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## Sympathy For The Devil: Gawker, Thiel, And Newsworthiness

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# Sympathy For The Devil: Gawker, Thiel, And Newsworthiness

**Keywords**

Hulk Hogan, Peter Thiel, individual privacy, journalists, newsworthiness, constitutionally protected press rights

## RESPONSE

### SYMPATHY FOR THE DEVIL: GAWKER, THIEL, AND NEWSWORTHINESS

AMY GAJDA\*

*At a time when some courts had shifted to protect privacy rights more than press rights, the Gawker website published a grainy and apparently surreptitiously recorded sex tape featuring professional wrestler Hulk Hogan. What the jury that awarded Hulk Hogan more than \$140 million in his privacy lawsuit did not know is that Peter Thiel, an individual apparently motivated to bring Gawker down, had helped to bankroll the plaintiff's case. This Response, inspired by The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism, argues that both sides in the Gawker dispute deserve some level of sympathy. First, Gawker for rejecting at times too restrictive ethics considerations when those considerations can lead to non-reporting that protects the powerful. But it also argues that sympathy is due to Thiel whose parallel motivation was to protect individual privacy at a time when some publishers believed they could publish whatever they wished. It ultimately concludes that caps on damages might best balance important and competing interests between press and privacy.*

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\* The Class of 1937 Professor of Law, *Tulane University Law School*. I am grateful to the *American University Law Review* for soliciting this Response from me and for excellent editing assistance. Thanks also to Chris Edmunds and David Meyer for helpful comments.

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*Pleased to meet you  
Hope you guess my name  
But what's puzzling you  
Is the nature of my game.*

—Rolling Stones, Sympathy for the Devil<sup>1</sup>

INTRODUCTION

There is a great quote from Politico media critic Jack Shafer in Lili Levi's important Article, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*.<sup>2</sup> "By secretly investing in the Hogan lawsuit," Shafer wrote, "Thiel has done the impossible: He's made us sympathize with Gawker."<sup>3</sup>

That collective "us" reflects multiple conversations that I have had with journalists and their allies who care deeply about press rights. Many sympathize with Gawker, a website known for its at times push-the-envelope but truthful reporting, and see Peter Thiel, a billionaire venture capitalist, as the enemy because he helped to bring down one of their own. Thiel indeed funded at least in part the Hulk Hogan invasion-of-privacy lawsuit that ultimately bankrupted Gawker.<sup>4</sup>

As Levi explained in her piece, however, Gawker and its news judgment had already become notorious by the time of the Hulk Hogan sex tape publication, including its 2007 story headlined "Peter Thiel is totally gay, people," at a time when Thiel considered that

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1. The Rolling Stones, *Sympathy for the Devil* (Decca Records 1968).

2. Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 777–78 (2017).

3. *Id.* (citing Jack Shafer, *Peter Thiel Does the Impossible! Nobody's Ever Sympathized with Gawker Before*, POLITICO (May 25, 2016), <http://www.politico.com/magazine/story/2016/05/gawker-peter-thiel-fourth-estate-213918>).

4. Levi, *supra* note 2, at 764 n.4, 773–75; see also Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016), <https://www.forbes.com/sites/mattdrange/2016/06/21/peter-thiels-war-on-gawker-a-timeline> (providing a background of Peter Thiel's career and a timeline of his attack on Gawker).

information part of his private life.<sup>5</sup> Part of its questionable reputation stemmed from Gawker Media founder and editor Nick Denton's near-mission statement that Gawker would publish the sort of information that ethics-abiding news publications would not<sup>6</sup> and the even more strident suggestion that Gawker would publish any information, as long as it was true and interesting.<sup>7</sup> Such a propriety-defying publication history, especially the flaunting of journalistic ethics, makes Gawker decidedly devilish. There is, however, good reason to have sympathy for the sort of devil that sets out to report the truth known to only a select, and often times, powerful few. One wonders, for example, if Gawker's journalistic audacity had been more commonplace, whether Hollywood mogul Harvey Weinstein, Alabama politician Roy Moore, and multiple others in power would have been able to mistreat as many as they allegedly did. Truthful reporting helps bring to light important secrets in Hollywood, in Congress, and in other high places—secrets often known to journalists who are silenced more by ethics considerations than legal ones. All that makes Gawker as an entity rather sympathetic.

And yet, journalism's ethical limits are there in large part to protect individuals' rights to privacy. Gawker's carefree attitude toward the very real emotional harm that can be done to people when their privacy is invaded is what ultimately brought it down.

This means that if one values individual privacy at all, it is possible to have sympathy for another devil of sorts, and that is Peter Thiel himself.<sup>8</sup> Thiel held a grudge and brought down a website that many relied upon for information, but, in doing so, helped protect individual privacy at a time when many online publishers believed that they could indeed publish whatever they wanted as long as it was true.

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5. *Id.* at 770 (examining Gawker's notoriety on the internet even prior to the Hulk Hogan sex tape).

6. Jeff Bercovici, *Playboy Interview: Nick Denton*, PLAYBOY (Feb. 24, 2014, 8:30 AM), <http://www.playboy.com/articles/gawker-playboy-interview-nick-denton>. This would include, Denton suggested, "sex pictures" because such images would be beneficial for society by having the effect of changing institutions, rather than damaging the individual. *Id.*

7. See Erik Wemple, *Condé Nast Exec Story: Gawker is Keeping Its Sleaze Game in Shape*, WASH. POST (July 17, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/07/17/conde-nast-exec-story-gawker-is-keeping-its-sleaze-game-in-shape> (detailing the actions of Gawker in a scandal after the Hogan lawsuit).

8. Thiel might be considered devilish in another way. He was an early investor in Facebook, a company known for disrupting both traditional media and traditional notions of privacy.

