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The Present of Newsworthiness

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AMY GAJDA'S *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS*

The Present of Newsworthiness

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In early February 2016, less than a week before this Book Symposium, the Utah Supreme Court decided that the photographic results of a woman's plastic surgery were not necessarily newsworthy.[1]

The decision may seem inconsequential at first. The plaintiff had an abdominoplasty and breast augmentation and agreed that photos be taken "for medical, scientific or educational purposes."[2] Fox News later aired partially redacted photographs of her nude body and post-operative state in a news story about the benefits and risks of plastic surgery.[3] The plaintiff settled with Fox, but filed a privacy-based lawsuit against her plastic surgeon.[4]

The Utah Supreme Court heard the case after a trial court dismissal and decided that the plaintiff's privacy tort claims should continue.[5] As regarding publication of private facts, the tort most relevant to this Symposium Paper, the court decided for the first time that such claims

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[1] *See* Judge v. Saltz Plastic Surgery, 367 P.3d 1006 (Utah 2016).

[2] *Id.* at 1009.

[3] *Id.* at 1010. As the court described it, Fox placed "black bars across Ms. Judge's bust and pelvis" after receiving unredacted photos from the doctor's office. *Id.*

[4] *Id.* The patient's consent was a major point of disagreement between the parties.

[5] *Id.* at 1017.

should include a newsworthiness element and defined the element in line with the Restatement (Second) of Torts.[6] News, the court wrote, "is a concept that has essentially been defined by traditional publishers and broadcasters, 'in accordance with the mores of the community.'"[7] Therefore, in Utah, if a truthful news item is newsworthy, but privacy-invading, the newsworthiness of the information can trump the plaintiff's privacy interests.

The court, however, put some additional limits on newsworthiness, again in line with the Restatement:

> Information is not considered to be of legitimate public concern "when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[8]

As regarding the case before it, the court decided that the newsworthiness issue should go to the jury. "[T]he dispute as to whether there was legitimate public interest in the photographs based on [the plaintiff's] participation in the broadcast," the court wrote, "or whether the inclusion of those photographs was gratuitous or overly intrusive made summary judgment inappropriate in this case."[9] The disagreement—plaintiff's claim that her participation in the broadcast did not make confidential medical photographs publishable versus defendant's claim that the viewing public had a legitimate interest in seeing the success of her surgery—was best put to a jury.[10] Those jurors would best decide whether there was appropriate newsworthiness in the photographs. In short, "reasonable minds could differ as to [the] issue," the court wrote, and therefore "summary judgment was inappropriate."[11]

At first read, the 2016 case seems to be a limited dispute between a doctor's office eager to show surgical prowess and a patient eager for privacy. But consider the decision's implications more broadly. First, the highest court in the state of Utah accepted the Restatement (Second) of Torts definition for newsworthiness, finding not only that news should be defined in line with the Restatement, but that news was not unlimited and stopped at morbid and sensational prying. Second, the decision suggests

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[6] *Id.* at 1012; RESTATEMENT (SECOND) OF TORTS § 652D cmt. g (1977).

[7] *Saltz Plastic Surgery*, 367 P.3d at 1012 (citing Shulman v. Group W. Prods., Inc., 955 P.2d 469, 478 (Cal. 1998)).

[8] *Id.* at 1012–13 (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977)).

[9] *Id.* at 1013.

[10] *Id.* at 1014

[11] *Id.*

that the question of newsworthiness is best put before a jury, and not a question to be decided in an early motion by the judge, despite seemingly broad language that suggests that publishers themselves decide what is news; this is important because the news story that resulted was a classic example of personalization, the use of an individual's plight or promise to illustrate a broader story and something that had been embraced by courts in the past.[12] Third, the case involved, in effect, a non-journalist doctor whose loss at the highest court in the state now affects all media publishers. Finally, the court suggested that "publication" of the photographs had occurred even though the defendant had sent them to only one individual; this expands the state's definition for publication where, traditionally, sending to one was not enough dissemination to make the pictures public. "[I]t becomes very clear," the court wrote, "that a reasonable factfinder could well conclude that when [the defendant] sent [the] photographs to the reporter, the photographs were substantially certain to be published."[13]

All this, of course, lines up with the thesis in my book, *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press*. In the book, I suggested that privacy was increasing, that newsworthiness was becoming a privacy touchstone because of increasingly push-the-envelope news decisions by media, that courts were becoming more hesitant to leave it to the publishers themselves to decide what is newsworthy despite historical deferential language, and that non-journalistic publishers who became defendants in cases involving newsworthiness would set dangerous precedent for all publishers, including mainstream journalists, in the future.

An outcome like the one in Utah supports my thesis that 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.

