Articles

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Full Court Press: Drawing in Media Defenses for Libel and Privacy Cases

Recent jury verdicts against Rolling Stone Magazine *and* Gawker Media *raise fundamental issues in defamation and privacy lawsuits, including who is a public figure, what counts as newsworthiness, and*

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whether truth is always a defense under the First Amendment. Using those verdicts as a starting point, I reexamine the democratic arguments the Supreme Court relied on to protect free speech and the press in New York Times v. Sullivan. *I conclude that subsequent cases overextended the* New York Times *rule in ways that weakened its democratic foundation. I suggest three reforms. Regarding the public figure doctrine, courts should enforce the oft-quoted, but frequently ignored, requirement that private individuals morph into public figures only to the extent that they voluntarily thrust themselves into a public controversy. In regard to privacy torts, truth should not be an absolute defense, no matter how uncomfortable such a conclusion is to one reading of the First Amendment. Judges and juries will have to continue to struggle over norms of newsworthiness when truth and privacy collide. Finally, media attention to the private lives of public officials, however justified on occasion, has become so routine as to defeat what* New York Times v. Sullivan *promised—a press focused on the investigation and criticism of official acts.*

In this Article, I reluctantly argue that the free speech promise of *New York Times v. Sullivan*[1] has been lost due to the ruling's overextension. The original decision was anchored to the press as a pillar of democratic self-government and robust public debate.[2] However, later decisions pulled up that democratic anchor by assigning equal weight to press coverage of (1) public and quasi-public ("limited") figures;[3] and (2) the private lives, as well as public conduct, of public officials and public figures alike.[4] The result has been a privileging of publicity over privacy that rests on a questionable First Amendment argument that any true story is necessarily newsworthy. When technology buttresses this legal position with an ever-expanding capacity to uncover private information, we weaken the particular service a free press provides for self-government.

My reluctance to criticize the "most important" free speech case[5] has to do with the vitriolic attacks on the press today. Adjectival bashing of journalists as "among the most dishonest human beings on

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1 N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

2 *Id.* at 270.

3 *See infra* text accompanying notes 28–41 (public figures) and text accompanying notes 42–46 (limited public figures).

4 *See infra* text accompanying notes 192–225.

5 *See infra* note 17.

earth"[6] or the "enemy of the American people"[7] must give pause to anyone suggesting now is a fit time to reconsider the basics of First Amendment protection for a free press.[8] However, I dare to do so, since I am convinced that preserving the press's central role in democratic self-government is at stake. I argue that the press[9] will be better able to defend this central mission if it draws in its First Amendment fort. There is, after all, a common sense distinction between the controversy that gave rise to modern press protection—the civil rights contribution the *New York Times* made in 1960 by daring to accept an advertisement criticizing law enforcement in Montgomery, Alabama—and the controversies today over the newsworthiness of stories about the private sexual lives of candidates, officeholders, and celebrities. When we blur that distinction, we extend *New York Times v. Sullivan* too far.

Even before the 2016 election, there were signs that the press was sailing through rough legal waters.[10] According to The Gallup Poll, public trust in the press has sunk to its lowest level since the organization began to survey it in 1972.[11] In 2016, a federal jury

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6 *See* Julie Hirschfeld Davis & Matthew Rosenberg, *Slamming Media, Trump Advances Two Falsehoods*, N.Y. TIMES, Jan. 22, 2017, at A1.

7 Michael M. Grynbaum, *Trump Calls Media the "Enemy of the American People*," N.Y. TIMES, Feb. 18, 2017, at A15.

8 President Trump is hardly the first in that office to take on the press. John Adams supported the 1798 Alien and Sedition Acts, in part to silence his press critics. Jefferson, an ardent defender of a free press, nonetheless thought "[n]ewspapers present for the most part only a caricature of disaffected minds." Franklin Roosevelt assigned certain reporters to his "dunce club" and used fireside chats to speak to the people directly. Nixon and his vice president, Spiro Agnew, popularized the notion of journalists as effete, liberal, intellectual snobs. *See A History of the Presidency – Presidents and the Press*, PROFILES OF U.S. PRESIDENTS, http://www.presidentprofiles.com/General-Information/A-History-of-the-Presidency-Presidents-and-the-press.html#ixzz4WEzNxRnh (last visited Sept. 29, 2017).

9 In this paper, I use the terms "press" and "media" interchangeably, though I do think the former word calls up a more positive image. *But cf.* WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 ("What's in a name? . . . [A] rose by any other word would smell as sweet . . . .").

10 "[A] First Amendment bubble of protection for media is in the process of bursting because of courts' privacy concerns, and the sometimes appalling decisions by push-the-envelope publishers that then attempt to cloak themselves with the Constitution." Amy Gajda, *The Present of Newsworthiness*, 50 NEW ENG. L. REV. 145, 147 (2016).

11 Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx; *see also Views of the News Media: 1985–2011, Press Widely Criticized, But Trusted More Than Other Information Sources*, THE PEW RESEARCH CTR. 6 (Sept. 22, 2011), http://www.people-press.org/files/legacy-pdf/9-22-2011%20Media%20Attitudes%20Release.pdf (percentage of those who find the press to be "immoral" is at an all-time high).

found *Rolling Stone Magazine* liable for maliciously defaming an associate dean of students at the University of Virginia in a false article about an alleged gang rape on campus.[12] In 2016, a Florida jury awarded Terry Bollea, the former professional wrestler known as Hulk Hogan, $115 million in compensatory damages and $25 million in punitive damages in an invasion of privacy suit against the *Gawker* website for posting a sex tape of him.[13] The tape truthfully depicted the events. However, while truth is a defense in a libel case, it is not in a privacy lawsuit. The lawsuit effectively put *Gawker* out of business.[14]

I do not offer these cherry-picked anecdotes as empirical evidence of a trend or shift in the outcome of libel and invasion of privacy cases against the press.[15] What these cases suggest is that issues at the core of the Constitution's Free Speech and Free Press Clauses are surprisingly unsettled.[16] In Parts I, II, and III, I consider the difficulties in identifying the limits of the public figure category, once the courts agreed to assign that fictional identity to more than just celebrities. In Part IV, I concentrate on invasion of privacy torts and the confusion over the bounds of "newsworthiness" and whether truth is always a defense. In Part V, I question the ease with which the *New York Times* rule migrated from covering the official acts of public officials to reporting on their private behavior.

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[12] Ben Sisario, Hawes Spencer & Sydney Ember, *Magazine Loses Suit Charging Defamation*, N.Y. TIMES, Nov. 5, 2016, at B1; *see infra* Part II for a detailed discussion of this case.

[13] Nick Madigan & Ravi Somaiya, *Hefty Damages to Hulk Hogan in Gawker Suit*, N.Y. TIMES, Mar. 19, 2016, at A1; *see also infra* Part IV, Section A.

[14] Sydney Ember, *In Bankruptcy, Gawker Offers Itself for Sale*, N.Y. TIMES, June 11, 2016, at A1.

[15] Despite the protections of *Sullivan*, a 2004 report found that libel awards against media defendants were still high. *See* Benjamin Barron, *A Proposal to Rescue* New York Times v. Sullivan *by Promoting a Responsible Press*, 57 AM. U. L. REV. 73, 74 (2004) (citing MEDIA LAW RESEARCH CTR., MLRC 2004 REPORT ON TRIALS AND DAMAGES, BULLETIN 28, tbl.8 (Feb. 2004)).

[16] For an in-depth study of the relatively minor role played by the Free Press Clause, independently of the Free Speech Clause, see David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002). In *Sullivan*, the Court relied on the Free Speech Clause and in no way limited its new protections against libel laws to journalists. N. Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964). For the view that the Free Press Clause independently grants special protections to the news media, see Justice Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975). For the contrary view, see Anthony Lewis, *A Preferred Place for Journalism?*, 7 HOFSTRA L. REV. 595 (1979).

I
GO FIGURE! PUBLIC FIGURE DOCTRINE

In 1964, no less a constitutional scholar than Harry Kalven, Jr. suggested that the Supreme Court's decision in *New York Times v. Sullivan* "may prove to be the best and most important . . . ever produced in the realm of freedom of speech."[17] A generation later, the dean of legal journalists, Anthony Lewis, thought that *Sullivan* had delivered on its promise, giving the First Amendment's "bold words their full meaning."[18] Without the change in libel law wrought by *Sullivan*, Lewis thought it doubtful that "the press could have done as much as it has to penetrate the power and secrecy of modern government, or to confront the public with the realities of policy issues."[19]

For Lewis, as for Kalven, the *Sullivan* opinion correctly crafted a constitutional hierarchy of free speech values, placing at the apex the "profound national commitment to the principle that debate on *public* issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and *public* officials."[20] The italicizations of "public" in this quotation are added by the author of this article, but the logic of *Sullivan* demands prioritizing the important constitutional role a free press plays as a watchdog on government over the less important press coverage of private persons. The decision singles out one kind of press coverage—that of the public conduct of public officials—as of paramount democratic value.

The problem with then-existing libel laws, the justices ruled, was that they created a "chilling factor" that could deter the press from equipping citizens to scrutinize public officials.[21] Any misstatement

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[17] Harry Kalven, Jr., *The* New York Times *Case: A Note on the "Central Meaning of the First Amendment*," 1964 SUP. CT. REV. 191, 194 (1964). Similarly, Alexander Meiklejohn considered the decision "an occasion for dancing in the streets." *Id.* at 221 n.125.

[18] ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 234 (1991).

[19] *Id.* at 245. Not everyone celebrates *Sullivan*'s contributions to a free press and democratic self-government. Cass Sunstein thought *Sullivan* had a "dark side" in harming public civility. Cass R. Sunstein, *Libel Protection's Troubling Dark Side*, THE MORNING CALL (Mar. 25, 2014), http://articles.mcall.com/2014-03-25/opinion/mc-libel-times-v-sullvian-web-20140325_1_sunstein-u-s-supreme-court-new-york-times. Benjamin Barron thought the decision encouraged an irresponsible press by removing incentives to report stories accurately. Barron, *supra* note 15, at 73.

[20] *Sullivan*, 376 U.S. at 270 (emphasis added).