This Response<sup>9</sup> proceeds in two main parts. In Part I, it explores three lawsuits whose troubling legal legacy stemmed, at least in part, from Gawker's news judgment hubris at a time when the courts' patience for the media was thinning.<sup>10</sup> Part II describes how an emerging judicial shift favoring privacy over press rights led in part to Gawker's downfall.

Finally, Part III suggests that sympathy for Gawker is appropriate as long as that sympathy is tempered by frank understanding of the very real costs its devil-may-care brashness posed not only for its subjects, but for a free press itself.

### I. GAWKER AND ITS CHOICES

I have argued before that Gawker is not typical mainstream journalism.<sup>11</sup> I labeled it quasi-journalism, an umbrella term that includes publications that publish truth while, at times, flaunting mainstream journalism's ethical considerations.<sup>12</sup> The quasi-journalism category differentiates Gawker's questionable publication choices from those of more ethics-based traditional journalism outlets such as the *New York Times*.

The differentiation is important in journalism. Ethics considerations play a key role in news judgment; reporters struggle daily with how much, if any, embarrassing information to include in any particular story. Journalists must be concerned not only with the truthfulness and relevance of the information they publish, but also with whether the harms that might come to individuals from disclosure outweigh the public's interest in the matter. The Society of Professional Journalists' Code of Ethics, for example, suggests that

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9. Essay would be a better word, given that this piece was inspired by Professor Levi's Article and is not meant to be a direct response to her arguments. In fact, several of the points made here do not contradict but amplify some of the points made by Professor Levi.

10. See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1041–43, 1067–68, 1071–72, 1077–78 (2009) (arguing that “declining respect for journalism and growing anxiety over the loss of privacy” shifted judicial deference in defining “newsworthiness” from journalists themselves to, at times, the standards suggested by their code of professional ethics).

11. See, AMY GAJDA, THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPAZZI THREATEN A FREE PRESS 122–23 (2015) (arguing that Gawker, unlike traditional journalism, published sensational news items more likely to inflict emotional harm, and that it refused to follow an established mainstream ethics code).

12. *Id.*

journalists minimize the harm that might occur from their coverage.<sup>13</sup> “Journalists should,” one provision reads, “[b]alance the public’s need for information against potential harm or discomfort.”<sup>14</sup> That same provision reminds journalists that “[p]ursuit of the news is not a license for arrogance or undue intrusiveness.”<sup>15</sup> Another warns that even though journalists may legally have access to certain information, the publication of that information may not be ethical.<sup>16</sup> For example, an additional provision reads that journalists should avoid publishing information that merely panders to the public’s lurid curiosity.<sup>17</sup>

I have argued that adherence to these ethics provisions and others like them helps differentiate a journalist from a mere publisher of information.<sup>18</sup> And this differentiation implicitly undergirds the legal precedents that have given journalists wide latitude. As the law currently stands, “newsworthiness” is the boundary line that separates legally protected privacy interests from constitutionally protected press rights.<sup>19</sup> For the most part, courts have been inclined to defer to journalists in deciding what is newsworthy, effectively presuming that anything published by reputable media has value as news. But that deference dates back to an era in which professional journalists largely controlled access to the printing presses and broadcast spectrum necessary to reach a mass audience. As a result, established judicial deference to journalists has been premised on an assumption that journalists are doing their own responsible privacy-versus-public-interest sort of balancing test before a news story sees the light of day.

These assumptions are now bumping up against the realities of a new age in which everyone has access to publish and which renegade disruptors like Gawker are challenging traditional media norms.

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13. *SPJ Code of Ethics*, SOC’Y OF PROF. JOURNALISTS, <http://www.spj.org/ethicscode.asp> (last updated Sept. 6, 2014, 4:49 PM).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See id.* (noting that journalists should “[a]void pandering to lurid curiosity”).

18. *See* GAJDA, *supra* note 11, at 222–24, 254–58 (arguing that to prevent erosion of the freedom of press, journalists should separate themselves from “unethical publishers who call for continually extending press rights to shield every conceivable disclosure of information, no matter the source and no matter the resulting harm”).

19. The Restatement (Second) of Torts points out that there is no invasion of privacy when journalists publish on matters of legitimate public concern. RESTATEMENT (SECOND) OF TORTS § 352D cmt. d (AM. LAW INST. 1977). This includes matters that are “customarily regarded as news.” *Id.* cmt. g.

In other words, despite Gawker's focus on truth over ethics, there is no blanket protection in the law for the revelation of all pieces of truthful information simply because they are truthful. The legal analysis at issue when a lawsuit involves privacy-invading truth is far more nuanced and has been so since at least 1890 when Samuel Warren and Louis Brandeis wrote their famous law review article, *The Right to Privacy*, arguing that we all have a right to privacy that should protect us from unfettered media choices.<sup>20</sup>

The Second Restatement of Torts, published nearly ninety years later, also helped to introduce the question of newsworthiness into this balance between individual privacy rights and freedom of the press.<sup>21</sup> The Restatement protects publishers who publish truthful information but only to a point. It suggests that liability is appropriate for media that publishes truthful information that can be characterized as "morbid and sensational prying . . . for its own sake,"<sup>22</sup> information that would be of no interest to a member of the public with decent standards.<sup>23</sup>

Despite the respect being accorded individual privacy, courts have protected journalists' news choices, even when those decisions were at the margins of propriety.<sup>24</sup> In addition to constitutional concerns, courts would explain that they knew little of journalism and, therefore, hesitated to second guess the news judgments made by professional journalists.<sup>25</sup> Such hesitation of the courts meant that for years journalists routinely won invasion-of-privacy lawsuits brought by plaintiffs whose private information had been published.<sup>26</sup>

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20. See Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1891) (discussing the foundations and development of privacy law).