But the outcome is very bad for media. Even though the underlying claim, as it found its way to the Utah Supreme Court, did not involve a media defendant, the impact on media in the state is likely to be the same: juries are more likely to decide questions of newsworthiness now, given the court's mandate that a jury decide the newsworthiness of the

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[12] *See, e.g.*, Sipple v. Chronicle Publishing, 154 Cal. App. 3d 1040, 1043, 1049 (Cal. App. 1984). In *Sipple*, the court decided in favor of the defendant newspaper that published a story revealing a gay man's sexual orientation. The man had saved President Ford from an assassination attempt, and the court held that the information about his sexual orientation furthered public understanding about gay men's courage and bravery. *Id.*

[13] *Saltz Plastic Surgery*, 367 P.3d at 1013 n.6.

photographs, and courts are likely to be less deferential to news media, given that the Utah court suggested that newsworthiness determinations in similar cases were best left to a jury and, arguably, its keener sense of public mores and decency standards.

As I argue in the book, the effect of such a turn from deference—the movement suggested in *Saltz* to allow jurors to decide these cases instead of deferring to media's news choices—could extend well beyond the courtroom no matter the outcome in any particular case. News editors, or their attorneys concerned about the mere potential for litigation, could well pull back on truthful stories that might arguably cross a line of privacy or propriety.

Recall that the ultimate news story in the Utah case, a story that explored the benefits and detriments of plastic surgery, is a perfect example of the use of personalization by media: the telling of one individual's story so that the reader or viewer can better understand a larger issue through his or her eyes. Here, as a journalism professor might suggest, the plaintiff's surgical photographs helped prove that the plaintiff's subjective claims of surgical success were objectively truthful and helped personify successes more generally. And yet, here, the court seemed unpersuaded by such an argument, even though past courts had embraced it as satisfactory proof of newsworthiness.

Imagine, a journalist would argue, a news story about plastic surgery that extolled or criticized results, but was told in generalizations without any visual evidence. That journalist would likely suggest that such a news article or video would not help inform the reader as much or draw the reader in as much as one using an individual's personal experience with corresponding photographs. This is why many news stories begin with a focus on an individual instead of broader, more generalized information.

Yet, as of 2016 in Utah, news organizations seemingly must consider whether the personalization of a particular story could survive a plaintiff's potential privacy claims. This, even though the case at that point did not involve media directly at all.

I. Other News Coverage and Newsworthy Relevant Cases: The Anti-Media Decisions

The Utah court is not alone in its turn toward privacy and against deference to media. Since early 2015, a number of other decisions have supported the suggestion that there has been a shift and that courts are turning away from their traditional trust in media and its ability to make appropriate news decisions. Three cases decided in the three-month period just before the Symposium are fairly good examples. Like the Utah decision, these cases suggest some support for the argument that privacy-related concerns are at the root of the shift. Finally, the three also suggest

that cases involving quasi-journalists or non-journalists have the potential to affect the jurisprudential future of mainstream journalism.

It is true that many of the cases below are trial court cases. As I suggest in the book, however, although these cases might not be what a law professor would like to see in a casebook as the perfect examples of higher authority and daunting precedence, they do help show what is happening in lower courts—a shift of some importance to those in a media law practice who advise clients. They also help show what individual judges are thinking more generally in cases involving media, even when traditional media is not a party.

Moreover, these lower court decisions can, and often do, lead to settlement in the instant cases, leaving no opinion but the one from the trial court. As suggested above, even those lower court decisions can lead economically constrained editors to be cautionary in future newsgathering or news coverage decisions, lest a similar lawsuit ensue. As a former litigator, I know from experience that even unpublished trial court decisions can be persuasive if the facts in the case at bar are similar. Finally, even if trial court decisions like those described below are overturned on appeal, consider the costs inherent in such an appeal and how, no matter the eventual victor, simple economics can work to stifle the publication of similar information in the future.

The first illustrative case, *Belsito Communications Inc. v. New Hampshire*,[14] was decided in 2016. It involved a freelance photographer, someone whom I would classify as a quasi-journalist for his failure to follow traditional journalism ethics provisions in, among other things, dressing as a firefighter apparently to blend in with rescue personnel.[15] He had outfitted a former ambulance with a sign that read "Fire Department Photographer," had maintained some of the ambulance's flashing lights, had dressed in a firefighter's coat, and had worn a firefighter's helmet that he had also altered to read "Photographer."[16] The case arose when police recognized that he was inside the perimeter of a fatal accident scene and that he was not an official fire department photographer.[17] They arrested him and confiscated his camera.[18]

The photographer brought a § 1983 action against police, arguing that they had violated his First Amendment rights by seizing his camera.[19] He maintained that press freedoms were involved: that he had freedom of the

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[14] No. 10-CV-450-SM, 2016 U.S. Dist. LEXIS 3694, at *1 (D.N.H. Jan. 12, 2016).

[15] *Id.* at *2–4

[16] *Id.* at *3–4.

[17] *Id.* at *7–8.

[18] *Id.* at *8.

