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A Professional Wrestler, Privacy, and the Meaning of News

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In October of 2012, something momentous happened in the clash between the law of privacy and the law of press: Gawker, a website that specialized in sensational news often involving celebrities – one that promoted itself as making "today's gossip … tomorrow's news" – published professional wrestler Hulk Hogan's sex tape without his permission.

It was momentous because the not-safe-for-work post illustrates how difficult it can be to define news, how the meaning of "the press" has changed in an internet age, and how legal protections for traditional newsgatherers can be imperiled if the words "news" and "press" are stretched too broadly to include all truth and all publishers. Those matters are the focus of this chapter.

The two-minute-long, black-and-white, grainy Hogan sex tape was not at all Hollywood-esque; it showed Hogan[1] completely nude, very much engaged in explicit sexual activity with a woman on a bed in someone else's house, handling himself in a way that indicated that he was quite unaware that he was being filmed (not that that would matter). Gawker headlined its scoop: "Even For a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe For Work, But Watch It Anyway." Millions did.

Within days, Hulk Hogan's lawyers announced that they would sue Gawker on behalf of their client and would stake their claim on the "basic concept" of "invasion of privacy."[2] Publishing another's explicit sexual activity, the attorneys said, "cannot be tolerated by a civil society."[3]

Gawker's lawyers came out swinging in response: "Tabloid journalism in America is protected under the newsworthy standard every day," they argued, and they maintained that the tape had real news value.[4] Gawker's *journalists* even more

[1] I will refer to him as Hulk Hogan throughout this chapter for ease of reader understanding. Hogan's real name is Terry Bollea, and his lawsuit was brought under the Bollea name.

[2] Nancy Dillon, *Hulk Smash*, N.Y. Daily News (Oct. 16, 2012), https://www.pressreader.com/usa/new-york-daily-news/20121016/281509338423024.

[3] *Id.*

[4] José Patiño Girona, *Hogan Seeks to Copyright His Sex Tape*, Tampa Trib., Nov. 9, 2012.

vehemently argued that the First Amendment protected their decision to publish, that the Constitution unambiguously "afford[ed] [them] the right to publish true things about public figures," and that any other legal decision would be "risible and contemptuous of centuries of First Amendment jurisprudence."[5]

I had heard about the sex tape very early on because a student had sent me a link to Gawker's original not-safe-for-work post. The student's sharing wasn't salacious; it was academic. I had been predicting in my media-related law classes for years that a gossip-type website would someday publish a sex tape featuring a celebrity and would suggest that the tape had news value protected by the Constitution. It had finally happened.

A brief bit of background is in order here. I became a law professor at the dawn of the internet age after an initial career in journalism. For nearly a decade, both before and during law school (and at some points after), I worked in journalism, mainly as a television news anchor, reporter, and producer in Toledo, Ohio; Salisbury, Maryland; Charlottesville, Virginia; Harrisburg, Pennsylvania; and Detroit, Michigan. I learned much in those newsrooms and television stations about the craft of journalism and about the ethics, principles, and gut feelings that stopped journalists from publishing many things that most people would consider deeply private. I recall learning from police precisely how a public figure had died, for example, which involved sexual information that would have mortified his family; I of course did not include such detail in news stories about his death. The fact that we had *video* of newsworthy tragedies like car accidents and plane crashes made such ethics decisions all the more routine and often easy because what we had on tape was so troubling. Our newsroom rule was that there would be no gruesome images of people and no death images. When Pennsylvania's state treasurer died by suicide at a press conference, I played a key role in our newsroom decision to freeze the video at the moment that he pulled the gun from his briefcase, even though our cameras had captured everything that transpired that tragic day. We would at times unintentionally capture video of embarrassing things, such as a clothing malfunction on a windy day or a person who fell on the street, and those videos were off limits too.

Many newsrooms like mine had their own ethics codes that guided such news decisions. The main one that journalists across the United States followed and continue to follow was drafted by the Society of Professional Journalists. "Only an overriding public need can justify intrusion into anyone's privacy," the SPJ Code read. It told reporters to "[a]void pandering to lurid curiosity" too.