[21] *Id.* at 271–72.

of fact, even if made in a good faith effort to report the truth, subjected the press to paying large defamation awards, not just for actual damage to reputation, but for presumed and punitive damages as well.[22] To be sure, there is no constitutional value in false and defamatory press statements per se.[23] Nevertheless, the Court concluded that the pursuit of truth required cutting the press broad constitutional slack. Henceforth, libel plaintiffs would bear the burden of proving not only that the press had published a falsehood, but also that it did so with "actual malice," meaning that the press published the statement knowing it was false or in reckless disregard of whether it was true or false.[24]

The *Sullivan* decision was unanimous. Interestingly, however, two justices added a concurrence to distinguish between press criticisms of the *official* conduct of public officials—the scenario presented in *Sullivan*—and press criticism of the *private* conduct of public officials. They preferred to limit the *Sullivan* holding to the former.[25]

However, *Sullivan* proved a difficult decision to compartmentalize. Rather quickly, two pillars of the decision—the distinction between covering official acts as opposed to the private conduct of public officials[26] and the clean distinction between public officials and everyone else—collapsed.[27] This collapse changed the nature of news in ways that now underscore the backlash against the press we are currently witnessing.

A. From Public Official to Public Figure

Within two years of *Sullivan*, the Court confronted the problem of persons who were not "of" government but who were very much "in"

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[22] *Id.* at 267.

[23] *Id.* at 279 n.19.

[24] *Id.* at 279–80.

[25] *Id.* at 301–02 (Douglas & Goldberg, JJ., concurring). The majority opinion expressly reserved this question. *Id.* at 283 n.23.

[26] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 77 (1964) ("The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."); Monitor Patriot Co. v. Roy, 401 U.S. 265, 275 (1971) ("Given the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks."). Courts have gone so far as to find the public has a legitimate interest in knowing about the private behavior of a candidate's minor children. *See* Kapellas v. Kofman, 459 P.2d 912, 915–16 (Cal. 1969).

[27] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967).

the news, and justifiably so.[28] For the same reason that the press needs breathing room to investigate heads of state, the press deserves space to investigate and criticize the heads of corporations,[29] head football coaches suspected of fixing games,[30] or retired generals leading marches against integration.[31]

Regarding public figures such as these, the Court underscored four reasons why libel laws should treat press coverage the same way *Sullivan* treated libel cases brought by public officials. First, public figures are like public officials in that they exercise power over important events and institutions.[32] Second, public figures, like public officials, in some sense volunteer for heightened media attention when they choose to occupy positions of power and interest to the general public.[33] Third, public figures, like government officials, command sufficient media attention to rebut any libelous story.[34] And fourth, the actions of public figures are generally as newsworthy, if not more so, than those of any government officials, save the highest.[35] For these reasons, the Court concluded that the First Amendment's free speech guarantees in libel cases must be the same for public figures and public officials.[36]

At one point, three judges on the Court joined in a plurality opinion balking at the public figure doctrine. They argued for changing the focus from the *identity* of the person bringing a libel lawsuit to the *subject matter* of the story. So long as the story is a matter of legitimate public interest, these justices argued, it cannot be less legitimate simply because it covers a private person.[37] However, a

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[28] Arthur B. Hanson, *Developments in the Law of Libel: Impact of the* New York Times *Rule*, 7 WM. & MARY L. REV. 215, 217–23 (1966).

[29] *See, e.g.*, Tavoulareas v. Piro, 817 F.2d 762, 766, 772 (D.C. Cir. 1987) (covering nepotism charges against head of a major oil company).

[30] *Curtis*, 388 U.S. at 135.

[31] *Id.* at 140.

[32] *Id.* at 164 (Warren, C.J., concurring) ("[I]t is plain that although they are not subject to the constraints of the political process, 'public figures,' like 'public officials,' often play an influential role in ordering society.").

[33] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[34] *Id.* at 344 ("The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.").

[35] *Curtis*, 388 U.S. at 147–48.

[36] *Id.* at 163 (Warren, C.J., concurring) ("differentiation between 'public figures' and 'public officials' . . . [has] no basis in law, logic, or First Amendment policy"); *see also* Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982).

[37] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 31–32 (1971) (Brennan, J., plurality opinion).

majority of the Court never adopted this test. The majority saw a need to give private persons more protection in libel suits than public officials or figures needed, given the greater ability public persons have to get their side of the story out.[38]

But just who is a public figure?[39] Steven Shiffrin speculates that courts would find it easier to consider a celebrity chef like Wolfgang Puck a public figure for all purposes than it would be for them to assume that the chairman of General Motors, currently Mary Barra, is necessarily a public figure.[40] This makes no democratic sense, Shiffrin rightly concludes, since the head of GM has far more power over American policy than even the most famous celebrity chef.[41]

B. From Public Figure to Limited Public Figure

Courts solved half of the Shiffrin hypothetical by inventing the category of limited public figures. As opposed to full-bodied public figures who achieve that status by virtue of "pervasive fame or notoriety,"[42] some persons move in and out of the media spotlight depending on the story. "Limited" public figures are persons who were private persons until they somehow "volunteered" to involve themselves in a matter of public importance.[43] By virtue of injecting themselves into a public controversy, limited public figures must live by *Sullivan*'s libel rules, until such time as they migrate back to their private lives.

The constraints of the limited public figure category are far from clear. On the one hand, a lawyer who voluntarily takes on a newsworthy case about alleged police misconduct does not forfeit his status as a private person.[44] On the other hand, an otherwise unknown

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[38] *Gertz*, 418 U.S. at 344–46.

[39] Rosanova v. Playboy Enters., 411 F. Supp. 440, 442 (S.D. Ga. 1976) ("Defining public figures is much like trying to nail a jellyfish to the wall.").

[40] Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 564 (2011).

[41] *Id.*

[42] *Gertz*, 418 U.S. at 351. For instance, George Clooney's fame makes him a public figure in everything he does.

[43] *Id.* at 345. *Gertz* also recognized at least the hypothetical existence of "involuntary public figures" who by circumstance and not choice become important for the media to cover in relation to a public controversy. *Id.* A 2004 review found only some nineteen cases dealing with involuntary public figures. Christopher Russell Smith, Note, *Dragged into the Vortex: Reclaiming Private Plaintiffs' Interests in Limited Purpose Public Figure Doctrine*, 89 IOWA L. REV. 1419, 1429 (2004).

[44] *Gertz*, 418 U.S. at 352. Despite *dicta* in *Gertz* that courts are reluctant to treat lawyers as public figures, courts have done so where events underlying a murder trial had

associate dean of students does forfeit her status once she becomes the focal point of a news story about a university's response to a student's allegation of rape on campus.[45]

While still a law professor, Justice Elena Kagan raised doubts about the boundaries of the public figure doctrine. Without answering the question, Kagan asked whether the public figure doctrine was working to extend *Sullivan* from press coverage of "truly powerful people" to instances of "press arrogance" in damaging the reputations of persons powerless to respond.[46]

II
THE *ROLLING STONE* LIBEL CASE AND THE LIMITLESS PUBLIC FIGURE CATEGORY

In seeking an answer to Justice Kagan's query, I turn to a detailed study of a well-known recent defamation case.[47] On November 19, 2014, *Rolling Stone* published an article detailing a University of Virginia (UVA) student's account of her alleged gang rape at a college fraternity house.[48] The story portrayed Nicole Eramo, an associate dean, as dismissive of the student's allegations as they wound their way through university procedures for investigating such complaints.[49] The online version of the article, on the magazine's website, was viewed more than 2.7 million times.[50] The author of the article, Sabrina Rubin Erdely, made numerous appearances on other media outlets, repeating the substance of the article.[51]

Rolling Stone was an unlikely candidate to serve as a poster boy for irresponsible journalism. The magazine has a long tradition of

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a "devastating effect on the [local] economy." Ratner v. Young, 465 F. Supp. 386, 400 (V.I. 1979).

45 *See infra* Part II.

46 Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197, 206 (1993).

47 Sisario, Spencer & Ember, *supra* note 12, at B1.

48 Sabrina Rubin Erdely, *A Rape on Campus: The Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Nov. 19, 2014.

49 The first paragraph of the article read: "Jackie was just starting her freshman year at the University of Virginia when she was brutally assaulted by seven men at a frat party. When she tried to hold them accountable, a whole new kind of abuse began." *Id.*; *see also* Eramo vs. Rolling Stone *Complaint*, WASH. POST ¶ 55, https://www.washing tonpost.com /apps/g/page/local/eramo-vs-rolling-stone-complaint/1692 (last visited Sept. 16, 2017).

50 Eramo vs. Rolling Stone *Complaint*, *supra* note 49, ¶ 1.

51 Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 868 (W.D. Va. 2016), *modified in part by* Eramo v. Rolling Stone, LLC, No. 3:15-CV-00023, 2016 U.S. Dist. LEXIS 141423 (W.D. Va. Oct. 11, 2016).

publishing important pieces of investigative journalism. For instance, the magazine is known for reporting on the abduction of Patti Hearst, the war in Afghanistan, home foreclosures in Florida, banking scandals, and the Boston Marathon terrorists. Contributors over the magazine's fifty-year history include journalistic pioneers, such as Tom Wolfe and Hunter S. Thompson.[52]

In this instance, however, *The Washington Post* and other media organizations cast doubt on key factual allegations in the *Rolling Stone* article.[53] After interviewing the alleged rape victim and investigating her claims, the Charlottesville police department issued a report stating that the victim told the police a different story than the one she told *Rolling Stone*. Essentially, there was "no substantive basis of fact to conclude that an incident occurred that is consistent with the facts described in the November 19, 2014, *Rolling Stone Magazine* article."[54]

Acknowledging that it placed too much trust in the victim's own account, *Rolling Stone* asked the Dean of the Columbia School of Journalism to undertake a review.[55] The review faulted *Rolling Stone* reporters and editors for failing to verify information and ignoring leads that suggested the unreliability of the alleged victim's

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[52] *Rolling Stone*, WIKIPEDIA, https://en.wikipedia.org/wiki/Rolling_Stone (last updated Aug. 18, 2017); *see also* HUNTER S. THOMPSON, THE ESSENTIAL WRITINGS OF HUNTER S. THOMPSON: FEAR AND LOATHING AT ROLLING STONE (Jann S. Wenner ed., 2011). In September of 2017, the owners of *Rolling Stone* announced that they were putting the magazine up for sale. Sydney Ember, *An Era's End*, N.Y. TIMES, Sept. 18, 2017, at B1.

[53] For instance, no party took place at the fraternity on the night that the victim claimed she was sexually assaulted there. *See* T. Rees Shapiro, *Key Elements of* Rolling Stone*'s U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html?utm_term=.666f823b26c9.

[54] *Eramo vs. Rolling Stone Complaint*, *supra* note 49, ¶ 125.