[19] *Id.* at *20.

press and of speech and that his arrest and the seizure of his camera had "prevented [him] from publishing and or broadcasting [] newsworthy pictures."[20] The website for which the plaintiff freelanced, 1st Responder News, argued the same.[21]

The court was not persuaded. It found the officer's actions in arresting the photographer and in seizing the camera unrelated to any newsgathering concerns: the photographer was impersonating a rescue worker; he had had displayed lights on the once-ambulance that violated the law; and, most important to considerations of news coverage, he had "illegally gain[ed] access to a controlled emergency scene without proper authorization."[22]

Consider that last line especially with regard to more mainstream coverage of police activity. The language on its face suggests that police may seize the cameras of those who cover accident scenes if the reporters have not received "proper authorization" to be on site. Moreover, note that the court suggested that such behavior is unrelated to or only indirectly related to constitutionally protected newsgathering efforts. The plaintiff, the court wrote succinctly and pointedly, "of course, had no right to impersonate rescue personnel *or* access the scene in order to gather news."[23]

The case—one involving a push-the-envelope photographer who dressed in what the authorities suggested was misleading garb[24] and who had integrated himself so well with apparently unknowing responders that he had volunteered to take "extraction photographs" of the death scene[25]—has the potential to affect future more mainstream newsgathering efforts should another court wish to read the language restricting scene access and authorization more broadly. The outcome can, therefore, impact journalistic and citizen coverage of police activity more generally, not just in cases involving those who have driven a modified ambulance and dressed in emergency responder garb at an accident scene.

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[20] *Belsito Commc'ns*, 2016 U.S. Dist. LEXIS 3694, at *20–21.

[21] *Id.* at *14–15.

[22] *Id.* at *24.

[23] *Id.* at *25 (emphasis added).

[24] *Id.* at *4.

[25] *Id.* at *7.

A second case example, *Bloomgarden v. United States Department of Justice*,[26] involves a Freedom of Information Act (FOIA) request that arose in Washington, D.C. *Bloomgarden*'s holding—one that restricts access to information regarding a former prosecutor—has the potential to limit similar requests in the future and thereby impact media's coverage of past events.

In *Bloomgarden*, a man eventually convicted in a separate criminal case, made a freedom-of-information request for disciplinary information against the former lead prosecutor.[27] The materials that the man requested had been put together twenty years before as part of an investigation into his initial prosecution; in the court's words, the former prosecutor had been "removed from [the] plaintiff's case . . . and his termination . . . was later proposed in a thirty-five page disciplinary letter . . . accompanied by . . . 3,649 pages of supporting evidence."[28] The plaintiff argued that that trove of information, if revealed, might help his argument for a new trial in the criminal matter.[29]

The court refused the man's request in a way that can be read to limit newsworthiness more generally, especially when it is pitted against individual privacy. In an initial hearing, the court "questioned the public's interest in learning about an 'inadequate, incompetent, sort of disobedient . . . [government] employee.'"[30] Later, it held with certainty that it would be a "clearly unwarranted" invasion of privacy should the information regarding the investigation into the prosecutor be released to the public, noting that "the alleged misconduct of a federal employee" would "hardly be a matter of national concern."[31]

Throughout, the court focused in part on the potential that release of the information could embarrass the former prosecutor,[32] who was now apparently a lawyer in private practice.[33] "[W]ithout question," the court wrote, the former prosecutor "has a strong interest in avoiding decades-old disclosures that would likely cause him professional embarrassment,"[34] likening the former prosecutor's disciplinary file to the disciplinary file of a student at a military academy.[35]

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[26] No. 12-0843 (ESH), 2016 WL 471251 at *1 (D.D.C. Feb. 5, 2016).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at *3 (quoting Kimberlin v. Dep't of Justice, 139 F.3d 944, 949 (D.C. Cir. 1998)).

[32] *Bloomgarden*, 2016 WL 471251 at *4.

[33] *Id.*

[34] *Id.*

[35] *Id.* (citing Dep't of Air Force v. Rose, 425 U.S. 352, 380–81 (1976)).

An investigative journalist would very likely disagree with the court's journalistic assessment that there is little that is newsworthy in information regarding the apparent misbehavior of a federal employee. That investigative journalist would likely be especially concerned that it was a judge who stood as the gatekeeper of the information, one who suggested that there was no news value in alleged misdeeds of those who work within the nation's criminal justice system. That investigative journalist would likely suggest that if no single investigation into a federal employee's alleged wrongdoing can be revealed to the public, there can be no hard evidence of a systematic pattern of misbehavior, no evidence of a systemic problem within the Justice Department or any other federal entity.

