has prevailed strongly in legal determinations of newsworthiness since roughly the 1960s. It surveys very nearly all of the early publication-of-private-fact cases²¹ and recounts how strengthening legal protection for both personal privacy and freedom of the press set the two values on a collision course, which was ultimately resolved by the courts largely in favor of the press on First Amendment grounds. Part II considers the ways in which recent developments have undermined judicial support for the modern position and exposed journalists to greater oversight in the courts. It shows how a range of recent decisions have weakened judicial deference to journalists’ news judgment, especially in a growing number of cases that tie understandings of newsworthiness—explicitly or implicitly—to aspirational ethics codes.

Part III examines the implications of the nascent resurgence of the publication-of-private-facts tort. It contends that there are significant perils in shifting the focus in defining the news from the judgment of working journalists and the demands of the consuming public to the sensibilities of judges and jurors. While this Article primarily offers a history and overview of the problem, Part IV raises initial policy and economic considerations and sketches the beginnings of an approach that might offer a way to avoid the peril. It explores a more deferential approach in assessing “newsworthiness” in which courts would have no power to punish truthful disclosures of private facts if journalists could reasonably disagree about the news story’s legitimate news value.

I. TRUSTING REPORTERS’ NEWS SENSE: THE ESTABLISHMENT OF

Professional Journalists Code of Ethics to find that NBC could be liable for certain reporting in its investigative program *To Catch a Predator*. (See also *infra* notes ___ - ___ and accompanying text (discussing Conrath in greater depth).)

²¹ For a comprehensive 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 AND ALAN U. SCHWARTZ, *THE RIGHT TO BE LET ALONE* (1962).

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THE MODERN POSITION OF JUDICIAL DEFERENCE IN DETERMINING “NEWSWORTHINESS”

What now presents itself so obviously as a “sensitiv[e] and significan[t]”²² clash between legal values of privacy and press freedoms was not always so apparent. A century ago, when recognition of privacy as a legally protectible interest was only fledgling, and when constitutional and other safeguards for freedom of the press were less substantial, legal disputes arising from unwelcome public disclosures could be resolved without evident appreciation of a conflict. And, without case law recognizing robust First Amendment protection for the press, courts often felt free to chastise publications that seemed, for any of a variety of reasons, to have crossed the line of fair play in their news judgment.

Over the first half of the 20th century, however, two independent and parallel developments set the stage for the modern conflict between privacy and press freedoms. Emerging tort protection for individual privacy eventually clashed with strengthening constitutional protection for freedom of the press. By the mid-1960s or so, guided in part by U.S. Supreme Court decisions emphasizing the overriding importance of a free press, most courts eventually settled on a position that gave strong deference to journalists in drawing the line between protected news reporting and legally sanctionable invasions of privacy.

A. *The Emergence of “Privacy” as a Legally Protected Interest*

“Privacy” is a heavily freighted word in American law. In *Griswold v. Connecticut*,²³ the U.S. Supreme Court famously used the term to describe a constitutional right of married couples to use contraception without fear of government surveillance or punishment. That constitutional right of “privacy” has expanded in the decades since *Griswold* was decided in 1965, encompassing today divergent interests in both “decisional” privacy – *i.e.*, the right to make certain profoundly personal decisions, such as those concerning contraception, abortion, or marriage, free from government coercion – and “informational” privacy – *i.e.*, the right to preserve the confidentiality of certain highly personal information, such as one’s medical records, in the government’s

²² *Bartnicki*, 532 U.S. at 528.

²³ 381 U.S. 479 (1965).

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possession.²⁴

But this constitutional right of privacy traces its lineage to earlier expressions of concern for privacy that arose in a very different context. 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.²⁵ The focus of Warren and Brandeis' concern was not government coercion, but the prying eyes of yellow journalists and gossip-mongers. They decried what they viewed as a shocking erosion of respect for private repose, fueled by a sensational press that was increasingly heedless of the "obvious bounds of propriety and of decency" and by the "intensity and complexity of life, attendant upon an advancing civilization."²⁶ 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.²⁷

Contrary to widely accepted assumptions,²⁸ legal notions regarding privacy did not actually originate with the Warren and Brandeis article.²⁹ Some courts in the United States had recognized personal interests in privacy even before Warren and Brandeis' call for recognition of a new, stand-alone tort, though the basis of earlier judicial

²⁴ See Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1987 (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).

²⁵ See Samuel Warren & Louis Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890). For an examination of some of the coverage of the Warren family that contributed to 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* (forthcoming 2008).

²⁶ *Id.* at 195-96.

²⁷ *Id.*

²⁸ 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 federal 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' 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 (1902) (suggesting that notion of a right of privacy originated in Warren and Brandeis' article).

²⁹ See Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. 125 (2007) (tracing privacy protection to earlier legal safeguards for confidentiality).

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intervention was often more obscure or free-form.³⁰ In the years following publication of *The Right to Privacy*, however, courts considered more explicitly whether to give privacy more direct and substantial protection.

After one surprisingly strong related victory for journalism,³¹ courts were initially skeptical about privacy interests in the publication context, but their concerns seemed based more on the status of the plaintiff rather than on broad constitutional issues. A court decided one early case in favor of the defendant publisher of a biography,³² but based its decision more on the public-figure status of the plaintiff, and later explicitly suggested that private persons would have more control over what was revealed in publications. Two additional privacy decisions followed in which courts also qualifiedly rejected plaintiffs' claims of privacy, suggesting that privacy could be protected under slightly different circumstances.³³ Meantime, a New York court had accepted privacy in a much more forthright way when it ruled in favor of a

³⁰ In *Commonwealth v. Blanding*, 20 Mass. 304, 312-13 (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 public, in newspapers . . . not only for crimes, but for faults, foibles, deformities of mind of person, even admitting all allegations to be true.” For a fuller analysis of very early privacy cases, see Amy Gajda, *Rethinking the Origin of Private Facts Without Warren and Brandeis* (forthcoming).

³¹ The California Supreme Court vindicated a reporter for the *San Jose Mercury* who had reported on a sensational divorce trial in violation of a trial judge’s gag order. *In re Shorridge*, 99 Cal. 526 (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 531, 535.

³² *Corliss v. E.W. Walker Co.*, 57 F. 434 (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.” But a later decision in the case limits broad notions of press freedom, finding that private individuals, but not public figures, can control publication of photographs of themselves. *Corliss v. E.W. Walker Co.*, 64 F. 280, 282 (D. Mass. 1894).

³³ *Murray v. Gast Lithographic & Engraving Co.*, 28 N.Y.S. 271 (Ct. Comm. Pleas 1894) (father cannot sue over daughter’s published portrait, though daughter may have valid claim); *Dailey v. Superior Court*, 44 P. 458, 460 (Cal. 1896) (prior restraint concerns preclude enjoining play about criminal defendant, although subsequent legal remedy may be permissible).

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plaintiff actor against a newspaper that had published a photograph of him as part of a public poll on his popularity.³⁴

But the two cases that may have had the greatest impact on privacy's early path came some years later, in 1902 and 1911. The New York Court of Appeals in the earlier case refused to recognize a tort action for the unauthorized use of a young woman's portrait on a poster advertising flour.³⁵ Nine years later, in a lawsuit directly involving journalism, the Washington Supreme Court similarly rejected any recovery for a victim of unwanted publicity.³⁶ In both, while denying a judicially created remedy, the courts suggested that legislative action to protect personal privacy would be both appropriate and, apparently, constitutional.

The Washington case, *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 charges in connection with a land deal.³⁷ The newspaper report had 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 a sense of disgrace.””³⁸

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.”³⁹ But even though two earlier courts had cautioned that a First Amendment analysis would be appropriate in the journalism context,⁴⁰ both later 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.

³⁴ *Marks v. Jaffa*, 26 N.Y.S. 908 (Sup. Ct. 1893) (“No newspaper or institution, no matter how worthy, has the right to use the name or picture of anyone 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”).

³⁵ *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

³⁶ *Hillman v. Star Pub. Co.*, 117 P. 594 (Wash. 1911).

³⁷ *See id.* at 692.

³⁸ *Id.* at 693 (quoting plaintiff's complaint).

³⁹ *Id.* at 695; *Roberson*, 64 N.E. at 544.

⁴⁰ *See Corliss*, 57 F. at 435; *Diener v. Star Chron. Pub. Co.*, 132 S.W. 1143 (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).

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While the New York court was more skeptical of 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 open the door to lawsuits not only against newspapers but also against neighbors for mundane insults or unflattering gossip; if arbitrary lines were to be drawn, the task should be left to the legislature.⁴¹

The Washington court in *Hillman* was more receptive to the plaintiff's claim of injury. The court openly sympathized with the child whose image appeared alongside the unflattering coverage of her father. It readily acknowledged that she had suffered "a wrong" deserving of a remedy, but suggested that the remedy must come from the legislature.⁴² "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."⁴³

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

Accordingly, in its very next session following the *Roberson* decision, the New York legislature enacted a statute making it unlawful to use, for trade or advertising purposes, "the name, portrait or picture of any living person without having first obtained the written consent of such person."⁴⁴ Other states moved to recognize broader privacy protection without waiting for legislative intervention. In 1905, the Georgia Supreme Court 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.⁴⁵ The court reasoned that no legislation was necessary because "[t]he right of privacy has its

⁴¹ See *Roberson*, 64 N.E. at 545-46.

⁴² See *Hillman*, 117 P. at 695.

⁴³ *Id.* at 696.

⁴⁴ See *Humiston v. Universal Film Mfg. Co.*, 178 N.Y.S. 752, 756 (App. Div. 1919) (quoting sec. 50 of the N.Y. Civil Rights Law and describing the statute's 1903 enactment as a direct response to the Court of Appeals' 1902 decision in *Roberson*).

⁴⁵ *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

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foundation in the instincts of nature”⁴⁶:

Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. . . A right of privacy in matters purely private is therefore derived from natural law.⁴⁷

Although the New York statute and the Georgia Supreme Court’s decision both dealt with the wrongful use of personal images in advertising – misappropriation claims under modern privacy doctrine – additional cases made clear that the growing legal readiness to protect personal privacy had a broader reach, similar to what the Washington court had suggested was necessary in *Hillman*. A Kentucky court in 1912, for example, upheld the right of parents to recover damages against a photographer who had made unauthorized photographs of their deceased conjoined twins.⁴⁸ After the twins died, the parents hired the photographer to photograph the dead children; but the photographer went on to make additional prints of the photograph and sought to copyright the image. The court ruled for the parents partly on straightforward contract grounds, finding that one who employs a photographer ordinarily retains a right to limit use of commissioned images. But the court also premised the parents’ recovery partly on the peculiar content of the photograph at issue and recognition that parents have a special legal interest in barring publicity of their children’s remains. “The most tender feelings of the human heart cluster around the body of one’s dead child,” the court observed.⁴⁹ And using a photograph to “expose[] it to public view” caused the parents a substantial legal injury.⁵⁰

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.⁵¹ In *Bazemore v. Savannah Hospital*, a newborn child with a severe and rare physical deformity⁵² died after

⁴⁶ *Id.* at 69.

⁴⁷ *Id.* at 69-70.

⁴⁸ *Douglas v. Stokes*, 149 S.W. 849 (Ky. Ct. App. 1912).

⁴⁹ *Id.* at 850.

⁵⁰ *Id.*

⁵¹ *See Bazemore v. Savannah Hosp.*, 155 S.E. 194 (Ga. 1930).

⁵² The child was born with his heart outside his body.

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surgery, and the hospital permitted a photographer to photograph the child's body. A photograph of the child and an account of his demise was then published in the *Savannah Press*, giving rise to the parents' lawsuit against the hospital, the photographer, and the newspaper. The trial court had dismissed the parents' lawsuit, but the state supreme court reinstated it, finding that the parents had stated a valid cause of action against all three defendants. The hospital's liability was supported by longstanding precedent based upon its alleged breach of "the confidence and trust" reposed in it by the plaintiffs, but the newspaper's liability was said to flow solely from its decision to publish private information the plaintiffs did not wish disclosed, ignoring the potential news value of the story. "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.⁵³

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.⁵⁴ 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.⁵⁵ And that same year, Maryland's highest court upheld contempt proceedings against five reporters who had disregarded a judge's order not to publish photographs of a criminal defendant, finding that the "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."⁵⁶

Even though a few courts sided with defendant publishers in privacy-related cases in the 1920s and 1930s,⁵⁷ courts held newspapers

⁵³ *Id.* at 195.

⁵⁴ *Schwartz v. Edrington*, 62 So. 660 (La. 1913) (the court wrote that the privilege to publish has its limitations).

⁵⁵ *Peed v. Washington Times*, 55 Wash. L. Rep. 182 (D.C. Super. Ct. 1927).

⁵⁶ *In re Sturm*, 136 A. 312, 314 (Md. 1927).

⁵⁷ *Herrick v. Evening Express Pub. Co.*, 113 A. 16 (Me. 1921) (mother had no valid claim when son's image was mistakenly published to illustrate article on another's death); *Smith v. Surratt*, 7 Alaska 416 (1926) (competing news crews can cover Arctic expedition against explorers' wishes because "enterprise itself is of [great] public

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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; she had changed her criminal ways only to see her former life chronicled in a movie.⁵⁸ Another plaintiff prevailed against a motion to dismiss filed by the producer of an early crime re-enactment program that featured the plaintiff's story.⁵⁹ A third case involved a published photograph of the plaintiff's abdominal area, in which a doctor had left a surgical clamp.⁶⁰ In each case, the courts made little or no inquiry into the potential news value of the stories and, instead, focused 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.

The trend continued through the era of the Second World War. Even after the 1930s, many courts sided with plaintiffs (and against media defendants whose news judgment they sometimes openly criticized): 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 presenting her as manly and given to coarse language⁶¹; a man whose photograph had been published in a detective magazine in connection with a true crime story⁶²; a woman profiled in a newspaper story about a mysterious weekly rose delivery the court criticized as one not worthy of news coverage⁶³; a girl whose photograph taken at a "trivial accident" was used two years later to illustrate a general news article on accidents⁶⁴; parents whose young

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").

⁵⁸ *Melvin v. Reid*, 297 P. 91 (Cal. Ct. App. 1931).

⁵⁹ *Mau v. Rio Grande Oil*, 28 F. Supp. 845 (N.D. Cal. 1939).

⁶⁰ *Banks v. King Features Syndicate*, 30 F. Supp. 352 (S.D.N.Y. 1939).

⁶¹ *Cason v. Baskin*, 20 So. 2d 243, 245 (Fla. 1944) (Rawlings called Cason "an ageless spinster resembling an angry and efficient canary" whom Rawlings said combined the "violent characteristics of both man and mother").

⁶² *Reed v. Real Detective Pub. Co.*, 162 P.2d 133 (Ariz. 1945) ("[u]nscrupulous advertisers and publishers without authority used pictures of individuals for gain or in a sensational way to promote sales of publications").

⁶³ *Sutton v. Hearst Corp.*, 90 N.Y.S.2d 322 (Sup. Ct. 1949) ("The article refers to the alleged fact that a Norfolk florist has been filling a weekly order for delivery to plaintiff of a rose, the order having been placed by an anonymous donor. This statement, even if true, is not current or past news which may be published without the consent of plaintiff.").

⁶⁴ *Leverton v. Curtis Publishing*, 97 F. Supp. 181 (E.D. Pa.) ("It is not pretended that the picture had the slightest news value when the defendant got hold of it

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daughter's divorce was recounted with dramatic embellishments in a Sunday newspaper magazine supplement⁶⁵; a cab driver whose picture was published in a satirical article about her peers⁶⁶; and a couple pictured spooning on stools as an illustration for an article about love relationships.⁶⁷ A Kentucky appellate court reinstated a privacy action against a newspaper that had published a debt notice, finding the information of no public interest and suggesting the need for legal protection against unscrupulous journalists.⁶⁸ And the Wisconsin Supreme Court found a newspaper liable under a state statute for publishing the name of a rape victim.⁶⁹

By 1942, the Missouri Supreme Court counted 14 states (plus the District of Columbia and Alaska, then a U.S. territory) as having 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.⁷⁰ Section 867 of the Restatement provided that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited in public is liable to the other." Just as Warren and Brandeis had suggested in *The Right to Privacy*, the language was broad enough to cover actions taken both by the press and gossiping neighbors, and contained no hand-wringing over First Amendment concerns.