[55] Sheila Coronel, Steve Coll & Derek Kravitz, Rolling Stone *and UVA: The Columbia University Graduate School of Journalism Report*, ROLLING STONE (Apr. 5, 2015), http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405 [hereinafter CJR].

account.[56] After this report, *Rolling Stone* retracted the original article and removed it from the website.[57]

Eramo, the UVA dean, then sued *Rolling Stone* for defamation. Dean Eramo charged that falsehoods about her in the article

> were not the result of an innocent mistake [but] . . . were the result of a wanton journalist who was more concerned with writing an article that fulfilled her preconceived narrative about the victimization of women on American college campuses, and a malicious publisher who was more concerned about selling magazines to boost the economic bottom line for its faltering magazine, than they were about discovering the truth or actual facts.[58]

This was the rare case where Dean Eramo could have been considered a public official as an administrator at a public university,[59] a public figure involved in a matter of public concern, or a private person simply doing her job. Classifying Dean Eramo as a public official would have had the disadvantage of making the status of a college dean depend on the accidental factor of whether she worked at a private or public university.[60] At any rate, because the trial judge decided that she was a public figure he never reached the issue of whether the dean was a public official.[61] Since public figures and public officials are treated alike for libel cases, there was no need to consider her governmental status.

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[56] The CJR found that *Rolling Stone* relied almost exclusively on the word of the alleged victim, without independently corroborating key facts such as the name, identity or even the existence of the supposed gang rape leader, the occurrence of any party at the fraternity on the night the assaults allegedly took place, the account the victim gave of telling her friends about the assaults, or the account the victim gave of her meetings with Dean Eramo. *Id.* The report gives the sense of a reporter and magazine in a rush to get the story out and overly fearful that probing the victim might cause her to stop cooperating. *Id.*

[57] *A Note to Our Readers*, ROLLING STONE (Dec. 5, 2014), http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205.

[58] *Eramo vs. Rolling Stone Complaint*, *supra* note 49, ¶ 9.

[59] *See* Grossman v. Smart, 807 F. Supp. 1404, 1408 (C.D. Ill. 1992) (classifying public university professors as public officials).

[60] The *Sullivan* decision expressly reserved decision on the applicability of the "actual malice" standard to libel cases brought by low-level public officials. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 n.23 (1964); *see also* LEWIS, *supra* note 18, at 172. *But cf.* David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 527 (1991) ("police officers are almost invariably classified as public officials, no matter how low their rank"); Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 979–80 nn.243–44 (2014) (citing to cases classifying public teachers as public figures).

[61] Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 869–71 (W.D. Va. 2016).

Before *Rolling Stone* published its article, Dean Eramo was hardly a subject of news interest. To be clear, as the University's point person on student sexual assault, her work touched on matters of public concern, and she did occasionally give interviews to the campus newspaper and other local media outlets. But it takes the limits out of "limited" public figure doctrine if such sparse and infrequent comments, done in the course of her employment, are sufficient to turn the dean into a person actively seeking to inject herself into the news. Then how does a *Rolling Stone* reporter's decision to focus on the dean's alleged failings as a campus sexual assault officer change her into a public figure?

In finding that Dean Eramo was a limited public figure, the judge provided five lines of reasoning.[62] First, the magazine story undoubted dealt with a public controversy, namely UVA's response to allegations of campus sexual assault.[63] Second, this controversy existed prior to the publication of the article. In fact, the Office of Civil Rights of the U.S. Department of Education was investigating the University's sexual assault complaint procedures, as it was at other universities.[64] Third, prior to the article, Dean Eramo "voluntarily assumed a position of 'special prominence' on this issue: she took advantage of her access to local media, specifically by appearing on WUVA, providing input to *The Cavalier Daily*, and speaking to local affiliates of national news networks."[65] Fourth, Dean Eramo remained a public figure at the time *Rolling Stone* published its story.[66] Fifth, after the story broke, Dean Eramo voluntarily sought to attract press attention to her efforts to restore her reputation.[67]

In holding Dean Eramo to be a limited public figure, the judge set aside one crucial fact that should have been *the* issue. UVA

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[62] *Id.* The judge followed a framework laid out in Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

[63] *Eramo*, 209 F. Supp. 3d at 870; *see also* CJR, *supra* note 55 ("'A Rape on Campus' had ambitions beyond recounting one woman's assault. It was intended as an investigation of how colleges deal with sexual violence. The assignment was timely. The systems colleges have put in place to deal with sexual misconduct have come under intense scrutiny."); *cf.* Roffman v. Trump, 754 F. Supp. 411 (E.D. Pa. 1990) (defendant Donald Trump's criticisms of the plaintiff's competency as an investment analyst went to a purely private controversy between the two persons).

[64] *Eramo*, 209 F. Supp. 3d at 870. *See generally* CJR, *supra* note 55.

[65] *Eramo*, 209 F. Supp. 3d at 870.

[66] *Id.*

[67] *Id.* at 871.

specifically prohibited Dean Eramo from talking to the reporter writing the *Rolling Stone* story, preferring that the university president be the "public official/figure" representing the university's position.[68] It seems churlish to say that Dean Eramo had effective channels of communication to protect her reputation when she could not tell her side of the story to the *Rolling Stone* reporter, whose article reached a national audience in the millions.[69] Far from volunteering to inject herself into the *Rolling Stone* story, the dean was prevented from doing so. She was caught between a rock and a hard place. On the one hand, the terms of her employment required her *not* to talk to the media in order to protect the privacy rights of students. On the other hand, the terms of libel law treated her as if she were free to protect her reputation by "self-helping" to media attention anytime she wanted.

Once the judge labeled Dean Eramo a limited public figure, he treated her efforts to respond to the published article as evidence that she met the test for volunteering to be the subject of media attention.[70] But how is it voluntary when the necessity of defending her reputation was thrust upon her by the defamatory account *Rolling Stone* chose to publish? It seems a clear case of having one's hand forced.

Since the beginning of the public figure doctrine, the Supreme Court has stressed that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure."[71] Lower courts have frequently found that the mere fact that a private person publicly responds to a media attack is not enough to turn that person into a public figure.[72] As one court put it: "too easy a finding that someone has become a public figure by virtue

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[68] The university cited student privacy rights as the reason it would be best to prohibit the dean who had talked to students about sexual assault from talking to the magazine. *Id.* at 870–71; *see also* CJR, *supra* note 55.

[69] *See* Eramo vs. Rolling Stone *Complaint*, *supra* note 49, ¶ 1.

[70] *Eramo*, 209 F. Supp. 3d at 871 (limited public figure status "bec[ame] even more apparent" when Eramo gave an interview to the *Columbia Journalism Review* after the publication of the original article).

[71] Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

[72] *E.g.*, Diversified Mgmt., Inc. v. Denver Post, Inc., 653 P.2d 1103, 1107 (Colo. 1982) (en banc) (citing DiLeo v. Koltnow, 613 P.2d 318 (Colo. 1980) (fired police officer does not become public figure merely by going to the media to defend his reputation)); Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 159 Cal. Rptr. 131, 141 (Cal. Ct. App. 1979) (public school teacher does not become a public figure in relation to a textbook controversy simply because she responded to press inquiries as required by the school district).

of responding to unfavorable publicity can have a chilling effect on the expression of a private figure."[73] Here is a clear instance of the damage done by overextending the *New York Times* rule—participation in speech is lessened rather than increased when private persons lose important legal protections simply by speaking out. *Rolling Stone* was able to play offense, while Dean Eramo was not allowed to put up the kind of defense available to private persons.[74]

Unfortunately, the judge's decision in the *Rolling Stone* case was in line with other court decisions stretching the limits of the limited public figure doctrine. Among persons classified as limited public persons, despite little volunteering, are: a farmer swept up into a public controversy over pollution in a nearby lake, with the judge dismissing as "irrelevant" the question of the farmer's "desire—or lack of desire—to draw attention to himself";[75] a man falsely reported on television news as committing a violent crime;[76] a lawyer falsely reported as having been found guilty on drug charges, since, in addition to representing the motorcycle gang indicted for drug trafficking, he had socialized with them on weekend trips and the like;[77] and a businessman who won a contract to build a controversial new water system for a township.[78]

At best, treating persons as limited public figures rests on a plausible application of familiar principles of "assumption of the risk"—If you can't stand the heat, stay out of the kitchen.[79] However, unlike celebrity public figures, limited public figures rarely possess the equity built into assumption of risk.[80] Persons such as Dean Eramo could hardly have known of the risk of defamatory national

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[73] *Diversified Mgmt.*, 653 P.2d at 1107.

[74] *See supra* text accompanying notes 68 and 69 for restrictions that hampered Dean Eramo's ability to defend her reputation.

[75] *See* Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1071 n.333 (1996) (citing to Wiegel v. Capital Times Co., 426 N.W.2d 43, 50 (Wis. Ct. App. 1988)).

[76] Erdmann v. SF Broad. of Green Bay, Inc., 599 N.W.2d 1, 7 (Wis. Ct. App. 1999).

[77] Stern, *supra* note 75, at 1073 (citing Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1085–86 (3d Cir. 1985)).

[78] Weinel v. Monken, 481 N.E.2d 776, 778 (Ill. App. Ct. 1985).

[79] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) ("[P]ublic figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood . . . .").

[80] The notion here is that individuals are less morally deserving of protection from press coverage when they knowingly seek out public prominence. *Id.* at 344 (referring to "a compelling normative consideration underlying the distinction between public and private defamation plaintiffs").

media attention when taking a job dealing with campus sexual assault and meeting with students bringing such allegations. The Supreme Court has stressed that mere involvement in a public controversy is a necessary, but not sufficient, condition for becoming a public figure.[81]

In the end, the legal burden of being a limited public figure did not keep Dean Eramo from winning her libel suit.[82] Once the judge determined that the plaintiff was a limited public figure, he had to next determine whether there was sufficient evidence of "actual malice" to let the case go to a jury or whether he should grant *Rolling Stone*'s motion for summary judgment on the grounds that no reasonable jury could find actual malice.[83] Frequently, a finding of public figure status is conclusive of the case, since the actual malice burden is hard to carry.[84] Indeed, this is one of the key protections that the public figure doctrine gives to media defendants—the ability to eliminate cases through summary judgment.[85] However, here the judge permitted the case to go to jury trial,[86] and the jurors found the article to be egregious enough for Dean Eramo to meet the bar for "actual malice" burden of proof so often described as "insurmountable."[87]

The jury did not specify its reasons for finding *Rolling Stone* liable. However, the judge instructed the jury that it could find actual malice only if it believed evidence that the magazine had serious doubts about the truth of its story and yet failed to investigate and instead published a story in reckless disregard of whether or not it was true.[88]

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[81] Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167 (1979).