The court also hints in its decision at right to be forgotten like considerations: that because the investigation into the federal prosecutor had happened years before, his embarrassment and privacy should trump even more whatever information might be gleaned from such materials—and that the passage of time decidedly made the information less newsworthy.[36] The public, the court wrote, "has only a negligible need to know about a largely unremarkable, decades-old proceeding involving an entry-level prosecutor."[37] "[I]t does not necessarily follow," the court reiterated, that even though prosecutors "do weighty, important work, affecting matters of" life and death, "that everything a prosecutor does is a matter of pressing public concern, especially as regards instances of garden-variety incompetence and insubordination, and especially years and years after the fact."[38] Note here the references to "garden-variety incompetence and insubordination" and the suggestion in such language choice that perhaps such behavior is perhaps somewhat commonplace among some federal workers, information arguably newsworthy in itself.

The suggestions, therefore, in *Bloomgarden*, that access to public information should be limited by the potential for embarrassment and by passage-of-time considerations, are striking. If an individual's embarrassment at the release of information and its impact on his or her current career is an important part of the privacy-significant weight against the public's interest in disclosure, much information regarding individuals should never be released and, if it is, they would be potentially important considerations in any resulting privacy tort action. If information of appropriate public concern is limited only to "current, newsworthy"[39] information, that restriction limits access and, potentially, publication in a

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[36] *Id.* at *3–4.

[37] *Id.* at *5.

[38] *Bloomgarden*, 2016 WL 471251, at *4.

[39] *Id.* at *3 (quoting Cochran v. United States, 770 F.2d 949, 959 n. 15 (11th Cir. 1985)).

way that gives judges great power to decide for themselves what is publishable news, to decide what could potentially lead to publishable news, and to limit discovery of materials to those of current interest to the public, not what might be of future interest to the public.

A final very recent case example, one decided in late 2015, involved a court's reprimand of a publisher who had created two websites seemingly to harass a particular individual. There, the court suggested that the publication of certain arguably truthful information should be restricted. In doing so, it also seemed to embrace right to be forgotten-like considerations.[40]

In *Hartzell v. Cummings*,[41] the Philadelphia Court of Common Pleas had initially ordered that the websites at issue be completely removed from the internet.[42] In a later hearing, it reinstated the websites but prevented their owner-publisher from, among other things, "post[ing] information regarding whether [the plaintiff] was a witness 'in the United States Federal Witness Protection Program.'"[43] While the underlying facts are murky, the individual named in the websites had filed a defamation-related tort action against the website's publisher and had asked the court to order the take-down.[44] The websites sprang from an underlying landlord-tenant dispute[45] and were the result, the tenant-now-publisher-defendant testified, of his investigation into the landlord-now-plaintiff's past.[46]

The defendant argued that the court's restriction on publication—the order that he take down certain information on the websites, including language suggesting that the plaintiff was a participant in the witness protection program—was an unconstitutional prior restraint.[47] He had the right to publish such information, he argued, because such information was truthful and was available at least initially through public sources even though the state had later provided evidence that the plaintiff was not in witness protection.[48]

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[40] I am in fact working on a paper titled *The Right to Be Forgotten in the United States* that explores these newer and older cases that suggest such a right.

[41] No. 150103764, 2015 Phila. Ct. Com. Pl. LEXIS 313, at *1 (D. Pa. Nov. 4, 2015).

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Hartzell*, 2015 Phila. Ct. Com. Pl. LEXIS 313 at *10; Hartzell v. Cummings, No. 1953, 2006 Phila. Ct. Com. Pl. LEXIS 504, at *1 (D. Pa. Dec. 29, 2006).

[46] *Hartzell*, 2015 Phila. Ct. Com. Pl. LEXIS 313 at *10.

[47] *See id.* at *1.

[48] *See id.* at *3.

The court, however, rejected the defendant-publisher's First Amendment arguments and sided with the plaintiff. In doing so, the court contrasted the "constitutional right to disseminate information"[49] with "an illegal campaign of harassment."[50] Any interest the public may have in information regarding an individual's participation in a witness protection program, the court suggested, was trumped by the individual's own interests in privacy and his interests in protection from physical harm.[51] Moreover, the court noted, any events that may have been related to crime had occurred twenty-five years before, and therefore were likely no longer newsworthy. In short, it wrote, "the items at issue are not protected speech"[52]—even if the underlying information about the witness protection program were truthful.[53]

"Although courts justifiably fear that restrictions on publication may have a chilling effect on the disclosure of future information," the court wrote, "the present case does not present a scenario in which the right to freedom of information is threatened." Especially key here, the court suggested that the plaintiff was "not a public figure and [that] the details about his past are likely not newsworthy twenty-five years after the fact."[54]

The third case, too, then, one involving what I would consider a quasi- or non-journalistic publisher of websites, has the potential to limit mainstream journalism. It would be doubtful that a mainstream journalist would publish information about an individual's participation in the witness protection program in the first place even if true, given the dangers noted by the court in its opinion upholding the injunction. But if a journalist did publish such a story for whatever presumably ethics-abiding reason, *Hartzell* seems at least some precedent in support of a plaintiff's claim for privacy and argument against the newsworthiness of the information.