That's why, when I joined the permanent faculty at the University of Illinois College of Media and its College of Law, I jumped at the chance to teach journalism ethics and I chose privacy as the main focus for my scholarship. I was

[5] John Cook, *A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won't.* Gawker, Apr. 25, 2016.

particularly interested in the conflict between privacy and the freedom to publish truth. I knew my own sensibilities, I knew journalism's ethics provisions, and I was intrigued when judges opined on the newsworthiness of journalistic decisions, at times deferring to publishers even in surprising situations.

That was in the early 2000s, and it soon became clear that the democratization of the internet and the ease of publishing had changed things. Suddenly, ethics-abiding gatekeepers of information like the journalists I had worked with for years – those commonly deferred to by judges – were not the norm. Suddenly, anyone could assess the public interest in anything (or not) and instantly publish whatever they believed would satisfy it, including the graphic or embarrassing visuals and information that would have never made it to any one of our newscasts.

That, then, is the background inspiration for my two decades of scholarship. I've written, for example, about the strikingly critical description of journalism in the famous law review article, titled The Right to Privacy, published in 1890 by Samuel Warren and Louis Brandeis, and argued that sensationalistic coverage both of Warren's family and his friend Grover Cleveland (a president with a scandalous past) had been the main spark for the piece.[6] I wrote in the California Law Review about a shift in court decisions in favor of privacy and against press freedoms, comparing journalism's ethics provisions with what at the time was far more permissive law.[7]

My first media-focused book, *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press*, explored the press-privacy clash even more deeply.[8] And my most recent book, *Seek and Hide: The Tangled History of the Right to Privacy*,[9] named by The New York Times as one of the 100 Notable Books for 2022, looked at the press-privacy clash over time, all the way back to the earliest days when Massachusetts was a colony and shut down a newspaper in part for reporting that the King of France was having an affair with his daughter-in-law. So, back in 2012, when that former student sent me a link to the Hulk Hogan sex tape, I instantly recognized the constitutional clash – and I also suspected that Hulk Hogan would ultimately win.

18.1 A BRIEF HISTORY OF PRIVACY AND NEWS

When Gawker journalists argued in the wake of Hulk Hogan's invasion-of-privacy lawsuit that a legal decision in favor of Hulk Hogan would be "risible and

[6] Amy Gajda, *What If Samuel D. Warren Hadn't Married a Senator's Daughter?: Uncovering the Press Coverage That Led to the Right to Privacy*, 2008 MICH. ST. L. REV. 35 (2008) (symposium).

[7] Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039 (2009).

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

[9] AMY GAJDA, SEEK AND HIDE: THE TANGLED HISTORY OF THE RIGHT TO PRIVACY (2022).

contemptuous of centuries of First Amendment jurisprudence," they weren't exactly right. From the very beginning of the United States, even before the First Amendment was ratified, there was recognition – sometimes troubling recognition – that not all bits of truthful information had equal news value. Back then, what we might today call invasion of privacy was known in part as "truthful libel," called that because, judges and other thought leaders said, truthful information could be more harmful at times to a person's reputation and emotions than falsity. Blackstone's Commentaries on the Laws of England had supported that idea to some extent, suggesting that, despite the essentiality of freedom of the press, those who published things that were "improper, mischievous, or illegal," including non-justifiable information about extramarital affairs, it was suggested, "must take the consequence of [their] own temerity."[10]

At least some of the Founders seemed to agree. Consider the discussion about the boundaries of press freedom between William Cushing and John Adams, who were particularly concerned that the Constitution might protect newspapers that reported on what they called politicians' "instances of male conduct" – their extramarital immoral behavior. Cushing, who would later become a justice on the U.S. Supreme Court, suggested that the *person* should be protected in such instances, not the *publisher*. "My question is this," Cushing's letter to Adams read, "[W]hether it is consistent with [the First Amendment], to deem & adjudge any publications of the press, punishable as libels, that may arraign the conduct of persons in office, charging them with instances of male conduct repugnant to the duty of their offices & to the public good & Safety; – *when such charges are supportable by the truth of fact*?"[11] "Doubtless," he added, the liberty of the press "may & ought to be restrainable" in some of those cases.[12]

Adams agreed. "You may easily conceive a Case, when a *Scandalous Truth* may be told of a Man, without any honest motive, and merely from malice,"[13] he replied to Cushing. "[I]n Such a Case, Morality and religion would forbid a Man from doing Mischief merely from Malevolence, and I thought that Law would give damages."

