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Amy Gajda

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## The Justices and News Judgment: The Supreme Court as News Editor

Amy Gajda \*

In 2011, in *Snyder v. Phelps*, the military funeral protest case involving the Westboro Baptist Church, the United States Supreme Court again warned that courts needed to protect speech broadly, lest judges become what the Court called “inadvertent censors.”<sup>1</sup> In the opinion, the Court touched upon what might be appropriate news, though the case only tangentially involved journalism. In a paragraph that specifically mentioned newsworthiness, the Court reminded readers that a matter of public concern<sup>2</sup> would be any matter that related to political, social, or other concerns of the community, regardless of its inappropriateness or controversial nature.<sup>3</sup>

The *Snyder* opinion is filled with related citations to the Court’s earlier, famous First Amendment jurisprudence upholding media rights to report or publish, including a case that refused to hold a newspaper liable for publishing the name of a rape victim,<sup>4</sup> a case in which a magazine published a photo spread fictionalizing in part a family’s terror at the hands of captors,<sup>5</sup> and a case in which minister Jerry Falwell was parodied in a particularly tasteless way by *Hustler* magazine.<sup>6</sup>

The *Snyder* case, therefore, was obviously not the first time the Justices had tried their hand at defining newsworthiness. They had been

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\* Associate Professor of Law, Tulane University Law School. The author is grateful for those comments from participants at the BYU Law Review Symposium: The Press, the Public, and the U.S. Supreme Court, and also for excellent research assistance from Dominique Fasano, Elizabeth LaVance, Ian Gunn, Parmita Samanta, and student editors at the *BYU Law Review*.

1. 131 S. Ct. 1207, 1216 (2011).

2. Courts in non-news contexts have somewhat routinely distinguished between matters of public concern and matters that have some sort of expanded news value. See, e.g., *Domina v. Van Pelt*, 235 F.3d 1091, 1097 (8th Cir. 2000) (differentiating between a matter of heightened public interest and a matter of public concern in a government employee speech case). Journalists, especially those who specialize in feature stories, would certainly agree that news necessarily extends beyond news of public concern.

3. *Snyder*, 131 S. Ct. at 1216.

4. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

5. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

6. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

doing so for well more than a century, in fact, and long before those famous cited decisions, sometimes acting more directly as after-the-fact editors and sometimes mentioning news value in a dicta-like fashion. In this way, the Supreme Court has decades of experience acting as a kind of a super news editor.

To better understand this role and why it matters, it is important to understand what non-judicial news editors do. Within any newsroom, news editors have tremendous power and responsibility. They ultimately decide what news and information is appropriate public fodder and what news and information, though true, is better left unwritten or unsaid.<sup>7</sup> A news editor, for example, might decide that certain truthful information is too private or too embarrassing or too harmful to be part of a news story, even if the information might be relevant to some readers. A politician's affair, for example, might be withheld if reporters or editors ultimately decide that it has little to do with the politician's political life.<sup>8</sup> Given the journalistic ethics standard for public persons, such information about a private person would likely never be published by a mainstream news source because, in any journalist's estimation, there would be nothing newsworthy for the public in the revelation.

And this is where the judicial system comes in. Should similarly private information be published about a public or private figure, and should the person sue for a privacy invasion, courts and juries are ultimately left to decide whether the public value of the news item should trump the person's right to privacy. The Restatement, for example, describes the balance this way:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.<sup>9</sup>

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7. The author worked as a journalist for many years before and during law school and taught reporting and journalism ethics courses at the University of Illinois for several years before joining the Tulane faculty.

8. Newsworthiness often depends upon the politician's public life. A politician who promotes himself as one with strong family values but is having an extramarital affair, or a politician who uses anti-gay rhetoric but has had homosexual relations, is far more likely to be the subject of an investigative report than one whose private life aligns with the politician's public face.

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

A definition for news, then, becomes highly relevant in privacy causes of action, among others, because a fact finder deciding a privacy claim is called upon to act as a news editor in deciding whether such information was of a type appropriate for public dissemination—whether it was “of legitimate public concern” or not. Legitimate public concern is not based upon any public *need* to know, however. The Restatement offers a broad definition, suggesting that matters of legitimate public concern include accidents, rare diseases, preteen pregnancy, and multiple other matters of “more or less deplorable, popular appeal.”<sup>10</sup>

I have suggested previously that lower courts have lately been more accepting of the publication of private-facts tort and related privacy-like causes of action. For example, multiple privacy and privacy-like cases have sprung from the NBC reality crime series *To Catch a Predator*, a television program in which journalists follow Internet vigilantes and police officers involved in stings to catch Internet child-sex predators.<sup>11</sup>

Though it has decided a number of cases involving news judgment and potential liability, the Supreme Court often makes it a point to suggest its decision is no broader than the matter before it. Because of this, it has never truly decided in a broad fashion where the line between two strong constitutional principles—the right to privacy and the right to press freedom—should be drawn. But, perhaps at least somewhat surprisingly, the Justices’ definition of newsworthiness over the years has crystalized into one that is much more in line with the Restatement; the Justices have held or suggested in multiple cases that news, or the information the public deserves to know, should be broadly construed and should not be based solely upon the public’s *need* for the information.

This symposium Article, part of a larger book project on the prickly relationship today between media and the courts,<sup>12</sup> looks historically at an earlier Supreme Court’s sense of news, those times from the start of the United States to *New York Times v. Sullivan*, a decided turning point for journalism, when the Court told us what information it believes is in the public interest in a news sense<sup>13</sup> and what information might best be

10. *See id.* cmt. g.

11. *See, e.g.,* *Conrad v. NBC*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008), as described in Part IV.

12. THE FIRST AMENDMENT BUBBLE: LEGAL CONTROLS ON NEWS AND INFORMATION IN AN AGE OF OVER-EXPOSURE (under contract with Harvard University Press).

13. Not all Supreme Court cases cited within this Article have news media defendants, but most do. The others are cases in which the Court seems to be guiding the definition for news and

kept under wraps. The early Court took a restrictive approach to press freedoms; over time, however, the Court's view has broadened, and today it decides many Press Clause cases in much the same way that a news editor makes publication decisions. The Article first looks at the period from the Court's beginning through the early 1900s, when *Gandia v. Pettingill* was decided. It then more closely analyzes *Gandia*, a softer turn for the Court in its jurisprudence involving news. Third, it explores the period from *Gandia* through *New York Times v. Sullivan* and the types of news stories the Justices found appropriate. It ends with the suggestion that today's lower courts, which are seemingly more willing to restrict truthful news stories in the name of privacy and other principles, should consider that at least a century of Supreme Court jurisprudence supports a broader definition of newsworthiness.

### I. THE EARLY COURT AND LIMITS ON APPROPRIATE NEWS

Measuring the latitude given publication of truthful information by the early Supreme Court, one might call the early Justices harsh editors indeed. The early Court was certainly accepting of information we all would agree would be newsworthy today, including news and information regarding treaties,<sup>14</sup> publications focusing on science and the arts,<sup>15</sup> and word about some of the proceedings of Congress and other legislative bodies.<sup>16</sup>

But some information that most would consider newsworthy today was, in the early Court's editorial eye, inappropriate for public consumption. This restriction on the availability of information sometimes had a narrow focus—the protection of an individual from embarrassment, for example—but it also sometimes protected what the Court found to be the greater societal good of government processes. In other words, in a legal sense, individual protection and societal protection would often trump whatever public good might come from the

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appropriate public information, albeit in a non-media case.