Moreover, the case seems to suggest, albeit in subtle language, that someone with a criminal record can become a private figure again through the passage of time. In doing so, it also suggests, as did the opinion in *Bloomgarden*, that the passage of time itself can make what was once newsworthy information no longer newsworthy.

In each of these three cases decided within weeks of the Symposium, then, there seems to be at least some proof of a continued turn toward

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[49] *Id.* at *11.

[50] *Id.*

[51] *Id.* at *12.

[52] *Hartzell*, 2015 Phila. Ct. Com. Pl. LEXIS 313, at *9.

[53] *Id.* at *11–12.

[54] *Id.* at *11.

privacy and arguably an increase in judicial confidence regarding determinations of newsworthiness and news coverage.

Perhaps the most significant example, however, is *Dahlstrom v. Sun-Times*, a case from early 2015 involving the news media directly. There, the Seventh Circuit decided that a newspaper could be liable for publishing information that journalists apparently knew had been acquired illegally.[55] The opinion reflects at least some of the reasoning in the more recent cases described above and, arguably, goes beyond.

In *Dahlstrom*, Sun-Times reporters published information from a drivers' license database that included the personal physical statistics and characteristics of police officers who had participated in a questionable lineup.[56] Because a federal law protects such information due to privacy concerns,[57] the officers sued the newspaper—and the federal appellate court sided with the officers over the journalists' First Amendment arguments. Even though the statute that protected drivers' license information prevented only access, the court decided, the statutory prohibition was relevant to the newspaper's later publication of the information.[58] The newspaper, the court wrote, "cites no authority for the proposition that an entity that acquires information by breaking the law enjoys a First Amendment right to disseminate that information."[59]

In the end, the court upheld the trial court's decision to deny dismissing the case on constitutional grounds and, in doing so, rejected the notion that there may be news value in the published information:

> [W]here members of the press unlawfully obtain sensitive information that, in context, is of marginal public value, the First Amendment does not guarantee them the right to publish that information.[60]

That case similarly supports my book's thesis. First, the Seventh Circuit refused to allow the newspaper's First Amendment arguments to protect it from the lawsuit; it specifically suggested that the news value in the information was of marginal value when weighed against the sensitivity of the information, even though the information—mostly physical characteristics—was arguably not private at all. Second, even though the court suggested that its opinion was limited to the facts in front of it, it held that decidedly truthful information obtained from a government database

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[55] *See* 777 F.3d 937 (7th Cir. 2015).

[56] *Id.* at 939. The information published included "birth date, height, weight, hair color, and eye color."

[57] Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq.* (1994).

[58] *Dahlstrom*, 777 F.3d at 948.

[59] *Id.* at 950.

[60] *Id.* at 954.

protected by statute can be the basis for a viable cause of action against the later publisher of the information.[61] Consider the implications for the publication of information from other closed government databases, for example, including criminal records. Here, it is also important to note that the information that was published supported an otherwise newsworthy article regarding what the newspaper believed to be a questionable lineup. In other words, even though the article itself may have been newsworthy, the court suggested that the precise information contained within it—physical descriptions of the officers involved in the lineup—was not, based in large part on the sensitivity of that information.

In late 2015, the Supreme Court refused the newspaper's petition for certiorari in the case.[62]

There are additional quick examples of recent decisions in which courts seem to be joining this turn. These cases, like those above, have the potential to restrict mainstream media even when the underlying claim does not involve a typical publisher. The court in *United States v. Blankenship* instated a gag order during trial for witness privacy and other reasons, despite media's arguments as to the newsworthiness of the case.[63] It noted that "[t]he order simply prevents the press from filling publications with quotes and accounts springing from the parties or potential trial participants."[64] In *In re Marriage of Eckersall*, the court held that a marriage-related form was not of public concern: "[i]ssues that arise in dissolution of marriage proceedings tend to be very fact specific and do not have broad-reaching implications beyond the particular dissolution of marriage proceedings" in contrast with "newsworthy information," the court wrote.[65] Further, in *Charalambopoulos v. Grammer*, a case involving the alleged stalking of a celebrity, the court found that a resulting legal matter was not of public concern because the celebrity had "failed to show that people were discussing these matters or that people other than the immediate participants in the controversy were likely to feel the impact of its resolution."[66] These cases seem to suggest at the very least judicial confidence in determining the news value of certain information.

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[61] *Id.*

[62] Sun-Times Media, LLC v. Dahlstrom, 777 F. 3d 937 (7th Cir.), *cert. denied*, 136 S. Ct. 689 (2015).

[63] 79 F. Supp. 3d 613, 619 (S.D.W. Va. 2015).

[64] *Id.*

[65] 28 N.E.3d 742, 747 (Ill. 2015).