[82] Sisario, Spencer & Ember, *supra* note 12, at B1. The jury awarded Eramo $3 million in damages. T. Rees Shapiro, *Jury Awards $3 Million in Damages to U-Va. Dean for* Rolling Stone *Defamation*, WASH. POST: BLOG (Nov. 7, 2016, 10:48 PM), https://www.washingtonpost.com/local/education/jury-to-deliberate-damages-to-u-va-dean-in-rolling-stone-defamation-lawsuit/2016/11/07/e2aa2eb0-a506-11e6-ba59-a7d93165c6d4_story.html. Subsequently, Eramo reached a confidential settlement with *Rolling Stone*. Matthew Haag, Rolling Stone *Settles Libel Suit Over 2014 Campus Rape Article*, N.Y. TIMES, Apr. 12, 2017, at B3.

[83] Eramo v. Rolling Stone, LLC, 209 F. Supp. 3d 862, 871–75 (W.D. Va. 2016).

[84] *See* Susan M. Gilles, *Public Plaintiffs and Private Facts: Should the "Public Figure" Doctrine Be Transplanted into Privacy Law?*, 83 NEB. L. REV. 1204, 1208 n.25 (2005) (citing to study showing that "just over eighty percent of defense motions for summary judgment" were granted due to "lack of evidence of actual malice").

[85] *See id.* at 1208.

[86] *Eramo*, 209 F. Supp. 3d at 875.

[87] Stern, *supra* note 75, at 1028.

[88] Lizzie Crocker, *This is What the Jury in the* Rolling Stone *Defamation Trial Must Decide*, THE DAILY BEAST (Nov. 2, 2016, 8:05 PM), http://www.thedailybeast.com

Some of that evidence came via the highly critical review of the magazine's decision making from the Columbia Journalism School that *Rolling Stone* itself had solicited.[89] The evidence certainly justified the jury's conclusion that the reporter started with a preconceived and sensational story line that needed a villain and she deliberately ignored any leads that would contradict her narrative.[90]

What if the jury had decided differently and accepted *Rolling Stone*'s defense that, while it made mistakes, it acted in good faith to report an important story? Had the jurors thought along these lines, they would have been bound to rule against Dean Eramo as a limited public figure who had to put up with defamatory stories that were negligently, but not maliciously, published. Here again is where an overextension of the *New York Times* rule occurs. The likes of a Dean Eramo are far removed from the powerful persons the *Sullivan* ruling had in mind when granting the press new protections in libel cases. While it makes good sense to expand the *New York Times* rule to some public figures, surely the decision is not so elastic as to impose defamation costs on a minor figure such as an associate college dean. My guess is if one had searched the web for mention of Dean Eramo's name the day *before* the *Rolling Stone* story broke, the results would have been small and locally confined to Charlottesville media. The fact that searching Dean Eramo's name *after* publication retrieves thousands of sites nationally should not stand as evidence that she is a public figure.[91]

/articles/2016/11/02/this-is-what-the-jury-in-the-rolling-stone-defamation-trial-must-decide.html.

[89] The judge denied *Rolling Stone*'s pretrial motion to keep the CJR from the jury. Eramo v. Rolling Stone, LLC, No. 3:15-CV-00023, 2016 U.S. Dist. LEXIS 142185, at *2 (W.D. Va. Oct. 13, 2016).

[90] Although the jurors did not disclose their reasoning, the trial judge denied *Rolling Stone*'s pretrial motion for summary judgment partly because he viewed the likely evidence as strong enough to support a jury conclusion that the reporter had massaged the facts to fit her preconceived ill-will toward university administrators. *See Eramo*, 209 F. Supp. 3d at 872; *see also* George Packer, Rolling Stone *and the Temptations of Narrative Journalism*, NEW YORKER (Apr. 6, 2015), http://www.newyorker.com/news/daily-comment/rolling-stone-and-the-temptations-of-narrative-journalism (reporter "never allowed herself to sustain any doubts" once she "found what she was looking for").

[91] On February 7, 2017, a Google search of "Nicole Eramo" retrieved 133,000 references, while "Nicole Eramo UVA" retrieved 18,800.

III
LIMITS TO LIMITED PUBLIC FIGURE DOCTRINE

In a different cultural climate, I might propose eliminating the "limited" option within the public figure doctrine entirely, forcing an all or nothing choice. Mindful of recent attacks on the press,[92] I venture in this paper to suggest a more modest reform. Courts should put teeth into the existing requirement that private persons morph into public figures only to the extent that they *meaningfully* volunteer to attract the media limelight.[93] In *Gertz*, the Court correctly distinguished a lawyer's consent to take on a controversial case from the lawyer's consent to make himself the story.[94] The same is true for Dean Eramo. Her choice to respond to a defamatory account cannot count as after-the-fact ratification of the initial media story she did not seek.[95]

A 1976 Supreme Court decision provides a model for how to rein in the "voluntary" prong of the limited public figure doctrine.[96] In covering divorce proceedings between socialites Mary and Russell Firestone, *Time Magazine* falsely reported that the grounds for granting the husband a divorce was his wife's adultery.[97] The Court held that divorce proceedings were not a "public controversy" to which the *New York Times* rule applied.[98] Moreover, Mary Firestone did not become a limited public figure in relation to the divorce by

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92 *See supra* notes 6–7; *see also* Jim Rutenberg, *Celebrating Independence as Free Press is Besieged*, N.Y. TIMES, July 3, 2017, at B1.

93 Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974); *see also* Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 167–68 (1979) (emphasizing that the newsworthiness of investigations into alleged Soviet espionage in the United States did not automatically convert plaintiff into a limited public figure, but courts must still consider whether he voluntarily thrust himself into media attention regarding this controversy). However, since *Gertz*, many courts have reasoned that a sufficiently important public controversy can "displace any real consideration of plaintiffs' voluntary participation . . . ." Smith, *supra* note 43, at 1440; *see also* Stern, *supra* note 75, at 1038 (noting that the original "stringent" requirement of voluntary action has given way to competing views).

94 *Gertz*, 418 U.S. at 352.

95 *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1558 (4th Cir. 1994) (while finding grandparents accused of child abuse to be limited public figures, agreeing that merely responding reasonably and proportionately to a defamatory story is not enough to change private persons into limited public figures).

96 Time, Inc. v. Firestone, 424 U.S. 448, 454–55 (1976).

97 *Id.* at 466–67 (Powell, J., concurring).

98 *Id.* at 454.

merely holding "several press conferences."[99] While it was true that she chose to answer reporters' questions, the Court did not think those responses amounted to "thrusting" herself into the media coverage of the divorce proceedings in a way that turned the domestic controversy public.[100]

Compare the Firestone opinion with the 2002 case where a Catholic priest, accused of child abuse, responded to the allegations by holding a single press conference. That was enough, a California court ruled, to make him a limited public figure.[101] But how is a person to defend his or her reputation without responding to bad press? And why should responding to attacks on your reputation raise the bar on winning a defamation case in court?[102] To be clear, the growing issue of sexual abuse in the priesthood was and still is a matter of vital public concern that the press should cover. However, unless the Court wishes to resurrect the never-adopted opinion in *Rosenbloom v. Metromedia*, extending the *New York Times* rule to all newsworthy stories, then the mere allegation that any particular unknown priest is a child abuser is not enough to make the person a public figure.

Jury verdicts often serve the important purpose of bringing community norms to bear on the application of the law in particular cases.[103] The *Rolling Stone* jury verdict provided early warning of a souring public attitude about the media.[104] I turn in the next Part to consider the public attitude when it comes to balancing the value of publicity versus the norms of privacy.

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[99] *Id.* at 485 (Marshall, J., dissenting). Nor did simply marrying a wealthy heir make Mary Firestone a general public figure. *Id.* at 453.

[100] *Id.* at 453.

[101] Smith, *supra* note 43, at 1420 n.2 (citing Baird v. Haigh, No. CGC-02-413508, 2003 Cal. Super. LEXIS 5034 (Cal. Super. Ct. Jan. 10, 2003)).

[102] *Id.* at 1419 (citing Dana Parsons, *Accused Priest Learns the Court Works in Mysterious Ways*, L.A. TIMES, Dec. 1, 2002, at B3).

[103] *See, e.g.*, Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983) ("[W]hether a publication is or is not newsworthy depends upon contemporary community mores and standards of decency. . . . This is largely a question of fact, which a jury is uniquely well-suited to decide."). For a general defense of the jury as an instrument of local democracy, see JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (2000).

[104] *See* Sisario, Spencer & Ember, *supra* note 12, at B1 (speculating that "the public's disillusionment with the news media and its transgressions and faults seemed to be a factor.").

IV
PRIVACY, TRUTH, AND NEWSWORTHINESS

Unlike libel, invasion of privacy may occur even if the offending story is true.[105] The personal injury is not to one's reputation but to one's right, under many state laws, to seclude intimate personal details from disclosure.[106] The *publicity* is the injury. Thus, it is often said that rape is one injury, while the disclosure of the victim's name is another, especially when the victim has sought to shelter her identity.[107] The same is true for the injury suffered by family or friends as a result of the online posting of photographs of the decapitated body of a daughter,[108] or of a toddler who died due to severe head trauma,[109] or of a racecar driver killed in a wreck, or of a trainer killed at SeaWorld.[110]

Many courts and commentators question whether privacy torts are reconcilable with the First Amendment.[111] The unresolved question is whether truth is always a defense in such cases.[112] Moreover, once a state recognizes invasion of privacy as a tort, the law has to take on the unenviable task of deciding, either as a matter of law or matter of fact, whether a given story is a matter of "legitimate public concern" or is privacy-invading.[113] For example, consider the case of Oliver W.

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105 *See* RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

106 *See, e.g.*, CAL. PENAL CODE §§ 630–638 (2016); *see also* LaHodny v. 48 Hours, No. 6:13-cv-2102-TC, 2015 U.S. Dist. LEXIS 38447, at *9 (D. Or. 2015) (quoting Mauri v. Smith, 929 P.2d 307, 310 (Or. 1996)).

107 Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471–74 (1975); *see also* Doe v. Sarasota-Bradenton Fla. Television Co., 436 So. 2d 328 (Fla. Dist. Ct. App. 1983) (rape victim sued television station for broadcasting her image and name, despite prosecutor's assurance that her identity would be kept private when she testified at trial).