14. See, e.g., *Ware v. Hylton*, 3 U.S. 199, 272 (1796) (explaining that the Constitution requires that treaties “should be published for the information of all”).

15. See, e.g., *Baker v. Selden*, 101 U.S. 99, 103, 105 (1879) (writing that those who publish books on science or the useful arts communicate “useful knowledge” and finding the remarks in another case “instructive” that scientific information was not daily changing like news).

16. *Field v. Clark*, 143 U.S. 649, 671 (1892) (quoting Justice Story with approval: “The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward . . . not by vague conjecture, but by positive facts.”).

publication of such otherwise newsworthy information. As the Court itself wrote in 1821, “the sole end and aim of all our institutions is the safety and happiness of the citizen.”<sup>17</sup> Given that priority, there would seem to be little value in information about that citizen that the public may wish to know.

One surprising, early example of such a protective editorial mindset addressed the publication of information regarding public officials; the Court’s sense seemed to be to protect the politician and his privacy. As background, today, in marked contrast, the journalistic and jurisprudential standard is that public figures, especially politicians, are nearly always fair game. The modern Restatement suggests that:

One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs. Thus an actor, a prize fighter or a public officer has no cause of action when his appearances or activities in that capacity are recorded, pictured or commented upon in the press. In such a case, however, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.<sup>18</sup>

Later, the Restatement authors explain more specifically that “[r]evelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.”<sup>19</sup> Even beyond treatment of politicians, however, the standard is one not of public need but of popular appeal, even if that popular appeal might be found deplorable by some.<sup>20</sup>

Given the modern standard, it is interesting to find language quite protective of politicians and other public figures in early Supreme Court

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17. *Anderson v. Dunn*, 19 U.S. 204, 226 (1821).

18. RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977).

19. *Id.* cmt. h.

20. *See id.* cmt. g.

cases. The news coverage we might take for granted today was not always found appropriate, and a public official's feelings and embarrassment about a truthful publication trumped any public right to learn certain details of his life.

Consider the early case of *White v. Nicholls*,<sup>21</sup> decided by the Court in 1845. There, the publication was a missive sent to multiple public officials, including the President, complaining about Robert White, a customs collector.<sup>22</sup> The authors asked that White be removed from office for what they considered antibusiness and antigovernment actions, including his support of a speech against the President and, later, his distribution of "bushels" of copies of a newspaper reporting upon that speech.<sup>23</sup> White sued at least one author for attempting to bring him into public "scandal."<sup>24</sup>

The Justices were surprisingly moved by White's situation, describing the matter before them in rhetorical fashion: "How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office . . . under the obligation of a supposed duty to arraign such men either at the bar of their immediate superiors or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity."<sup>25</sup> Men in "common life," the Justices wrote, had protections for "their safety and their peace," including protections against the publication of even presumably truthful information that would harm them in their roles as "sympathetic and social creature[s]" and would cause others to shun them.<sup>26</sup>

The Justices reasoned that such legal protections should extend "still farther" to protect those in official governmental positions, equating a politician with a businessman and finding that both had an important reputation to protect.<sup>27</sup> For "the rights and happiness of individuals" and the "quiet and good order of society," the Justices held:

That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or *which is calculated to make him infamous, or odious, or*

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21. 44 U.S. 266 (1845).

22. *Id.*

23. *Id.* at 271.

24. *Id.* at 274.

25. *Id.* at 285.

26. *Id.*

27. *Id.*

*ridiculous*, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made.<sup>28</sup>

Malice, the Justices decided, would be presumed to exist and need not be proved in most cases; whatever justification may have existed for the information would be the burden of the defendant.<sup>29</sup>

Consider the impact such a decision would have had on a journalist of the day. Truth would be little defense to a lawsuit brought against a publisher who made a public official look odious or ridiculous, even if the published information were true. Instead, the happiness of the politician and society's need for quiet and order trumped, at least in a presumptive way, the news value of the underlying information.<sup>30</sup>

So protective was it, the Court even struggled a bit with whether "calumnious or inflammatory speeches" given on the legislative floor should be published.<sup>31</sup> Though presumably meant to protect the person at whom the calumnious or inflammatory speech was aimed (the Court suggested that some of the language spoken on the floor may bring personal suffering to others<sup>32</sup>), the limitation on such reporting certainly also protects the publically elected speaker. Such protection, in the Court's words, enabled "representatives to execute the functions of their office without fear of prosecutions, civil or criminal."<sup>33</sup>

Thirty years after *White v. Nicholls*, a federal statute put before the Court negatively affected newspapers by making it a criminal act to put into the mail "any article . . . designed or intended for the prevention of conception or procuring of abortion" and anything "giving information, directly or indirectly, where, or how, or of whom, or by what means, either of the things before mentioned may be obtained or made."<sup>34</sup> The statute also restricted the publication of any information regarding a lottery. The early Court upheld these restrictions on publication over freedom of the press arguments, finding that congressional intent was to

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28. *Id.* at 291 (emphasis added).

29. *Id.*

30. I will argue in an upcoming article that this decision and others laid the groundwork for privacy long before Samuel Warren and Louis Brandeis wrote *The Right to Privacy* in 1890.

31. *Kilbourn v. Thompson*, 103 U.S. 168, 202 (1880).

32. *Id.*

33. *Id.* at 203.

34. *Ex parte Jackson*, 96 U.S. 727, 736 (1877). The case, as earlier explained, is primarily one regarding a newspaper's right to publish information on a lottery.



keep such indelicate matters as contraception, abortion, and lotteries from the public mails as corruptive influences and injurious to public morals. The Court decided that any restraint on the press was minor when balanced against the potentially corruptive information.<sup>35</sup>

Also in the name of public good, the Court brushed aside the argument that journalists should be able to attend and cover public executions. In 1890, the Court decided *Holden v. Minnesota*<sup>36</sup> and held that an Indiana law excluding journalists from hangings was constitutionally valid. More relevant here, however, was the Court's response to a second part of the law that mandated limited newspaper coverage of such an execution, the statute read: "No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper."<sup>37</sup> Such a limitation, the Justices decided, was put in place by a wise legislature for the public good.<sup>38</sup>

It was also apparently for both the private and public good that sensational information about pending court cases be restricted. In 1904, the Court decided *Dorr v. United States*,<sup>39</sup> where the defendant-journalist had published what appears to have been a rather sensational account of a trial, including headlines in capital letters that read "TRAITOR, SEDUCER, AND PERJURER" and "WIFE WOULD HAVE KILLED HIM."<sup>40</sup> In upholding sanctions against the journalist, the Court relied upon an earlier case in which a journalist was held liable for publishing a headline that embarrassed the plaintiff.<sup>41</sup> The editorial reprimand, the Court found, was appropriate because, "[t]he publisher must add nothing of his own" to such trial reporting and "all sensational headings to reports should be avoided."<sup>42</sup> These sensational headlines, the Justices opined in upholding the punishment, were "unnecessary to a fair and truthful report of judicial proceedings."<sup>43</sup>

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35. *Id.* at 727.

36. 137 U.S. 483 (1890).

37. *Id.* at 486.

38. *Id.* at 491.

39. 195 U.S. 138 (1904).

40. *Id.* at 149.

41. *Hayes v. Press Co.*, 18 A. 331 (Pa. 1889).

42. *Dorr*, 195 U.S. at 152-53 (quoting NEWELL ON DEFAMATION, LIBEL AND SLANDER § 163).

43. *Id.* at 153.