21. RESTATEMENT (SECOND) OF TORTS § 652D.

22. *Id.* cmt. h.

23. *Id.* cmts. g–h (identifying the Restatement section that includes what is "customarily regarded as news," and explaining the scope of a private fact).

24. See, e.g., *Anderson v. Blake*, No. CIV-05-0729-HE, 2006 WL 314447, at \*2 (W.D. Okla. Feb. 9, 2006) (deciding as a matter of law that the media's right to disseminate newsworthy information outweighed an individual's right to privacy, where the newsworthy information was a video of the plaintiff being raped), *aff'd sub nom.* *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007).

25. See, e.g., *id.* at \*2 (citing *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989)) (stating that judicial judgments on journalists' decisions could have a "chilling effect on the freedom of the press to determine what is a matter of legitimate public concern").

26. See Gajda, *supra* note 10, at 1957–61 (reviewing Supreme Court decisions and the lower courts' interpretation of these decisions—"[I]t often appeared that the 'news' was whatever reporters and editors said it was").

One rather extreme example of this deference to journalism is the outcome in *Anderson v. Blake*.<sup>27</sup> In *Anderson*, a television news program had aired video portions of the plaintiff's rape, a crime that had been videotaped by her attacker.<sup>28</sup> The court admitted that the clip showed "brief shots of plaintiff's naked feet and calves [and] also revealed the alleged attacker's face, showed portions of his naked body and depicted him moving above and around plaintiff's obscured body."<sup>29</sup> Nevertheless, the court decided that the tape's news value trumped the plaintiff victim's privacy rights: "As plaintiff admits," the court wrote, "the circumstances surrounding her alleged rape and the alleged rapes of two others by the same person were newsworthy" and the tape itself helped provide evidence to viewers that the man had indeed committed the crime and had recorded it.<sup>30</sup>

In *Anderson*, the court suggested that its hands were basically tied. It could not properly protect the freedom of the press to determine what is of legitimate public concern while simultaneously engaging in "after-the-fact judicial 'blue-penciling.'"<sup>31</sup> Even if the court, in hindsight, would have made a different editorial decision, it explained that it had to "resist the temptation to edit journalists aggressively."<sup>32</sup>

With the growth of the internet, however, came a decided change in media and a shift among some judges from news judgment deference to news judgment skepticism. As publishers began to publish information without seeming regard to ethics-delineated boundaries and individual privacy interests, courts began to respond by curtailing journalists' ability to decide for themselves what is newsworthy.<sup>33</sup> These courts also began to embrace privacy more stridently.<sup>34</sup> The Ohio Supreme Court, for example, accepted the false light privacy tort for the first time in 2007.<sup>35</sup> The court explained that "ethical standards regarding the acceptability of certain [internet-based] discourse ha[d] been

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27. No. CIV-05-0729-HE, 2006 WL 314447, at \*1 (W.D. Okla. Feb. 9, 2006), *aff'd sub nom.* *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007).

28. *Id.*

29. *Id.* (footnotes omitted).

30. *Id.* at \*2.

31. *Id.* (citing *Ross v. Midwest Commc'ns, Inc.*, 870 F.2d 271, 275 (5th Cir. 1989)).

32. *Id.*

33. *See, e.g.*, GAJDA, *supra* note 11, Chapter Three (reviewing a number of state and federal court decisions ruling against the media).

34. *See, e.g.*, *Welling v. Weinfeld*, 866 N.E.2d 1051, 1059 (Ohio 2007) (adopting § 652(e) of the Restatement (Second) of Torts).

35. *Id.* at 1052; 57 A.L.R.4th 22 (1987).

lowered,” leading to real harm to individuals’ reputations.<sup>36</sup> Thus, “the law’s ability to protect the innocent” needed bolstering.<sup>37</sup> A year later, a federal trial court decided that NBC could be liable for intentional infliction of emotional distress for its “To Catch a Predator” reporting; a prosecutor (and apparent would-be child sex offender) had killed himself while cameras waited to record his arrest.<sup>38</sup> The court suggested that NBC had failed to follow journalism ethics rules, thereby creating potential liability for its truthful, but what the court apparently considered emotionally harmful and privacy-invading, reporting.<sup>39</sup>

It was in this decidedly shifted environment—one that was beginning to embrace privacy ideals over the freedom of the press—that Gawker published the Hulk Hogan sex tape.<sup>40</sup> In doing so, Gawker pushed the question of where to draw the press-privacy line to the forefront in a case involving extreme and decidedly uncomfortable facts. The case is explored more fully later in this Response.<sup>41</sup>

In July 2015, while the Hulk Hogan case was pending, Gawker pushed another envelope of journalistic propriety when it published text messages between the relatively unknown David Geithner, the chief financial officer of Condé Nast who was married to a woman, and a male escort who was also a porn star.<sup>42</sup> The texts were deeply private and their public revelation would be certainly embarrassing.<sup>43</sup> Moreover, in a journalistic sense, they appeared merely voyeuristic and had little or no news value.<sup>44</sup> “[T]his is Gawker,” the *Washington Post* critically noted, suggesting that Gawker had made a “pretty automatic editorial decision” to “Publish!” even under decidedly questionable conditions.<sup>45</sup> “The rest of the world,” the *New York Times* reported,

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36. *Welling*, 866 N.E.2d at 1058.

37. *Id.* at 1058–59.

38. *Conradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 383 (S.D.N.Y. 2008).