Two decades later, with the publication of William Prosser's influential 1960 article, *Privacy*, in the *California Law Review*, the right

and published it two years after the event."), *aff'd*, 192 F.2d 974 (3d Cir. 1951) (finding invasion of privacy but based more on misappropriation principles).

⁶⁵ Aquino v. Bulletin Co., 154 A.2d 422 (Pa. Super. Ct. 1959).

⁶⁶ Peay v. Curtis Pub. 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).

⁶⁷ Gill v. Curtis Pub. Co., 239 P.2d 630 (Cal. 1952) (suggesting that the article, not so much "news," but more about "philosophical or psychological or semi-education discussion of abstractions," should have been published without the photograph and 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"). Some of the aforementioned cases clearly carried overtones of "misappropriation" theory.

⁶⁸ Trammel v. Citizens News, 148 S.W.2d 708, 709 (Ky. Ct. App. 1941).

⁶⁹ State v. Evjue, 33 N.W.2d 305 (Wis. 1948) ("there is a minimum of social value in the publication of the identity of a female in connection with such an outrage").

⁷⁰ Barber v. Time, Inc., 159 S.W.2d 291, 293 (Mo. 1942), citing 4 Restatement of Torts § 867.

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of privacy was firmly established in American tort law.⁷¹ 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. 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.⁷² 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.

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

As the account above makes clear, 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 – courts historically have often given short shrift to claims of press freedom and, relatedly, arguments based on the news value of disputed reporting. Indeed, court opinions reaching back to the founding of the American republic have often crackled with hostility to the press, and reporters and publishers could find themselves subject to legal sanction even for indisputably truthful reporting or political commentary.

Given the spotty protection historically provided to the press by the First Amendment, it is not surprising that many early cases giving legal protection to personal privacy gave only thin acknowledgment of the danger such liability might pose for freedom of the press. Even when courts recognized the tension between privacy and press freedom, their

⁷¹ William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

⁷² On the dominating influence of Prosser's views in the Second Restatement's formulation of tort protection for privacy, see G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 173-79 (1980); Matthew W. Finkin, *Law Reform American Style: Thoughts on a Restatement of the Law of Employment*, 18 LABOR LAW. 405, 410-11 (2003). For a personal, anecdotal account of Prosser's commanding role as Reporter in crafting the Second Restatement of Torts more generally, see John W. Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CAL. L. REV. 1255 (1972).

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opinions often contemplated a relatively narrow range of conflict.

1. Recognition of Free Press Concerns

Pavesich, the 1905 Georgia decision, for example, acknowledged that press freedoms might seem to be a “stumbling block” to robust privacy protection, but concluded that “legitimate[]” news reporting would rarely collide with valid privacy interests.⁷³ 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.⁷⁴ “[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.”⁷⁵ But this resolution of the conflict 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.

There were some early decisions that were notably deferential to journalism, especially in New York under that state’s privacy statute. Courts interpreting the legislative language – barring the unauthorized use of “the name, portrait or picture of any living person” for purposes of advertising or trade – recognized the need to differentiate between purely commercial and journalistic publicity. 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 had saved the lives of the crew by signaling for help using the ship’s telegraph machine.⁷⁶ The court found that the motion picture had made a commercial use of the seaman’s name and likeness in retelling the story through actors. In doing so, however, the court suggested that a different result would follow if the defendant had simply retold the plaintiff’s story in a more straightforward, journalistic fashion.⁷⁷

⁷³ See *Pavesich*, 50 S.E. at 73.

⁷⁴ See *id.* at 72.

⁷⁵ *Id.* at 73-74.

⁷⁶ *Binns v. Vitagraph Co. of America*, 103 N.E. 1108 (N.Y. 1913).

⁷⁷ *Id.* at 1110 (suggesting that “[i]t would not be within the evil sought to be

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Subsequent decisions by lower New York courts generally followed that dictum in holding the statute inapplicable to news reporting. In 1919, an intermediate appellate court in *Humiston v. Universal Film Manufacturing Co.* refused recovery against a company that had featured the plaintiff's name and photograph in a newsreel account of her role in solving "a famous murder mystery."⁷⁸ The court readily acknowledged that the defendant's business of creating and distributing newsreels was a "trade," and that unauthorized use of the plaintiff's image in that trade would seem to fall within the literal scope of New York's statute.⁷⁹ But the court concluded that it was implausible to think that the legislature had meant to penalize every unauthorized reporting by newspapers and newsreels, even though the newspapers and newsreels were profit-making enterprises.⁸⁰

Another New York court reached the same conclusion in the case of a young woman – "a Great Trick Diver" who made appearances "diving from a height into a shallow tank of water" – who was unhappy to find her photograph in costume on a page in the *National Police Gazette*.⁸¹ Styling itself (perhaps somewhat oddly given its title) as "the Leading Illustrated Sporting Journal in the World," the *Gazette* was "devoted very largely to pictures of pugilists, wrestlers, athletes, and vaudeville performers, and prize dogs"; it was, the court wrote, a common "ornament of village barber shops."⁸² While acknowledging that "[t]he language of the statute is very general and is susceptible of a very wide meaning," the court concluded that it could not sensibly be extended to ordinary newspapers and magazines, even to ones devoted heavily to photographs of athletes, vaudeville performers, and prize dogs.⁸³ The court explained: "When the statute was enacted originally in 1903, the custom of publishing in papers the portraits of individuals who

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").

⁷⁸ 178 N.Y.S. 752, 754 (App. Div. 1919).

⁷⁹ See *id.* at 756-57; 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).

⁸⁰ See *id.* at 757-58.

⁸¹ *Colyer v. Richard K. Fox Pub. Co.*, 146 N.Y.S. 999, 999 (Sup. Ct. 1914).

⁸² *Id.* at 1000.

⁸³ *Id.* at 1000-01.

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were distinguished in their activities of life was very general. If the Legislature had intended to wipe out this custom, it could have said so easily in positive language.”⁸⁴

Given those early interpretations of the legislative language, most early New York courts rejected privacy causes of action when the information about the plaintiff was revealed in a journalism or quasi-journalism context.⁸⁵

The New York courts grounded their narrowing construction of the statute in legislative intent rather than any constitutional impediment.⁸⁶ But some other courts, unconstrained by statutory

⁸⁴ *Id.* at 1001.

⁸⁵ *See, e.g.*, *Moser v. Press Pub. Co.*, 109 N.Y. Misc. 963 (Sup. Ct. 1908) (privacy statute does not apply to news photo, because otherwise newspapers would be liable for privacy invasions daily); *Jeffries v. New York Evening Journal*, 124 N.Y. 780 (N.Y. Sup. Ct. 1910) (author cannot prevent newspaper from publishing his photo); *Merle v. Sociological Research Film Corp.*, 152 N.Y.S. 829 (App. Div. 1915) (name of photo above building in documentary not actionable); *Martin v. New Metropolitan Fiction*, 260 N.Y.S. 972 (App. Div. 1932) (photo in detective magazine not actionable); *Kimmerle v. New York Evening Journal*, 186 N.E. 217 (N.Y. 1933) (newspaper story suggesting that criminal courted plaintiff not actionable); *People v. McBride*, 288 N.Y.S. 501 (Magis. Ct. 1936) (book on strike breaking not criminally actionable via statute); *Middleton v. News Syndicate Co.*, 295 N.Y.S. 120 (Sup. Ct. 1937) (plaintiff “cigarette girl’s” mention with photograph in column not actionable); *Lahiri v. Daily Mirror*, 295 N.Y.S. 382 (Sup. Ct. 1937) (photograph of mystic in column not actionable); *Kline v. McBride*, 11 N.Y.S.2d 674 (Sup. Ct. 1939) (plaintiff’s name in book about strike breaking not actionable); *Levey v. Warner Bros.*, 57 F. Supp. 40 (S.D.N.Y. 1944) (film based on life of George Cohen not actionable); *Koussevitzky v. Allen, Towne, & Heath, Inc.*, 68 N.Y.S.2d 779 (Sup. Ct. 1947) (biography of plaintiff conductor not actionable); *Molony v. Boy Comics*, 98 N.Y.S.2d 119 (App. Div. 1950) (comic book based on plaintiff’s heroic actions not actionable); *Callas v. Whisper, Inc.*, 101 N.Y.S.2d 532 (Sup. Ct. 1950) (staged photo of young woman in bar 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); *Goelet v. Confidential, Inc.*, 171 N.Y.S.2d 223 (Sup. Ct. App. Div. 1958) (gossip article about plaintiff’s marriage not actionable). *But see McNulty v. Press Pub. Co.*, 241 N.Y.S. 29 (N.Y. Sup. Ct. 1930) (apparently political cartoon actionable because sold to other newspapers); *Blumenthal v. Picture Classics, Inc.*, 257 N.Y.S. 800 (Sup. Ct. 1932) (plaintiff pictured momentarily in tourist documentary-like film has valid claim); *Redmond v. Columbia Pictures*, 14 N.E.2d 636 (N.Y. 1938) (golfer pictured in short subject film has valid claim); *Semler v. Ultem Publications, Inc.*, 9 N.Y.S.2d 319 (City Ct. 1938) (plaintiff model’s photo in *Silk Stocking Stories* magazine actionable); *Youssouppoff 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).

⁸⁶ In finding that the statute could not reasonably be construed to apply to journalism, the *Humiston* court acknowledged but set to one side “the question of

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language or legislative intent, and perhaps influenced generally by the New York 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 attention. "There are times," wrote a federal court in South Carolina, "when one, whether willingly or not, becomes an actor in an occurrence of great public or general interest."⁸⁷ Accordingly, six men arrested for abducting and beating a high school band director had no legal right to suppress news coverage of the charges or publication of their mug shots; the crime "had aroused great public interest," the court held, and "[t]he public had a right to know the facts."⁸⁸ Additional examples include a man whose life – including convictions and later pardons for bank robbery and murder – was chronicled on a television program⁸⁹; a man whose false report to police three months earlier about a panther's escape was the subject of a radio report⁹⁰; and a man who robbed a bank and was later surprised to see his story reenacted on television.⁹¹

Even innocent victims in crime dramas often became proper subjects of public interest and, therefore, lost privacy rights. Thus, for example, the victim of a savage street crime in Louisville who had 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."⁹² Bystanders and others caught up in other sensational dramas similarly lost any claim to privacy, including a plaintiff featured in a photograph depicting her

constitutional right." 178 N.Y.S. at 757.

⁸⁷ Frith v. Associated Press, 176 F. Supp. 671, 675 (D.S.C. 1959).

⁸⁸ *Id.* at 676. On the same rationale, a newspaper won a privacy lawsuit after it reported that a man on trial for sedition worked as a bartender in a hotel frequented by government officials. See *Elmhurst v. Pearson*, 153 F.2d 467 (D.C. Cir. 1946).

⁸⁹ *Bernstein v. NBC*, 129 F. Supp. 817 (D.D.C. 1955).

⁹⁰ *Smith v. NBC*, 292 P.2d 600, 604 (Cal. Ct. App. 1956) (there is "current news value" in news events that have aroused past public interest).

⁹¹ *Miller v. NBC*, 157 F. Supp. 240 (D. Del. 1957) (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).

⁹² *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. Ct. App. 1929).

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unsuccessful attempt to dissuade a woman from a suicide jump⁹³; a man shown outside a crime scene in a news broadcast⁹⁴; and a judge upset when a newspaper quoted his comment about corporal punishment at a youth services commission meeting.⁹⁵

Even when plaintiffs were not themselves present and active participants in an unfolding news story, courts widely agreed that family members of crime or accident victims could claim no legitimate expectation of privacy in the details of their loss. Thus, 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 accident⁹⁶; a mother who sued a newspaper that had covered her son's fatal shooting⁹⁷; a father who sued over an article about his son's fatal drug overdose⁹⁸; parents who sued over an article about their son's murder and a photograph of his body⁹⁹; a plaintiff whose husband's murder was featured in *Front Page Detective* magazine¹⁰⁰; heirs of a murder victim whose story was told also in *Front Page Detective*¹⁰¹; a plaintiff who sued over an article about her daughter's murder¹⁰²; the

⁹³ Samuel v. Curtis Publishing, 122 F. Supp. 327 (N.D. Cal. 1954).

⁹⁴ Jacova v. Southern Radio and Television, 83 So.2d 34, 36 (Fla. 1955).

⁹⁵ Reardon v. News-Journal, 164 A.2d 263 (Del. 1960) (no privacy cause of action possible because of freedom of the press, public interest, and news value in article).

⁹⁶ Kelley v. Post Pub. Co., 98 N.E.2d 286 (Mass. 1951) ("The publication of such a photograph might very well be indelicate or lacking in good taste but it would not in our opinion . . . constitute an actionable wrong to the plaintiffs.").

⁹⁷ Abernathy v. Thornton, 83 So. 2d 235 (Ala. 1955) (holding that plaintiff had no "right to be spared unhappiness through publicity concerning her dead son" in newsworthy story).

⁹⁸ Rozhon v. Triangle Publications, 230 F.2d 359 (7th Cir. 1956) (finding that the subject was legitimate public news, even though the death had occurred several months before).

⁹⁹ Bremmer v. Journal-Tribune, 76 N.W.2d 762 (Iowa 1956) (finding the subject a "top-rank news story" and the photograph newsworthy).

¹⁰⁰ Jenkins v. Dell Pub., 251 F.2d 447 (3d Cir. 1958) ("Any 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 items offers").

¹⁰¹ *Id.* at 450 ("the interest of the public in the free dissemination of the truth and unimpeded access to news is so broad, so difficult to define and so dangerous to circumscribe" that only when there is very clearly no public interest should courts rule against media).

¹⁰² Wagner v. Fawcett Publications, 307 F.2d 409, 411 (7th Cir. 1962) (suggesting that newsworthiness was a new area of law that needed to be built in small

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family of a man whose indictment in a criminal investigation was mentioned in a news story on his traffic death¹⁰³; parents who lost their teenaged son to a drug overdose¹⁰⁴; police officers pictured during an arrest¹⁰⁵; and the mother of murder victim Emmett Till who sued based upon two articles about his death in *Look* magazine.¹⁰⁶

In some cases, courts held that the loss of privacy associated with victimization could also be enduring. In *Smith v. Doss*,¹⁰⁷ 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.”¹⁰⁸ Additional courts agreed that news stories maintained their newsworthiness over the years.¹⁰⁹

In time, courts came to recognize a broader scope of legitimate public interest beyond crime-related stories. Whereas the Georgia Supreme Court in 1930 had suggested that a newspaper might well be barred on privacy grounds from reporting on the tragic birth and death of a child born with a rare birth defect,¹¹⁰ the South Carolina Supreme Court concluded in 1956 that the birth of a child to a 12-year-old girl and her

increments, and finding that the murder was “current news”).

¹⁰³ *Milner v. Red River Valley Pub. Co.*, 249 S.W.2d 227 (Tex. Civ. App. 1952) (“The truth of the printed matter was a complete defense”).

¹⁰⁴ *Rozhon v. Triangle Publications*, 230 F.2d 359 (7th Cir. 1956) (father “had been catapulted into an area of legitimate public news interest”).

¹⁰⁵ *Hull v. Curtis Pub. Co.*, 125 A.2d 644, 651 (Pa. Super. Ct. 1956) (“it must not be forgotten that the right of privacy infringes upon freedom of speech and press 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”).

¹⁰⁶ *Bradley v. Cowles Magazines*, 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).

¹⁰⁷ 37 So.2d 118 (Ala. 1948).

¹⁰⁸ *Id.* at 121.