[66] 2015 U.S. Dist. LEXIS 10507, at *13 (N.D. Tex. Jan. 29, 2015).

II. Other News Coverage and Newsworthy Relevant Cases: The Pro Media Decisions

The news is not all bad for media, of course, and there are recent newsworthiness-relevant cases that go the media's way. I include three initially here that contrast directly or indirectly with the cases cited above. These cases harken back at least in part to the glory days of journalism when publishers were trusted and protected, statutorily or otherwise.

In *Skokan v. Peredo*,[67] for example, a case decided in 2015, a New York trial court decided that under the state's version of a privacy statute,[68] a woman's claim against a doctor for releasing medical photographs of her acne to a magazine would not stand. The statute's newsworthiness exception should be broadly construed, the court held, and protected "the article on teen acne [that was] a newsworthy matter and a matter of public interest."[69] It is true that New York's statute is particularly protective of publications because as long as there is a "real relationship" between the news article and the accompanying photograph, a plaintiff cannot win.[70] It is also worth noting that other claims continued against the doctor. Even so, the case is in some conflict with the one decided by the Utah Supreme Court regarding the newsworthiness, or not, of plastic surgery medical photographs.

With regard to any suggestion of a right to be forgotten in the cases above, it is of some note that a federal trial court in New York ordered that once-sealed documents in a long-closed civil lawsuit be unsealed because a *New York Times* reporter had asked that they be.[71] "The decision whether a potential investigatory story is newsworthy is ultimately for the journalist to make," the court wrote, "it is not for the subject of the investigation or the court to decide."[72] With regard to the passage of time, the court found that "there is no implication in the case law or in common sense why the passage of more than three years should disable a journalist from seeking unsealing"[73] and that there was no reason why a journalist should be required to request that documents be unsealed before the lawsuit is closed.[74]

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[67] 2015 N.Y. Misc. LEXIS 2797 (July 23, 2015).

[68] N.Y. CIVIL RIGHTS LAW § 51 (McKinney 2009).

[69] *Skokan*, 2015 N.Y. Misc. at *14.

[70] *Id.* at *15.

[71] *In re* Pineapple Antitrust Litigation, 43 Media L. Rep. 2175 (S.D.N.Y. 2015).

[72] *Id.* at *6.

[73] *Id.* at *7.

[74] *Id.* at *6–7.

And in *Martin v. Hearst Corporation*,[75] the Second Circuit rejected negligent infliction of emotional distress and defamation-based claims springing from a website's inclusion of the plaintiff's arrest record. The plaintiff filed suit, arguing that the information was false because her criminal action had been ended "without an acquittal and without placing [her] in jeopardy" of a conviction and that the arrest had been erased under Connecticut erasure law.[76] The court, however, responded that the state's erasure statute "creates legal fictions, but it does not and cannot undo historical facts or convert once-true facts into falsehoods."[77] The plaintiff's claim for negligent infliction of emotional distress, the court held even more specifically, "fails because there is nothing negligent about publishing a true and newsworthy article."[78]

These cases are included here to show that the news for media is not all dire, but also to suggest that schisms continue to develop with regard to matters involving privacy concerns and newsworthiness. Moreover, some of these decisions and the quotes within them are decidedly more in line with the pro-media cases decided in the 1970s and 80s, a time when most media could be trusted to make news judgments in line with ethics considerations. Compare that with the *Dahlstrom* case involving truthful publication of drivers' license information, for example, in which the Seventh Circuit found the newspaper potentially liable after balancing the public interest in the information and the information's sensitive nature.

III. The Hulk Hogan-Gawker Case

Perhaps the most significant and strongly relevant case involving newsworthiness in recent months, at least in terms of headlines, is the one brought by professional wrestler Hulk Hogan against Gawker, a push-the-envelope website that published Hogan's sex tape without his permission. In March 2016, the month after this Book Symposium, a jury decided that Hulk Hogan should receive more than $100-million from Gawker for its invasion of his privacy. Jurors flatly rejected the website's argument that the sex tape itself had news value.[79]

Even so, there is some indication based upon past decisions that the *Bollea* case could ultimately be decided in favor of Gawker, at least at the next level of court should the case not settle. In two separate opinions, a

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[75] 777 F.3d 546 (2d Cir. 2015).

[76] *Id.* at 548 n.1 (quoting Cislo v. City of Shelton, 692 A.2d 1255, 1260 n.9 (Conn. 1997)).

[77] *Id.* at 551.

[78] *Id.* at 552.

[79] Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded $115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html?_r=0.

federal trial court and a state appeals court suggested that Gawker had the right to determine the newsworthiness of the sex tape and to publish it if it found it newsworthy.