39. *Id.*

40. See Mary Bustillos, *Everything You Need to Know About Hulk Hogan vs Gawker*, MOTHERBOARD (July 1, 2015), [https://motherboard.vice.com/en\\_us/article/mgbyd8/hulk-hogans-sex-tape-is-about-to-go-to-trial-gawker](https://motherboard.vice.com/en_us/article/mgbyd8/hulk-hogans-sex-tape-is-about-to-go-to-trial-gawker) (detailing the circumstances of the Hulk Hogan lawsuit).

41. See *infra* Section I.C (describing the Hulk Hogan case in depth, including the process of publication and the public’s reaction).

42. Wemple, *supra* note 7.

43. *Id.* (reporting that David Geithner had arranged to pay a male escort \$2500 for a three-hour session).

44. *Id.* (noting that the meeting between Geithner and the male escort ultimately did not come to fruition, and thus, it was “[n]ot that much of a story”).

45. *Id.*

“scream[ed] in condemnation” of Gawker’s publication choice.<sup>46</sup> The *Huffington Post* accused Gawker of “gay-shaming,” refusing to label the “outing” story as journalism.<sup>47</sup> The subhead to the *Huffington Post* article read, “The people who work there should be ashamed.”<sup>48</sup>

Eventually, Nick Denton ordered the article removed from the Gawker website.<sup>49</sup> He explained that he had come to recognize that the media environment had shifted from one that would defend the article as based on truth to one that expected greater editorial restraint.<sup>50</sup> “We all have secrets,” he explained, and “they are not all equally worthy of exposure.”<sup>51</sup>

But the damage had been done. Clay Calvert, a journalism professor at the University of Florida and a staunch advocate of the press, told *The Washington Post* at the time that the questionable publication showed that Gawker had continually “push[ed] the envelope of newsworthiness.”<sup>52</sup> He predicted that, someday, a pro-press First Amendment defense based upon news value alone would not be successful in court and that Gawker would lose.<sup>53</sup> That day would come a few months later when a jury decided that Gawker had gone too far in its publication of the Hulk Hogan sex tape.<sup>54</sup>

The notion of an unfettered press speaking truth to power is sympathetic, even heroic, but there is room for doubt over whether Gawker’s news judgments should be considered journalism, given its gaudy rejection of conventional professional standards.<sup>55</sup> Was Gawker playing a game of sorts with courts when it proudly crossed the line of appropriateness in publishing? Or was the game when it wrapped itself

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46. *Id.*

47. See Gabriel Arana, *Gawker’s Outing of Condé Nast CFO is Gay-Shaming, Not Journalism*, HUFFINGTON POST, [http://www.huffingtonpost.com/entry/gawker-condenast-david-geithner\\_us\\_55a90c56e4b0c5f0322d0b2c](http://www.huffingtonpost.com/entry/gawker-condenast-david-geithner_us_55a90c56e4b0c5f0322d0b2c) (last updated July 21, 2015, 2:35 PM) (“The people who work there should be ashamed.”).

48. *Id.*

49. Nick Denton, *Taking a Post Down*, KINJA: NICK DENTON (July 17, 2015, 2:30 PM), <http://nick.kinja.com/taking-a-post-down-1718581684>.

50. *Id.*

51. *Id.*

52. Wemple, *supra* note 7.

53. *Id.*

54. See *Bollea v. Gawker*, No. 12-012447CI-11, 2016 Fla. Cir. Lexis 4703, at \*¶3–5 (Fla. Cir. Ct. June 8, 2016) (agreeing with the jury that the sex tape was not a matter of legitimate public concern, and therefore Gawker’s invasion of Terry Bollea’s privacy was not protected by the First Amendment).

55. See GAJDA, *supra* note 11, at 122–23.

in First Amendment protections when it made news judgments antithetical to traditional journalism?

Gawker's devilish role becomes clearer given three examples of the ways in which the judicial system responded to the website and its envelope pushing. In each, there seems to be at least the potential for some lasting anti-Gawker effect that could burden all media.

#### A. *The Teenager v. Gawker*

Unfortunately, in any discussion of media litigation financing, the Gawker case stands as today's most prominent example. Litigation financing, especially by individuals out to get media companies, is indeed troubling, as Professor Levi explains. Yet, as detailed above, Gawker's own brashly anti-ethics stance necessarily makes it far from the perfect media darling.<sup>56</sup>

As another example, take Gawker's 2012 decision to publish an article titled, "*Female High School Student Accused of Flashing Vagina in Yearbook Photo*," which brought international attention to a North Carolina high schooler.<sup>57</sup> The article suggested that the 18-year-old had been accused of "exposing her hooha" by "lifting her graduation gown," and that said image had been published in the high school yearbook, which Gawker called a "crotchbook."<sup>58</sup> To illustrate its story, Gawker included a photo of the high school student in her cap and gown, but it covered both her face and her pelvic area with suggestive black bars.<sup>59</sup>

The teenager asked that Gawker take the story down, arguing that editors had decidedly misconstrued her fully clothed and very appropriate yearbook stance, but Gawker refused.<sup>60</sup> The student's resulting lawsuit maintained that she had suffered severe emotional harm after the publication of the article, explaining that even strangers had ridiculed her.<sup>61</sup> She brought claims against Gawker for libel and for negligent infliction of emotional distress.<sup>62</sup> Gawker filed a motion

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56. Levi, *supra* note 2, at 765; *see supra* notes 5–7 and accompanying text.

57. Neetzan Zimmerman, *Female High School Student Accused of Flashing Vagina in Yearbook Photo*, GAWKER (May 25, 2012, 11:00 AM), <http://gawker.com/5913350/female-high-school-student-accused-of-flashing-fem-junk-in-yearbook-photo>; *see also* Araya v. Deep Dive Media, LLC, 966 F. Supp. 2d 582, 585 (W.D.N.C. 2013).