¹⁰⁹ *See Cohen v. Marx*, 211 P.2d 320 (Cal. Ct. App. 1949) (prize fighter maintained his newsworthiness ten years later); *Estill v. Hearst Publishing*, 186 F.2d 1017 (7th Cir. 1951) (prosecutor in photo with John Dillinger is newsworthy after fifteen years); *Barberi v. News-Journal*, 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 has no valid privacy claim);

¹¹⁰ *See Bazemore v. Savannah Hosp.*, 155 S.E. 194 (Ga. 1930) (sustaining validity of plaintiffs’ complaint).

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20-year-old husband was a fitting subject of news coverage.¹¹¹ Additional cases expanded the type of facts in which public knowledge trumped the individual's right to privacy: a woman photographed with her chauffeur in an article titled "Principals in Divorce Scandal"¹¹²; persons listed as communists in the newspaper¹¹³; and a man whose picture illustrated an article reporting on the problem of financial hardship among retirees.¹¹⁴

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 had been filmed while exercising had no valid privacy cause of action because the film had news value.¹¹⁵ The court wrote:

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 poundage. The amusing comments which accompanied the pictures did not detract from their news value.¹¹⁶

Another fuller, positive discussion of newsworthiness came in 1939, when a court found that a surviving husband had very little privacy

¹¹¹ *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.")

¹¹² *Thayer v. Worcester Post*, 187 N.E. 292 (Mass. 1933) (but deciding that woman's privacy claim failed primarily because photograph was taken in public place and not surreptitiously).

¹¹³ *Johnson v. Scripps Publishing Co.*, 18 Ohio Op. 372 (Ohio Comm. Pleas 1940) ("the rights of the public are paramount to the right of privacy of the individual, when the individual engaged in conduct which vitally affects the public welfare and public concern").

¹¹⁴ *Truxes v. Kenco Enterprises*, 119 N.W.2d 914 (S.D. 1963) (the photograph of the plaintiff helped to illustrate an article that disseminated news of public concern).

¹¹⁵ *Sweenek v. Pathe News*, 16 F. Supp. 746 (E.D.N.Y. 1936).

¹¹⁶ *Id.* at 747-48.

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to protect within a story about his wife's suicide.¹¹⁷ 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.'"¹¹⁸ The woman's suicide, then, was news, the court decided, and her husband could not bar coverage of the event, 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.¹¹⁹

In 1940, and in seemingly direct contrast to the early *Hillman* case, the highest court in Massachusetts decided that public interest in a news event should legitimately fend off 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 neighbor's affairs."¹²⁰

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.*,¹²¹ 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.¹²² As a child of eleven, the plaintiff had been famous for his spectacular intellect, lecturing "distinguished mathematicians on the subject of Four-Dimensional Bodies" and attracting considerable press attention.¹²³ In his adult life, "[t]he unfortunate prodigy" had desperately sought obscurity and "to avoid the public gaze," but the magazine tracked him down and profiled him as part of a "Where Are They Now" feature, recounting "his general breakdown" and idiosyncratic behavior.¹²⁴ 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:

¹¹⁷ *Metter v. Los Angeles Examiner*, 95 P.2d 491 (Cal Ct. App. 1939).

¹¹⁸ *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)).

¹¹⁹ *Id.*

¹²⁰ *Themo v. New England Newspaper Pub.*, 27 N.E.2d 753 (Mass. 1940).

¹²¹ 113 F.2d 806 (2d Cir. 1940).

¹²² *Id.* at 807.

¹²³ *Id.*

¹²⁴ *Id.*

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Regrettably or not, the misfortunes and frailties of neighbors and ‘public figures’ are subjects of considerable interest and discussion of 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.¹²⁵

The *Sidis* court reserved judgment on “whether or not the newsworthiness of the matter printed will always constitute a complete defense” in privacy actions, but held that it at least 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 upon him, the questionable and undefinable status of a ‘public figure.’”¹²⁶ Importantly, the foundation of the court’s judgment to open such persons’ private lives to this scrutiny was not public necessity but public curiosity.

During this same period, a federal district court in Minnesota ruled in favor of a newspaper that had reported on a divorce and child custody case. “[I]t cannot be controverted,” the court wrote, “that there is a wide-spread interest in this very kind of news and perhaps it is not strange that it should be so” because divorce and custody disputes occur with frequency in the United States.¹²⁷ A district court in New York found similarly that actor Charlie Chaplin had no valid privacy cause of action even though a celebrity gossip columnist had broadcast surreptitiously gathered telephone conversations between Chaplin and the columnist, and Chaplin’s butler and the columnist, finding that the broadcasts should be considered reports of general public interest.¹²⁸ The court, apparently equally untroubled by the disclosures and the surreptitious wiretapping, wrote that “courts cannot and should not pass judgment on the value of particular news items.”¹²⁹ And an Illinois

¹²⁵ *Id.* at 809.

¹²⁶ *Id.*

¹²⁷ *Berg v. Minneapolis Star & Tribune*, 79 F. Supp. 957, 961 (D. Minn. 1948). *See also* *Langford v. Vanderbilt University*, 287 S.W.2d 32 (Tenn. 1956) (newspaper article about libel suit does not invade privacy of libel plaintiffs because lawsuit was newsworthy).

¹²⁸ *Chaplin v. NBC*, 15 F.R.D. 134 (S.D.N.Y. 1953).

¹²⁹ *Id.* at 138-39. In a later case involving a celebrity, a California court found

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appellate court rejected a privacy lawsuit based on a magazine photograph of the plaintiff and his so-called “land yacht,” a large recreational vehicle.¹³⁰ The court found that readers would have an interest in the RV, even though plaintiff himself had avoided the limelight.¹³¹

By 1962, the Supreme Court of New Mexico found no valid publication of private facts claim after a newspaper printed an article that mentioned a teenager’s sexual assault on his younger sister.¹³² The young girl sued for invasion of her privacy, but the court wrote briskly 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.”¹³³

As Dean Prosser explained in *Privacy* in 1960, tort protection against public disclosure of private facts, “slow to appear in the decisions,” had necessarily begun to surrender to valid news, including “all events and items of information,” even those regarding “matters of genuine, even if more or less deplorable, popular appeal.”¹³⁴ Although not every publication privacy case was decided in favor of media in the 1950s and 60s,¹³⁵ by 1972, Professor Don Pember expressed satisfaction

no valid privacy case of action because even though the magazine presented the information in a scandalous, tabloid-like way, plaintiff’s one-day teenage marriage to actor Janet Leigh was legitimate news).

¹³⁰ *Buzinski v. DoAll Co.*, 175 N.E.2d 577 (Ill. Ct. App. 1961).

¹³¹ *Id.* at 579.

¹³² *Hubbard v. Journal Publishing*, 368 P.2d 147 (N.M. 1962).

¹³³ *Id.* at 148.

¹³⁴ Prosser, *supra* note __, 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.

¹³⁵ Most of these later cases are only somewhat related to publication privacy cases, although they all spring from news stories or quasi-journalistic endeavors. *Ettore v. Philco Television Broadcasting*, 229 F.2d 481 (3d Cir. 1956) (boxing match broadcast as one of “Greatest Fights of the Century” created valid privacy action because issue was property-rights related); *Strickler v. NBC*, 167 F. Supp. 68 (S.D. Cal. 1958) (man pictured in television drama praying during plane’s emergency landing has valid privacy claim); *Harms v. Miami Daily News*, 127 So. 2d 715 (Fla. Ct. App. 1961) (woman whose name and telephone number were published in story suggesting that readers call to hear her “sexually telephone voice” had valid privacy claim because information was not of public interest); *Patterson v. Tribune Co.*, 146 So. 2d 623 (Fla. Ct. App. 1962) (newspaper’s publication of court docket that included woman’s drug addiction commitment proceedings created valid privacy action); *Nappier v. Jefferson Standard Life Ins. Co.*, 322 F.2d 502 (4th Cir. 1963) (rape victims named by implication in news story have valid privacy claim because statute creating liability upon publication trumped

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that the “grave possibility of censorship of the press” posed by judicial newsworthiness determinations had not materialized because courts had instead very much deferred to editors and readers in determining what should be considered valid news.¹³⁶

2. *Early Supreme Court Opinions and News Judgment*

Most of the early cases did not tie newsworthiness to an analysis of journalists’ First Amendment rights but, as in *Sidis*, navigated the boundary between press and privacy rights as a matter of public policy under the common law. A series of First Amendment rulings by the U.S. Supreme Court, however, helped significantly to shift the boundary in favor of public disclosure.¹³⁷

The Court first touched on the issue somewhat tangentially in the late 1940s 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.”¹³⁸ The Court found the statute unconstitutional, and in doing so refused to make constitutional protection for publishing dependent upon a judicial assessment of the importance of a periodical’s content. “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.”¹³⁹ This provided basic support for true-life crime coverage, the bane of multiple later victims turned plaintiffs.¹⁴⁰

The Court’s 1964 decision in *New York Times v. Sullivan*¹⁴¹

story’s news value).

¹³⁶ PEMBER, *supra* note ___ at 168.

¹³⁷ See, e.g., Comment: *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1387 (1975) (“[u]ntil 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”).

¹³⁸ *Winters v. New York*, 333 U.S. 507, 508 (1948).

¹³⁹ *Id.* at 511.

¹⁴⁰ *But see, e.g., Annerino v. Dell Pub.*, 149 N.E.2d 761 (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”).

¹⁴¹ 376 U.S. 254 (1964).

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provided a still more important boost to journalists' claims of constitutional privilege. The decision raised barriers to tort recovery against journalists for defamation, requiring public officials to show that any damaging falsehoods in news reports were made maliciously or with reckless disregard for the truth. 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.¹⁴²

Four years later, in *Time v. Hill*,¹⁴³ the Justices even more directly addressed news value, both practically and constitutionally: "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," they wrote. "Exposure of the self to others in varying degrees is a concomitant of life in a civilized society [and] the 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."¹⁴⁴ The Court added that "broadly defined freedom of the press assures the maintenance of our political system and an open society."¹⁴⁵

In subsequent opinions, the Justices signaled not only their willingness to diminish the legal remedies available to public figures against journalists, but questioned even whether it was any business of the courts to superintend the news judgment of the press. In 1971, for example, the Court acknowledged that a "press report of what someone has said about an underlying event of news value can contain an almost infinite variety of shadings."¹⁴⁶ In another case that same year, Justice Harlan wrote in a dissenting opinion that he wished "to avoid subjecting the press to judicial second-guessing of the newsworthiness of each item they print."¹⁴⁷

The Supreme Court continued to strengthen the hand of journalists well into the 1970s and 1980s, with decisions supporting newspaper coverage of highly secretive government information in *New York Times v. United States*¹⁴⁸ and, in *Cox Broadcasting v. Cohn*,¹⁴⁹ absolving

¹⁴² *Id.* at 272, 280.

¹⁴³ 385 U.S. 374 (1967).

¹⁴⁴ *Id.* at 388.

¹⁴⁵ *Id.* at 389.

¹⁴⁶ *Time v. Pape*, 401 U.S. 279, 286 (1971).

¹⁴⁷ *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (Harlan, J., dissenting).

¹⁴⁸ 403 U.S. 713 (1970).

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reporters from penalty when they published the name of a murder victim who had been raped.¹⁵⁰ In 1976, it wrote that it was not the function of the Court to write a code of journalistic behavior.¹⁵¹ In 1977, it held that a judge could not prevent a newspaper from publishing a story about a juvenile offender.¹⁵² In a similar case, the Court struck down a statute making it a crime to publish the name of a juvenile offender, writing that the publication of truthful information lawfully obtained by media could not be punished “except when necessary to further an interest more substantial” than the protection of juvenile offenders,¹⁵³ a protection clearly of great importance within society.¹⁵⁴ In 1978, it found that a newspaper could not be convicted for reporting on confidential judicial proceedings, finding that the public interest in such an operation trumped any privacy concerns.¹⁵⁵ In 1989, the Justices ruled that a newspaper could not be held liable for publishing the name of a rape victim, even though a state statute and the newspaper’s own ethics code prohibited it.¹⁵⁶

Perhaps the most supportive language supporting media defendants and news determinations came in *Gertz v. Robert Welch, Inc.*¹⁵⁷ There, the Court worried that a legal test for defamation would create difficulty by forcing judges to decide what publications addressed issues of general public interest. “We doubt the wisdom of committing this taste to the conscience of judges,” Justice Powell wrote for the

¹⁴⁹ 420 U.S. 469 (1975).

¹⁵⁰ 420 U.S. 469 (1975).

¹⁵¹ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 550 (acknowledging that journalism standards vary from region to region).

¹⁵² *Oklahoma Pub. v. District Court*, 430 U.S. 308 (1977) (finding both *Cox* and *Nebraska Press* controlling).

¹⁵³ *Smith v. Daily Mail Pub.*, 442 U.S. 97, 104 (1979).

¹⁵⁴ Curiously, the majority wrote that privacy was not an issue in the case, *see 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,” *id.* at 108. If, in fact, names of juvenile offenders are not generally released, privacy – or at least secrecy – would indeed seem to be an issue in the case.

¹⁵⁵ *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829 (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. *Id.* at 839.

¹⁵⁶ *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

¹⁵⁷ 418 U.S. 323 (1974).

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majority.¹⁵⁸ That same year, in *Miami Herald v. Tornillo*,¹⁵⁹ the Court found a Florida statute unconstitutional because it required certain reply coverage. In rejecting the statute, the Justices 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” A later court suggested that *Miami Herald* stood 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.”¹⁶⁰

The media did not win every privacy-related case in the Supreme Court – in 1976, for example, the Justices ruled that a wealthy heiress would not be considered a public figure in coverage of her divorce case¹⁶¹ and, in 1977, the Court sided with a human cannonball and against television news broadcasters in a case involving the right of publicity¹⁶² -- but the trend of decisions plainly favored press rights over privacy rights when the two came into conflict.¹⁶³ 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.”¹⁶⁴ At least, the Restatement authors observed,

[i]t seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become 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

¹⁵⁸ *Id.* at 346.

¹⁵⁹ 418 U.S. 241 (1974).

¹⁶⁰ *Nelson v. McClatchy Newspapers*, 936 P.2d 1123, 1131 (Wash. 1997).

¹⁶¹ *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

¹⁶² *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977).

¹⁶³ “[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).

¹⁶⁴ Restatement (Second) of Torts, § 652D (1977).

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will of course control.¹⁶⁵

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

Although commentators including Warren and Brandeis and some judges had acknowledged from 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. Indeed, in some respects, tort doctrine protecting privacy and constitutional doctrine protecting the press seemed to be developing on separate but converging tracks during much of the 20th century. Yet, by the 1960s – 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 it was impossible not to see that the two were on a collision course.

As the law developed, “newsworthiness” emerged as an essential balance point between privacy and press. First as a matter of common law and later increasingly as a matter of constitutional command, courts recognized that newsworthiness entitled the press to publicize what otherwise should remain personal and private information.

Early on, some courts showed startling self-confidence in second-guessing the editorial judgment of experienced journalists, and an eagerness to educate journalists on newsworthiness and the precise meaning of the term “news,” often looking beyond a story’s topic to critique its particular placement within the newspaper or even the author’s style of writing. The U.S. Court of Appeals for the Second Circuit, for example, caustically scolded *The New York Times* for engaging in 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 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; it was obviously there only for entertainment value” and was “already stale news.”¹⁶⁶

¹⁶⁵ *Id.*, comment d.

¹⁶⁶ *Hogan v. New York Times*, 313 F.2d 354, 356 (2d Cir. 1963); see also *Metzger v. Dell Publishing*, 136 N.Y.S.2d 888, 890 (Sup. Ct. 1955) (“While *not a news*

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Yet overall the courts' understanding of what qualified as newsworthy progressively expanded and their readiness to impose their own assessments of news value retreated. Whereas earlier court decisions tended to define newsworthiness in terms of the public's legitimate and proper need to know, later opinions looked more heavily to the fact of the public's curiosity. By the closing decades of the 20th century, guided by Supreme Court opinions casting doubt on the constitutional legitimacy of judicial supervision of news judgment, court decisions in both the state and federal courts appeared to coalesce around the idea that judges should heavily defer 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.