108 *See* Jeffrey Abramson, *Searching for Reputation: Reconciling Free Speech and the "Right to be Forgotten,"* 17 N.C. J.L. & TECH. 1, 51 (2015).

109 Marsh v. Cty. of San Diego, 680 F.3d 1148, 1152–53 (9th Cir. 2012).

110 Clay Calvert, *Protecting the Public from Itself: Paternalism and Irony in Defining Newsworthiness*, 50 NEW ENG. L. REV. 165, 181 (2016).

111 *See, e.g.*, Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1232 (7th Cir. 1993) ("First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts. . . ."); RESTATEMENT (SECOND) OF TORTS, § 652D (AM. LAW. INST. 1977) (demonstrating that the Supreme Court has yet to resolve whether truth is a defense to the tort of publicity given to private life).

112 *See, e.g.*, Shulman v. Group W. Prods., Inc., 955 P.2d 469, 479 (Cal. 1998) (noting the lack of guidance from the Supreme Court).

113 *Id.* ("It is in the determination of newsworthiness . . . that courts must struggle . . ."); *see also* RESTATEMENT (SECOND) OF TORTS, § 652D(b) (AM. LAW. INST. 1977) (stating plaintiff must prove that the story was "not of legitimate concern to the public"); *SPJ Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS (1996), http://www.spj.org

Sipple.[114] In 1975, Sipple struck the arm of a woman aiming a gun at President Gerald Ford, arguably saving the President's life.[115] In subsequent media coverage, some reporters took note of the fact that Sipple was a gay man.[116] Sipple sued for public disclosure of private facts. Among the reasons the court gave for upholding a summary judgment against Sipple was the newsworthiness of a story that rebutted "the false public opinion that gays were timid, weak and unheroic figures."[117] Also, the story raised questions about whether President Ford had delayed publicly thanking Sipple due to Sipple's sexual orientation.[118] For these reasons, a private matter became a matter of legitimate public concern.

In the decade after *Sullivan*, the Supreme Court took the position that a "responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."[119] Faced with the troubling cases where truthful news arguably invaded a person's privacy, the Court found ways to deflect the issue.[120]

A. Hulk Hogan Wrestles Gawker

Now, avoiding the issue is harder than ever. The website, *Gawker*, gleefully took on the mission of extending the boundaries of the news beyond traditional restraints.[121] The name defined the goal—to peer at, peak into, and expose. *Gawker*'s creators thought that the more

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/pdf/ehticscode.pdf (stating cautiously that "an overriding public need can justify intrusion into anyone's privacy.").

114 Sipple v. Chronicle Publ'g Co., 201 Cal. Rptr. 665, 670 (1984).

115 *Id.* at 666.

116 *Id.*

117 *Id.* at 670.

118 *Id.*

119 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256 (1974) (striking down a Florida law requiring newspapers to give candidates for public office a "right of reply" to editorials opposing them).

120 *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471–74 (1975) (concluding there was no invasion of privacy in printing rape victim's name, since reporter found it in a court public record); Fla. Star v. B.J.F., 491 U.S. 524, 532–34 (1989) (concluding that the newspaper lawfully obtained the name of sex offense victim from a public police record); Bartnicki v. Vopper, 532 U.S. 514, 521 (2001) (concluding that the original wiretap may have been unlawful, but the radio station obtained its information lawfully).

121 *See, e.g.*, Madigan & Somaiya, *supra* note 13, at A1 (noting *Gawker*'s "insistence that nearly any topic is fair game").

private an event was, the greater the public's curiosity. *Gawker*'s job was to satisfy that curiosity, not judge it.[122]

Gawker met its match against professional wrestler, Hulk Hogan. In 2012, Hogan, whose given name is Terry Bollea, sued *Gawker* for posting a tape online showing Bollea having sex with the wife of a friend.[123] *Gawker* added a "play-by-play" written narrative of the sex, including graphic descriptions of Bollea's penis and of the sounds he made during intercourse.[124] Bollea sued under Florida law for public disclosure of private facts, invasion of seclusion, and for intentional infliction of emotional distress.[125] *Gawker*'s defense was that the story and photos were in fact news.[126] *Gawker*'s editor testified that the public "love[s] to watch famous people having sex" and the Internet has made it easier for all of us to be "shameless voyeurs and deviants."[127] The jury sided with Bollea and returned a verdict for $115 million in damages,[128] tacking on another $25.1 million in punitive damages.[129] The verdict forced *Gawker* into bankruptcy.[130]

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122 In closing argument at trial, *Gawker*'s lawyer stressed that exposing what celebrities would rather the public *not* know is "what we want journalists to do." *Id.* Plaintiff's exhibits quoted Nick Denton, founder of *Gawker*, as saying that the site's standards for publication were "raw" and could be "shameless" and "mean." Plaintiff's Statement of Facts Established at Trial in Support of Plaintiff's Combined Opposition to Motion for New Trial or, in the Alt., for Remittitur and to Motion for Judgment Notwithstanding the Verdict ¶ 22, Bollea v. Gawker Media, LLC, No. 12012447 CI-011 (2016), http://www.litigationandtrial.com/files/2016/05/Hogan-Post-Trial-Statement-of-Facts.pdf [hereinafter Plaintiff's Statement of Facts].

123 Bollea v. Gawker Media, 913 F. Supp. 2d 1327 (M.D. Fla. 2012) (filing originally in federal court); Gawker Media, LLC, v. Bollea, 129 So. 3d 1196, 1198–99 (Fla. Dist. Ct. App. 2014) (Bollea dismissed the federal suit in favor of proceeding in state court).

124 Plaintiff's Statement of Facts, *supra* note 122, ¶¶ 54–55.

125 *Bollea*, 129 So. 3d at 1198–99.

126 Les Neuhaus, *On Stand, Denton Justifies Posting of Hulk Hogan Sex Video*, N.Y. TIMES, Mar. 16, 2016, at B2. Interestingly, in both state and federal pretrial motions denying Bollea's request for a preliminary injunction requiring *Gawker* to take down the tape pending outcome of the trial, judges ruled that the sex tape was about a matter of public concern, thanks in part to Bollea's penchant for attracting media attention to his sexual life. *Bollea*, 129 So. 3d at 1202; *accord Bollea*, 2012 U.S. Dist. LEXIS 162711 at *8–9; *Bollea*, 913 F. Supp. 2d 1327.

127 Plaintiff's Statement of Facts, *supra* note 122, ¶ 73 (quoting deposition of Andrew A. Daumier).

128 Madigan & Somaiya, *supra* note 13, at A1.

129 Nick Madigan, *Jury Adds $25 Million to* Gawker*'s Bill*, N.Y. TIMES, Mar. 22, 2016, at B2.

130 Ember, *supra* note 14, at A1.

Gawker agreed to settle with Bollea for $31 million and to forego its right to appeal.[131] Univision now owns *Gawker*.[132]

Unlike the *Rolling Stone* case, there was no dispute Hulk Hogan was a public figure, even though Bollea attempted to argue that the tape was not of Hulk Hogan but of him as Bollea, the private person in bed.[133] However, the celebrity of Hogan was not dispositive of the case. If the tape had been of a candidate running for office, the information arguably would have been relevant to voter assessment of the candidate's fitness for office. By contrast, the jury evidently found that even a celebrity wrestler had a right to a private sex life and that there was no countervailing public concern being served by *Gawker*'s posting a sex tape.

The jury did not specify its reasons for rejecting *Gawker*'s defense that the sex tape was within the bounds of legitimate news.[134] It could not have helped *Gawker*'s cause that, when asked during a video deposition whether *any* sex tape was too private for *Gawker* to publish, A.J. Daulerio, *Gawker*'s editor, flippantly replied that it would be if the tape featured a child.[135] If the joke were ever funny, it ceased to be when the editor responded to the follow-up question of how young the child would have to be: Under "four," Daulerio deadpanned.[136]

New Yorker staff writer Jeffrey Toobin singled out the Hogan case as an early sign of what has now mushroomed in the Trump campaign and presidency.[137] Toobin's takeaway is that Hogan's lawyers successfully harnessed the same "privileged snobs versus the rest of us" strategy that the Trump administration uses in its criticism of the

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131 Sydney Ember, Gawker *Ends a Dispute that Led to Bankruptcy*, N.Y. TIMES, Nov. 3, 2016, at B1.

132 Maya Kosoff, *Peter Thiel Wasn't* Gawker*'s Only Tormentor*, VANITY FAIR (Aug. 16, 2016, 3:19 PM), https://www.vanityfair.com/news/2016/08/peter-thiel-wasnt-gawkers-only-tormentor.

133 Nick Madigan, *Under Pointed Questioning in* Gawker *Trial, Hulk Hogan Keeps Calm Tone*, N.Y. TIMES, Mar. 9, 2016, at B8.

134 One member of the six-person jury did give an interview after trial, saying that the sex tape "was worse than I expected." Tom Kludt, *Hulk Hogan Juror: "Video Was Worse Than I Expected,"* CNNMONEY (Mar. 21, 2016, 7:26 PM), http://money.cnn.com/2016/03/21/media/hulk-hogan-gawker-juror.

135 Les Neuhaus, *A Crude Remark, Cross-Examined*, N.Y. TIMES, Mar. 15, 2016, at B3.

136 *Id.*

137 Jeffrey Toobin, Gawker*'s Demise and the Trump-era Threat to the First Amendment*, NEW YORKER (Dec. 19 & 26, 2016 Issue), http://www.newyorker.com/magazine/2016/12/19/gawkers-demise-and-the-trump-era-threat-to-the-first-amendment.

media.[138] Of course, it took some doing to recast Hogan "the celebrity" as Bollea "the common man," but Bollea's lawyers took every opportunity to portray their client as different from the fictional Hulk Hogan.[139]

It also helped that billionaire Peter Thiel's financing of the Hogan case remained hidden. Some years earlier, *Gawker* publicized Thiel's gay sexual orientation, a truth that the PayPal founder had not hidden from Silicon Valley associates, but a truth that he preferred not to reveal publicly.[140] Some see Thiel as the puppeteer of the Hogan litigation, remaining hidden while staging the case to silence a media organization against which he held a grudge.[141]

Thiel is hardly the first person to finance another person's lawsuit, while remaining in the shadows. *Gawker* lost not because of Thiel's money but because the jury gave its own answer regarding what images belong online. The significance of this verdict should not be missed. For a "jury to say that a celebrity has a right to privacy that outweighs the public's 'right to know,' and that a celebrity sex tape is not newsworthy, represents a real shift in American free press law."[142] Samantha Barbas's historical research shows that, in contrast to the Hogan verdict, case law by the 1940s had settled on an expansive view of journalism where "one surrendered her right to privacy to whatever extent publishers felt was necessary to report the news."[143] Another scholar finds the same judicial deference to

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138 *Id.* Toobin quotes this line in Bollea's lawyer's closing argument before a Florida jury: "I'm not so sure all of us are shameless voyeurs and deviants. They may be up on Fifth Avenue at *Gawker*, but that's a little bit of an assumption for the rest of the world." *Id.*

139 Plaintiff's Statement of Facts, *supra* note 122, ¶ 1 ("Terry Bollea was raised in a low income neighborhood in Port Tampa. . . . After graduating from high school, he pursued a career in music. . . . He also worked construction jobs and as a longshoreman to make ends meet.").