Thereafter, a court in New Orleans in 1811 sided with a man who'd written a love letter and against a newspaper that had threatened to publish it.[14] Whatever press freedoms existed in the publication of the letter, the court explained, paled in comparison to the plaintiff's privacy interests, and it repeatedly condemned the

[10] 3 William Blackstone, Commentaries on the Laws of England 125 (1765); United States v. Fries, 9 F. Cas. 826, 839 (C.C.D. Pa. 1799) (No. 5,126) (quoting Blackstone at 152).

[11] Letter from William Cushing to John Adams (Feb. 18, 1789) (founders.archives.gov) (emphasis added).

[12] *Id.*

[13] *Id.*

[14] Denis v. Leclerc, 1 Mart. (o.s.) 297 (La. Sup. Ct. 1811).

publisher who would share such truthful information. Any constitutional promise of a free press, it said, would not protect the publisher of personal secrets:

> If [the First Amendment] can be invoked to support the defendant, in the right of . . . violating the secrets of his correspondence, it will protect the propagation of any slander or libel. Neither Congress, nor the Circuit Court of the United States, seem to have ever considered this article as susceptible of so strange a construction.

A little more than a century later, the first Restatement on Torts protected privacy in a similar way. "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others," the provision read in 1939, was liable for what was called "Interference with Privacy."[15] Such protection for privacy included seemingly newsworthy situations; those Restatement authors would have held a newspaper liable for publishing a photograph taken in public of a "hideously deformed" person harmed at birth by inexpert medical care, even when that photograph accompanied an article about the need for better medical care for newborns.[16]

Forty years later, when the American Law Institute published the Second Restatement on Torts, it included a parallel provision titled Publicity Given to Private Life.[17] "One who gives publicity to a matter concerning the private life of another," the provision read, "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." As for what would be both highly offensive and not of legitimate concern, the Restatement authors suggested that "[s]exual relations . . . are normally entirely private matters" and that "even the actress . . . is entitled to keep to herself . . . such intimate details of her life."[18]

But the American Law Institute added an important note to this new publication-related privacy tort:

> It has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment.[19]

That warning note made sense for several reasons. Once journalism turned away from scandal and started to abide by ethics standards more generally[20] (a shift that

[15] Restatement of Torts § 867 (Am. Law Inst. 1934).
[16] *Id.*
[17] Restatement (Second) of Torts § 652D (Am. Law Inst. 1977).
[18] *Id.*
[19] *Id.*
[20] I looked at this history of journalism and law first in *Judging Journalism*, *supra* note 7, and amplified the coverage in both The First Amendment Bubble, *supra* note 8, and in Seek and Hide, *supra* note 9.

occurred mainly in the 1920s and 1930s), court decisions increasingly deferred to journalism's news judgment in many cases that involved claimed invasion of privacy, sometimes even in a constitutional sense. The Supreme Court wrote in *Gertz v. Robert Welch, Inc.*, a 1974 defamation case concerning the assessment of matters of general public interest, for example, that it doubted the wisdom of committing such an assessment task to judges.[21] In another case that same year, the justices worried even more strongly about judicial interference with the news judgment of journalists, suggesting that "government regulation of this crucial process" was inconsistent "with First Amendment guarantees."[22] And then, in 1975, in *Cox Broadcasting v. Cohn*,[23] the Court held that a television station that had broadcast the name of a deceased rape victim would not be liable for a privacy invasion despite her grieving father's emotional pain and a state statute that allowed punishment for such a publication. It seemed that much, if not all, truthful information, even emotionally harmful information, would be protected.

The already deferential lower courts generally followed suit. Four years after *Cox Broadcasting*, in 1979, the Iowa Supreme Court held that "[i]n determining whether an item is newsworthy, courts cannot impose their own views about what should interest the community."[24] Judges, the court added, "do not have license to sit as censors."[25] Federal courts suggested the same: "[J]udges, acting with the benefit of hindsight," the First Circuit wrote in 1989, should not assess journalistic news judgment aggressively, because "[e]xuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists."[26]

But shortly thereafter, in the mid-to-late 1990s, the internet exploded in a very real way. Rather suddenly, it was not at all clear which publishers qualified as journalists and what truthful publications qualified as journalism. If there were indeed honorable journalists whose sharp quills needed judicial defenders and if indeed the law protected a journalistic judgment of newsworthiness, what about the bloggers and the social media posters and the others who created websites filled with a reality that wreaked emotional harm? Would those assessors of information of public interest and publishers of truth be protected too?