From the mid-1960s on, courts sided staunchly with media defendants and their determinations of newsworthiness. "In determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community," the Iowa Supreme Court wrote in 1979. "Courts do not have license to sit as censors."¹⁶⁷ 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, 'the courts are not concerned with establishing canons of good taste for the press or the public.'"¹⁶⁸ 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 blue-penciling after the fact would blunt the quills of even the most honorable journalists."¹⁶⁹ This consensus,

report, the article [about a gang beating] fairly may be said to be an attempt to portray the existence of a condition which indisputably is a subject of legitimate public interest [and] [s]omewhat differently phrased, the article may be described as a survey of a social condition") (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 [as] [i]t was in the Sunday supplement and not 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" and, while "the basic facts of the article were admittedly true," the author had "embellished and fictionalized" some).

¹⁶⁷ *Howard v. Des Moines Register*, 283 N.W.2d 289 (Iowa 1979).

¹⁶⁸ *Neff v. Time, Inc.*, 406 F. Supp. 858, 860 (W.D. Pa. 1976) (the plaintiff was pictured with his pants zipper down at a football game).

¹⁶⁹ *Ross v. Midwest Communications*, 870 F.2d 271, 275 (5th Cir. 1989). See also *Fletcher v. San Jose Mercury News*, 261 Cal. Rptr. 699, 706 (Cal. Ct. App. 1989)

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favoring strong deference to journalists' own judgments concerning newsworthiness, emerged as the modern position of the courts after the 1960s.

Under this deferential approach, a newspaper that identified a particular woman as having been sterilized during an earlier period of institutionalization was not liable for its report.¹⁷⁰ 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.¹⁷¹ 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 story had news value.¹⁷²

A 1984 California case, *Sipple v. Chronicle Publishing*,¹⁷³ 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.¹⁷⁴ He was hailed as a hero. Shortly after the event, newspapers began to report that Sipple was gay. Sipple sued for publication of private facts, but lost. 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 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."¹⁷⁵

(court refuses to act "as some kind of journalism review seminar offering our observations on contemporary journalism and journalists" and rejects plaintiff's argument based on failure to follow ethics standards).

¹⁷⁰ *Howard*, 406 F. Supp. 858.

¹⁷¹ *Cape Publications v. Bridges*, 423 So.2d 426 (Fla. Ct. App. 1982) (describing the event as "a typical, exciting, emotion-packed drama to which newspeople, and others, are attracted").

¹⁷² *Hall v. Post*, 372 S.E.2d 711 (N.C. 1988).

¹⁷³ 201 Cal. Rptr. 665 (1984).

¹⁷⁴ *Id.* at 666.

¹⁷⁵ *Id.* at 670. Professor Frederick Schauer has called this an "involuntary sacrifice to and for the larger community," wondered "whether this indiscriminate design, and disproportional impact, is appropriate," and suggested that courts rethink their evaluation of privacy cases in terms of victory or defeat for media. Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699, 721-724 (1991). Courts may now be responding to such concerns.

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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. Newsworthiness had reached a new, broader meaning.

To be sure, some courts continued to side with plaintiffs. A few courts hesitated to validate journalists' decisions to revive coverage of long-ago crimes or other events.¹⁷⁶ Some ruled for plaintiffs on the ground that their exposure was entirely gratuitous to an otherwise valid news story,¹⁷⁷ or refused to overturn a jury decision against media on newsworthiness grounds.¹⁷⁸ The Idaho Supreme Court, for example, left open the possibility that journalists might be held liable for pointlessly humiliating a news subject.¹⁷⁹

¹⁷⁶ Compare, e.g., *Conklin v. Sloss*, 150 Cal. Rptr. 121 (Ct. App. 1978) (while crimes themselves retrained newsworthiness, disclosing the names of criminals "serve[d] little independent public purpose"); *Bimbo v. Viking Press*, 1981 U.S. Dist. LEXIS 12180 (D. Mass. May 14, 1981) (plaintiff has valid publication claim based on information in book about an alleged incestuous relationship); and *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982) (victim's name released by media could serve as basis for negligence action), with *Roshito v. Hebert*, 439 So. 2d 428 (La. 1983) (reviving coverage of 25-year-old cattle theft in newspaper was not a privacy invasion).

¹⁷⁷ See *Huskey v. NBC*, 632 F. Supp. 1282, 1289-91 & 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"); *Deaton v. Delta Democratic Pub.*, 326 So.2d 471 (Miss. 1976) (accepting newsworthiness of report on children labeled as mentally retarded, but finding that children's faces could have been blurred in news photo); *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).

¹⁷⁸ *Hawkins v. Multimedia, Inc.*, 344 S.E.2d 145 (S.C. 1986) (court refused to overturn a jury that found it not of general interest that a minor male had fathered a child even though the court itself had earlier ruled it of general interest that a minor female had given birth to a child).

¹⁷⁹ *Taylor v. KTVB, Inc.*, 525 P.2d 984 (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. 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

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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 *Titticut Follies*.¹⁸⁰ 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 25 years, permitting it to be viewed only by 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.¹⁸¹ The ban on general distribution was not lifted until 1991.

Yet, notwithstanding this handful of decisions rejecting journalistic claims of newsworthiness,¹⁸² 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" Becomes Law*

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

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.

¹⁸⁰ See *Commonwealth v. Wiseman*, 249 N.E.2d 610 (Mass. 1969).

¹⁸¹ See *id.* at 618 (permitting viewing only by "legislators, judges, lawyers, sociologists, social workers, doctors, psychologists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity").

¹⁸² See *Diaz v. Oakland Tribune*, 188 Cal.Rptr. 762 (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*, 787 F.2d 463 (9th Cir. 1986) (in a related case, court found that the newsworthiness of exposing the true identity of a family in the federal witness protection program was a jury question).

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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 even 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 those factors.¹⁸³

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, conflict, and emotion.¹⁸⁴ Another journalism text substitutes "the unusual" for novelty, and "necessity" for impact.¹⁸⁵ The meaning of each of these words 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"¹⁸⁶ and news decisions 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."¹⁸⁷

Some journalists subscribe to simpler, seemingly even broader definitions of news. In his book on reporting, former reporter Tim Harrower quotes several famous journalists and editors for the propositions that "[n]ews is anything that makes a reader say 'Gee whiz,'" and that "[n]ews is anything that will make people talk."¹⁸⁸

¹⁸³ *Marcus v. Iowa Public 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.

¹⁸⁴ See TIM HARROWER, *INSIDE REPORTING* 17 (2006).

¹⁸⁵ MELVIN MENCHER, *NEWS REPORTING AND WRITING* 61, 62 (2006).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 65.

¹⁸⁸ *Id.* at 16.

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Another journalism text similarly suggests that most reporters write about what interests them personally, including stories of “significance, drama, surprise, personalities, sex, scandal, crime, numbers, and/or proximity.”¹⁸⁹

By 1977, these definitions for the amorphous term “news” – the journalists’ own expansive conception of “news” -- were effectively enshrined in the Second Restatement of Torts. In commentary accompanying the provision summarizing liability for unwanted disclosure of private facts, the Restatement authors observed that recent Supreme Court precedent had effectively 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, [and] a report to the police concerning the escape of a wild animal *and many other similar matters of genuine, if more or less deplorable, popular appeal.*¹⁹⁰

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 uses of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be

¹⁸⁹ TONY HARCUP, JOURNALISM: PRINCIPLES AND PRACTICE 34 (2003).

¹⁹⁰ Restatement (Second) of Torts, § 652D, *comment g* (1977) (emphasis added).

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expected to have a legitimate interest in what is published.¹⁹¹

The Restatement definition is limited only by language that contrasts legitimate news with that in which the public is essentially uninterested: 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.”¹⁹²

The Restatement, then, reflected that court decisions had come to rest the idea of newsworthiness on “popular appeal,” even popular appeal that some might find more or less deplorable, rather than any independent measure of the gravity or urgency of or need for the reported information. By this modern position – the Restatement definition has been generally integrated into common law¹⁹³ -- the “news” is 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.¹⁹⁴

As many plaintiffs learned, this standard imposed a nearly insurmountable barrier to liability. To two commentators who wrote in 1979, the newsworthiness privilege was “seemingly limitless.”¹⁹⁵

II. TURNING BACK: THE RETRENCHMENT OF NEWS

With the establishment of the modern position favoring journalists in defining news value, journalism appeared to have won a decisive victory over tort limitations concerned with privacy. The drumbeat of First Amendment precedents seemed to many to signal the

¹⁹¹ *Id.*, comment j.

¹⁹² *Id.*, comment h.

¹⁹³ “As is often the case with the various Restatements, this concept [of newsworthiness] has been integrated in the common law.” Steven Geoffrey Gieseler, *Information Cascades and Mass Media Law*, 3 FIRST AMEND. L. REV. 301, 314 (2005)

¹⁹⁴ “[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 CAL. L. REV. 957, 1006 (1989).

¹⁹⁵ 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) (suggesting a community decency standard similar to one in obscenity cases).

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imminent adoption of an absolute journalistic privilege to publish truthful information. Indeed, by the 1980s and early 1990s, some courts and commentators were openly wondering whether the tort of publication of private facts had been rendered obsolete by the development of modern First Amendment doctrine.¹⁹⁶

In the past decade or so, however, journalists have suffered surprising defeats that appear to mark a meaningful retrenchment of judicial deference toward journalism and, with it, the 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*

The period in which courts settled on the modern position favoring deference to journalists in defining news value was dominated by three momentous public conflicts: the Civil Rights Movement, the Vietnam War, and Watergate. Press coverage, often courageous and pioneering, played a pivotal role in each. Shocking television images of snarling police dogs attacking demonstrators in Alabama, news 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.¹⁹⁷ The rising public respect 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*. Not surprisingly, many of the landmark decisions expanding press rights during this era were linked to these events.¹⁹⁸ *New York Times v. Sullivan* in 1964 grew out of a full-page advertisement defending Martin Luther King and denouncing police

¹⁹⁶ 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.

¹⁹⁷ For discussion of the role of television reports in shaping consciousness of segregation and racial justice, see, e.g., William G. Thomas, *Television News and the Civil Rights Struggle: The Views in Virginia and Mississippi*, Southern Spaces (2004), available at <http://www.southernspaces.org/contents/2004/thomas/4a.htm> (last visited Jan. 8, 2008).

¹⁹⁸ See BRUCE W. SANFORD, DON'T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 11 (1999) (contrasting modern public distrust for the press, dating to the 1980s, with the Watergate and Vietnam era).

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abuses in Montgomery, Alabama. The Pentagon Papers case, *New York Times v. United States*, involved reportage on a top-secret study of U.S. military involvement in Vietnam.

More 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 24-hour news cycle; (2) the obsession with celebrity and the proliferation of print and broadcast tabloids; (3) the melding of news and entertainment programming through "reality TV" with its focus on economic rather than news decisions; and (4) deepening ambiguity over the identity and role of "journalists" with the advent of the internet, blogging, and podcasting.¹⁹⁹ If Woodward and Bernstein's heroic sleuthing provides the iconic media image of the last generation, our own may well be the sprawling media encampment outside the gates of Paris Hilton's estate.²⁰⁰

As the understanding and nature of news has changed, public respect for the media has fallen.²⁰¹ The causes of this erosion in public

¹⁹⁹ Dean Smolla suggests these trends as helping to shape privacy law: a tabloid and paparazzi culture, an evaporating public/private divide, and news-entertainment reality television focus on ordinary people. Smolla, *supra* note __, 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 N.D. J. L. ETHICS & POL'Y 595, 624-25 (2005).

²⁰⁰ 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 (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*, 1 J. DISP. RESOL. 143 (2007).

²⁰¹ See, e.g., Peter Johnson, *Trust in Media Keeps on Slipping*, USA Today, May 27, 2003 (reporting Gallup Poll results showing that "[t]rust in the media has dropped from 54% in 1989 . . . to a low of 32% in December 2000"); Timothy W. Maier, *News Media's Credibility Crumbling*, Freedom of Information Center, May 8, 2004 ("Americans rate the trustworthiness of journalists at about 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*, August 1, 2007 (finding journalists among "the lowest ranking" with only 13% support), available at www.harrisinteractive.com/harris_poll/index.asp?PID=793.

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trust are undoubtedly many. The business pressures of media convergence and the increasing commercialization of journalism may be one.²⁰² But the transmogrification of the news is certainly another. In a 2005 address to the Kansas Press Association, Carl Bernstein himself reportedly 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.”²⁰³ 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.²⁰⁴ “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.”²⁰⁵ Bob Woodward has similarly complained that the United States now boasts “a scandal press corps.”²⁰⁶

By early summer of 2007, the Ohio Supreme Court had caught the wave of anti-media sentiment. 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.²⁰⁷ Privacy torts had first been suggested, the court wrote, during a period of yellow journalism and had then been scaled back as journalism had become more responsible during the 20th century through “formal training in journalism and ethics.”²⁰⁸ Yet, today, journalism is again spiraling downward, the court noted, in part because of the ease of internet publication, suggesting the need for courts to ratchet up once again their scrutiny of the press and quasi-press.²⁰⁹ “[E]thical standards

²⁰² See, e.g., Sandra Mims Rowe, *The New ‘News’ Media and Public Trust*, 76 *The Virginia News Letter* 1 (June 2000).

²⁰³ Dave Ranney, *Watergate Journalist Says Media Losing Public’s Trust*, *Lawrence (Kan.) Journal-World & News*, Apr. 16, 2005.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See HOWARD GARDNER, ET AL, *GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET* 135 (2001) (quoting Woodward).

²⁰⁷ *Welling v. Weinfeld*, 866 N.E.2d 1051, 1058-59 (Ohio 2007).

²⁰⁸ *Id.* at 1058.

²⁰⁹ I use quasi-press here to mean some bloggers and others who publish on the internet. While it is not appropriate here to discuss extensively the definition of the word journalist, it is apparent that professional journalists have both a more developed news

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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.”²¹⁰

A few months later, in February 2008, a federal district court in New York admonished NBC News for its popular investigative television program titled *To Catch a Predator*, one that highlights police arrests of suspected child sex offenders who first enter a strange home where they believe they will meet a child for sex, confronted instead by the *To Catch a Predator* host. The court ruled that the sister of a man featured could go forward with a tort claim against the network based on an episode of the program: one that featured her brother who committed suicide just as police attempted to arrest him for soliciting what he apparently believed was a 13-year-old boy online.²¹¹ In rejecting NBC’s motion to dismiss key claims, the court found that the *To Catch a Predator* journalists very likely had violated several provisions of the Society of Professional Journalists’ Code of Ethics, including those that suggest that reporters “show good taste,” recognize that certain reporting

sense and more restrictive norms than many who write in the blogosphere, suggesting that a distinction is appropriate. As Professor Daniel Solove has noted, “[t]he average blogger is not a journalist” but instead a diarist who does not follow any ethics code. DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION* 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 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. Frequent blogger Professor 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).

²¹⁰ *Welling*, 866 N.E.2d at 1058-59. 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*, 637 A.2d 1063, 1070 (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.* (Shea, J., dissenting).

²¹¹ *Conrad v. NBC Universal*, 2008 U.S. Dist. LEXIS 14112 (S.D.N.Y. Feb. 26, 2008).