140 Toobin, *supra* note 137.

141 *See, e.g.*, Ben Kenigsberg, *Read All About It, If You Still Can*, N.Y. TIMES, June 23, 2017, at C10 (reviewing a film documentary highly critical of Thiel's behind-the-scenes-role); *see also* Toobin, *supra* note 137.

142 Madigan & Somaiya, *supra* note 13, at A1.

143 Samantha Barbas, *Saving Privacy from History*, 61 DEPAUL L. REV. 973, 1009 (2012); *see also* United States v. Sterling, 724 F.3d 482, 529 n.9 (4th Cir. 2013) ("[C]onsidering newsworthiness would cause the court to 'serve as editor-in-chief.'") (quoting United States v. Sterling, 818 F. Supp. 2d 945, 954 (E.D. Va. 2011)); Solano v. Playgirl, Inc., 292 F.3d 1078, 1089 n.8 (9th Cir. 2002) ("Courts are, and should be, reluctant to define newsworthiness.") (citing Lerman v. Flynt Distrib. Co., 745 F.2d 123, 139 (2d Cir. 1984)); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980) ("No arm of the government, including the judiciary, should be able to set society's agenda" for what to debate.); Cantrell v. Forest City Publ'g Co., 484 F.2d 150, 157 (6th

publishers' judgments of newsworthiness in the 1960s and 70s, when coverage of the civil rights movement, the Vietnam War, and the Watergate scandal gave a "romantic, heroic image" to reporting.[144] A 2005 review found that the levels of judicial deference to the press remained high at the time.[145]

The *Gawker* verdict exposes a long-standing problem at the very heart of free speech jurisprudence: Just what is newsworthy? I turn now to this foundational issue.

B. Defining "Newsworthiness"

Consider various positions on how to define newsworthiness, including the maximalist, minimalist, and middle positions.

1. The Maximalist Position

Gawker's position was that, so long as it is true, virtually everything is news and that courts have no business filtering out stories that attract public interest, no matter how seedy the interest.[146] For the maximalist, the market determines the limits of newsworthiness—anything that sells is by definition newsworthy.[147] For instance, to adapt an example given by Professor Clay Calvert, someone might post a snapshot of his fifth-grade report card, but no one would, since who is Clay Calvert? Why would anyone be interested in reading his fifth-grade report card?[148] The market does

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Cir. 1973), *rev'd on other grounds*, 419 U.S. 245 (1974) ("Only in cases of flagrant breach of privacy which has not been waived or obvious exploitation of public curiosity where no legitimate public interest exists should a court substitute its judgment for that of the publisher."); Judge v. Saltz Plastic Surgery, 367 P.3d 1006, 1012 (Utah 2016) ("'News' . . . is a concept that has essentially been defined by traditional publishers and broadcasters, 'in accordance with the mores of the community.'"). *But cf*. Clay Calvert & Justin B. Hayes, *To Defer or Not to Defer? Deference and its Differential Impact on First Amendment Rights in the Roberts Court*, 63 CASE W. RES. L. REV. 13, 53 (2012) (arguing "that deference, as a concept, is too loosely bandied about and trotted out on an as-needed basis, rather than being used with consistency, predictability, and analytical rigor").

144 Barbas, *supra* note 143, at 1032.

145 Gilles, *supra* note 84, at 1208 n.25.

146 *See* Jonathan Mahler, *Snark's Moment of Truth*, N.Y. TIMES, June 14, 2015, at BU1 ("By *Gawker*'s definition, if it's interesting, it's news.").

147 Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. 1, 15–16 (1998) ("[S]ex and scandal . . . must be . . . matters of public concern or there would be no way to explain all the concern paid to them.").

148 Calvert, *supra* note 110, at 186–88.

the work—newsworthiness is not a *moral* standard but an economic one.[149]

The maximalist position has little to back it. A 1975 California Supreme Court opinion pinpointed the problem with the maximalist position when it noted that no one would "be able to enjoy a private life save with leave of the press."[150] Weeding out *Gawker* is not a threat to First Amendment rights but a way of protecting the press from the abusive overreach of *Gawker*-type news that has done so much to sour public perceptions of the media.[151]

2. The Minimalist Position

If there is a maximalist position, there ought to be a minimalist one. However, few media outlets continue the practice of strong gatekeeping of the news. Like maximalists, minimalists refer to news that is "in the public interest." But what actually interests people might not be in the public interest. Minimalists shift the definition of political news from what people *want* to know to what people *need* to know in a self-governing democracy. The famous box on *The New York Times* masthead—"All the News That's Fit to Print"—offers a moral definition of newsworthiness. Over the years, the *Times* has self-censored the news when *it* judged that even the truth did *not* serve the public interest, for instance by refusing to publish the day and location of what became the Bay of Pigs invasion of Cuba[152] or to print the "news" that President John F. Kennedy had been seen entering a New York hotel with Marilyn Monroe.[153]

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149 Wagner v. Fawcett Publ'ns, 307 F.2d 409, 411 (7th Cir. 1962) (rejecting suggestion in amicus brief that standard in invasion of privacy cases should be "public interest" rather than "newsworthiness"); *see also* BOB DYLAN, *Stuck Inside of Mobile with the Memphis Blues Again*, on BLONDE ON BLONDE (Columbia 1966) ("Your debutante knows what you *need* but I know what you *want*.") (emphasis added).

150 Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975).

151 Clay Calvert, *Victories for Privacy and Losses for Journalism? Five Privacy Controversies From 2004 and Their Policy Implications for the Future of Reportage*, 13 J.L. & POL'Y 649, 696–97 (2005) (protecting central role of journalism in a democratic society may require responsible outlets to distance themselves from egregious invasions of privacy); *see also* Calvert, *supra* note 110, at 170 ("[T]he bad guys of the quasi-journalism world could ruin it for the good guys of the real-journalism one.").

152 David W. Dunlap, *1961: The CIA Readies a Cuban Invasion, and the Times Blinks*, N.Y. TIMES (Dec. 26, 2014, 11:30 AM), https://www.nytimes.com/times-insider/2014/12/26/1961-the-c-i-a-readies-a-cuban-invasion-and-the-times-blinks/.

153 *See* MATT BAI, ALL THE TRUTH IS OUT: THE WEEK POLITICS WENT TABLOID 28 (2014).

The minimalist position suffers from two key problems. First, just as a matter of description, it no longer maps onto the actual news business we have. There is no turning back the clock on what the Internet has wrought—a vast demotion of journalists as effective gatekeepers of the news.[154] If Wikileaks posts e-mails hacked from staff members in Hillary Clinton's presidential campaign, *The New York Times* has to cover it as news, whether or not the paper would have printed the e-mails on its own. Secondly, as a normative manner, it is not clear that a gatekeeping press always serves the core democratic goal of informing the people. In the 1970s, the Washington press knew that Representative Wilbur Mills, the powerful chairman of the House Ways and Means Committee, had a serious drinking problem. However, it considered his alcoholism a private matter until Mills drove drunk and crashed his car near the Washington, D.C. Tidal Basin. A stripper in Mills' car then jumped into the water.[155] The ensuing scandal convinced editors that the public needed to know about the fitness of the individual who could single-handedly hold up all federal appropriations bills.[156]

3. The Middle Position

Courts, journalists, and law professors have struggled to find a sound middle ground.[157] The code of ethics recommended by the Society of Professional Journalists states that "ethical journalism . . . [b]alance[s] the public's need for information against potential harm or discomfort."[158] Many court opinions are along the same lines, for instance, a federal court's recognition that "[t]he right of privacy stands on high ground . . . [and yet it] must be accommodated to the need for reasonable latitude for the selection of topics for discussion

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[154] *See* Smolla, *supra* note 147, at 7 ("[A] marketplace with ever increasing competitive pressures may tend to make serious journalists more tabloid-like.").

[155] Stephen Green & Margot Hornblower, *Mills Admits Being Present During Tidal Basin Scuffle*, WASH. POST (Oct. 11, 1974), http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/tidalbas.htm; *see also* Dennis Hevesi, *Wilbur Mills, Long a Power in Congress, is Dead at 82*, N.Y. TIMES (May 3, 1992), http://www.nytimes.com/1992/05/03/us/wilbur-mills-long-a-power-in-congress-is-dead-at-82.html.

[156] For guidelines regarding jurisdiction over appropriation bills, see *Committee Jurisdiction*, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, https://waysandmeans.house.gov/committee-jurisdiction (last visited Aug. 26, 2017).

[157] *See, e.g.*, Shulman v. Group W. Prods., Inc., 955 P.2d 469, 481 (Cal. 1998) (citing to "[t]he difficulty of finding a workable standard in the middle ground" between the minimalist and maximalist positions).

[158] *SPJ Code of Ethics*, *supra* note 113.

in newspapers."[159] In a recent, non-media case balancing free speech and privacy, the Supreme Court distinguished the "special protection" afforded speech on public matters from the "less rigorous" protection given to speech on "matters of purely private significance."[160] A good example of the middle position is the Eleventh Circuit's decision that including biographical information on the early-life of a murdered model was relevant but that including nude photographs from bygone years was not.[161]

Like all line drawing, it is one thing to acknowledge that a line must be drawn and another to defend the particular line that is drawn. In 1977, the Restatement (Second) of Torts sided with protecting the newsworthiness of stories even of "deplorable popular appeal," yet permitted plaintiffs to recover against "morbid and sensational prying into private lives for its own sake . . . ."[162] But that would have been a difficult line to discern in the Hulk Hogan case, since the tape obviously had "popular appeal"—over five million views—however "deplorable" it was.