By 2007, the answer, at least in many places, appeared to be no. "Ethical standards regarding the acceptability of certain discourse have been lowered," the Ohio Supreme Court wrote in a case that recognized for the very first time in the state the privacy tort of false light, even though the justices had rejected it in the past as being too similar to defamation.[27] "[A]s the ability to do harm has grown," those

[21] 418 U.S. 323 (1974).
[22] Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[23] Cox Broadcasting v. Cohn, 420 U.S. 469, 487 (1975).
[24] Howard v. Des Moines Register & Tribune Co., 283 N.W.2d 289 (1979).
[25] *Id.* at 302.
[26] Ross v. Midwest Communications, Inc. 870 F.2d 271 (5th Cir. 1989).
[27] Welling v. Weinfeld, 886 N.E.2d 1051, 1058–59 (Ohio 2007).

justices wrote, referring to the internet, "so must the law's ability to protect the innocent."[28]

That same sort of shift seemed to be happening at the United States Supreme Court too.

18.2 *BARTNICKI V. VOPPER* AND HULK HOGAN

In 2001, eleven years before Gawker published the Hulk Hogan sex tape, the Supreme Court decided *Bartnicki v. Vopper*.[29] The decision was an important one for media; the justices had found that a radio station would not be liable for publishing a cellphone conversation that had been surreptitiously recorded by an unknown person and had been given to the radio station by someone who did not work there. On the tape, an official who represented the local teachers' union had suggested that violence might be used against school board officials in order to influence a labor dispute. The Supreme Court held that such a discussion was in itself a matter of public concern. Even though the revelation of the wiretapped conversation violated federal law, the justices reasoned, the later broadcast of that recording was not unlawful because the First Amendment protected the station's decision to publish such "unquestionably" newsworthy information. "[S]tate action to punish the publication of truthful information seldom can satisfy constitutional standards," the Court wrote, quoting its own language from 1979's *Smith v. Daily Mail Publishing*.[30]

There were three wrinkles in *Bartnicki*, however, and each suggested that, like the lower courts, the Supreme Court might also be shifting away from broad protection for publishers – a shift springing in part from willy-nilly publication decisions.

The first wrinkle was that the *Bartnicki* decision did not sweep broadly. The radio station had not been involved in the surreptitious recording of the information itself; it had been given the tape by a person unaffiliated with the station and, therefore, was innocent of any wrongdoing. There remained a "still-open question," the Court wrote, and that was "whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well."[31] (Later decisions, including those from federal appellate courts,[32] have indeed held publishers liable for information that they obtained unlawfully, although the issue remains open at the Supreme Court.)

The second wrinkle was that the word "seldom" in the *Daily Mail Publishing* quote – that "state action to punish the publication of truthful information *seldom*

[28] *Id.* at 1059.
[29] Bartnicki v. Vopper, 532 U.S. 514 (2001).
[30] 443 U.S. 97, 102 (1979).
[31] *Bartnicki*, 532 U.S. at 528.
[32] Dahlstrom v. Chicago Sun-Times, 777 F.3d 937 (7th Cir. 2015).

can satisfy constitutional standards" – seemed an important limitation in *Bartnicki*. In other words, the *Bartnicki* Court could have chosen language that was more sweepingly protective of news, for example, by declaring that state action to punish the publication of truthful information can *never* satisfy constitutional standards. But it did not. Instead, the justices in the *Bartnicki* majority wrote that the outcome could well be different in cases involving different facts, such as those in which there had been the revelation of non-newsworthy "domestic gossip or other information of purely private concern."[33] Moreover, the justices in *Bartnicki* noted that the Court had, over time and in the sorts of decisions that included *Cox Broadcasting*,[34] repeatedly refused "to answer categorically whether truthful publication may ever be punished consistent with the First Amendment."[35] Quoting *Florida Star v. B.J.F.*,[36] the Court wrote that "the future may bring scenarios which counsels our not resolving anticipatorily" this "ultimate question," because of the "sensitivity and significance of the interests presented between [the] First Amendment and privacy rights."[37]