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“may cause discomfort or harm,” and intrude into private lives only when there is an “overriding public need.”²¹²

Echoing similar concerns, a federal trial court complained in a 2007 case involving media access to jurors’ names that it was dealing with a much more aggressive media today in which news had effectively become boundless. Today’s bolder media, the court wrote in rejecting the media’s request for access, “can, and unhesitatingly will, investigate jurors’ lives” and force even reluctant jurors into the spotlight. Reporters in 2007 will no longer politely accept a negative answer, the court suggested ruefully, unlike more decent reporters from just 15 years before.²¹³

As hinted at in that opinion, just as public respect for journalists has declined, public anxiety over a broader loss of privacy in modern society has swelled. Professor Solove has called this the Internet’s dark side.²¹⁴ Relentless advances in technology, changing norms, and new initiatives in government surveillance in the post-9/11 world have all contributed to a growing public sense that privacy is in peril. Professor Anita Allen notes that “[w]ebsites and public access television” have pushed the contours of accountability in previously deeply private areas, such as abortion.²¹⁵ Professor Kevin Werbach similarly observes:

Technology has dramatically broadened the scope and accuracy of information about individuals and their actions. And the coming years will witness an even greater explosion of personal tracking, recording, and monitoring. Beginning with camera-enabled mobile phones, a series of technologies, including wireless sensors and real-time location tracking, will converge to produce a world in which virtually everything might be

²¹² *Id.* at *42.

²¹³ *United States v. Calabrese*, 2007 U.S. Dist. LEXIS 74612, *11 (N.D. Ill. Oct. 5, 2007) (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 __, at 610 (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”).

²¹⁴ SOLOVE, *supra* note __, at 4 (“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”).

²¹⁵ ANITA L. ALLEN, *WHY PRIVACY ISN’T EVERYTHING* 35 (2003).

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recorded.²¹⁶

The ubiquity of camera phones, Professor Werbach observed, 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 freelance photojournalists and paparazzi.²¹⁷ But they and other new surveillance customs are also fundamentally threatening established notions of privacy. “A ‘private’ sphere,” he writes, “implies it is possible to cabin the ‘public’ sphere. Moreover, the idea that privacy can be ‘invaded’ implies some agent doing the invasion. While both conditions still hold much of the time, the growing pervasiveness of sensor technologies begins to undermine them.”²¹⁸

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.”²¹⁹

1. *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 generally²²⁰ – are posing a threat to the modern position favoring

²¹⁶ Kevin Werbach, *Sensors and Sensibilities*, 28 CARDOZO L. REV. 2321, 2321 (2007).

²¹⁷ *Id.* at 2327-28. 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* recently reported on the same phenomenon. Mireya Navarro, *Everyone Wants to be Taking Pictures*, N.Y. TIMES, Nov. 18, 2007 (those attempting to photograph a celebrity included “a teenager with a camera, an opportunist with a cell phone and even the waiter who once tipped photographers to celebrity sightings,” intensifying “an already aggressive atmosphere”).

²¹⁸ *Id.* at 2339-40.

²¹⁹ 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).

²²⁰ 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

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journalists in the legal definition of newsworthiness, especially in publication privacy cases.²²¹ A series of recent court decisions have sided with plaintiffs, retreating from the willingness of the modern position to follow reporters and the consuming public in defining the boundaries of legitimate reporting. In doing so, several courts, like the Ohio Supreme Court, have pointed directly or indirectly to a concern for eroding ethics among journalists and quasi-journalists.²²² Others, like the New York federal district court, have seized upon the professional ethics codes of news organizations to justify pushing reporting back into the boundaries of “responsible” coverage. Journalists’ own ethics codes both as a direct or an indirect standard have thus proved a convenient tool for imposing a narrower legal conception of “newsworthiness.”

Former Chief Judge of the Court of Appeals for the District of Columbia Circuit Abner J. Mikva suggested that this retrenchment had started by the mid-1990s, observing 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.”²²³ The media should “[w]atch out,” he wrote, because “[t]here’s a backlash coming in First Amendment doctrine.”²²⁴

There are two very recent cases that provide clear examples of this trend within a privacy context, one involving the disclosure of personal financial information and the other the disclosure of personal relationships, two areas in which older courts likely would have sided with the media defendants very early on in the litigation.

In one, a California appellate court found what it called “highly sensitive private financial information” regarding the plaintiff --

months of the twentieth century”).

²²¹ 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.” SANFORD, *supra* note ___, at 151.

²²² Contrast the Ohio court’s language with this laudatory language from a 1983 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*, 312 S.E.2d 405, 413 (N.C. 1984).

²²³ Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. L. REV. 291, 296 (1994).

²²⁴ *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. MEYER, *infra* note ___ at 89.

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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.²²⁵ The trial court had also denied the defendant’s motion to strike the complaint on newsworthiness grounds.

In the second, a Washington newspaper published a story in its gossip column about a CNN assignment editor and named several men she had dated, suggesting that the editor “use[d] her position to meet all the ‘right’ people.”²²⁶ The woman sued in federal court in the District of Columbia for publication of private facts.²²⁷ The court rejected the newspaper’s motion to dismiss and found that the plaintiff had stated a valid claim for publication of private facts. The court found it “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,”²²⁸ and, on that basis, concluded categorically that the plaintiff’s “personal, romantic life is not a matter of public concern.”²²⁹ 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.

That courts in 2006 and 2007 concluded that publication of the regular stuff of gossip columns – the dating practices of quasi-celebrities²³⁰ – and relatively mundane personal data of the sort readily available on the internet²³¹ could be legally sanctioned shows strikingly how far some courts have retreated from the modern position’s deference

²²⁵ *Siu v. Lee*, 2007 WL 2956360 (Cal. App. Ct. Oct. 11, 2007).

²²⁶ *See Benz v. Washington Newspaper Pub. Co.*, 2006 U.S. Dist. LEXIS 71827 (D.D.C. 2006).

²²⁷ 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.

²²⁸ *Id.* This, even though the article itself had not mentioned sexual activity other than by somewhat obscure slang implication.

²²⁹ *Id.* at *25.

²³⁰ The newspaper had reported, for example, that the plaintiff, a journalist in a position to influence the coverage of a national television news network, had dated a former coach of the University of Maryland men’s basketball team.

²³¹ Not all recent courts have agreed that such information is not newsworthy. *See Valeriano v. Rome Sentinel*, 842 N.Y.S.2d 805 (App. Div. 2007) (newspaper not liable when name, address, birthdate, and social security number published in newsworthy article).

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to journalists' conception of "news" as encompassing even matters "of more or less deplorable popular appeal."²³² The ultimate irony, of course, was that the plaintiff who invited the former 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.

There are other examples of this trend against a broader legal definition for 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.²³³ 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.²³⁴ 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.²³⁵

Inadequate digitalization is at the heart of additional, at least initially successful, publication-of-private-fact cases. The Georgia Court of Appeals upheld a \$500,000 jury award against a television station that had accidentally aired seven seconds of an AIDS patient's face though it had promised to make him unrecognizable²³⁶; the court found no news value in the identity of a particular AIDS patient.²³⁷ 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

²³² Any shift within federal courts would be especially troubling. 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).

²³³ See *Stratton v. Krywko*, 2005 Mich. App. Lexis 23, *4 (Mich. Ct. App. 2005).

²³⁴ *Id.* at *17, *20.

²³⁵ *Id.*

²³⁶ *Multimedia WMAZ v. Kubach*, 443 S.E.2d 491 (Ga. Ct. App. 1994).

²³⁷ *Id.* at 494.

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interview.²³⁸ In both cases, the newsworthiness defense was arguably undermined by the fact that the defendant outlets had themselves initially agreed to omit the disputed identifying information from their reports.

In other cases, however, courts have invited juries to determine the newsworthiness of particular facts or details included in concededly newsworthy stories, even in the absence of any such arguable concessions.

In *Winstead v. Detroit News*,²³⁹ a trial court had granted summary judgment in favor of a newspaper's decision to publish 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. The plaintiff was not named directly in the article as the source's ex-wife, but she contended that details made her reasonably identifiable to family and friends. The trial court ruled that the article and its personal disclosures concerning the plaintiff were "newsworthy" as a 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."²⁴⁰ But the appellate court reversed and held that a jury should decide whether the personal details about the plaintiff were truly "of legitimate public interest."²⁴¹ The court suggested that the media's concerns about the effect of jury review for freedom of the press were "overstate[d]."²⁴²

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.²⁴³ The court in *M.G. v. Time Warner* 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. 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

²³⁸ Doe v. Univision, 717 So.2d 63 (Fla. Ct. App. 1998).

²³⁹ 517 N.W.2d 874 (Mich. Ct. App. 1994).

²⁴⁰ *Id.* at 875.

²⁴¹ *Id.* at 878.

²⁴² *Id.* at 879.

²⁴³ M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504 (Ct. App. 2001).

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sports could be placed in harm's way,"²⁴⁴ and because, while it revealed something personal about some in the photograph, it did not identify which team members were victims. But the court ruled that that "the intrusion [was] far greater and outweigh[ed] the values of journalistic impact and credibility."²⁴⁵

In 1996, 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.²⁴⁶ The woman knew that the reporters were near, as they had just asked her unsuccessfully for an interview.²⁴⁷ The *Tribune* argued that the article focused on guns and gang violence, plainly subjects of legitimate public concern, and that the mother's words²⁴⁸ gave a human voice to the tragedies of such violence,²⁴⁹ but the court 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."²⁵⁰ The court held that a jury should decide whether the reported scene was genuinely newsworthy. 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.²⁵¹

Also in 1996, a Rhode Island court sent back to trial over the media defendant's news value arguments a case involving a videotape of

²⁴⁴ *Id.* at 514.

²⁴⁵ *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 had valid publication of private facts claim when videotape of her describing alleged sexual abuse aired nationally on cable channel's documentary).

²⁴⁶ *Green v. Chicago Tribune*, 675 N.E.2d 249 (Ill. App. Ct. 1996).

²⁴⁷ *Id.* at 251.

²⁴⁸ The *Tribune* quoted her as saying: "I love you, Calvin. I have been telling you for the longest time about this street thing." "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.* at 254.

²⁴⁹ *Id.* at 255.

²⁵⁰ *Id.* at 256.

²⁵¹ The there court found that the name of a witness to a crime may not be newsworthy, even though the crime itself was. *Times-Mirror v. Superior Court*, 244 Cal. Rptr. 556 (App. Div. 1988) (newspaper intern reported name of person who discovered body and confronted suspected murderer).

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a man sleeping fitfully in a sleep clinic, played as part of a television news report on sleep apnea.²⁵² The court sided with the plaintiff on the issue of newsworthiness, turning aside the station's contentions that the man was not identifiable and that it had, in any event, a "right to publish truthful information in which there is a clear public interest."²⁵³ In a similar case involving medical treatment more tangentially, a Missouri appellate court found that a couple who appeared in a television news story about a gathering of parents who had used in vitro fertilization methods to conceive had a valid publication claim over media arguments of news value.²⁵⁴ There too the trial court had dismissed the lawsuit on newsworthiness grounds.

There are additional examples. 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.²⁵⁵ "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."²⁵⁶ And a 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.²⁵⁷

Finally, and perhaps most surprisingly given the nation's appetite for celebrity news, in 1995, a California appellate court 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 when a newspaper reported certain facts that included the son's out-of-wedlock birth, child support payments, and trust fund value.²⁵⁸

²⁵² *Manocchia v. Narragansett Television*, 1996 R.I. Super. Lexis 77 (R.I. Super. Ct. 1996).

²⁵³ *Id.* at * 17.

²⁵⁴ *Y.G. v. Jewish Hospital*, 795 S.W.2d 488 (Mo. Ct. App. 1990). This decision was in line with an earlier one involving an allegation of negligence on the part of the media entity. *Hyde v. City of Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982) (identity of sexual assault victim not of legitimate public concern).

²⁵⁵ *Baugh v. CBS*, 828 F. Supp. 745 (N.D. Cal. 1993).

²⁵⁶ *Id.* at 755.

²⁵⁷ *Michaels v. Internet Enter. Group*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998).

²⁵⁸ *Hood v. National Enquirer*, 17 No. 9 Ent. L. Rep. 3, B082611 (Cal. App.

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Recent court decisions have similarly refused to defer to determinations of newsworthiness in other contexts. A 2007 Pennsylvania court sustained a publication-of-private-facts claim, finding that it was not a matter of public interest whether an adult female “plaintiff did or did not have an intimate 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.²⁵⁹ A California court refused to open records in a shareholder derivative action to media, finding that general newsworthiness was an insufficient argument for access,²⁶⁰ 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.²⁶¹ Also in 2007, a Florida court wrote that it doubted there would be news value in medical records obtained by news media for a story,²⁶² a Connecticut court refused to strike a privacy complaint against a television news program that aired video taken inside a home,²⁶³ 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.²⁶⁴ That same year, a federal court found no significant news value in a copyrighted photograph of the September 11, 2001, crash of United

Div. 1995).

²⁵⁹ *Sharp v. Whitman Council*, 2007 WL 2874058 (E.D. Pa. 2007).

²⁶⁰ *Mercury Interaction Corp. v. Klein*, 2007 Cal. App. LEXIS 2059, at ** 96-97 (Cal. Ct. App. 2007) (“The claim that the subject of the litigation may be newsworthy—in 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”).

²⁶¹ *In re Thow*, 2007 Bankr. LEXIS 4122, at * 21 (W.D. Wash. 2007) (“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”).

²⁶² *Post-Newsweek Stations v. Guetzloe*, 2007 Fla. App. LEXIS 15709 (Fla. Ct. App. 2007). The court refused to uphold an injunction against publication, however.

²⁶³ *Lattanzio v. WVIT*, 2007 Conn. Super. LEXIS 1660 (Conn. Super. Ct. 2007).

²⁶⁴ “*Alex*” v. *Renegades Associates, Inc.*, 2007 N.Y. Misc. LEXIS 5350 (Sup. Ct. 2007).

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Flight 93 in Pennsylvania, because more than one year had passed since the national tragedy.²⁶⁵

Three 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.²⁶⁶ "As a result," the court wrote, "it is unclear whether there was really a tremendous public interest in reporting the story."²⁶⁷

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*, 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*.²⁶⁸ 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.²⁶⁹ 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 refused to find that it was newsworthy as a matter of law.²⁷⁰

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 compelling. A mother's anguish over a son lost to epidemic gang violence, helicopter accidents in the Iraq war, images of the September 11 attacks, child sexual abuse, and even unconventional love relationships are of obvious interest and significance or at the very least qualify as matters of "more or less deplorable popular appeal." Nor did the privacy interests in these cases – a sleep clinic video, a mother's words of grief, a Little League team photograph, coverage of a hospital stay with fleeting medical and identity information, a list of dating partners – seem unusually significant

²⁶⁵ *McClatchey v. Associated Press*, 2007 U.S. Dist. LEXIS 17786 (W.D. Pa. 2007).

²⁶⁶ *Turnbull v. ABC*, 32 Media L. Rep. 2442 (C.D. Cal. 2004).

²⁶⁷ *Id.* at *48.

²⁶⁸ *Lowe v. Winter*, 2007 U.S. Dist. LEXIS 49962 (D.D.C. 2007).

²⁶⁹ *Id.* at * 5-7.

²⁷⁰ *Id.* at * 6-7.

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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 more clearly identifiable plaintiffs, including 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. It appears that some courts, frustrated with the excesses of modern journalism, or more sensitive to the ongoing erosion of personal privacy in modern society,²⁷¹ are striking the balance between press and privacy differently than did their predecessors, an analysis that Steven Gieseler has called “an ad hoc undertaking in which the definition [of news] fluctuates according to the ‘experience, outlook, and even idiosyncrasies’ of the decision-maker,”²⁷² the judge or jury.

2. *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. As noted earlier, a succession of First Amendment cases in the 1960s, 1970s, and 1980s fueled mounting doubt about the constitutionality of *any* limitation on the freedom of the press to report truthful information on matters of public concern. In case after case, the Court acknowledged but ultimately sidestepped the question whether journalists might enjoy an absolute privilege to report truthful information under the Constitution.²⁷³ In 2001, the Court had an

²⁷¹ One author has suggested that judges themselves, including those serving on the Supreme Court, are becoming increasingly the subjects of news coverage and that, 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 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”).

²⁷² Gieseler, *supra* note ___ at 319.