In *Patterson v. Colorado*,<sup>44</sup> decided three years later, the Court ruled against the publisher of news articles and an editorial cartoon designed to criticize the Colorado Supreme Court. The journalist argued that the articles were true and that press freedoms protected him, but the Court decided that such critical publications were necessarily “contrary to the public welfare,” that punishment could extend to such truthful statements, and that such publications tended to obstruct the administration of justice.<sup>45</sup> The Justices admonished the newspaper for publishing the material, suggesting that editorial “propriety and necessity” should have caused them to decide to suppress it.<sup>46</sup>

There is an additional surprising aspect of importance in *Patterson*. In the decision, the Supreme Court quoted with approval an earlier Massachusetts Supreme Court case in which a newspaper publisher was held liable for publishing a truthful news story about a man who presumably died of alcohol poisoning at a local bar.<sup>47</sup> The lower court had found the truth of the information to be of little relevance: “No state of society would be more deplorable,” the court wrote, “than that which would admit an indiscriminate right in every citizen to arraign the conduct of every other, before the public, in newspapers . . . not only for crimes, but for faults, foibles, deformities of mind or person, even admitting all such allegations to be true.”<sup>48</sup> Such “private intermeddlers” such as journalists, the court wrote, should not be given the power to disrupt “the circle of friends, families, children and domestics” that would occur should the defendant prove the truth of embarrassing information;<sup>49</sup> it turned away any argument that this particular information—a death in a bar, presumably from alcohol poisoning or bad alcohol—was newsworthy and both of public interest and public concern.<sup>50</sup> Instead, the court focused on the potential harm to the bar’s owner, who would suffer business losses whether the information was true or false.<sup>51</sup> Ultimately, private embarrassment won out over the

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44. *Patterson v. Colorado ex rel. Att’y Gen.*, 205 U.S. 454 (1907).

45. *Id.* at 462.

46. *Id.* at 463.

47. *Id.* at 462 (citing *Commonwealth v. Blanding*, 20 Mass. 304 (1825)).

48. *Blanding*, 20 Mass. at 312.

49. *Id.* at 313.

50. *Id.* at 318.

51. *Id.* at 319–20.

public interest<sup>52</sup> in a case involving a story most would find quite newsworthy today.

A final quick example of the early divide in editorial choices between the early Justices and journalists comes from an 1887 case in which a party attempted to introduce newspaper articles to prove bad character.<sup>53</sup> Such crime-focused “sensational articles,” the Court scoffed, were of little use because they were “of too indefinite and uncertain a character” to be of use.<sup>54</sup>

There were some glimmers of hope through this early period, however, that news would one day encompass more than just information that the Justices themselves found palatable. In 1878, for example, the Justices seemed to credit newspapers or, more precisely, the “newspaper enterprise” with “universal education” and bringing to “all the intelligent people” “every case of public interest”; those who would be the best jurors, the Court suggested, would likely have read or heard about any newsworthy court case.<sup>55</sup> In *The Telephone Cases*, the Court seemed to approve of newspapers as some evidence to prove historical fact.<sup>56</sup> In 1887, the Justices recognized public value in “intelligence of general and public interest,” though they failed to define the phrase, and upheld an Indiana statute that allowed for such news to be transmitted by telegraph before an older queue of private messages.<sup>57</sup> And in *Swearingen v. United States*, decided in 1896, they wrote that while a newspaper editorial used language that was “exceedingly coarse and vulgar” and potentially libelous, it was not “obscene, lewd, and lascivious,” was not calculated to corrupt mind and morals, and could therefore be mailed.<sup>58</sup>

A final hint that the Court was becoming a bit more understanding of the news process came in 1909. At issue in the case was a newspaper advertisement for whiskey that featured a photograph of a teetotaler used

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52. *Id.* at 320–21.

53. *Goetz v. Bank of Kansas City*, 119 U.S. 551, 555 (1887).

54. *Id.*

55. *Reynolds v. United States*, 98 U.S. 145, 155–57 (1878). There are other, similar cases around this same time period essentially permitting the press to publish information on pending cases, even those that might influence a potential juror’s opinion in the case. *See, e.g., Spies v. Illinois*, 123 U.S. 131 (1887).

56. 126 U.S. 1 (1888).

57. *W. Union Tel. Co. v. Pendleton*, 122 U.S. 347, 358 (1887).

58. *Swearingen v. United States*, 161 U.S. 446, 450–51 (1896).

without her permission.<sup>59</sup> The Court found in the teetotaler's favor, but, in related dicta, seemed to be moving away from a concern for those featured in an emotionally harmful way in a news story.<sup>60</sup> "If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for . . . a piece of news," the Court wrote, "the usual principles of tort will make him liable . . ."<sup>61</sup>

But, in total, from its start through 1912, the Court had ruled against journalistic news judgment in sometimes very surprising ways.

## II. 1912 AND GREATER RECOGNITION FOR NEWS

By 1912, the Court seemed willing to share its editorial expertise with those journalists before it and those nonparties who would be affected by its at least somewhat restrictive perception of what news was appropriate for the public to know. The Court had decided that for either the good of society or one of its citizens, newspapers could not publish articles regarding pending court cases that others might find critical of the courts; they could not publish articles on contraception, abortion, and lotteries;<sup>62</sup> they could not publish political cartoons that might embarrass courts; they could not use certain sensational headlines; they could not report on executions other than to simply state that they had happened; and, perhaps most importantly, they were limited in what they could publish about public officials because the leaders' individual happiness was paramount and such reporting might embarrass them.

It is surprising, then, that in 1912, with that sort of history, the Justices decided *Gandia v. Pettingill*<sup>63</sup> as they did. *Gandia* turned the tide slightly in favor of newspapers and their editorial decisions regarding public officials.

The *Gandia* plaintiff, Mr. Pettingill, was a United States Attorney for Puerto Rico, and the newspaper in Puerto Rico published a critical news item suggesting that he follow the rules that applied to local public officials and not carry on a law practice outside of his official duties.<sup>64</sup> The editorial basically argued that Pettingill, though acting lawfully, was

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59. *Peck v. Tribune Co.*, 214 U.S. 185, 188 (1909).

60. *Id.* at 189.

61. *Id.*

62. *See generally ex parte Jackson*, 96 U.S. 1878 (1877).

63. 222 U.S. 452 (1912).

64. *Id.* at 457.

acting unethically and argued that federal law should conform with local law in prohibiting such a practice.<sup>65</sup> Pettingill's attorney described the facts this way:

The . . . publication against plaintiff . . . was libelous *per se*. The language used showed a clear intent to injure plaintiff in his profession as a lawyer and to induce the public to believe that he was intentionally and continuously violating the law and guilty of unprofessional conduct.<sup>66</sup>

Admittedly, the article seems to have pushed the boundaries of mainstream reporting even by today's standards. As Justice Holmes wrote in a unanimous decision by the Court, "The conduct of Mr. Pettingill . . . is described as a monstrous immorality, a scandal . . ." <sup>67</sup> But, Justice Holmes also noted, the reporting was completely accurate: in his role as private practitioner, Mr. Pettingill had filed cases against the local government, even as he served as the U.S. Attorney, and it was true that the public found such a dual role distasteful because, had he been an attorney for the local government, a statute would have prevented him from continuing in both practices.<sup>68</sup> Considering that the underlying charge against the newspaper was libel, "there was no issue on the matter of fact."<sup>69</sup>

For the attorneys representing Pettingill, however, the fact that the article was truthful made little difference under the reasoning in the *White* case, decided nearly seventy years before.<sup>70</sup> Under *White*, the mere fact that the information was embarrassingly critical and harmed Pettingill in his line of work was all that mattered; whether the information was true was entirely irrelevant.