58. Zimmerman, *supra* note 57.

59. *Id.*

60. Araya, 966 F. Supp. 2d at 586.

61. *Id.* at 586–87.

62. *Id.* at 585.

to dismiss, arguing that the First Amendment protected its decision to run the story.<sup>63</sup>

The Western District of North Carolina was clearly not amused. It sided strongly with the high school student in an opinion highly critical of Gawker's choice to publish.<sup>64</sup> In a sharp response to Gawker's claim that the article concerned a public controversy and therefore deserved First Amendment protection, the court found that the article "tended to pander more to the 'lurid' [and] 'voyeuristic attention of the people.'"<sup>65</sup> Gawker had used a sensational and graphic headline—"Flashing Vagina[s]"—to attract readers to its website.<sup>66</sup> Moreover, and of key importance to future First Amendment litigants, the court suggested that the situation involved both a private party and a private controversy and, therefore, deserved lessened protection.<sup>67</sup> The court also found that "the false accusation that [the plaintiff] actively lifted her gown for the purpose of a photograph [was] sufficient to be libelous per se."<sup>68</sup>

Finally, the court held that the student's negligent infliction of emotional distress claim was valid, which is a troubling result for future media litigants, given the emotional distress that any news story could well cause to the individual at its focus.<sup>69</sup> The court found that, under North Carolina's "Good Faith and Retraction" statute, once the student notified Gawker of the article's inaccuracies, Gawker had a duty to publish a retraction and by not doing so, Gawker had breached its duty.<sup>70</sup> More importantly, the court ruled that the plaintiff's severe

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63. *Id.* at 582–83, 587; *see also* Memorandum in Support of Motion to Dismiss at 4, 6, 7, 9, *Araya*, 966 F. Supp. 2d 582 (citing various cases arguing that the First Amendment protects expression, even when that speech is insulting or outrageous).

64. *Araya*, 966 F. Supp. 2d at 592.

65. *Id.* (quoting *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1107 (D.D.C. 1991)).

66. *See id.* (noting that "[t]he article lured readers to the website with a sensational headline focused on 'Flashing Vagina[s]'" ).

67. *Id.* at 594 ("[T]his Court does not believe that the First Amendment protects false statements in libel or infliction of emotional distress cases concerning private plaintiffs and private controversies." ).

68. *Id.* at 598 ("A fair interpretation by the ordinary person would arrive at the conclusion that such an individual was disrespectful of the decorum demanded by societal norms, and perhaps was purposefully seeking attention for his or her own behavior." ).

69. *Id.* at 603.

70. *Id.* at 601–02.

Before any action, either civil or criminal, is brought for the publication, in a newspaper or periodical, of a libel, the plaintiff or prosecutor shall at least five days

emotional distress was foreseeable.<sup>71</sup> “Because of the age of the plaintiff,” the court reasoned, “the widespread nature of [Gawker’s] media reach, the vulnerability of private individuals in the press, the embarrassing nature of the facts as represented, and the notice of falsehood,” the plaintiff had pleaded foreseeability with “sufficient factual heft.”<sup>72</sup> Note in particular the court’s concern not for freedom of the press, but for “the vulnerability of private individuals in the press”<sup>73</sup> and how that language contrasts with historic language lauding the press.<sup>74</sup>

The story of the mortified teenager shows how bad facts make bad and lasting law in the current anti-media environment. News judgments made by publishers like Gawker can harm all media when courts respond by eroding the traditional judicial deference that had long shielded journalistic news judgment. It is relevant here too that the court considered the Gawker article a “piece of journalism”<sup>75</sup> published by “the press”<sup>76</sup> and, in that context, emphasized the vulnerability of people like the plaintiff who had been harmed by publishers. That language and the ultimate outcome, especially the suggestion that the plaintiff had a valid negligent-infliction-of-emotional-distress claim, has at least the potential to shape the outcome in lawsuits brought against media in the future.

### B. *The Acquitted and Gawker*

As a second example of how Gawker has helped in some part to shape the changing anti-media legal landscape, consider *Huon v. Denton*,<sup>77</sup> a lawsuit involving Gawker’s at-the-time spinoff website, *Jezebel*.<sup>78</sup> The outcome, a reverse-and-remand decision by the Seventh Circuit, may not appear particularly troubling at first, especially

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before instituting such action serve notice in writing on the defendant, specifying the article and the statements therein which he alleges to be false and defamatory. N.C. GEN. STAT. § 99-1(a) (2012).

71. *Araya*, 966 F. Supp. 2d at 602.

72. *Id.*

73. *Id.*

74. See, for example, *Time, Inc. v. Hill*, 385 U.S. 374 (1967), in which the Court wrote that constitutional “guarantees are not for the benefit of the press so much as for the benefit of all of us” because “a broadly defined freedom of the press assures the maintenance of our political system and an open society.” *Id.* at 389.

75. *Araya*, 966 F. Supp. 2d at 585.

76. *Id.* at 602.

77. 841 F.3d 733 (7th Cir. 2016).

78. *Id.* at 736; JEZEBEL, <https://jezebel.com> (last visited Nov. 30, 2017).

because the judge sided with Gawker on a number of fronts.<sup>79</sup> At the same time, however, the outcome suggests some pushback against traditional protections for the press.<sup>80</sup> In short, the court's decision reads almost as if it wanted to find Gawker liable for something.