²⁷³ See, e.g., *Florida Star*, 491 U.S. at 532-33 (“[O]ur cases have carefully eschewed reading 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 [the] First Amendment and privacy rights counsel relying on limited principles that sweep not more

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opportunity to reach that question and hand journalists an absolute constitutional privilege, and yet the Justices stopped pointedly short.²⁷⁴

*Bartnicki v. Vopper*²⁷⁵ 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.²⁷⁶ The question for the Court was whether the station could be proscribed from broadcasting the information because it had been unlawfully obtained by a third party, or whether the First Amendment privileged the station in disclosing newsworthy information that it had lawfully obtained.

The Court sided with the station, but on narrow grounds. The Court reiterated that "state action to punish the publication of truthful information seldom can satisfy constitutional standards,"²⁷⁷ but it also reaffirmed its "repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."²⁷⁸ 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."²⁷⁹ 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 whose privacy was invaded was himself an active participant in the public controversy. "One of the costs associated with participation in public affairs," the Court reminded, "is an attendant loss of privacy."²⁸⁰ Yet, although finding that "[i]n this case, privacy concerns give way when balanced against the interest in publishing matters of public

broadly than the appropriate context of the instant case.").

²⁷⁴ Even before the *Bartnicki* decision, 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* note ___ at 80 (citing *Wilson v. Lane*, 526 U.S. 603 (1999)).

²⁷⁵ 532 U.S. 514 (2001).

²⁷⁶ *Id.* at 518-19; *see also id.* at 525 (accepting that "the subject matter of the conversation was a matter of public concern").

²⁷⁷ *Id.* at 526.

²⁷⁸ *Id.* at 529.

²⁷⁹ *Id.* at 533.

²⁸⁰ *Id.* at 534.

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importance,”²⁸¹ 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.”²⁸²

Justice Breyer’s concurring opinion, joined by Justice O’Connor, emphasized the narrow scope of the Court’s holding. “[T]he Court’s holding does not imply a significantly broader constitutional immunity for media,” he wrote.²⁸³ Indeed, Breyer suggested that legislatures might wish to take action to prevent certain privacy invasions, lest “continuously advancing technologies” make it easier to eavesdrop in the bedroom and elsewhere.²⁸⁴ He closed his opinion by warning against “adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”²⁸⁵

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,” raising “significant privacy concerns.”²⁸⁶ 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.²⁸⁷

The narrowness of the media’s victory in *Bartnicki* – notably providing a 5-4 majority that suggests a privacy trump to media’s First Amendment newsworthiness arguments – is both striking and, for journalists, ominous. It could mark a decided turn at the Supreme Court in favor of personal privacy and against media news determinations. Only three years after *Bartnicki*, the Justices suggested that family members have the right “to limit attempts to exploit pictures of the deceased family member’s remains for public purposes,” in a Freedom of Information Act case with significant implications for media.²⁸⁸ The Court unanimously found that the phrase “personal privacy” in the Act included survivor’s privacy after quoting the complaint of Vincent

²⁸¹ *Id.*

²⁸² *Id.* at 533.

²⁸³ *Id.* at 536 (Breyer, J., concurring).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 541.

²⁸⁶ *Id.* at 541 (Rehnquist, C.J., dissenting).

²⁸⁷ *Id.* at 553-54.

²⁸⁸ *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004).

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Foster's sister that if photographs of his suicide were released, "[o]nce again [her] family would be the focus of conceivably unsavory and distasteful media coverage."²⁸⁹

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

B. *The Judicial Use of Journalistic Ethics in Policing the Press in Privacy Cases*

Significantly, some recent lower courts have already seized upon a device for doing precisely that; they have reined in journalistic excesses by employing the professional ethical standards of journalists themselves to determine that a disputed story was not genuinely newsworthy.²⁹⁰ In *M.G. v. Time Warner*, the Little League case, for example, the court wrote that public policy favored non-publication of the disputed team photo, "as does the journalism profession."²⁹¹ 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.²⁹²

In *Y.G. v. Jewish Hospital*,²⁹³ too, the case involving a couple that had conceived through in vitro fertilization and had appeared against their wishes in a television news story, the court criticized news media "which fail or refuse to follow the traditional and modern canons of journalism."²⁹⁴ 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

²⁸⁹ *Id.* at 167.

²⁹⁰ Professor Bezanson suggested that this was "the most recently developing" approach to editorial judgment in 1999. Bezanson, *supra* note __, at 830. In an early publication privacy case, the court may have been the first to suggest that journalism has freedom but also corresponding responsibility as suggested in its "self-governing code." Patterson, *supra* note __, at 625.

²⁹¹ *M.G.*, 107 Cal. Rptr. 2d at 513.

²⁹² *Id.*

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

²⁹⁴ *Id.* at 496; *see also* KOVR-TV 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).

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standard for non-newsworthiness. The court, however, invoked the “canons of journalism” to justify legal sanctions against the media’s news judgment.

There are other examples. The federal district court in the *Conradt* case allowed the plaintiff’s intentional infliction of emotional distress claim to go forward, finding specifically that the NBC’s alleged journalism ethics code violations could support a jury finding of outrageousness.²⁹⁵ The court in the early stages of a privacy case found for the plaintiff when part of the plaintiff’s argument was that the ABC television network had failed to follow both “standard journalism ethics” and its own ethics guidelines in a hidden camera documentary.²⁹⁶ A similar determination came in a Utah case in which media defendants were alleged to have enticed underage children to chew tobacco for inclusion in a story. 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.”²⁹⁷

California’s Supreme Court in 2007 went so far as to use journalism standards against a scholar, decidedly a quasi-journalist at best. It allowed a privacy action to proceed against a researcher who studies recovered memory of childhood abuse and who had used the plaintiff’s story within scholarly articles and presentations.²⁹⁸ 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.²⁹⁹ Significantly, the court also noted that while it found the information at issue newsworthy, “no profound or overriding public *need* . . . justified resort” to certain actions alleged to have been taken by the defendant.³⁰⁰

Journalism ethics codes are surfacing against journalists in additional cases still working their way through the court system. In a very recent privacy-related case involving a newspaper’s violation of a

²⁹⁵ *Conradt*, 2008 U.S. Dist. LEXIS 14112, *3 (“NBC characterizes the series as ‘an investigative news series’ and refers to Dateline as a ‘news program’”).

²⁹⁶ *Turnbull v. ABC*, 32 Media L. Rep. 2442, *11 (C.D. Cal. 2004).

²⁹⁷ *Utah v. Krueger*, 975 P.2d 489 (Utah Ct. App. 1999). The media defendants argued that they had not set up the video at all, but had used the video as part of the story because such images were “essential to television journalism.” *Id.* at 497.

²⁹⁸ *Taus v. Loftus*, 151 P.3d 1185 (Cal. 2007).

²⁹⁹ *Id.* at 1223.

³⁰⁰ *Id.* (emphasis added).

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protective order, a case with obvious privacy implications, a federal trial 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.³⁰¹ 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].”³⁰²

Additional court decisions appear to rely on equivalent ethics standards in rejecting the broader Restatement definition of news, even when they do not mention ethics codes expressly.³⁰³ In *Green v. Chicago Tribune*, 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 for its own sake,” especially given their powerful effect within the context of the story.³⁰⁴ The same might be said of the disclosures within the reports concerning the CNN editor’s romances, the Michigan accident victim, and the sleep apnea story, among others.

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 . . . [reporters] must adhere to the ethics of the great profession of journalism,” and that readers were “entitled” to “high quality”

³⁰¹ Zyprexa Litigation, 474 F. Supp. 2d 385, 397 (E.D.N.Y. 2007) (emphasis added).

³⁰² *Tilton v. McGraw-Hill*, 2007 U.S. Dist. LEXIS 1449, at *5 (W.D. Wash. Jan. 5, 2007). The court therefore seemingly equates its own local “rules,” which are absolutely mandatory, with so-called journalism ethics “rules.”

³⁰³ 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 __, at 193. Jeff Storey has noted a similar trend in defamation lawsuits. “Ethical 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.” Storey, *supra* note __, at 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. Hartman, *supra* note __, at 656.

³⁰⁴ Professor Bezanson recognizes this narrowing as well. Bezanson, *supra* note __, at 781 (“Discomfort with the potential breadth of the newsworthiness inquiry is evident in *Green*” where the court “defined newsworthiness more narrowly”).

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reporting.³⁰⁵ Several years later, a second court counseled reporters that it believed that all 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.³⁰⁶ Today, some courts have started to enforce that expectation.

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 or their equivalent has a unique and obvious appeal for judges by offering the appearance of deferring to journalists, even while substantially narrowing their discretion. But tying the legal standard of “newsworthiness” to judicial interpretations of professional ethical standards not only narrows the legal definition of news, it makes protection for journalists dependent upon the ability of judges and jurors to discern sensitively the nuanced norms of a field to which they are often frankly hostile.³⁰⁷ 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”;

³⁰⁵ *Herald Co. v. Seawell*, 472 F.2d 1081, 1094 (10th Cir. 1972).

³⁰⁶ *In re Access to Certain Records of Rhode Island Advisory Committee*, 637 A.2d 1063, 1067 (R.I. 1994) (emphasis added). The ethics provisions footnoted this comment: “A responsible news medium scrutinizes; it does not unjustly or irresponsibly incite a wildfire of insinuation.”

³⁰⁷ One judge openly suggested “that the press adopt and be bound by an effective code of journalism ethics” and that ombudspersons be established at news organizations, complaining that “the 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, 589-90 (Common Pleas Ct. 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 reach back to the founding of the Republic. *See, e.g., State v. Norris*, 2 N.C. 429 (1796) (“The people in this country do not take for truth every thing that is published in a newspaper”); *Case of Fries*, 9 F. 826 (D. Pa. 1799) (a newspaper uses “the grossest, the most insidious practices . . . to warp your sentiments”).

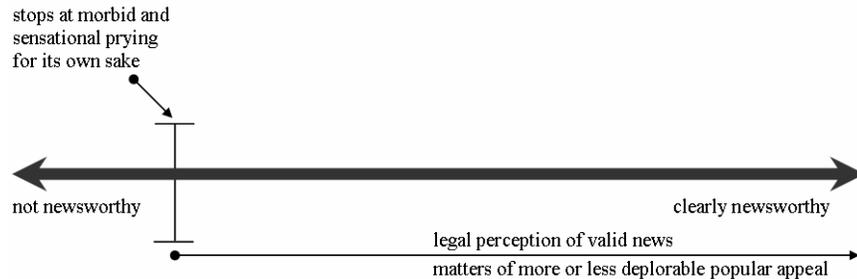
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accordingly, “[t]he rules resulting from their deliberations would likely be awkward and overly intrusive.”³⁰⁸

A. Journalism Ethics: A Narrowing of News

A substantial divide separates the conceptions of newsworthiness found in ethical standards and the broader Second Restatement of Torts.³⁰⁹ The modern position reflected in the Restatement and prevailing until recently in the courts deferred heavily to the market-driven news judgment of working journalists. Its definition of news encompassing all matters “of more or less deplorable popular appeal,” and stopping only at “morbid and sensational prying for its own sake,” 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:

What is “Newsworthy”?
The Law View



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

³⁰⁸ Morant, *supra* note __, at 618.

³⁰⁹ 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 __, at 299.

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individuals may cope with the exigencies of their period.”³¹⁰ The standard thus embraces journalism’s own understanding that news has value both in terms of topic and timeliness.³¹¹

Contrast the breadth of that approach with the more restrictive definition of news suggested by some courts’ readings of journalism ethics codes.³¹² There are multiple codes, including those of the Society of Professional Journalists (SPJ),³¹³ the Radio and Television News Directors Association (RTNDA),³¹⁴ and those drafted by individual media outlets such as *The New York Times*³¹⁵ and National Public Radio.³¹⁶ These codes do not purport to fix standards of appropriate conduct for *all* journalists, though the SPJ code has a broad reach, but are meant to apply to members or employees of the authoring organization or company. In addition, there are certain generally unwritten ethics standards in journalism, such as a refusal to cover suicides that have little or no valid public news value and a policy of not naming sexual assault victims.³¹⁷

The wording of nearly all provisions in journalism’s ethics codes and standards is suggestive rather than compulsory.³¹⁸ Professor Logan

³¹⁰ *Lowe v. Hearst Communications*, 2007 U.S. App. Lexis 11528, at *7 (5th Cir. May 16, 2007) (“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 [and] the newsworthiness of the story was enhanced by a discussion regarding the legal ethics . . . as well as by commentary from the prosecutor’s office about its proposed response.”).

³¹¹ *See, e.g., In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998) (noting that newsworthiness is fleeting and that to postpone a story may be to quash it altogether).

³¹² As one commentator has noted, “[e]thical and legal standards are not identical.” Jeff Storey, Note, *Does Ethics Make Good Law? A Case Study*, 19 *CARDOZO ARTS & ENT. L.J.* 467 (2001). Moreover, while journalists themselves may define news broadly, ethics codes help guide news judgment beyond a cover-it-all, blanket approach.

³¹³ Ethics materials available at <http://www.spj.org/ethicscode.asp>. Professor David Logan called the SPJ code “the most influential.” David A. Logan, “*Stunt Journalism, Professional Norms, and Public Mistrust of the Media*,” 9 *J. LAW & PUB. POL’Y* 151, 159 (1998).

³¹⁴ Ethics materials available at <http://www.rtna.org/ethics/coe.shtml>.

³¹⁵ Ethics materials available at http://www.nytc.com/pdf/NYT_Ethical_Journalism_0904.pdf.

³¹⁶ Ethics materials available at <http://www.npr.org/about/ethics/>.

³¹⁷ SOLOVE, *supra* note __, at 195. Professor Solove also notes that media generally refuse to cover politicians’ children.

³¹⁸ “The [early] canons were mostly statements of ideals and aspirations and

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calls them “gauzy generalities.”³¹⁹ Indeed, the aim of the codes is not to dictate editorial decisions but to guide journalists in making discretionary ethical calls regarding story coverage, recognizing that responsible journalists may well come to different conclusions while applying the same standards, depending upon the community served, the news organization itself, and the journalist’s internal ethics sense. Even if an ethical standard appears on its face to oppose publication, codes typically acknowledge that there may be overriding reasons to go forward with the disclosure. *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.³²⁰ The NPR News Code of Ethics and Practices suggests that its purpose “is 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.”³²¹ These standards of practice then are deliberately amorphous, subjective, and subject to claims of exigency.³²²

And yet the precise language pertaining to news value within the

contained no enforcement procedures for punishing code violations.” Lynn Wickham Hartman, *Standards Governing the News: Their Use, Their Character, and Their Legal Implications*, 72 IOWA L. REV. 637, 640 (1987). The provisions remain that way. The SPJ Code of Ethics, repeatedly uses the word “should” and not the word “must.” 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.” www.spj.org/blog/blogs/ethics/archive/2007/06/20/7736.aspx. 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.

³¹⁹ Logan, *supra* note __, at 159.

³²⁰ Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments, ¶¶ 10-12, at http://www.nytc.com/pdf/NYT_Ethical_Journalism_0904.pdf.

³²¹ See <http://www.npr.org/about/ethics/> (introduction paragraph 3).

³²² Indeed, Professor Clay Calvert suggests that even the once universally accepted goal of objectivity in journalism is no longer universal. Clay Calvert, *The Law of Objectivity: Sacrificing Individual Expression for Journalism Norms*, 34 GONZ. L. REV. 19 (1999) (criticizing decision supporting reassignment of reporter based on ethics ideal of neutrality and objectivity and lamenting that objectivity in journalism is now the law in Washington State).

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codes is far more restrictive than such organic interpretive language implies. 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 that "[o]nly an overriding public need can justify intrusion into anyone's privacy" or its urging that journalists "[s]how good taste [and] [a]void pandering to lurid curiosity," language the federal district court in New York recently seized upon. National Public Radio, too, suggests that "[o]nly an overriding public need to know can justify intrusion into anyone's privacy." Both directly address the inherent conflict between public *need* and public *interest*, and side with need, a clearly narrower news standard. *The New York Times* code, while mostly silent as to precise privacy news determinations, suggests broadly that reporters "not inquire pointlessly into someone's personal life." The RTNDA code suggests similarly that broadcast journalists "[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."