But the Supreme Court shifted its stance and rejected the narrowness of the *White* ruling.<sup>71</sup> First, the Justices explained that Pettingill was the type of person the public should care about and reasoned that information regarding him was fairly reported, even if that information

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65. See generally *Gandia v. Pettingill*, 222 U.S. 452 (1912).

66. *Id.* at 455.

67. *Id.* at 457.

68. *Id.*

69. *Id.*

70. *Id.* at 454.

71. *Id.* at 457.

might harm him in his line of work.<sup>72</sup> Pettingill was a “public officer in whose course of action connected with his office the citizens of Porto [sic] Rico had a serious interest, and *anything bearing on such action* was a legitimate subject of statement and comment.”<sup>73</sup> Accordingly, the Justices decided, the question was not whether the information published was harmful to Pettingill but whether the information that had been published was in some way unreasonable; that decision, the Court held, was taken away from the jury when the judge found such an article to be libel per se.<sup>74</sup>

Moreover, the Justices deferred a bit to the way the newspaper handled the story and described the newspaper’s language more temperately despite its sensationalism, finding that the reporting—described as a “somewhat more exuberant expression[] of meridianal speech”<sup>75</sup>—seemed at least somewhat appropriate under the circumstances and certainly not libelous as a matter of law.<sup>76</sup> The Court continued: “But what really hurt the plaintiff was not the comment but the fact. The witnesses for the plaintiff said that the people of Porto [sic] Rico considered the acts charged immoral, and the statute referred to showed that such was their conception of public duty.”<sup>77</sup>

In other words, the newspaper had published something sensational but true on a matter of public interest involving a public official, and it seemed to the Justices that the newspaper should not be liable for such a publication even if it embarrassed the plaintiff.<sup>78</sup> Sure, the plaintiff’s actions were technically lawful, and, sure, the newspaper criticized him and placed him under the microscope for these lawful acts, but he could not recover under those circumstances alone.<sup>79</sup>

The Court, however, did not end newspaper liability in similar cases. It suggested early in the decision that the newspaper defendant would not be liable for a truthful publication regarding something that was “a legitimate subject of statement and comment,”<sup>80</sup> but it then also noted

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72. *Id.*

73. *Id.* (emphasis added).

74. *Id.* at 457–58.

75. *Id.* at 458.

76. *Id.*

77. *Id.* at 458–59.

78. *Id.*

79. *Id.*

80. *Id.* at 457.

that the outcome might be different in a case where a jury found express malice or excess.<sup>81</sup> This meant that, under *Gandia*, a newspaper's motive and the reasonableness of its comments would be scrutinized in future cases,<sup>82</sup> presumably even when the reporting involved true facts. In 1912, then, libel could exist in cases involving truthful publication if the publication pushed the envelope too far or if reporters acted out of some not-yet-satisfactorily-defined express malice.<sup>83</sup>

Even so, *Gandia* was a victory for newspapers, previously saddled with potential liability for publishing embarrassing yet truthful information regarding public officials. The Justices, it may have seemed to journalists at the time, were starting to understand the nature of journalism and were starting to recognize, as would a news editor, that some stories could do individual harm but were decidedly important in a public information sense.

### III. TOWARD A BROADER DEFINITION FOR NEWSWORTHINESS

*Gandia* was not a clean break from past days of harsh editorial criticism from the Supreme Court. The Justices had suggested, after all, that courts should continue to look for malice and excess in truthful stories even regarding public officials.<sup>84</sup> The Court waffled for the next twenty years; it was deferential toward journalism's editorial decisions in some cases but critical and skeptical toward journalistic traditions in others.<sup>85</sup>

It may have been simply that those on the Court had grown more comfortable with the editorial decisions made by newspapers and newsmen. The Court's rhetoric seemed to indicate such a change. News, the Justices respectfully wrote in a 1918 copyright case, was "information respecting current events . . . a report of matters [that are] ordinarily publici juris . . . [and] the history of the day."<sup>86</sup> News, they

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81. *Id.* The Justices explained that such a phrase needed further analysis that was inappropriate to the case before them.

82. *Id.*

83. *Id.* at 458.

84. *Id.* at 457.

85. In *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288 (1913), publishers had argued that certain mailing restrictions impacted press freedoms, but the Court disagreed, explaining that Justices were "concerned not with any general regulation of what should be published in newspapers" but instead with the propriety of mailing privileges. *Id.* at 316.

86. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918).

noted, which was often based on public tips to journalists who then investigated the tip,<sup>87</sup> was “extremely useful”<sup>88</sup> and had particular value when novel and fresh.<sup>89</sup>

During this period, the Court twice upheld a newspaper’s right to publish certain information from tax returns, even though a federal law at the time prevented such a publication.<sup>90</sup> The Justices decided that such coverage, including “names and addresses of tax payers and the amounts paid by them,”<sup>91</sup> was—to quote the Court’s editor-like language directly—“[a] proper matter for news publication”<sup>92</sup> because the information had been made publically accessible and any law that criminalized publication under those circumstances would abridge press freedoms.<sup>93</sup>

But at the same time that the Justices seemed to be more accepting of the printed press, broadcast news suffered its first defeat. The case, *Mutual Film Corp. v. Industrial Commission of Ohio*,<sup>94</sup> involved the censorship of newsreels. These newsreels were shorter films shown in theaters before a feature-length movie; they contained news of “events of historical and current interest” and are described in a way that makes them consistent with today’s national newscasts.<sup>95</sup> Because any type of motion picture was so new at the time, the case syllabus helpfully explained that they were “a series of instantaneous photographs . . . projected upon a screen with great rapidity [so that] there appears to the eye an illusion of motion.”<sup>96</sup>

The producers argued that newsreels should not have to go before a censoring board before a public showing. These films, they explained, were not merely entertainment, but had news value and, therefore, should

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87. *Id.* at 243.

88. *Id.* at 235.

89. *Id.* at 238.

90. See *United States v. Balt. Post*, 268 U.S. 388 (1925); *United States v. Dickey*, 268 U.S. 378 (1925).

91. *Dickey*, 268 U.S. at 386.

92. *Id.* at 384.

93. *Id.*

94. 236 U.S. 230 (1915).

95. “A newsreel showing events from around the world, including Serbian troops returning from the front, the launch of the USS Mississippi, a unit of the Irish Rangers departing from Montreal, Canada, and the launching of the USS Shaw.” *Mutual Weekly*, No. 109, IMDB, <http://www.imdb.com/title/tt1799562> (last visited Sep. 12, 2012).

96. *Mutual Film Corp.*, 236 U.S. 230 at 232.



not be scrutinized by a government focused on morality<sup>97</sup> the way in which a typical Hollywood feature film would be. The producers explained that newsreels were exactly like newspapers: they used “photographs [that were] promptly secured a few days after the events which they depict happen[ing]” and therefore “regularly furnish[ed] and publish[ed] news,” albeit “through the medium of motion pictures.”<sup>98</sup> These newsreels, then, contained the sort of news the Supreme Court had recognized was at its best when novel and fresh.<sup>99</sup> Freedom of the press, the producers argued, was at issue.