The problem with the middle ground position is that it seeks a *substantive* standard for "newsworthiness" (the *what* of news) when really there are only procedural guidelines (*who* gets to decide what is news). In *The First Amendment Bubble*, law professor and former journalist Amy Gajda begins with a classic statement of the middle position: "courts will need to . . . [draw] lines in a way that recognizes truthful expression's real harms while continuing to offer protection for some truthful, hurtful—but responsible and newsworthy—reporting."[163] Professor Gajda then proposes what seems to be a substantive answer to the question of what is newsworthy. *Any* truthful information is presumptively newsworthy, but the presumption can be overcome "in truly exceptional cases" when the degradation of a person's "dignity" caused by the disclosure "clearly outweighs" the public's interest in that disclosure.[164]

However, when we probe what human dignity is, or when it is degraded in a "truly exceptional case," this seeming standard has no

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159 Afro-Am. Publ'g Co. v. Jaffe, 366 F.2d 649, 654 (D.C. Cir. 1966).

160 Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[N]ot all speech is of equal First Amendment importance . . . .") (citation omitted).

161 Toffolini v. LFP Publ'g Grp., 572 F.3d 1201, 1209 (11th Cir. 2009).

162 RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (AM. LAW INST. 1977).

163 AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS 223 (2015).

164 *Id.* at 233.

definite substance to offer. Professor Gajda reasonably has to retreat to relying on a procedure for drawing the line. To be sure, Professor Gajda mentions content that *could* degrade human dignity (sex, grief, or medical condition), but the line drawing is still there, as when she approvingly quotes a federal court's distinction between "the merely embarrassing" and the "deeply shocking."[165]

Professor Gajda considers three procedures for who should decide where to draw the line around the news: (1) news institutions, with old-style deference from the courts; (2) judges deciding the issue of newsworthiness as a matter of law; and (3) juries deciding the issue as a matter of fact.[166] Professor Gajda is hostile to juries; they are too easily swayed by sympathetic plaintiffs facing off against large media corporations.[167] Moreover, even going to a jury trial drives up the costs of litigation.[168] However, returning to an era of judicial deference to newsrooms' own judgments is not desirable given the influx of new media outlets with suspect editorial judgments.[169]

For Professor Gajda, this leaves the judge as the proper person to decide, as a matter of law, what in fact constitutes newsworthiness.[170] Procedurally, the burden of proof is on the plaintiff to overcome the starting presumption that any truthful information is newsworthy.[171] One problem is that Professor Gajda never clarifies whether the standard of proof is the ordinary one in civil cases—preponderance of the evidence—or whether it would be better to require privacy plaintiffs to prove, by "clear and convincing evidence," that the story was "the truly exceptional one" degrading their dignity.[172]

A deeper problem with Professor Gajda's approach comes when she warns that judges do not necessarily understand the news business

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165 *Id.* (quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234–35 (7th Cir. 1993)).

166 *See generally id.* at 222–38.

167 *Id.* at 237.

168 *Id.* at 257.

169 *Id.* at 237.

170 *Id.* at 233; *see also* Rosanova v. Playboy Enters., 411 F. Supp. 440, 444 (S.D. Ga. 1976) (citing to cases holding that "whether a matter is of public interest or general concern is a question of law for the court"). For a proposal that would call upon judges to define baseline norms of responsible journalism and to decide summarily whether a media defendant had met those norms, see Barron, *supra* note 15, at 124 ("[T]he judiciary is the body best situated to regulate the press.").

171 GAJDA, *supra* note 163, at 233.

172 In defamation suits, the standard of proof is "clear and convincing" evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

and therefore should seek advice from practicing journalists.[173] Journalism professors will not do—the expertise comes from practice in judging newsworthiness.[174] Moreover, the judge's selection of experts would somehow have to weed out "quasi journalists" of the *Gawker* variety who do not have experience in ethical news judgments.[175] At this point, Professor Gajda's procedures pile elitism upon elitism. Not only are juries distrusted, but judges must turn to elite experts to know what the public should read, view, or hear.[176]

C. A Modest Proposal

Trying to eliminate all ambiguity in a term like newsworthiness is a fool's errand. We should not expect legal standards to offer more certainty than the subject matter allows. That said, the *Rolling Stone* and Hulk Hogan cases illustrate a danger that requires a response.

New media technologies vastly expand both the number and variety of media outlets, together with networks for obtaining and distributing the most intimate details of a person's life instantly, globally and graphically. The Internet did not invent gawking and gossiping.[177] However, it empowers gossip by sustaining what otherwise might have just become yesterday's news. Stories do not die but replicate like viruses, spreading from one site to others. In such a media environment, the balance between privacy and publicity fundamentally shifts.[178]

This is hardly the first time that First Amendment law has had to evolve with changing technology. In response to the telegraph and telephone, the principles of common carriage developed in the law.[179] In response to radio and television, Congress and the courts pointed out technical factors such as scarcity of over-the-air frequencies to justify imposing obligations on broadcasters including licenses, fairness reviews, and rights of reply that did not apply to print journalism.[180] Cable television somewhat,[181] and then the Internet

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173 GAJDA, *supra* note 163, at 233 (citing to Supreme Court case advising judges to be "chary of deciding what is and is not news").

174 *Id.* at 258.

175 *Id*. at 245–48 (restricting the definition of who is a journalist).

176 For a similar criticism, see Calvert, *supra* note 110, at 186–88.

177 For much earlier criticism of a privacy-invading press, see generally Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

178 For the way the Internet remembers all, see Abramson, *supra* note 108, at 6–7.

179 *See* Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 874 (2009).

180 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–76 (1969).

entirely, eliminated the scarcity of media outlets[182] and ushered in a world where everyone can publish his or her own newspaper (website), own a television station (YouTube channel), or be a journalist (blogger). It would hardly be surprising for law to adopt a less deferential attitude in a modern media environment without effective gatekeepers to whose professional judgments earlier courts felt comfortable deferring.

When the Second Restatement of Torts was published in 1977, editors were careful to note that the Supreme Court had yet to resolve the constitutional issue of whether truth was always a First Amendment defense to the charge of publication of private facts.[183] After the Hogan case, the time has come to resolve this issue. If we wield the First Amendment to turn truth into an absolute defense, there could be no valid invasion of privacy laws left at all.[184] The *Gawker*s of the new media world show us the need to respond to misuses of free speech principles as mere covers for press arrogance.

Procedurally, media defendants will still get protection from judges dismissing privacy lawsuits upon finding as a matter of law that the article was about a matter of "legitimate public concern."[185] Even if the judge permits a case to proceed to trial, the burden remains on the plaintiff to prove that the story was not a matter of legitimate public concern. Trials, especially jury trials, increase the cost of defending against a privacy claim and add an element of unpredictability to the results.[186] But since the underlying issue is whether the public's need to know outweighs the burden on privacy, asking the jury—as a body representative of the community—seems the right procedure to follow in a democracy.[187]

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[181] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 628–29 (1994) (taking notice that cable channels are not physically scarce).

[182] *See* Reno v. ACLU, 521 U.S. 844, 849–52 (1997).

[183] RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

[184] *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1091–93 (2000) (arguing that privacy laws are frequently so overbroad as to be unconstitutional).

[185] Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1233–34 (7th Cir. 1993) (granting summary judgment because no reasonable jury could ignore evidence establishing the newsworthiness of the story).

[186] *See, e.g.*, Barron, *supra* note 15, at 114–20 (arguing that the actual malice rule in *Sullivan* imposes large litigation costs and urging adoption of a summary procedure that would avoid trials).

[187] Typical of the procedure in jury trials are the California jury instructions telling jurors that the plaintiff must show that "the private information was not of legitimate

I acknowledge that imposing liability on truth telling is dangerous, and we cannot allow *Gawker* to be the test case for all conflicts between privacy and publicity. Consider, for instance, the situation in Europe. The highest court in the European Union, the European Court of Justice, has ordered search engines to take down links to truthful information about a person if that person requests it and if the information is harmful to the identity or reputation of that person and deemed "irrelevant" to any public purpose.[188] Elsewhere, I have given two cheers to this so-called "right to forget" as an understandable response to the unsurpassed power of search engines to monopolize control over individual reputations.[189] However, clearly the First Amendment should prohibit importing the European solution here in the United States.[190]

The press should take this post-Hogan moment to acknowledge the headwinds it faces and adopt "best practices" that could provide shelter against those winds.[191] If journalists feel obliged to get into bed with the *Gawker*s by insisting on absolute free speech rights to publish even the most private and invasive stories, then it won't take a weatherman to know which way the wind is blowing.

V
PRIVATE CONDUCT OF PUBLIC OFFICIALS

More than any other, one development brings concerns about reputation together with the debate over privacy. Following *Sullivan*, the Court extended the logic of the case to cover press coverage of the *private*, as well as *official*, conduct of public officials. That extension rested on the argument that the moral character of someone holding office is relevant to voters and that private behavior, especially sexual

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public concern" and that factors to consider in deciding questions of newsworthiness include "(a) the social value of the information; (b) the extent of the intrusion into [plaintiff's] privacy; [and] (c) whether [plaintiff] consented to the publicity explicitly or by voluntarily seeking public attention . . . ." CAL. CIVIL JURY INSTRUCTIONS (CACI) § 1801 (2003), https://www.justia.com/trials-litigation/docs/caci/1800/1801.html.

188 *See* Abramson, *supra* note 108, at 6.

189 *Id.* at 71–78.

190 In addition to the First Amendment, federal law protects interactive computer services from defamation lawsuits if all they did was post or link to content generated by others. *See* Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1) (1998).

191 For suggestions as to what these "best practices" might be, see generally Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781 (2009).

fidelity to one's partner, tells us much about moral character.[192] A more nuanced argument is that it is not the act of sex that is relevant, but rather the *risk-taking* tendency that the act reveals.[193] On this view, it is not relevant that candidates are actually virtuous towards their partners, so long as candidates maintain the *appearance* of sexual virtue toward their partners.[194] Another nuanced argument is that we are interested in news about sexual hypocrisy rather than sexual acts. Thus, stories about the marital infidelities of Representative Newt Gingrich and others became relevant in revealing a kind of two-faced posturing when they railed against President Clinton.[195]

The seamless connection between keeping public faith with the voters and keeping private faith with a spouse is not obvious. In the past, newspapers seemed to have known about the private sexual affairs of John F. Kennedy,[196] Lyndon Johnson,[197] Dwight Eisenhower,[198] and Franklin Roosevelt,[199] yet chose not to publish the information.[200] Few, if any, made the argument that we could not trust Eisenhower as a general if he was committing adultery at the time he was the supreme commander of allied forces in WWII. Fidelity to spouse was one thing, fidelity to country another.[201]

Much has changed since then. The key moment came in 1987 when press coverage of Senator Gary Hart forced the then-leading candidate for the Democratic Party nomination for the presidency out

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192 *See* JAMES DAVID BARBER, THE PRESIDENTIAL CHARACTER: PREDICTING PERFORMANCE IN THE WHITE HOUSE (1972) (arguing that presidential behavior reflects basic personality traits); Ralph Gregory Elliot, *The Private Lives of Public Servants: What Is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 826–27 (1995).