Such ethics provisions, media attorney and author Bruce Sanford has written, serve as strong restrictive guidance to journalists, even when the law would allow coverage:

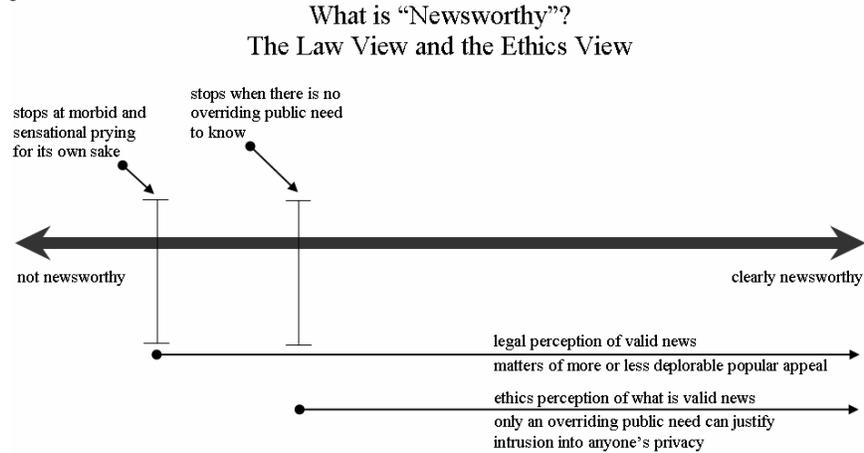
What the public does not see, however, is the editorial process that goes on in such situations Cynics assume that anything salacious in a court file can find a home on the air or in print. But people in newsrooms are cognizant of their power to exacerbate or magnify a person's pain or suffering. And 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.³²³

Here is the way the difference between the Restatement definition for news and several ethics codes' definitions for news might

³²³ SANFORD, *supra* note __, at 103. As another example of this weighing process, professor and former journalist Philip Meyer, author of the well-respected and often-cited *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. PHILIP MEYER, *ETHICAL JOURNALISM* 86 (1987).

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be graphed, revealing a distinctly tighter definition for news within journalism ethics:



Whereas the standard found in the Restatement defers to journalistic news judgment so long as an intrusion on privacy is not gratuitously destructive, resort to ethical standards invites courts to balance more fluidly individual privacy interests against the public's overriding *need* to know.³²⁴

There are significant risks of error and abuse in inviting judges to police journalists by enforcing ethics standards. For one, journalists' ethics codes are filled with intersecting and even opposing statements of value.³²⁵ 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." They suggest that reporters respect the "dignity and intelligence" of newsmakers and yet make their "first obligation" to the public. They suggest that reporters "seek truth and report it" but also "minimize harm." Such internal tensions are unremarkable in documents meant to

³²⁴ At least one court has recognized the divide between legal standards for journalists and ethical standards for journalists. *Mayes v. Lin Television*, 27 Media L. Rep. 1214, at *17 (N.D. Tex. 1998) (The plaintiff "attempts to hold [the defendant] to a journalistic standard not mandated in the law which, in essence, would permit her to dictate the content of a news broadcast" and punish the reporting of truthful, though embarrassing, information).

³²⁵ "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 ___, at 613.

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capture and credit a diversity of values. They are left unresolved by the codes precisely because the drafters contemplated 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.

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 press coverage,” as the SPJ Code requires, or had lived up to duties requiring reporters to “show good taste” and “[a]void pandering to lurid curiosity,” a standard to which the *To Catch a Predator* journalists were recently held. From the viewpoint of some news subjects, NPR’s ethical mandate that its reporters “treat the people they cover fairly and with respect” could seem significantly under-enforced. Adding to the confusion, the 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.”

Indeed, the danger that jurists and jurors might wield broad journalistic standards as markers to impose liability has already been realized. In a 1996 California defamation case,³²⁶ 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” within journalism and that journalists should “observe common standards of decency.”³²⁷ The court criticized the defendant tabloid for falling short of these lofty goals, ones that it found should be at the heart of all journalism. A second court relied on general ethics principles it claimed were followed by “every daily newspaper that expects itself to be taken seriously,” to uphold a jury award for a plaintiff in a defamation

³²⁶ 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 (1984) (“the issues of a journalist’s fault is not within the competence of the lay jury unaided by evidence of journalistic practices”).

³²⁷ *Khawar v. Globe*, 54 Cal. Rptr. 2d 92,107 (Ct. App. 1996) (citing both the Society of Professional Journalists Code of Ethics and the American Society of Newspaper Editors Statement of Principles).

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case.³²⁸

Professor Todd Simon had warned of this possibility in 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.”³²⁹

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 will be tempted to conclude that the newsworthy aspects of the story could have been relayed as effectively in a more general or abstract way. When the Massachusetts court banned *Titicut Follies*, for example, it wrote that “[r]ecognizable pictures of individuals, although perhaps resulting in more effective photography, were not essential.”³³⁰ Thirty years later, an Illinois court similarly chided *Chicago Tribune* reporters for including a grieving mother’s words in their page-one story, writing that jurors “could find the . . . article . . . did not need plaintiff’s intimate statements to [her son] or his photograph to convey the human suffering behind gang violence.”³³¹ The courts in the Little League case,

³²⁸ *Murphy v. Boston Herald*, 865 N.E.2d 746 (Mass. 2007). For additional ethics use within defamation cases, see Morant, *supra* note __, at 620-23.

³²⁹ Simon, *supra* note __, 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 467.

³³⁰ *Wiseman*, 249 N.E.2d at 617.

³³¹ *Green*, 675 N.E.2d at 255. 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

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the in vitro fertilization case, and many others similarly suggested that disputed news stories could have been written without a focus on particular persons.

Yet this injunction would ignore what journalists and others understand about the powerful communicative effects of personalizing stories and 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 soundbites and so little on generalizations and charts is that personalization is so effective at reaching readers and viewers. "Where possible," one journalism text urges, "leads should focus on people doing things, since readers have a hard time identifying with impersonal institutions and abstract 'Important Issues of the Day.' If an event is the story's focus, show how the event will affect or has affected people."³³² Additional texts suggest that a good reporter "put[s] quotes and human interest high in the story" to "give the report life and meaning"³³³ and that one of the most important traits of a good journalist is a search "for the human side of the news, for voices that enliven the writing."³³⁴ Moreover, as Professor Zimmerman suggests, a story that fails to name sources or persons "is properly subject to serious credibility problems."³³⁵

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 non-fiction book entitled *The Promised Land: The Great Black Migration and How It Changed America*. Writing for the Seventh Circuit in

entertaining background for their T.V. expose concerning the high salaries paid to executives at U.S. Healthcare").

³³² M.L. STEIN & SUSAN F. PATERNO, *THE NEWSWRITER'S HANDBOOK: AN INTRODUCTION TO JOURNALISM* 64 (1998). A media scholar put it this way: "News does not advance the cause of democracy . . . because it personalizes (gives preference to individual actors over institutional or political considerations) [and] dramatizes (emphasizes crisis over continuity and personal drama over persistent problems of our time) . . ." ROB ANDERSON, ROBERT DARDENNE & GEORGE KILLENBERG, *THE CONVERSATION OF JOURNALISM* 66-67 (1996).

³³³ NEWS REPORTING AND WRITING, *supra* note ___, at 138, 141.

³³⁴ BRUCE D. ITULE, DOUGLAS A. ANDERSON, *NEWS WRITING AND REPORTING FOR TODAY'S MEDIA* 31 (2003). The authors later explain that quotations from those affected by a story generate emotion, "provide vivid description," "bring a dull story to life," and "send tingles down a person's back." *Id.* at 98.

³³⁵ Zimmerman, *supra* note ___, at 356.

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Haynes v. Alfred A. Knopf, Inc.,³³⁶ 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.”³³⁷ 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.”³³⁸

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.³³⁹ The court rejected the plaintiff’s claims that such personalization was unnecessary.³⁴⁰

The value of personalization is not the only matter dividing journalists from many jurists and juries. There is also a fundamental misunderstanding about the mechanics, literal and figurative, of

³³⁶ 8 F.3d 1222 (7th Cir. 1993).

³³⁷ *Id.* at 1233.

³³⁸ *Id.*

³³⁹ *Ross v. Midwest Communications*, 870 F.2d 271, 274 (5th Cir. 1989).

³⁴⁰ There are other cases in which courts support journalism’s style over plaintiffs’ claims of journalism’s wrongs, although many were decided during journalism’s heyday in the courts. *Gilbert v. Medial Economics Co.*, 665 F.2d 305 (10th Cir. 1981) (plaintiff’s photograph and name “strengthen the impact and credibility of the article”); *Gaeta v. New York News*, 465 N.E.2d 802 (N.Y. 1984) (the “familiar journalistic technique of featuring the experiences of a single individual, as exemplifying in human terms the plight of many” does not support a defamation claim); *Cinel v. Connick*, 15 F.3d 1338 (5th Cir. 1994) (materials broadcast were “substantially related” to the story); *Carter v. Superior Court*, 2002 Cal. App. Unpub. LEXIS 5017 (Cal. Ct. App. 2002) (material that jury might find not important or in poor taste or overly sensational will not support privacy action); *Huggins v. Moore*, 726 N.E.2d 456, 461 (N.Y. 1999) (“in portraying a matter of public concern, the media are permitted to employ the familiar journalistic technique of featuring the experiences of a single individual, as exemplifying in human terms the plight of many”) (citations omitted); *Carter v. Superior Court*, 2002 Cal. App. Unpub. LEXIS 5017, at *12 (Cal. Ct. App. 2002) (“[i]t may have been unnecessary for [the two media defendants] to show [the plaintiff] in his underwear or state that he had been at a bathhouse that night [but the] standard, however, is not necessity”) (citations omitted). These cases echo one of the earliest courts to credit journalism. The New York Court of Appeals wrote in 1932 that certain journalistic techniques, including “slight irony or wit, or all those delightful touches of style which go to make an article readable,” would not support a libel action against a newspaper. *Briarcliff Lodge Hotel v. Citizen-Sentinel Publishers*, 183 N.E. 193 (N.Y. 1932).

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journalism. Professor Jane Kirtley was the executive director of the Reporters Commission for Freedom of the Press when she first complained 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 gather the news. They don’t get it. They simply don’t get it.”³⁴¹

There are 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, lamenting that even in “responsible newspapers” profit is a motive.³⁴² 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 that, under those dubious circumstances, a jury would be better able to form an “intelligent and accurate opinion as to whether the defendant reporter should have conducted additional investigations.”³⁴³

Another judge similarly criticized media defendants for not submitting to the bench “written canons of journalism ethics that [would] purport to justify [their] actions” while the same judge simultaneously 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.³⁴⁴

A federal trial court in Maine similarly sided with plaintiffs and against media in preliminary skirmishes in a newspaper defamation case. 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,³⁴⁵ a boast of a type not uncommonly heard in

³⁴¹ SANFORD, *supra* note __, at 169 (quoting Professor Kirtley).

³⁴² *Richmond Newspapers v. Lipscomb*, 362 S.E.2d 32 (Va. 1987).

³⁴³ *Id.* at 42. For additional examples from newsgathering cases, see Story, *supra* note __, at 490-91.

³⁴⁴ *Cramlet v. Multimedia Program Productions*, 1985 U.S. Dist. LEXIS 21704 (D. Colo. March 15, 1985) (“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”).

³⁴⁵ *Norris v. Bangor Publishing*, 53 F. Supp. 2d 495 (D. Maine 1999).

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newsrooms across the county. 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.

There was a similar outcome in a New York case in which 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."³⁴⁶

Still another court critiqued an article in a consumer magazine – pointedly "refrain[ing] from describing [the article] as exemplifying the very 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.³⁴⁷

Finally, the Massachusetts Supreme Judicial Court in 2007 relied on the SPJ Code in upholding a plaintiff's verdict in a defamation case and accepted testimony from a journalism expert who opined, according to the court, that "it is never 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."³⁴⁸ Yet both of these "principles of journalism," as the court called them, are quite debatable and 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.³⁴⁹ Reporters will also sometimes

³⁴⁶ *Greenberg v. CBS*, 419 N.Y.S.2d 988, 998 (N.Y. Sup. Ct. 1979).

³⁴⁷ 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, page proofs, and second page proofs." *Bose Corp. v. Consumers Union*, 692 F.2d 189, 197 (1st Cir. 1982).

³⁴⁸ *Murphy v. Boston Herald*, 865 N.E.2d 746, 765 (Mass. 2007).

³⁴⁹ The Supreme Court noted as much in *Masson v. New Yorker*, 501 U.S. 496, 470 (1991), when it wrote that reporters "by necessity" change certain quotes "at the very least to eliminate grammatical and syntactical infelicities." Journalism text authors agree: "Generally, most editors allow reporters to clean up grammar or take out profanities in

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report an important story without two sources when circumstances warrant, despite the ordinary place of the two-source rule.³⁵⁰

If there is this sort of fundamental misunderstanding and disconnect between *jurists* and journalists,³⁵¹ 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.³⁵²

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.’” BRUCE D. ITULE & DOUGLAS A. ANDERSON, *NEWS REPORTING AND WRITING FOR TODAY’S MEDIA* 100 (2003); *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”).

³⁵⁰ “Under competitive pressure, many news organizations have given up traditional rules such as having two sources of attribution” Stanford News Service, *Journalists discuss clash of ideals, reality in their business*, July 2, 1997, available at <http://news-service.stanford.edu/pr/97/970702journalist.html> (quoting 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, *BROADCAST NEWS HANDBOOK* 90 (2001). *See also* Storey, *supra* note __, at 474 (“newspapers frequently use information from single sources if they regard the source as especially credible”).

³⁵¹ For additional examples of the judge-journalist divide, see Murchison, *infra* note __, at 60-65. 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 (arguing that Supreme Court jurisprudence has forced journalists into “trivial, lax, and sensationalistic” reporting); *see also id.* at 207.

³⁵² In one poll, respondents were asked, “[o]verall, 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% to 53% over the eight-year period from 1997 to 2005. As another sign of a divide between jurors and journalists, in 2005, only 16% of those Americans surveyed could name freedom of the press as one of the specific rights guaranteed by the First Amendment. *First Amendment Center State of the First Amendment Final Annotated Survey*, available at <http://www.firstamendmentcenter.org/PDF/SOFA.05.final.web.6.27.pdf>. As support for

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As Professor Bezanson has argued, content analysis is a “deeply problematic venture in the news setting.”³⁵³ Ethical standards without the nuances created by interpretation and experience are clearly an appealing device for a judiciary and public increasingly impatient with the excesses of a reality-television culture, a hungry 24-hour news cycle, and media that appear to be more concerned about profitability than the gravity of news content. But making vague aspirational and internally conflicted ethical codes the foundation for tort assessments of “newsworthiness” carries an unacceptable 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 already recognized that departures from journalism ethics codes provide an unacceptably thin ground for imposing liability on the press. Indeed, in *Harte-Hanks v. Connaughton*,³⁵⁴ the Court held in 1989 that even “an extreme departure from professional standards” was insufficient to establish liability for defamation against a public figure.³⁵⁵ “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 majority of this Court.”³⁵⁶ 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.³⁵⁷

If “extreme departure[s]” from ethics codes are an insufficient

these concerns, 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 __, at 461.

³⁵³ Bezanson, *supra* note __, at 855 (“[n]ews is not the accidental occurrence of content – or information or events or opinion – and therefore cannot effectively or accurately be judged by content alone”).

³⁵⁴ 491 U.S. 657 (1989).

³⁵⁵ *Id.* at 665.

³⁵⁶ *Id.* at 666.

³⁵⁷ *Id.* at 668.