But a highly skeptical Court rejected the argument that news films deserved any special protection and that newsreels were any different from a Hollywood blockbuster. “They may be used for evil,” the Justices wrote, and the fact that they would bring together women, men, and children for viewing “ma[d]e them the more insidious in corruption by a pretense of worthy purpose.”<sup>100</sup> The Court continued, “They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences.”<sup>101</sup>

The Court apparently felt that it did not need to elaborate and did not make clear precisely which topics would not be appropriate for all public audiences and why general interest in politicians was worthy while general interest in certain newsreel subjects may not be. And while the Justices suggested that they agreed with plaintiffs’ counsel that newsreels were “a means of making or announcing publicly something that otherwise might have remained private or unknown,”<sup>102</sup> they also worried about a certain “spectacle”<sup>103</sup> about them that did not exist in the print medium. Moreover, these types of newsreel “motion pictures” were “a business pure and simple,” the Justices explained (without any apparent worry that newspapers also made money), and, therefore, were “not to be regarded . . . as part of the press of the country or as organs of

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97. *Id.* at 241.

98. *Id.* at 232.

99. *Id.* at 233.

100. *Id.* at 242.

101. *Id.*

102. *Id.* at 243.

103. *Id.* at 244.

public opinion.”<sup>104</sup> Instead, these newsreels were “mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but . . . capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.”<sup>105</sup>

It was acceptable, then, that the censoring hand of the state have first crack at them before public exhibition. The news value in the material and its timeliness, the Court decided, were no excuses for circumventing the process.

It’s true that the printed press also did not escape the editorial hand of the Court during this period, but most cases involved newspapers’ criticism of certain government processes. In *Toledo Newspaper Co. v. United States*,<sup>106</sup> the Court upheld a contempt conviction brought against journalists who had published editorials and cartoons regarding a matter pending before a court. The publications did not sound outlandish; Justices Holmes and Brandeis described the newspaper’s works as mainstream and, in condemning the contempt convictions, suggested that at most, the language and drawings “no doubt contained innuendos not flattering to [the judge’s] personality.”<sup>107</sup> A majority of the Supreme Court, however, rejected the argument that the information was of public concern and found instead that the administration of justice trumped because protection was needed from criticism that could lead to its destruction.<sup>108</sup> The Justices would also later uphold the conviction of a newspaper editor whose editorials criticized the draft.<sup>109</sup>

But then, in 1931, came *Near v. Minnesota*,<sup>110</sup> perhaps the decided tipping point in favor of journalism’s own editorial sensibilities. *Near* did not involve what we might consider to be a mainstream newspaper. The defendant, *Saturday Press*, was described by the dissent as containing “malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons, and the Jewish race.”<sup>111</sup> The Minnesota Supreme Court earlier had criticized *Saturday Press* journalists as scandalmongers who “regularly

104. *Id.*

105. *Id.*

106. 247 U.S. 402 (1918).

107. *Id.* at 424.

108. *Id.* at 421.

109. *Frohwerk v. United States*, 249 U.S. 204 (1919).

110. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

111. *Id.* at 724 (Butler, J., dissenting).

and customarily engaged in a business of conducting a newspaper sending to the public malicious [and] scandalous" articles,<sup>112</sup> warning that, though decidedly a newspaper of popular appeal,<sup>113</sup> it was obvious that "indulgence in such publications would soon deprave the moral taste of society and render it miserable."<sup>114</sup> Among the targets of its sensationalism—the subjects of stories the Minnesota court critically noted were designed to drive up circulation<sup>115</sup>—were "the mayor of Minneapolis, the chief of police of Minneapolis, the county attorney of Hennepin county, the Jewish race, and the members of the grand jury of Hennepin county."<sup>116</sup> Therefore, the Minnesota court had decided, the *Saturday Press* was of "no real service to society"<sup>117</sup> and a nuisance under a Minnesota statute that outlawed publication, sales, and possession of any "malicious, scandalous and defamatory newspaper."<sup>118</sup>

The United States Supreme Court, however, reversed the Minnesota court's decision in a way that recognized journalistic value in even sensational, scandalous information presented in a way that would increase newspaper sales:

[T]he articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and others in connection

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112. *State ex rel. Olson v. Guilford*, 219 N.W. 770, 773 (Minn. 1928).

113. *Id.*

114. *Id.*

115. *Id.* at 772.

116. *Id.* at 771.

117. *Id.* at 773.

118. *Id.* at 770.

with the prevalence of crimes and the failure to expose and punish them.<sup>119</sup>

“The importance of this [reporting],” the Court explained, quoting James Madison on press liberties, “consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments . . . whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.”<sup>120</sup> The Justices worried that the Minnesota statute permitted an injunction after “mere proof of publication,” and looked not at truth alone, but at whether the journalists published truth “with good motives and for justifiable ends.”<sup>121</sup> The *Saturday Press*, the Justices decided, could continue its so-called scandalmongering—and the statute at issue lost its bite.

It is true that in reversing the Minnesota decision the Court focused more on the prior restraint aspects of the statute, but the Justices’ reasoned description of the journalism at issue is marked; they could have joined with the Minnesota court in condemning the articles’ sensationalism and focused on the way such editorial decisions seemed designed to increase circulation to the detriment of those persons at issue, but they did not.

Instead, and keenly important here, the Justices wrote that public officials’ character and conduct should remain open for free debate and discussion in journalism<sup>122</sup> and that a press that was both vigilant and courageous needed to be encouraged by courts.<sup>123</sup> Corruption and crime within government were two areas deserving of journalistic scrutiny,<sup>124</sup> of course, but so was the character of the public official.<sup>125</sup> Moreover, the substance of the reporting was far more important than its scandalous or sensational nature. The Court noted that any public officer who had been *falsely* represented—not just truthfully but embarrassingly or scandalously or sensationally represented—could simply sue for defamation.<sup>126</sup>

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119. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 704 (1931).

120. *Id.* at 717 (citations omitted) (internal quotation marks omitted).

121. *Id.* at 709–10.

122. *Id.* at 719.

123. *Id.* at 720.

124. *Id.* at 719–20.

125. *Id.* at 718.

126. *Id.* at 718–19.

Suddenly, protection of the individual and his emotions at the cost of press freedoms, concern about preserving government processes at all costs, and hand-wringing about the way sensationalism and scandal reporting might influence the public mind stopped. Instead of protecting individuals or society at the cost of limiting news of public interest, the limitation on news suggested by the *Near* Court was far more narrow: "No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops," the Court wrote.<sup>127</sup>

The Court continued its deferential-to-journalism language over the course of the next few decades as it moved toward the watershed decision in *New York Times v. Sullivan*.<sup>128</sup> Just a few years after *Near*, in 1936, the Court decided *Grosjean v. American Press Co.*<sup>129</sup> and praised an untrammelled press as "a vital source of information," noting that journalists helped shed light on the public and business affairs of the nation and misgovernment<sup>130</sup> and served as great interpreters between the government and the people.<sup>131</sup> To allow the press to be fettered, the Court wrote, "is to fetter ourselves."<sup>132</sup> Four years later, in 1940, in *Thornhill v. Alabama*, it embraced as important news not just information about government and its officials, but also "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."<sup>133</sup> News about a business-related dispute, for example, was important public information not because the public *needed* to know about the precise issue, but because the information about the specific matter that the newspaper provided might affect broader issues, including future persons, future businesses, and a future even more industrial society.<sup>134</sup>

In 1941, in *Bridges v. California*,<sup>135</sup> the Court embraced reporting on the judicial system and ended the practice of finding in contempt

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127. *Id.* at 716.

128. 376 U.S. 254 (1964).

129. 297 U.S. 233 (1936).

130. *Id.* at 250.

131. *Id.*

132. *Id.*

133. 310 U.S. 88, 102-03 (1940) (suggesting that a labor dispute was decidedly one of those matters as it involved health and wages that impacted society in a very broad fashion).