The case involved a man who had sued an unaffiliated website for suggesting that he was a rapist when he had, in fact, been acquitted of the crime.<sup>81</sup> The Gawker-related article was provocatively titled "*Acquitted Rapist Sues Blog for Calling Him Serial Rapist*"<sup>82</sup> and included the man's booking photograph.<sup>83</sup> The plaintiff argued in part that the headline partnered with the mugshot suggested that he was a rapist, when in fact, he had been acquitted.<sup>84</sup> The Seventh Circuit rejected the plaintiff's defamation claim.<sup>85</sup> "[H]eadlines must be considered alongside the accompanying article and not in isolation," the court wrote, finding that the article itself accurately described the circumstances of the man's acquittal.<sup>86</sup>

Gawker, however, did not fare as well when the court considered the comments left by readers under the article.<sup>87</sup> Normally, section 230 of the Communications Decency Act (CDA) protects websites from tort liability for comments left by others so that website publishers are not tasked with cleaning up unaffiliated speech.<sup>88</sup> Here, however, the plaintiff argued that "Gawker's comments forum was not a mere passive conduit for disseminating defamatory statements" but that "Gawker itself was an information content provider."<sup>89</sup> The court agreed, in effect, that Gawker could be liable if it had done the following things that the plaintiff alleged:

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79. *Huon*, 841 F.3d at 736 (finding that the trial court judge correctly rejected the defamation claim because the title of the article was innocent when read with the whole article, and the article was an accurate report).

80. *Id.* at 742 (explaining that Gawker may be correct that none of Huon's allegations actually occurred, but that does not warrant dismissal).

81. *Id.* at 736.

82. *Id.*

83. *See id.* at 737 (explaining that the Jezebel article superimposed the defendant's 2008 mugshot onto the Above the Law (ATL) article and explained both the criminal trial for rape and the lawsuit against ATL).

84. *Id.* at 739.

85. *Id.* at 736.

86. *Id.* at 739.

87. *Id.* at 736–37. The website at issue was Jezebel, one of Gawker's websites at the time. The court repeats the Gawker name throughout, however.

88. 47 U.S.C. § 230(c)(1), (f)(3) (2012).

89. *Huon*, 841 F.3d at 742.

(1) “encouraged and invited” users to defame [the plaintiff], through selecting and urging the most defamation-prone commenters to “post more comments and continue to escalate the dialogue”; (2) “edited,” “shaped,” and “choreographed” the content of the comments that it received; (3) “selected” for publication every comment that appeared beneath the Jezebel article; and (4) employed individuals who authored at least some of the comments themselves.<sup>90</sup>

Past courts had rejected related claims against websites because of section 230 of the CDA.<sup>91</sup> Here, however, the Seventh Circuit decided that the plaintiff could attempt to prove these allegations—seemingly including comment selection and comment encouragement for profit—reversing the trial court judge who ruled that the plaintiff failed to state a claim.<sup>92</sup>

Although the court did not discount the plaintiff successfully proving all four points to support his claim, it highlighted the fourth—that Gawker employed some of the anonymous commenters—regardless of the fact that there was no apparent evidence to support the allegation.<sup>93</sup> Moreover, the court seemed to be particularly interested in the economic reasons that may have been behind Gawker’s decision to accept comments in the first place. The court viewed critically the complaint’s allegation that Gawker “employees might have anonymously authored comments, alleging that increasing the defamatory nature of comments can increase traffic to Gawker’s websites, which can in turn enhance the attractiveness of Gawker’s commenting system for prospective advertisers.”<sup>94</sup> Furthermore, the court’s opinion critically explained how Gawker had planned to “monetize” comments and why this might be attractive to advertisers.<sup>95</sup> This sort of focus—on media’s business interests as relevant to its

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90. *Id.*

91. *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (holding that section 230 of the CDA barred claims against a publisher who failed to remove or screen defamatory messages); *see also* *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (finding that section 230 “allows website operators to engage in blocking and screening of third-party content, free from liability for such good-faith efforts”).

92. *Huon*, 841 F.3d at 736, 742.

93. *Id.* at 742.

94. *Id.*

95. *Id.*

potential liability—rejects longstanding precedent that suggests that journalism’s profitability interests should be irrelevant.<sup>96</sup>

Gawker denied all of the plaintiff’s allegations<sup>97</sup> and amici helped argue that a pro-plaintiff response by the court would lead to a wave of frivolous claims springing from unaffiliated others’ comments despite CDA protections.<sup>98</sup> The Seventh Circuit was not persuaded.<sup>99</sup> “Indeed,” the court wrote, “potentially meritorious claims could be prematurely and improperly dismissed if we were to accept the Gawker Defendants’ position, since the information necessary to prove or refute allegations like [the plaintiff’s] is typically available only to defendants.”<sup>100</sup>

This outcome is troubling for all news media. First, section 230 of the CDA has been interpreted broadly to protect behavior such as selecting certain comments for publication and for editing out certain comments.<sup>101</sup> Second, many websites benefit in some way from comments; the additional clicks help prove an increasing readership and an increasing readership helps raise advertising rates, even for mainstream news sites.<sup>102</sup> Finally, some mainstream news organizations actively encourage reporters to engage commenters with comments of their own after an article in order to answer questions and maintain civility.<sup>103</sup> The possibility that liability can spring from the encouragement and shaping of comments, and potentially even from the economic interests in comments, is troubling for websites of any

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96. This is inherent in the CDA itself. *See Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 690 (S.D. Miss. 2014) (rejecting the plaintiff’s assertion that defendant’s receipt of profits from advertising was improper under the CDA).

97. *Id.* (clarifying that Gawker may, in fact, be innocent, but the allegations are not so implausible that a dismissal under Rule 12(b)(6) is warranted).

98. *Id.* at 742–43.

99. *Id.* at 743.

100. *Id.*

101.

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected . . . .

47 U.S.C. § 230(c)(2)(a) (2012).

102. *See Adam Felder, How Comments Shape Perceptions of Sites’ Quality—and Affect Traffic*, ATLANTIC (June 5, 2014), <https://www.theatlantic.com/technology/archive/2014/06/internet-comments-and-perceptions-of-quality/371862> (suggesting that the “bottom-line metric on the web” is traffic).