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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 punishing truthful reporting under privacy law on that basis. As Professor Marc Franklin suggested in the early 1960s, “[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.”³⁵⁸

The Supreme Court has repeatedly stressed the importance of the search for truth as a rationale for First Amendment protection. In *New York Times 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,”³⁵⁹ calling it a “national commitment” that public debate be “uninhibited, robust, and wide-open.”³⁶⁰ Tolerance of some inevitable erroneous statements, the Court explained, is necessary to ensure “breathing space” for free expression in pursuit of truth.³⁶¹ The Court warned that *truthful* speech would be quashed should libel law become too intolerant of falsity, quoting 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.”³⁶²

The Justices have made this even clearer within the context at issue here, writing in *Herbert v. Lando*, that they 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.³⁶³ Yet a newsworthiness standard tied to judicial interpretations of journalism ethics codes would effectively empower judges to police news judgment on a negligence standard even when there is no question as to its reliability. Any such turn away from the broader definition of news suggested by the Second Restatement and formerly endorsed by what has been here called the modern position in

³⁵⁸ Franklin, *supra* note ___, at 140. 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.”

³⁵⁹ 376 U.S. at 269.

³⁶⁰ *Id.* at 270.

³⁶¹ *Id.* at 271-72.

³⁶² *Id.* at 725 (citing JOHN STUART MILL, ON LIBERTY (Oxford: Blackwell rev. ed. 1947)).

³⁶³ 441 U.S. 153, 172 (1979)

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press-privacy conflicts invites journalistic timidity and self-censorship.³⁶⁴

For some courts, of course, such as the Ohio Supreme Court in *Welling*,³⁶⁵ this chilling effect is not an overlooked byproduct of tort doctrine, but precisely the point of expanding liability rules. And yet, as courts embracing the modern position had long and rightly cautioned, the “uncertainty such decisions could create for writers and publishers” leads to “dangerous ground” for First Amendment values.³⁶⁶ Judges, “acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively” lest “[e]xuberant judicial blue-penciling after-the-fact . . . blunt the quills of even the most honorable journalists.”³⁶⁷

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

This Article has shown that judicial deference to journalists in defining the news, embraced as the operative standard of tort liability under the Second Restatement of Torts and enshrined as a constitutional principle in many court opinions, is now in some retreat. Just a little over a decade ago, the prevailing view in the courts was that news was whatever journalists published in response to the inquisitive demands of the consuming public; the Supreme Court appeared to be on the brink of announcing an absolute First Amendment privilege to publish truthful information, however intimate or embarrassing, on matters of public concern; and many judges and scholars were ready to write the obituary

³⁶⁴ “[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. 745, 756 (1991). More recently, Dean 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 ___, at 656.

³⁶⁵ *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007); *see supra* notes ___-___ & accompanying text.

³⁶⁶ *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1291 (D.D.C. 1981); *see also* *Star Telegram v. Doe*, 915 S.W.2d 471, 475 (Tex. 1995) (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”) (Gonzalez, J., concurring).

³⁶⁷ *Ross v. Midwest Communications*, 870 F.2d 271, 275 (5th Cir. 1989).

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of the privacy torts.

Today, the landscape looks startlingly different -- and yet remarkably similar to the early years of privacy when courts routinely held journalists liable for what courts considered non-newsworthy reporting. Courts are increasingly asserting their own judgments in determining the proper boundaries of journalism, drawing increasing support from their reading of journalism ethics codes. The prospects for an absolute First Amendment privilege have dimmed considerably after the Supreme Court issued a narrow ruling in *Bartnicki* emphasizing the danger to legitimate privacy concerns raised by intrusive surveillance. And a raft of recent court decisions upholding privacy claims, and even adopting new privacy causes of action, show that the privacy torts are very much alive. As Professor Eugene Volokh warned in 2000, the “danger [of newsworthiness] has materialized.”³⁶⁸

In part, of course, journalism has itself to blame for these developments. To the extent that journalists have needlessly pushed the envelope of decency and good taste in pandering to base public appetites, they have made themselves more vulnerable to public and judicial backlash.³⁶⁹ Some courts recently have pointed to a failure of self-regulation to justify more aggressive judicial regulation of the media.³⁷⁰

³⁶⁸ Eugene Volkh, *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).

³⁶⁹ 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 __, 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 __, 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 with a modern democratic society.” Morant, *supra* note __, 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 __, 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 [and] the media must pay more attention to ethics and fairness because that is what the public and courts increasingly demand.”).

³⁷⁰ There was the suggestion more than a decade ago that journalists should question seriously courts’ engagement in “explicit and implicit fashioning of professional standards” in libel cases. Brian C. Murchison, *et al.*, *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N. C. L. REV. 7, 15 (1994). The authors suggested that such judicial action poses a serious threat to press freedoms. *Id.* at 7.

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At least part of the problem lies in the constantly blurring line over the definition for journalist and whether the Jerry Springers and Tucker Maxes of the world belong under the ever-widening tent.

Some may suggest 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 be strengthened,³⁷¹ not weakened; ethics standards in journalism have been rightly described as important "rivers of strength" within a troubled industry.³⁷² A suggestion that journalists weaken their ethics codes standards simply to stem the tide of anti-media court decisions could be equated to a loosening of medical standards in response to medical malpractice claims.

Perhaps surprising to some, the alignment between journalist and privacy advocate 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."³⁷³ Indeed, as bloggers and others with the capacity to invade privacy at the touch of a keyboard struggle to create a norms balance, journalism ethics codes may provide a useful model, thereby preserving some privacy even within the chaotic free-for-all of the blogosphere.

But greater self-restraint on the part of journalists and a celebration of ethics cannot be a complete solution to the dilemma of aggressive judicial scrutiny of news judgment. First, especially with the rise of the internet, bloggers, and podcasting, the "news media" is now simply too expansive and diffuse to make universal self-regulation feasible.³⁷⁴ Second, and more fundamentally, given that a core constitutional problem with overzealous judicial scrutiny of news

³⁷¹ SOLOVE, *supra* note __, at 195.

³⁷² GARDNER, *supra* note __, at 179.

³⁷³ As recounted in SANFORD, *supra* note __, at 196.

³⁷⁴ Indeed, the Ohio Supreme Court pointed to this consideration in justifying the need for expanded tort regulation of public disclosures. *See Wellman*, 866 N.E.2d at 1058-59. Steven Geiseler also notes the "general lack of norms and ethics governing Internet (quasi-) journalism" and suggests that "the generally accepted canon of professional journalism ethics is largely absent in cyberspace." Geiseler, *supra* note __, at 328.

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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.³⁷⁵ The first step is to realize the ways in which recent court decisions have in fact imposed upon journalists' news judgment.³⁷⁶ Judges must become sensitive to the way in which employing professional ethics codes or standards to discredit and invalidate the news judgment of individual journalists or news organizations carries significant potential for effectively imposing the independent sensibilities of judges or jurors. Presently, some courts appear to believe that resort to ethics codes is a reliable means of policing journalists' own conception of newsworthiness. By understanding the aspirational and amorphous quality of most ethics codes, however, and by appreciating the way in which broad and conflicts standards concerning news content afford enormous latitude to journalists who follow them, courts can realize the substantial danger that judicial "applications" of journalistic ethics codes effectively invite enforcement of judicial intuitions about news judgment on journalists.

Second, recognizing that a workable, bright-line test for newsworthiness is impossible,³⁷⁷ courts should reframe their inquiries into journalistic news judgment in a way that is genuinely, and not merely superficially, deferential.³⁷⁸

³⁷⁵ 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 __, at 1091 (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). *Id.* at 1093, 1113.

³⁷⁶ See e.g., Gieseler, *supra* note __, at 333 ("the 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."

³⁷⁷ "There is no easy bright-line approach." Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1029 (2003). This is one reason the SPJ Code, as but one example, offers working journalists nearly 40 separate provisions to help guide their news determinations.

³⁷⁸ Professor Zimmerman suggested that deference was the most appropriate and principled response to publication of private fact actions 25 years ago. Zimmerman,

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In other contexts in which the judiciary recognizes that other actors have primary constitutional authority in a given realm, 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 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.³⁷⁹ Similarly, because the Constitution confers primary authority on parents in making decisions about the upbringing of children, parental childrearing judgments ordinarily may be overridden only where they are so palpably unreasonable as to constitute abuse or neglect.³⁸⁰ The test often used to determine the murky boundary between protected parental discipline and punishable abuse, moreover, looks to whether parents could reasonably disagree over the propriety of the decision.³⁸¹

The goal is to articulate a standard that provides a measure of real insulation to discretionary judgment from unrestrained second-

supra note __, 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 the courts. The economic survival of publishers and broadcasters depends upon their ability to provide a product that the public will buy.”).

³⁷⁹ See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 452-56 (7th ed. 2000); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term – Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 75-77 (1997).

³⁸⁰ 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, 714-15 (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”).

³⁸¹ 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 the parent's action or belief was grossly deviant from what a reasonable prudent parent would do or believe in the same situation”).

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guessing by others – to ensure that judicial intervention overriding constitutionally protected judgment is reserved for cases of nearly indisputable misjudgment. Thus, 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; instead, courts are constitutionally required to presume that parents are the best judges of their children’s welfare and may override their judgment only if deferential review shows it to be plainly misguided.³⁸²

A similar approach to determining the boundaries of protected journalistic news judgment would bring privacy doctrine back to being closer in line with the outlines of the Second Restatement of Torts and would ensure 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, including what elements and details to include in the reportage – is one over which journalists could reasonably disagree, courts should defer absolutely to the defendant news organization and refuse to impose liability, often in a defense motion to dismiss or another preliminary pleading.

Journalistic ethics codes could be somewhat relevant to this judicial inquiry, but they would play a different and far more circumscribed role than they have played in some recent court decisions. Specific ethics codes should not be used to enforce a best-practices conception of news judgment, filtered through the lenses of individual judges and jurors. Instead, collectively they could be offered only for the more limited purpose of proving the absence of any reasonable disagreement about the impropriety of the disputed publication.

This means that I both agree and disagree with Professor Daniel Solove who also suggests a balancing test, but one that would favor privacy more often.³⁸³ Instead, I argue that publication of private facts should remain a viable tort, but should be confined to cases where no reasonable journalist would agree with the media defendant’s news decision. Under such a standard, liability could not be imposed simply

³⁸² See *Troxel*, 530 U.S. at 67-70.

³⁸³ See Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 562 (2006) (“[p]rotecting privacy requires careful balancing, as neither privacy nor its countervailing interests are absolute values”); Solove, *supra* note __, 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”).

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upon a judge or jury's "mere disagreement" with an editor's news judgment. The test would not be whether a court agreed that the journalist's decisions concerning coverage were "reasonable," but rather whether the journalists' peers would widely agree that she had crossed the line. Liability would not follow whenever a journalist's judgments seemed not to measure up to a judge's understanding of aspirational ethics standards; instead, liability would require a consensus of the defendant's own colleagues that his actions were indefensible, that the challenged news judgment was beyond the pale of professional discretion.

Such a truly deferential standard would significantly limit the occasions when journalists could be held liable for truthful reporting, ensuring that judicial intervention would be confined only to the most egregious cases. Admittedly, the legal protection afforded to privacy claimants would shrink, but the greater determinacy provided by truly deferential review would help to answer concerns about the use of balancing tests in privacy cases.³⁸⁴ It is true, as Professors Solove and Richards both suggest, that such deference "all but preclud[es] a plaintiff from ever making a successful claim,"³⁸⁵ but a true publication of private facts case against a journalist should be rare indeed under the First Amendment.

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 moment in history,"³⁸⁶ is as salient 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

³⁸⁴ 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 to privacy is unlikely to protect much privacy at all").

³⁸⁵ Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L. J. ____ (2007) (suggesting that courts' struggles with newsworthiness lead them to defer to journalists in most publication of private facts claims).

³⁸⁶ Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 327 (1966).

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conversation, there are limits to what the law can do about it.”³⁸⁷

The news for journalism is not all dire. Even today, most courts continue to side with media in determining newsworthiness, sometimes in cases involving even deeply private disclosures.³⁸⁸ But the emerging trend toward a narrower and far less predictable judicial conception of the news, one that relies on ethics codes that judges and juries simply do not understand, for example, may pose greater hazards in the years to come unless courts take corrective action to restore a more appropriate measure of deference. Dean Smolla predicts that in this century there will be an increase in societal yearning for the right to be let alone and a gradual strengthening of privacy law in response.³⁸⁹ Now is the time to recognize the courts’ narrowing of news and move the definition back to its broader constitutional standard.

CONCLUSION

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 for no reason other than to titillate the public curiosity, it would not hesitate to find for an aggrieved plaintiff on privacy grounds.³⁹⁰ Virtually all journalists and their codes

³⁸⁷ Smolla, *Information as Contraband*, *supra* note __, at 1110 (adding that newsworthiness “is the gatekeeper, and the gate to a plaintiff’s recovery is often shut”).

³⁸⁸ *See, e.g., Anderson v. Blake*, 2006 U.S. Dist. LEXIS 8454 (W.D. Okla. 2006). There, the court found news value in videotaped images of an alleged rape, including the plaintiff’s “makes feet and calves” and her alleged attacker’s “upper torso, his arms and hands and his lower left leg.” *Id.* at *5. It also “depicted him moving above and around plaintiff’s obscured body.” *Id.* 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 v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007). This decision though seems in direct contrast to one from California in which the court decided that the videotape of the start of an alleged sexual assault lacked news value. *Doe v. Luster*, 2007 Cal. App. Unpub. LEXIS 6042 (Cal. Ct. App. 2007) (“The 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).

³⁸⁹ Rodney A. Smolla, *Accounting for the Slow Growth of American Privacy Law*, 27 *NOVA L. REV.* 289, 322-23 (2002).

³⁹⁰ *Scheetz*, 747 F. Supp. at 1534.

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of ethics would likely agree with that assessment, finding such a report to amount to “morbid and sensational prying for its own sake,” and, therefore, to fall outside even the Second Restatement’s generous conception of “news.”

Yet truly meritorious publication privacy cases are -- and should be -- rare. Respect for the First Amendment and recognition of the overriding value of protecting the ability of journalists to pursue and report the news require toleration of some instances of poor news judgment, just as the importance of robust public debate warrants toleration of some instances of false speech. News judgment within publication privacy requires even greater constitutional breathing space because it involves truth. Moreover, news judgment itself is highly subjective and dependent upon multiple influences; there is no set demarcation point for news, not on the local level or even within a single newsroom. A scenario that looks to ethics codes or some other narrowing standard threatens First Amendment values, especially in the hands of judges or jurors who are likely to lack a deep understanding of the factors relevant to their application.

In 2004, a weekly alternative newspaper in Portland, Oregon, reported that former Portland Mayor and Oregon Governor Neil Goldschmidt had had a sexual relationship with a 14-year-old girl during the late 1970s.³⁹¹ The next year, the newspaper won the Pulitzer Prize for that reporting.³⁹² 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.³⁹³ As more courts give such skeptical persons the power to impose their own sensibilities concerning “newsworthiness” in assigning tort liability, investigative stories like the prize-winning one in Oregon may never be published.

“Liberty of the press is in peril,” the Supreme Court noted in

³⁹¹ Nigel Jaquiss, *The 30-Year Secret*, WILLAMETTE WEEKLY, May 12, 2004, cover story, available at <http://www.wweek.com/story.php?story=5091>.

³⁹² Rukmini Callimachi, *Portland Weekly Gets Pulitzer*, THE SEATTLE TIMES, Aug. 5, 2005, available at http://seattletimes.nwsourc.com/html/localnews/2002231177_week05m.html.

³⁹³ 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” Another poster called those who criticized the former mayor a “lynch mob.” Available at http://www.wweek.com/story.php?story=5091#comments_view.

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1974, “as soon as the government tries to compel what is to go into a newspaper.”³⁹⁴ 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 Weekly*’s story, and Mr. Marceaux and Mr. Amiri, who each argued unsuccessfully to skeptical courts that they had the right to dictate the news, portends a perilous future for journalism and the First Amendment.

³⁹⁴ *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) (quoting ZACHARIAH CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 633 (1947)).