134. *Id.* at 103.

135. 314 U.S. 252 (1941).

those journalists who wrote about pending court decisions. It again moved toward an expanded definition for news, one that included stories merely in the public *interest*, not solely stories of weighty, life-changing, all-would-agree importance: “It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist.”<sup>136</sup> The Court suggested that only extremely serious and substantial evils of publication could be punished and that news of public interest that was simply annoying to some obviously did not qualify.<sup>137</sup> The Justices also embraced those arguments regarding news value that they had rejected in *Mutual Films* and recognized the need for some news to get out to the public quickly, when the audience was “most receptive.”<sup>138</sup> The Justices suggested that although some information might not be in good taste and might embarrass some, it should nonetheless be embraced as a matter of public interest and, therefore, valid news.<sup>139</sup>

In 1946, Justices in *Hannegan v. Esquire, Inc.*,<sup>140</sup> moved even further away from equating news with public need. There, the Postmaster General had limited the mailing privileges of *Esquire* magazine, citing a statute that limited distribution to “information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers.”<sup>141</sup> The Postmaster General’s own reading of *Esquire* found no information of public, literary, scientific, artistic, or industrial character but, instead, ample proof that it was “morally improper” and “not for the public welfare and public good.”<sup>142</sup> But the Supreme Court’s reading of *Esquire* was more sympathetic, focusing again on the value in certain stories that were merely in the public *interest*, including information on “topics of current interest,” “sports,” “fashion,” and articles by and about prominent men in various fields,<sup>143</sup> even though others, the Court noted, would find such news and

136. *Id.* at 268.

137. *Id.* at 262–63.

138. *Id.* at 269.

139. *Id.* at 270.

140. 327 U.S. 146 (1946).

141. *Id.* at 148 (quoting Classification Act of 1879, 39 U.S.C. § 226 (1946) (current version at 39 U.S.C. § 4354) (originally enacted as Act on Mar. 3 1879, ch. 180, § 14, 20 Stat. 359) (corresponds to ch. 443, 48 Stat. 928 (1934))).

142. *Id.* at 149.

143. *Id.* at 150.

information risqué or racy or in poor taste.<sup>144</sup> The Justices suggested it would be impossible to create a satisfactory test based solely upon literary or educational values and mandated a broadening of the statutory language.<sup>145</sup> “What is good literature, what has educational value, *what is refined public information*, what is good art, varies with individuals as it does from one generation to another,” the Court explained,<sup>146</sup> rejecting any public “norm” in news and information as foreign to the system.<sup>147</sup> “What seems to one to be trash,” the Court noted importantly, “may have for others fleeting or even enduring values.”<sup>148</sup>

Other decisions followed in line that were implicitly supportive of news and information in the public interest and deferring to journalism’s—and presumably the public’s own—sensibilities, including sketchy, one-sided, lousy, unfair, strong, intemperate, unfairly critical, tasteless, sensational, inflammatory journalism.<sup>149</sup>

Perhaps the best example during this time was *Winters v. New York*,<sup>150</sup> a case that echoes the reasoning in *Near*. There, too, a state statute made it unlawful to publish a newspaper or magazine that was a nuisance, one, the statute noted, that was “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime.”<sup>151</sup>

The offending publication at issue in *Winters* was titled *Headquarters Detective: True Cases from the Police Blotter*.<sup>152</sup> A New

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144. *Id.* at 151.

145. *Id.* at 154–55.

146. *Id.* at 157 (emphasis added).

147. *Id.* at 158.

148. *Id.*

149. *See, e.g.*, *Stroble v. California*, 343 U.S. 181, 192 (1952) (upholding a murder conviction even though news coverage before trial included details revealed by the prosecutor of the defendant’s confession, the prosecutor’s opinion that the defendant was guilty, and descriptions of the defendant as a “fiend” and a “sex-mad killer”); *Craig v. Hamey*, 331 U.S. 367, 374–76 (1947) (concluding that sketchy, one-sided, lousy, unfair, strong, intemperate, unfairly critical, tasteless reporting cannot be punished and that news of a community rallying against a judge’s decision was a matter of legitimate public interest); *Pennekamp v. Florida*, 328 U.S. 331, 348–49 (1946) (“For such injuries, when the statements amount to defamation, a judge has such remedy in damages for libel as do other public servants.”). *But see Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (reversing a murder conviction because the spectacle of a television confession prejudiced the community); *Irvin v. Dowd*, 366 U.S. 717, 725 (1961) (holding that defendant did not get a fair trial due to prejudicial news coverage, including news that fostered strong prejudice against him).

150. 333 U.S. 507 (1948).

151. *Id.* at 508.

152. *Id.* at 508 n.1.

York court had earlier described the magazine as one that contained “stories [] embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators.”<sup>153</sup> That is an apt description: the June 1940 issue, the issue reviewed by the Supreme Court in its decision,<sup>154</sup> features on its cover the image of a woman, presumably a model, bound to a chair, her eyes filled with fear and her mouth slightly open, apparently with horror.<sup>155</sup> The words on the cover headline what is inside: “Trailing the Tourist Camp Killers!” and “Slave to a Love Cult.”<sup>156</sup> The stories in the issue also include “Murderers Make Mistakes: The law’s greatest aid is stupidity” and “Girls Reformatory: The straight and narrow way—to crime!”<sup>157</sup> Multiple photos feature models reenacting crime scenes in quite sensational ways, and there are two photos of what appears to be the actual body of a dead woman published as a sort of solve-it-yourself puzzle, with the results of the police investigation on the following page.<sup>158</sup> These crime news magazines were decidedly sensational and clearly lacked the revelation of government-corruption that was the focus of the *Saturday Press* stories in *Near*. But the crime sagas published within *Headquarters Detective* were apparently truthful, and it was clear from the proliferation of such magazines that the public was interested. As it did in *Near*, the Court struck down the ordinance against such publications as unconstitutional, reversing the conviction of a *Headquarters Detective* bookseller.<sup>159</sup> “Though we can see nothing of any possible value to society in these magazines,” the Court wrote, once again tipping in favor of public interest and journalistic judgment, “they are as much entitled to the protection of free speech as the best of literature.”<sup>160</sup>

Just a few years later and just a few years before the sweeping changes brought about by *New York Times v. Sullivan*, the Court decided

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153. *People v. Winters*, 48 N.Y.S.2d 230, 231 (1944), *aff’d*, 63 N.E.2d 98 (N.Y. 1945), *rev’d sub nom. Winters v. New York*, 333 U.S. 507 (1948).

154. *Id.*

155. Copy on file with author.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Winters v. New York*, 333 U.S. 507, 510 (1948).

160. *Id.*



*Roth v. United States*.<sup>161</sup> Though the case's real focus was on obscenity, it wrote that "[t]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."<sup>162</sup> The Court also moved far away from a stifling definition for published news and information it had embraced in early years, holding that "[a]ll ideas having *even the slightest redeeming social importance*—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties [of the First Amendment]."<sup>163</sup>

From there, of course, came the Court's decision in *New York Times v. Sullivan*, in which the Court protected journalists from lawsuits brought by public officials when the publication had made an honest mistake of fact.<sup>164</sup> As regarding news judgment, the Court worried about a newspaper's self-censorship and suggested that newspapers might not survive a "pall of fear and timidity" brought about by repeated lawsuits by public officials who had argued they had been defamed in the press.<sup>165</sup> It lauded news media that published information about those running for public office and suggested that information about a politician's character was so important that, except under exceptional circumstances of purposeful or nearly purposeful misreporting, it would be protected even if the press got the information, even derogatory information, wrong.<sup>166</sup> The Court decidedly chose the protection of the press over the protection of public officials' character.