In *Bollea v. Gawker Media*,[80] the federal trial court case, the court rejected Hulk Hogan's request for a preliminary injunction that would have ordered the sex tape taken down. Quoting cases that suggested that the media had nearly sole authority to decide what was news— "the judgment of what is newsworthy is primarily a function of the publisher, not the courts"[81] and "federal courts should resolve doubtful cases at summary judgment to prevent freedom of the press from being restricted"[82]—the court decided that Hulk Hogan was unlikely to win his underlying privacy claim because of the First Amendment power of freedom of the press and because of the public's interest in the tape. Therefore, the court rejected his request for an injunction:

> Plaintiff has failed to satisfy his heavy burden to overcome the presumption that the requested preliminary injunction would be an unconstitutional prior restraint under the First Amendment. Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.[83]

After the federal court eventually determined that it did not have jurisdiction because of incomplete diversity,[84] Hulk Hogan renewed a claim in state court and again asked for an injunction.[85] There, a state trial level court ruled in Hulk Hogan's favor without much explanation.[86] The state appeals court reversed. As had the federal court, the state appellate court held that "it was within Gawker Media's editorial discretion to publish the written report and video excerpts,"[87] suggesting similarly that

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[80] 2012 WL 5509624, at *1 (M.D. Fla. 2012).

[81] *Id.* at *3 (quoting Heath v. Playboy Enterps., Inc., 732 F.Supp. 1145, 1149 n.9 (S.D. Fla. 1990)).

[82] *Id.* at *3 (citing Haynes v. Alfred A. Knopf, 8 F.3d 1222, 1234 (7th Cir. 1993)).

[83] *Id.* at *8.

[84] Bollea v. Clem, 937 F. Supp. 2d 1344, 1349 (M.D. Fla. 2013).

[85] Gawker Media v. Bollea, 129 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2014).

[86] *Id.*

[87] *Id.* at 1202.

judges should not substitute their own determination of newsworthiness for that of publishers.[88]

While such language could well give the sense that the premise of my book is wrong, the jury's ultimate decision regarding newsworthiness seems to support it. Here, the jurors' rejection of Gawker's newsworthiness standards indicates at least in part some media's inability to determine what consumers today find of public interest and what, to the public mind, invades privacy beyond reasonable bounds. The jury's decision, then, can be taken both as a rejection of Gawker's news judgment and a rejection of the courts' sense that media knows best in its news value determinations.

It is at least of some relevance here that a very strong majority of Americans would agree with the jurors who decided the Hulk Hogan sex tape case: a poll taken in April 2016 showed that only 70% of the 1000 polled found such a publication acceptable. [89] A full 77% found it unacceptable to publish this particular sex tape, with similar numbers for hypothetical sex tapes involving other celebrities and politicians.[90] If any future court, then, looks to public mores and public standards of decency in a newsworthiness determination, as did the 2016 Utah court, this is some indication of where that line might be drawn by the public itself.

Given all this, it is possible that, despite earlier language that favored Gawker, any appeals court hearing the Hogan-Gawker dispute will reject earlier deference toward Gawker and will hesitate to question the jury's ultimate determination regarding the newsworthiness of a sex tape featuring a celebrity.

If so, that would be a very good outcome for privacy because it would help protect most individuals from truly invasive media coverage, even when media senses news value in information. But it would also be a very bad outcome for media, once protected by a judicial sense of its superior ability to determine matters of public interest.

Here, I wish I were able to say that I win no matter the court's ultimate decision in the Hulk Hogan case: that if the final appeals court hearing the case decides against Gawker, it proves my thesis that courts are deferring to media's newsworthiness determinations less; and that if the court decides in favor of Gawker, it is a decided victory for press freedoms generally and a suggestion that courts are getting it right again.

But, unlike the federal trial and state appellate courts that by mid-2016 had published opinions in the Hulk Hogan case, I see a decided lack of

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[88] *Id.*

[89] Peter Moore, *Americans Overwhelmingly Decide with Hulk Hogan, Not Gawker*, YOUGOV (April 6, 2016, 11:28 AM), https://today.yougov.com/news/2016/04/06/americans-overwhelmingly-side-hulk-hogan-not-gawke/.

[90] *Id.*

newsworthiness within the sex tape itself. Despite what some may believe, and also as I argue in the book, it is possible to both support media and privacy here. Both early courts in the Hulk Hogan case, for example, could have embraced the newsworthiness of the tape *and* some privacy of the individual by deciding that, while the existence of a sex tape itself may be of public interest and worthy of some attention and perhaps calm description and maybe even an appropriately discrete screen shot from the tape itself, the graphic contents of a surreptitiously recorded sex tape itself are not newsworthy. But the courts did not.