103. For an example, see *nola.com*, the website of the New Orleans *Times-Picayune* newspaper.

sort. It is all the more troubling considering that the *Huon* decision came from a federal appellate court with the very real power to shape outcomes in similar cases in the future.

### C. Gawker and Hulk Hogan

In 2012, Gawker published a grainy and graphic sex tape featuring professional wrestler Hulk Hogan.<sup>104</sup> “[B]ecause the internet has made it easier for all of us to be shameless voyeurs and deviants,” the article that introduced the sex tape explained, “we love to watch famous people having sex” even though it is “something we’re not supposed to see.”<sup>105</sup> Gawker titled its article, “*Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed is Not Safe for Work but Watch it Anyway.*”<sup>106</sup>

In Fall 2012, a former student who remembered that this particular press-privacy clash regarding a celebrity sex tape was one that I predicted would occur someday alerted me to the article. As Gawker urged in its headline, I watched the video at work and I took notes, recognizing that a lawsuit may well be filed based upon the publication and that the video could soon disappear in response.

In those notes, I wrote that the video “showed Hulk Hogan’s buttocks and penis for approximately one minute and twenty seconds.” That meant that anyone who clicked on the link could watch Hulk Hogan fully nude and engaged in sexual behavior for over a minute; Gawker’s attorneys have suggested that ten seconds of this nudity involved graphic sex.<sup>107</sup> An attorney for Hulk Hogan described the tape as one that featured “oral sex” and “standard sexual intercourse,” one that also went to great lengths to provide subtitles as Hogan spoke to his sex partner.<sup>108</sup> While it would not matter much to the law at

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104. The original article is no longer available, but a screenshot can be found here: Jonathan Mahler, *Gawker’s Moment of Truth*, N.Y. TIMES, (June 12, 2015), <https://www.nytimes.com/2015/06/14/business/media/gawker-nick-denton-moment-of-truth.html>.

105. *Id.*; Eriq Gardner, *Gawker Trial: Editor Admits Hulk Hogan’s Penis Isn’t Newsworthy*, HOLLYWOOD REP. (Mar. 14, 2016, 9:42 AM), <http://www.hollywoodreporter.com/thr-esq/gawker-trial-editor-admits-hulk-875098>.

106. Gardner, *supra* note 104.

107. *Poucher Lecture 2017*, FLA. L. REV. (Nov. 9, 2017), <https://mediasite.video.ufl.edu/Mediasite/Play/c297f67eec0343c7b3292b7d9702bba81d> (statement made by Gregg Thomas, Gawker’s local counsel).

108. Julia Marsh & Yaron Steinbuch, *Where Gawker Editor Draws the Line: A Sex Tape of a 4-Year-Old*, N.Y. POST (Mar. 9, 2016, 11:29 AM), <http://nypost.com/2016/03/09/gawker-editors-line-a-sex-tape-of-a-4-year-old> (“I saw a video depicting my client having sex, oral sex, standard sexual intercourse, [that] took great pains to display his

issue, it is also worth noting that it appeared that Hulk Hogan had no idea he was being taped;<sup>109</sup> his casual spoken and body language suggested as much. Moreover, the video camera seemed affixed to someplace high, perhaps the bedroom ceiling, creating a view from above as might a security-type camera. The camera did not seem placed in a way that would have given a more provocative view of captured behaviors.

Ultimately, Gawker did not defend its decision to publish the sex tape well. A.J. Daulerio, the author of Gawker's Hulk Hogan sex tape story, suggested at trial that he was "amused" by the tape because it "was not a situation [Daulerio] ever expected to watch [Hulk Hogan] in."<sup>110</sup> The *Hollywood Reporter's* coverage of the trial highlighted in part Daulerio's admission that the graphic nudity featured in the Hulk Hogan sex tape had little or no news value:

After Daulerio acknowledged that he had told other *Gawker* staffers that Hogan's penis should be shown in the video, [Hogan's attorney] zeroed in on the topic.

"Mr. Bollea's penis had no news value, right?" asked [Hogan's attorney].

"No," responded Daulerio.

"It wasn't newsworthy, right?"

"No."

"There was no news value to showing them having sex?"

"No, not necessarily."<sup>111</sup>

The *Hollywood Reporter* also focused on Daulerio's testimony about his publishing motivations and his lack of concern about how others might view the tape:

"You could have commented [on what appeared in the tape] without showing the tape?" [Hulk Hogan's attorney] asked.

"I could have," said Daulerio.

"You believed publishing the sex tape would bring traffic to the site, right?"

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penis and even went so far as to demonstrate what everyone was saying to each other . . . by virtue of incorporating subtitles.").

109. I spent a number of years working in television before I became a lawyer and, therefore, usually have some ability to judge whether individuals are aware of a camera's presence or not. As I recall from the tape, Hogan moves about the room and talks informally in a way that suggests he does not know he is being filmed.

110. Gardner, *supra* note 104.

111. *Id.*

“Again, the whole point of publishing is to bring traffic. This is the way I chose to present the story.”

“You didn’t care whether it emotionally distressed him, right?”

“That’s not my job.”

“It didn’t matter that it was a morbid and sensation-prying, did it?”