193 *See* Anita L. Allen, *Privacy and the Public Official: Talking About Sex as a Dilemma for Democracy*, 67 GEO. WASH. L. REV. 1165, 1170 (1999) (citing to Bill Clinton's risky extramarital affair while president with a White House intern).

194 *Id.* at 1169.

195 *Id.* at 1180–81.

196 BAI, *supra* note 153, at 28.

197 *Id.* at 29.

198 *See* KAY SUMMERSBY MORGAN, PAST FORGETTING: MY LOVE AFFAIR WITH DWIGHT D. EISENHOWER (1976).

199 DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT: THE HOME FRONT IN WORLD WAR II 517–18 (1994).

200 *See, e.g.*, BAI, *supra* note 153, at 28 (recounting *New York Times* reporter's story of seeing President Kennedy entering a New York hotel with Marilyn Monroe but being told by an editor that there was "[n]o story there").

201 For this view, see Anthony Lewis, *Sex and Leadership*, N.Y. TIMES, Feb. 23, 1998, at A19 ("[S]traying from the straight and narrow does not disable one as a statesman, a general or a civil rights leader.").

of the race.[202] In April 1987, *Newsweek* published a story mentioning persistent reports about Hart's troubled marriage and his "womanizing."[203] Shortly after, a reporter for the *Miami Herald* took a telephone call from a woman saying she had a photograph of Hart and a young blonde on a yacht named "Monkey Business" sailing near the island of Bimini.[204] Following up on the lead, *Herald* reporters staked out Hart's home in Washington, D.C. and observed Hart and a young blonde enter the house and apparently not come out until morning.[205]

The *Herald* ran the story as front-page news, at about the same time that a feature-length profile of Hart appeared in *The New York Times Magazine*. The *Times* quoted Hart as responding to reports of his womanizing by saying, "Follow me around. I don't care . . . . If anyone wants to put a tail on me, go ahead. They'd be very bored."[206] The convergence of that remark and the *Herald* story set in motion events from which the Hart campaign never recovered.[207] When a *Washington Post* reporter asked Hart whether he had ever committed adultery, Hart deflected the question.[208] The denouement came when the *Post* let Hart staffers know that they were prepared to run a story about another, more long-standing and discreet affair that Hart allegedly had with a Washington socialite.[209] At that point, Hart dropped out of the race.[210]

Different lessons can be gleaned from Hart's fate. A *Herald* reporter maintains that the story was never about sex, but about exposing Hart's hypocrisy in running a campaign based on the "very highest possible standards of integrity and ethics," while cheating on his wife and lying to the public about it.[211] For others, the takeaway is that the press served the public interest by weeding out a candidate

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202 *See generally* BAI, *supra* note 153.

203 *Id.* at 84.

204 *Id.* at 77, 83–84.

205 *Id.* at 93–97.

206 *Id.* at 107.

207 *Transcript of Hart Statement Withdrawing His Candidacy*, N.Y. TIMES (May 9, 1987), http://www.nytimes.com/1987/05/09/us/transcript-of-hart-statement-withdrawing-his-candidacy.html.

208 BAI, *supra* note 153, at 169–73.

209 *Gary Hart and Donna Rice–1987*, WASH. POST (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/frenzy/hart2.htm.

210 *Transcript of Hart Statement Withdrawing His Candidacy*, *supra* note 207.

211 BAI, *supra* note 153, at 92–93.

who was reckless enough to utter the "follow me around" challenge.[212]

I do not find the high-minded defense that "it is not about the sex" persuasive, at least in the current media environment. There are good reasons why Matt Bai subtitled his study of the Hart exposures "The Week Politics Went Tabloid."[213] Political news has become entertainment news.[214] Granted, there is a difference between a sex tape on Hulk Hogan and the public concerns raised by the sexual behavior of a candidate or public official. But just how concerned should we be? In different ways, Clarence Thomas,[215] Bill Clinton, and Donald Trump survived widespread reporting of sexual misbehavior. This may indicate that the public is not as judgmental about the private lives of public figures as the reigning media paradigm has it.[216]

It might help to distinguish various grounds for covering private sexual lives of public officials and candidates. Few doubt that evidence of *criminal* sexual conduct is relevant to fitness for office.[217] Sometimes, however, media investigations reveal conduct that is widely considered improper yet may not constitute a crime. An example here is the revelation not only that Representative Barney Frank visited a male sex prostitute, but that he had used the power of his office to fix legal problems for the man. For the same reasons that the House voted to censure Frank for ethics violations, the story was certainly newsworthy, however lurid.[218] Likewise, the fact that Elliot Spitzer, Attorney General of New York, frequented prostitutes while traveling on taxpayer money *and* using his office to crack down on

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[212] *Id.* at 32.

[213] *Id.* at title page.

[214] "The . . . collision of sex and presidential politics . . . unleashed something latent in the popular culture, some powerful impulse toward gossip and ridicule that couldn't be restrained." *Id.* at 170.

[215] *See generally* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS (1994).

[216] For politicians who have survived sex scandals, see Campbell Robertson, *Politicians Are Slowed by Scandal, but Many Still Win the Race*, N.Y. TIMES, July 18, 2013, at A11.

[217] Examples here include stories about a drunk Senator Edward Kennedy driving off the Chappaquiddick Bridge, off Martha's Vineyard, killing a young woman passenger, and leaving the scene, *see* BAI, *supra* note 153, at 20; or the sex plus cocaine affairs of Washington, D.C. Mayor Marion Barry, *see* Marjorie Williams, *No Sex, Please! We're in Washington*, WASH. POST SUNDAY MAG., Sept. 22, 1991, at 15.

[218] *See* Allen, *supra* note 193, at 1173 (citing Michael Oreskes, *Barney Frank's Public and Private Lives: Lonely Struggle for Coexistence*, N.Y. TIMES, Sept. 15, 1989, at A14).

prostitution made the story relevant to his campaign for governor.[219] And sometimes the story really is about risk-taking and bizarre behavior rather than sex, as was the case with Congressman Anthony D. Weiner's "sexting" of young girls.[220]

The problem is that the litmus test for stories of private sexual lives goes way behind the political relevance of the above categories. A Google search for "George W. Bush + mistress" returned 3,120,000 stories, even though none of the usual rationales about risk-taking and visibility of affairs applied to the president.

Suppose, as a hypothetical, *The New York Times* had accepted an advertisement in 1960 critical of Montgomery commissioner L.B. Sullivan's sexual behavior. Suppose Sullivan had sued the *Times* for libel or invasion of privacy. Would the Court have felt it as important to protect such an account as one that focused on his public acts in arresting Martin Luther King? Even better, suppose a far-right publication had exposed King's private sexual life. Would the public's interest in assessing King as a civil rights leader have been served by such stories?

Let me distinguish three costs of the extension of the *New York Times* rule from coverage of official conduct to stories about private affairs. First, media coverage, or even the threat of it, may dissuade worthy persons from seeking or continuing to hold office.[221] In an earlier generation, the litmus test for sexual morality was divorce and that standard kept the well-qualified Governor of New York, Nelson Rockefeller, from pursuing the presidency.[222] Who is to say the current tests for sexual morality serve us any better?

Second, far from serving the original *Sullivan* purpose of making public debate of public issues "robust," a focus on private peccadillos too often *distracts* the public. Perhaps public attention is not a limited commodity; perhaps it even grows when watered first by entertaining stories about private matters. But how does reading all about a candidate's sexual lying prepare one to read, for example, about whether United States officials deceived citizens into a war by lying about the presence of weapons of mass destruction in Iraq? The difference is a difference in kind.

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219 BAI, *supra* note 153, at 191–92.

220 Robertson, *supra* note 216, at A11.

221 "In an age where good men and women increasingly shun positions of public trust for precisely this reason, it is not illegitimate to inquire whether society is well served by this state of affairs . . . ." Elliot, *supra* note 192, at 830.

222 BAI, *supra* note 153, at 29.

Third, there is damage to journalism. This is the hardest to assess. In some ways, we live in a golden age of information creation, distribution, and access. Journalism is only a small part of the information industry, and the First Amendment's speech and press clauses apply to all sorts of information having little to do with government. Still, as David Anderson argues, our republic has been well served by the existence of an organized press that receives special, if uncodified, legal preferences in the form of press pools, pressrooms, press releases, and press secretaries.[223] These arrangements distinguish the press as a business from the rest of the information industry in ways that are hard to define but traditional to our culture.[224]

It is not difficult to imagine, given the current political climate, that the press could lose its unique status. Juries roundly rejected the claims by *Rolling Stone* and *Gawker* that they were practicing journalism when they offered up, in different ways, lurid accounts of gang rape on campus or sex in the bedroom. Only by combining journalistic self-restraint with legal rules that constrain publishers can the press preserve its special role as the people's watchdog.[225]

CONCLUSION

New York Times v. Sullivan can regain its democratic footing by bringing in the walls of the First Amendment fort that later cases built. In regard to the public figure doctrine, courts should enforce the oft-quoted, but frequently ignored, requirement that private individuals become public figures only to the extent that they *voluntarily* thrust themselves into a public controversy. In regard to privacy torts, truth should not be an absolute defense, however uncomfortable such a conclusion is to one reading of the First Amendment. Judges and juries will have to continue to struggle over norms of newsworthiness when truth and privacy collide. Finally, media attention to the *private* lives of public officials, however justified on occasion, has become so routine as to defeat what *New*

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223 Anderson, *supra* note 16, at 430. *But cf.* William Bennett Turner, *Free Speech in the Trump Era: The View from Berkeley*, MEDIUM (June 3, 2017), https://medium.com/@william.b.turner/free-speech-in-the-trump-era-b46b4dc3ed44 ("[N]o First Amendment right of access to government facilities (like the White House) . . . and no president can be compelled to grant interviews or hold press conferences.").

224 Anderson, *supra* note 16, at 430.

225 *Id.* at 449; *see also* Stewart, *supra* note 16, at 632–35.

York Times v. Sullivan promised—a press helping citizens to focus on the investigation and criticism of official acts.