Note, for example, the courts' use of broad language from older cases that protects "publishers" and the suggestion that courts must defer to publishers' determinations of newsworthiness more generally. This language made some sense in the days in which publishers were a discrete, generally ethics-abiding group. Today, with some, that is far from the case. If, in fact, all publishers have the ability to determine newsworthiness, and if in fact courts must defer to publishers generally, that means that anyone with a website or even a Facebook account (including those who publish revenge porn photographs of former loves) must be deferred to. In short, a plaintiff could never win a privacy-related tort claim if such language were adhered to without discretion because a publisher had indeed determined the newsworthiness of or the interest the public would have in that information. This would include the video surreptitiously taken of sportscaster Erin Andrews and published on the Internet by someone who had decided to share it with the public; in 2016, she too won millions from a jury based in part on invasion of privacy.[91]

Clearly, such deference cannot continue if we still value some aspect of our private lives.

IV. Testing a Definition for Newsworthiness

In my book, I offered a definition for newsworthiness that I aligned with the 1977 Restatement definition for publication of private facts and newsworthiness. Therefore, this definition incorporates some limitations. Important for media, it presumes the newsworthiness of truthful information:

> Because the Supreme Court has warned courts to be "chary of deciding what is and what is not news," the publication of any truthful information is presumptively newsworthy and of public interest and, therefore, is protected from tort-based and related claims. This presumption of newsworthiness may be overcome

[91] Suzannah Gonzales & Fiona Ortiz, *Jury Awards Erin Andrews $55 Million in Lawsuit Over Nude Video*, REUTERS (Mar. 8, 2016, 10:36 AM), http://www.reuters.com/article/us-tennessee-andrews-stalking-verdict-idUSKCN0W92IL.

> only in truly exceptional cases, when the degradation of human dignity caused by the disclosure clearly outweighs the public's interest in the disclosure.[92]

I suggested that the human dignity limitation be defined in accordance with historically private information and events: in particular, "depictions of sex, nudity, deeply private or deeply embarrassing medical conditions, private expressions of grief, and other similar parts of humanness generally not exposed to others."[93]

I am not absolutely certain how the court decisions explored above would be decided under this definition, but I suspect that most of those that were decided against the defendant—the anti-media cases—would be reversed and the pro-media cases would remain on the pro-media side of the balance sheet. The Pennsylvania court decided, for example, that information alleged about a long ago crime and participation in the witness protection program would not be newsworthy.[94] Under my definition, the information regarding past crimes would be newsworthy as a matter of law. (Any information regarding participation in a witness protection program would be closer, but a presumably viable argument under a dignity-centric definition when life is in danger.) Like past crimes, information regarding a long ago investigation involving a federal prosecutor likely would be newsworthy, as would the publication of innocuous physical characteristics. In my suggested definition, one that tries to balance privacy and newsworthiness with decided protections for news judgment, only deeply personal information, deeply private information that impacted another's humanness would be punished.

It is clear that under such a definition, Hulk Hogan's deeply private sexual activity would not be newsworthy, and that his privacy would be protected.

The 2015 Utah case is perhaps the best latest check on the definition. Recall that the case involved before and after photographs of a plastic surgery patient, and that the court decided that a jury should decide whether "inclusion of [the] photographs was gratuitous or overly intrusive."[95]

Issues of consent aside, under my definition for newsworthiness, the photographs would be presumed newsworthy. But it is possible and perhaps even likely that the plaintiff could have convinced the court that the medical photographs of her body were so deeply personal that they did

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[92] AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARRAZI THREATEN A FREE PRESS 233 (2015).

[93] *Id.*

[94] Hartzell v. Cummings, 2015 Phila. Ct. Com. Pl. LEXIS 313, at *9.

[95] Judge v. Saltz Plastic Surgery, 367 P.3d at 1013 (Utah 2016).

not have enough news value to counterbalance human dignity considerations, even given her participation in the underlying news story about plastic surgery.

In other words, under my definition, it seems that the Utah case could well have gone to the jury, just as the Utah court decided it should under the Restatement's definition for news, one that draws the line at morbid and sensational prying for its own sake.

Perhaps it is at least relevant then that the same thing happened in the Hulk Hogan case despite two courts' use of historic language that suggests that the publisher has the right to publish whatever it thinks is newsworthy. Despite those quotes, and despite that strong pro-media language and holdings favoring Gawker, Hulk Hogan's privacy-related claims were decided by jurors.

In this way, the Hulk Hogan case supports my thesis no matter its final outcome: that some once-deferential courts are now turning to juries to help them determine the news value of claimed private information.

CONCLUSION

In early 2015, I argued in *The First Amendment Bubble* that courts were becoming skeptical of media's news determinations more often and that, instead of historic deference, judges seemed to be embracing privacy considerations more. I called it a nascent trend. Since then, a number of courts have supported my thesis

The case involving Hulk Hogan and Gawker's publication of his sex tape, therefore, has the potential to be an important one if it does not settle before appeal. The Supreme Court will someday need to decide whether a publisher's sense of what the public wants to know should be the benchmark in news determinations. It will also need to decide at what point one person's privacy trumps another's determination of newsworthiness.

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