A quick, nonexhaustive review of some of the decisions that followed shows the Court often embraced or at least accepted even more difficult editorial choices, refusing to punish journalists who published accurate information about a rape that included the name of the victim,<sup>167</sup> the true names of juvenile offenders,<sup>168</sup> and a radio broadcaster who published the embarrassing but true recording of a

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161. 354 U.S. 476, 484 (1957).

162. *Id.*

163. *Id.* (emphasis added). Admittedly, the Court limited this expansive language a bit to exclude those ideas that threaten areas of more important interests, though earlier it had limited those areas markedly to extremely serious and substantial evils. *Bridges v. California*, 314 U.S. 252, 262 (1941).

164. 376 U.S. 254, 279–80 (1964).

165. *Id.* at 278.

166. *Id.* at 279–82.

167. *Cox Broad. v. Cohn*, 420 U.S. 469 (1975).

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

private cellular phone call on a matter of public interest.<sup>169</sup> While recognizing that media would sometimes push the envelope in a sensationally harmful and incorrect way, the Court nonetheless found that it still deserved protection.<sup>170</sup> In a prior restraint sense at least, the Court echoed *Near* and found that any limitation on news would necessarily spring from “the direct, immediate, and irreparable harm that would result [and] outweigh the public’s interest in knowing, for example, the specific details of troop movements during wartime.”<sup>171</sup> In a case involving the publication of a rape victim’s name, the Court sided with the newspaper and suggested that if it were ever appropriate constitutionally to punish a newspaper for publishing truthful information that the newspaper had lawfully obtained, it would be only in a situation where a “state interest of the highest order” was at issue.<sup>172</sup> One case that turned against journalism was *Zachinni v. Scripps-Howard Broadcasting Co.*,<sup>173</sup> in which a human cannonball successfully argued that a newscast should not be able to show his full performance.<sup>174</sup> But the decision was largely based on intellectual property rights,<sup>175</sup> and the Court seemed to recognize that such an event had news value: that, indeed, everyday people would be interested in someone who blew himself out from a cannon.<sup>176</sup> This was news even though it was decidedly information that the public did not need to know.

It can be argued then, perhaps beginning somewhat fuzzily with the *Gandia* decision in 1912, that over the last 100 years the modern Supreme Court has embraced a fuller definition for news and has been more accepting of journalistic news judgment. It has explicitly and repeatedly recognized that although certain news and information may be distasteful or harmful or lacking in more refined taste or be far from information the public needs, such news remains in the public interest.

169. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

170. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

171. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 605 (1976).

172. *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

173. 433 U.S. 562 (1977).

174. *Id.* at 578.

175. *Id.* at 574–75.

176. *Id.* at 569 (concluding that if “respondent had merely reported that petitioner was performing at the fair and described or commented on his act, with or without showing his picture on television, we would have a very different case”).

Such a sense of news is much more in line with how a seasoned news editor might decide what stories to cover and what stories to publish.

#### IV. WHAT TODAY'S COURTS MIGHT LEARN FROM 100 YEARS OF A BROADER NEWS SENSE AND MORE DEFERENTIAL NEWS JUDGMENT

What I have tried to show here is that the Supreme Court has had a broader news sense for at least a century and, over the course of time, seems to have embraced a news definition that is very much in line with that of a seasoned journalist. The Court, at least at times, seems quite deferential. There were glimmers that this would come to be the standard even in the 1800s, when the Justices recognized value in not just news of great importance but "intelligence of general and public interest."<sup>177</sup>

It is all the more surprising, then, given this level of protection for news judgment and the embrace of a fuller definition for news by the Supreme Court, that some lower courts today seem increasingly willing to punish journalism for coverage of events that are at least arguably in the public interest. Such decisions often do not adequately consider the chilling effects on journalism and the constitutional issues at stake.<sup>178</sup>

One of the best examples is *Conradt v. NBC*,<sup>179</sup> decided by a New York federal district court. The decision is one that might appeal at a gut level to those who criticize sensational media treatment of arrestees. William Conradt, a state prosecutor who had previously run for a judgeship in Texas, was caught in an online child-sex sting by a vigilante group known as Perverted Justice and NBC journalists who covered the investigation. When police showed up to arrest Conradt at his home for chatting in a highly sexualized way and sending related photographs to someone he apparently believed to be a thirteen-year-old boy, Conradt killed himself. The trial court, hearing a case for intentional infliction of emotional distress brought by his sister on his behalf, condemned NBC for, among other things, not recognizing that its story might cause Conradt harm. It allowed the case to progress closer to trial over NBC's arguments that such information was of "manifest public concern."<sup>180</sup> In

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177. *W. Union Tel. Co. v. Pendleton*, 122 U.S. 347, 358 (1887).

178. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009); Amy Gajda, *The Value of Detective Stories*, 9 J. TELECOMM. HIGH TECH. L. 385 (2011).

179. 536 F. Supp. 2d 380 (S.D.N.Y. 2008).

180. *Id.* at 396.

rejecting NBC's arguments, the court wrote that "a jury could take note of the fact that . . . NBC failed to act 'ethically' and violated 'numerous journalistic standards'"; it went on to cite certain provisions of the Society of Professional Journalists Code of Ethics:

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

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

Show good taste. Avoid pandering to lurid curiosity.<sup>181</sup>

The opinion, therefore, focused much more on the journalists' acts and news sense and whether, in the judge's opinion, they fit within the perimeters of good taste springing from a nonbinding journalism ethics code—and not at all on the fact that Conradt was a public official, one who had run for public office, and one whose job it was to defend the public and prosecute those who attempted to harm children, precisely what he was being arrested for. As the *Near* Court wrote more than seventy years ago, public officers' "character and conduct remain open to debate and free discussion in the press," and individual harm should be of concern only in situations involving defamatory falsehoods,<sup>182</sup> not emotionally harming truths. Moreover, good taste under Supreme Court precedent upholding the lurid *Headquarters Magazine* cannot be a news standard. Certainly, journalism would be stifled if journalists were forced to consider the potential liability for a failure to align with a judge's preferred reading list and emotional distress should they reveal a public official's misconduct.

A second example involved more frivolous matters, specifically a gossip item in a Washington, D.C., newspaper. There, the federal trial court decided an early motion in a defamation and privacy lawsuit against the newspaper that had reported that a producer for CNN had dated a number of men, including the coach for the University of Maryland men's basketball team. The producer sued for defamation because of the incorrect information in the article and its tone, but she also sued for invasion of privacy based upon the revelation that she had

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181. *Id.* at 397.

182. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 719 (1931).

dated three men whom she had, in fact, dated. The article was decidedly gossipy and critical of the woman's purported actions:

CNN Producer Kathy Benz, 35, uses her position to meet all the "right" people. She's been linked romantically with power players—including venture capitalist Jonathan Ledecy (a Washington Nationals ownership hopeful), University of Maryland basketball coach Gary Williams, Chicago Cubs VP John McDonough, Sirius CEO Mel Karmazin, actor Hugh O'Brien, CNN correspondent John Bisney, Georgetown hairstylist Paul Bosserman and her one time fiance, AOL millionaire John Daggitt. Now she has hooked up, according to her gal pals, with porn king Mark Kulkis. The couple first met when Kulkis, 40, president and CEO of Kick Ass Pictures, did a CNN interview while he was in D.C. for the National Republican Congressional Committee's annual President's Dinner. He's the honorary chairman of the NRCC's Business Advisory Council. That's a roundtable of millionaire entrepreneurs. Kulkis made tabloid headlines when he escorted porn star Mary Carey to GOP dinner with President Bush in June. At that time, he and Carey enjoyed a private lunch with White House insider Karl Rove. Wouldn't you have liked to have been a fly on that wall?<sup>183</sup>

Later, the newspaper ran a correction that read, in part:

Ms. Benz says that she dated Gary Williams, Paul Bosserman and John Daggitt, but did not date the other men mentioned in the column. We regret the errors. We did not intend to suggest any improper relationship or misuse of her position at CNN and apologize to Ms. Benz for any offense taken.<sup>184</sup>

Benz's privacy claim was based on the publication of private facts for the parts of the story that were correct, arguing that her dating life, though presumably taking place at least in part in public, was private information.<sup>185</sup> The court readily agreed that such information was not fit for public consumption:

The Court is persuaded that it is unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column of

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183. Benz v. Wash. Newspaper Publ'g Co., No. 05-1760, 2006 U.S. Dist. LEXIS 71827, at \*5 n.4 (D.D.C. Sept. 29, 2006).

184. *Id.* at n.5.

185. *Id.* at \*22–23.

a widely distributed newspaper, particularly in the context in which the information was revealed. Further, plaintiff's personal, romantic life is not a matter of public concern.<sup>186</sup>

Here, too, the court gave no regard to the public interest in gossip items and certainly failed to differentiate between a quasi-public figure like CNN producer Benz (perhaps an involuntary one once she apparently dated certain high-profile men) and a thirty-something Hollywood star who similarly would not want her dating life revealed in the lines of a gossip column. Here, at least one journalist had decided that the public would, in fact, be interested in such a story and certainly *People* magazine and the gossip columns of daily newspapers thrive on similar tidbits. But instead of focusing on news—even gossipy news—and the public interest, the court's focus was on what the subject of the story would want revealed about herself, something the Supreme Court had rejected as a standard nearly 100 years before.

There are more recent examples of lower courts valuing and defining news in a more restrictive way. A federal district court in a 2012 privacy case involving the revelation of a crime of child molestation (but not involving traditional news media) wrote with certainty that “due to the passage of time, the public has no interest in the facts [of the child molestation crime] and will not benefit from them.”<sup>187</sup> The court felt so strongly that no reasonable jury could decide the matter any differently that it granted the plaintiff's motion for summary judgment and scheduled trial on a damages issues alone.<sup>188</sup> What is remarkable is that the court did not hesitate at all regarding its judgment of the news value of the underlying story. One can imagine a situation in which a crime, even a crime as devastating as child molestation, might, in fact, be of public interest.

Another federal court more recently ruled that photographs of a celebrity wedding should not have been published in a gossip magazine.<sup>189</sup> As the court explained:

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186. *Id.* at \*25.

187. *Pelc v. Nowak*, No. 8-11-CV-79-T-17TGW, 2012 U.S. Dist. LEXIS 91125, at \*6–7 (M.D. Fla. July 2, 2012).

188. *Id.* at \*6.

189. *Monge v. Maya Magazines, Inc.*, No. 10-56710, 2012 U.S. App. LEXIS 16947 (9th Cir. Feb. 6, 2012).

[Noelia Lorenzo] Monge and [Jorge] Reynoso were married at the “Little White Wedding Chapel” in Las Vegas, Nevada on January 3, 2007. Valuing their privacy, and Monge’s image as a young, single pop singer, the couple went to great lengths to keep the wedding a secret: only the minister and two chapel employees witnessed the ceremony. Using Monge’s camera, chapel employees took three photos of the wedding; later that night at least three more photos of Monge and Reynoso in their nuptial garb were also taken. The pictures were intended for the couple’s private use. For two years Monge and Reynoso succeeded in keeping their wedding a secret, even from their families.<sup>190</sup>

When a family friend and paparazzo found the photographs and sold them, the couple’s attempts to keep the wedding a secret failed. The court explained, “Intent on secrecy, Reynoso denied the marriage to his own mother, but to no avail: She had already seen the wedding photos in a gossip magazine.”<sup>191</sup> Despite a defense argument that copyright law creates a fair use exemption for newsworthy items,<sup>192</sup> suggesting that, at the very least, the “publication transformed the photos from their original purpose—images of a wedding night—into newsworthy evidence of a clandestine marriage,”<sup>193</sup> the court held the magazine liable for publishing the photos. It advised, editorially, that journalists should have instead published the couple’s marriage certificate, and it blamed the magazine for taking the right of control over the photos (and presumably the right of control over their personal lives) out of the hands of the celebrities.<sup>194</sup>

The dissent strongly warned that such a holding would lead to greater celebrity control over their images, even when the matter was one decidedly in the public interest, a wedding kept secret for two years in order to mislead the public.<sup>195</sup> The dissent worried—correctly, I think—that the holding would, in fact, have a major impact on journalism:

If public, newsworthy figures were permitted to invoke a “private use” exception, Tiger Woods, for example, could have claimed copyright in his sexting messages and, without fair use, the media would have no

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190. *Id.* at \*3.

191. *Id.* at \*4.

192. *Id.* at \*15.

193. *Id.* at \*21.

194. *Id.* at \*31.

195. *Id.* at \*49 (Smith, J., dissenting).

right to quote them. Likewise, without a fair use defense, the media would have only been able to describe former Congressman Anthony Weiner's self-portraits, rather than reprint the images themselves.<sup>196</sup>

The holding, the dissent warned, would "effectively vest in the courts the power to circumscribe news stories and the sources upon which the media may rely."<sup>197</sup>

Each of these more recent examples has the potential to seriously impact future news decisions by journalists. The cases would make them question, at least, the propriety of coverage of past crimes, the publication of unreleased celebrity photos, and news stories about an arrest for a despicable crime like attempted child sex abuse.

Most remarkably, such a narrowing of news seems contrary to the Supreme Court's century-long broadening of news. It goes against language from the Court in the *Snyder* case that warned of "inadvertent censorship" and that reminded readers that appropriate news coverage broadly included inappropriate or controversial news regarding political, social, or other concerns of the community. Through proscribing such coverage, lower courts seem to be moving back in time, defining news as did a very early Supreme Court, growing ever more focused on individual harm done to those who are the focus of news stories rather than on the public interest in the underlying story itself.

## V. CONCLUSION

For at least a century, the United States Supreme Court has, more often than not, decided cases in line with journalistic sensibilities or, at least in a way that favors journalism. In doing so, even in cases involving extremely sympathetic plaintiffs, the Justices have moved away from the more restrictive language in earlier decisions in which the Court worried more about the protection of public persons than about the public's interest in the underlying information.

Even though the Justices have never squarely decided precisely where the public interest ends and individual privacy begins and even though their decisions regarding news judgment are purposefully narrow, the cases cited in this Article help show that the line is closer to news that is of general, broad public interest rather than that of specific public

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196. *Id.* at \*59.

197. *Id.* at \*60-61.



need. As much as lower courts seem to be starting to trend against news media in cases where they might disagree as to the propriety of coverage, this Supreme Court jurisprudence helps provide support for the argument that the First Amendment is more protective of news media than these courts allow. As the Court wrote in 1974, “the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment,” suggesting that government regulation of “this crucial process” would not be constitutional under current First Amendment doctrine.<sup>198</sup>

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198. *Miami Herald Publ'g Co., v. Tomillo*, 418 U.S. 241, 258 (1974).