The third wrinkle appeared in *Bartnicki*'s concurring and dissenting opinions. Justices Breyer and O'Connor in concurrence suggested that the Constitution tolerated certain privacy-protective laws because of the right of privacy's importance and called it an "interest[] of the highest order."[38] They suggested too that even *public* figures retained some rights to "private communication," especially in an age involving "challenges" that "technology may pose to the individual's interest in basic personal privacy."[39] And then they listed as among "truly private matters," what they called "sexual relations" between two public figures that had been recorded.[40] In other words, a celebrity sex tape.

Three justices dissented in *Bartnicki*; they would have ruled against the radio station's claimed First Amendment interests. They too were worried about the "significant privacy concerns" arising from technological advances that allowed others to access personal communications. "Even where the communications involve public figures,"[41] Justices Rehnquist, Scalia, and Thomas wrote, the conversations are nonetheless private and worthy of protection. That third wrinkle, therefore, means that in 2001 at least five of the justices on the Supreme Court would

[33] *Bartnicki*, 532 U.S. at 533.
[34] 420 U.S. 469 (1975).
[35] *Bartnicki*, 532 U.S. at 529.
[36] 491 U.S. 524 (1989).
[37] *Bartnicki*, 532 U.S. at 529.
[38] *Id.* at 536 (quoting *id.* at 518).
[39] *Id.* at 541.
[40] The concurrence cited Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 2d 823 (C.D. Cal. 1989), a case involving the actress Pamela Anderson and her husband, rock star Tommy Lee.
[41] *Bartnicki*, 532 U.S. at 554–55.

surely have sided with Hulk Hogan and against Gawker's publication of the sex tape featuring him.

It also suggests that Bartnicki, although a 6-3 decision in favor of media, was ultimately a 5-4 decision against it – a decision against media's own discretion to determine newsworthiness in situations that involve personal privacy. Just as *Bartnicki* itself suggested, this had been hinted at in a more nuanced reading of those earlier seemingly pro-publication decisions, including the word "seldom" in *Daily Mail Publishing*. "[T]here *is* a zone of privacy surrounding every individual," the Court had written in *Cox Broadcasting v. Cohn*, for example, "a zone within which the State may protect him from intrusion by the press, with all its attendant publicity."[42] And in *Florida Star*, the justices had written: "We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense"[43] because there is "sensitivity and significance" in privacy interests that are just as profound as those inherent in press interests.

In other words, if anything, centuries of jurisprudence seemed to tip Hulk Hogan's way.

18.3 THE LEGACY OF GAWKER'S PUBLICATION OF HULK HOGAN'S SEX TAPE

The pretrial litigation over Hulk Hogan's sex tape was contentious. Gawker argued that the First Amendment protected its right to publish the tape as news, while Hogan claimed the explicitness of the tape violated his privacy. Although two preliminary court decisions found that any restriction on publishing the tape would be an unconstitutional prior restraint,[44] neither of these opinions addressed the graphic nature of the nudity and sexual intercourse. In fact, it was not clear whether the judges had even seen the video excerpts that Gawker published. In 2016, the case proceeded to a Florida jury.

[42] *Cox Broadcasting*, 420 U.S. at 487.

[43] *Florida Star*, 491 U.S. at 541.

[44] In 2012, a federal trial court rejected Hogan's request for a preliminary injunction to force removal of the tape, noting that his "public persona," composed of, among other things, reality television appearances, a biography, and discussion of his sex life, made the video "a subject of general interest and concern to the community." Bollea v. Gawker Media, 2012 U.S. Dist. Lexis 162711 (M.D. Fla. Nov. 13, 2012). Further, in 2014, a Florida appellate court overturned a trial court injunction and ruled that Hogan's "extramarital affair and the video evidence of such" were linked to "a matter of public concern" and, in the preliminary injunction context, were "within Gawker Media's editorial discretion to publish." Gawker Media v. Bollea, 129 So. 3d 1196 (Fla. App. 2014).

At trial, jurors heard the Gawker reporter who wrote the post admit that there was no news value in the graphic nudity shown in the tape,[45] and thereafter they decided that Gawker should pay Hogan $140 million, an astonishing amount that ultimately drove Gawker to bankruptcy. The case settled for $31 million, but even that sum was large enough to create quite a stir in the plaintiffs' bar. The Washington Post suggested that there was a new disorder, which it called "Hulk Hogan Syndrome" that was suddenly afflicting plaintiffs who'd been wronged by media, leading to these plaintiffs and their attorneys "winning big."[46] The headline theorized that such verdicts might well reflect hostility toward more modern publishers.

Since then, various courts have decided other cases in ways suggesting that Hulk Hogan Syndrome is real and that judges also might have it. Put another way, modern court decisions show that judges are both worried about privacy interests and fed up with the breadth of the newsworthiness defense – and, in turn, they have pivoted to positions that disfavor publishers. In 2022, for example, the federal district court for Oregon decided that a famous author's stepdaughter had a valid claim against her stepfather's biographer who had described in rather graphic terms the sexual abuse she had suffered at the hands of her birth father.[47] The Supreme Court of Indiana in 2023 decided that a patient's diagnosis and prescribed treatment were private information; the publisher had mistakenly received the information meant for another and had posted it to Facebook.[48] And, in 2023, a federal district court in Indiana held that Netflix producers who had shared on social media the identities of people conceived by a prolific sperm donor as part of a promotional campaign for a documentary could be liable for invasion of privacy.[49]

But, notably, in each of those examples – just as in the Hulk Hogan case – it is not clear whether any of those publishers should be considered journalists or whether those truthful publications should be considered journalism. It's possible to argue that such labels are appropriate in each, of course: that the biographer and the Facebook poster and the Netflix producers were all journalists and that each bit of truth that they published was news. But looking at those decisions from the *ethics* provisions that often inform journalists' decisions regarding what is appropriately published and what isn't – what newsworthiness means in a journalistic sense – the labels "journalist" and "news" are not at all clear. Many journalists, I would think, would say these decisions to publish were utterly inappropriate given the facts. And

[45] Eriq Gardner, *Gawker Trial: Editor Admits Hulk Hogan's Penis Isn't Newsworthy*, Hollywood Rep. (Mar. 16, 2016), https://www.hollywoodreporter.com/business/business-news/gawker-trial-editor-admits-hulk-875098/.

[46] Paul Farhi, *Rolling Stone Verdict May Reflect Hostility Toward Media*, Wash. Post, Nov. 6, 2016.

[47] Conroy v. Mewshaw, 2022 WL 2981453 (D. Ore. July 28, 2022).

[48] Z.D. v. Community Health Network, 217 N.E.3d 527 (Ind. 2023).

[49] Doe v. Netflix, 2023 WL 3848379 (S.D. Ind. June 6, 2023).

these, in part, are the reasons that judges who once deferred to the judgments of publishers of truth are less likely to do so today. Perhaps the greatest worry in all of this is that such decisions can now affect what might be considered "real" journalists, those in legacy journalism who might well decide after sincere newsroom introspection that a more graphic description of sexual abuse on different facts was appropriate to a news story, or that an individual's medical diagnosis was newsworthy, or that the precise names of people involved in something that had news value was an important part of the story. It is not going too far to suggest here that journalists like those who worked and continue to work in my old newsrooms can be chilled by such outcomes that involve people who published truth under very different standards.

This modern pushback against the broad invocation of newsworthiness in privacy cases can help inform discussions about who or what qualifies as press for constitutional purposes too. If law has created deferential carveouts for journalism over the years on the assumption that the journalistic entities would be operating within professional ethics strictures that decided questions of newsworthiness in a way that balanced important social norms and interests, what happens to those carveouts when those assumptions are no longer true? And how might this backlash against the actions of fringe actors who are eager to justify their behaviors as newsworthy lead to scalebacks that remove constitutionally valuable protections from those who are actually performing the press function?

It seems clear that a more sacrosanct approach to terms like "press" and "news" would ultimately benefit the whole – that more exclusive definitions would help protect the publishers that matter most. Privacy's history teaches that lesson. And a $140-million-dollar jury verdict is surely a very big lesson too.