“No it didn’t.”<sup>112</sup>

Earlier, Daulerio had testified in a deposition contradictorily that most sex videos had news value, even including those involving children.<sup>113</sup> When Hulk Hogan’s attorney asked Daulerio where he might draw the line, Daulerio suggested that coverage of sex tapes involving children aged four and under would be inappropriate.<sup>114</sup>

By its own admission, then, Gawker had made a decision to publish the Hulk Hogan sex tape without regard to news value, but for public amusement and for clicks. Gawker’s statements regarding the lack of news value in the sex tape had sealed its fate, even arguably on appeal. Recall the Restatement’s focus on newsworthiness and its suggestion that morbid and sensational prying for its own sake would not be tolerated.<sup>115</sup>

The jury awarded Hulk Hogan \$140 million dollars in damages.<sup>116</sup> The case settled in late 2016 for \$31 million.<sup>117</sup>

## II. THE PERFECT STORM: GAWKER AND A FED-UP JUDICIARY

In 1995, Judge Abner Mikva of the U.S. Court of Appeals for the D.C. Circuit warned in a law review article that a change was coming in the

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112. *Id.*

113. Marsh & Steinbuch, *supra* note 108.

114. *Id.* Later, Gawker suggested that Daulerio was being flippant. *See* Gardner, *supra* note 104 (explaining how Daulerio testified at trial that Hogan’s attorneys knew he was being sarcastic during the deposition, but acknowledging that child pornography is not a topic to joke about).

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

116. Laura Wagner, *Jury Awards Hulk Hogan Additional \$25 Million in Sex Tape Lawsuit Against Gawker*, NPR (Mar. 18, 2016, 9:22 PM), <http://www.npr.org/sections/thetwo-way/2016/03/18/471037070/jury-awards-hulk-hogan-115-million-in-sex-tape-lawsuit-against-gawker>.

117. Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html>.

law that would negatively affect all media.<sup>118</sup> “Watch out!” he wrote, “[t]here’s a backlash coming in First Amendment doctrine.”<sup>119</sup>

Judge Mikva explained that there was a feeling among some judges that current legal precedent from the time of *New York Times Co. v. Sullivan*<sup>120</sup> protected the media’s “inaccurate and harmful reporting” too strongly and that “the state of journalism,” including a decline in standards in reporting, had led to the coming backlash.<sup>121</sup> At the dawn of the internet, then, long before Gawker and similar websites had entered the publishing picture, a highly influential judge on perhaps the nation’s most influential federal appellate court, warned that judges were fed up and that irresponsible journalism was on its way toward lessening press freedoms. As prescient as Judge Mikva was, it is not clear that he foresaw how quickly the brazen conduct of upstart publishers would fulfill his prophesy.

Gawker is not alone in facing such backlash; the threat to privacy posed by internet rogues has also eroded trust of mainstream media. Just a few months after the jury decision in the Hulk Hogan case, a federal judge in Florida found that ESPN may well have invaded an NFL player’s privacy when it included the player’s medical chart in a tweet about his finger needing amputation.<sup>122</sup> The judge recognized that the information about the public figure’s finger amputation was newsworthy but held that the addition of the medical chart could well have gone too far.<sup>123</sup> The case immediately settled.<sup>124</sup> Compare that outcome with the one involving the rape tape in *Anderson*, in which the court decided that the video of a private plaintiff helped prove that the rape had indeed been taped.<sup>125</sup>

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118. See Abner J. Mikva, *In My Opinion, Those Are Not Facts*, 11 GA. ST. U. L. REV. 291, 296 (1995).

119. *Id.*

120. 376 U.S. 254, 279–83 (1964).

121. Mikva, *supra* note 118, at 296–97.

122. See *Pierre-Paul v. ESPN Inc.*, No. 16-21156-Civ-COOKE/TORRES, 2016 WL 4530884, at \*1 (S.D. Fla. Aug. 29, 2016). Jason Pierre-Paul had sued for the same privacy tort as Hulk Hogan. *Id.*

123. *Id.*

124. Marissa Payne, *Jason Pierre-Paul and ESPN Reach Settlement in Invasion-of-Privacy Lawsuit*, WASH. POST (Feb. 3, 2017), <https://www.washingtonpost.com/news/early-lead/wp/2017/02/03/jason-pierre-paul-and-espn-reach-settlement-in-invasion-of-privacy-lawsuit> (speculating that ESPN may have settled because there was no clear precedent).

125. *Supra* notes 27–32 and accompanying text.

What may be most important here, however, is what is suggested by Judge Mikva's warning in 1995: the shift toward privacy and against the press is one that is perfectly allowable under current law because such assessment is the subject of judicial discretion. Ultimately, a judge's hands are not tied in favor of protection for the press because the test is a more subjective one.<sup>126</sup> Consider the Second Restatement of Torts section mentioned earlier titled, "*Publicity Given to Private Life*."<sup>127</sup> There, the Restatement authors suggest that media liability is appropriate should media publish particularly invasive private facts about an individual without a good news-based reason<sup>128</sup>: "One who gives publicity to a matter concerning the private life of another" is liable for a privacy invasion 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>129</sup> The Restatement later suggests that news is a broad term, but that its appropriate meaning does have boundaries:

The line is to be drawn 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. The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.<sup>130</sup>

This balancing language between press and privacy and its recognition that at some point the right to privacy trumps the freedom of the press to report truthful information parallels the relevant Supreme Court jurisprudence. Although cases such as *Florida Star v. B.J.F.*<sup>131</sup> and *Bartnicki v. Vopper*<sup>132</sup> ultimately sided with media in its reporting of truthful information, the Court's holdings are far from broad.<sup>133</sup>

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126. See Mikva, *supra* note 118, at 296.

127. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

128. *Id.*

129. *Id.*

130. *Id.* § 652D cmt. a.

131. 491 U.S. 524, 526 (1989) (a rape victim's identity).

132. 532 U.S. 514, 518 (2001) (a surreptitiously-recorded cell phone conversation).

133. For an in-depth discussion of related Supreme Court jurisprudence, see Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. (forthcoming 2018).

In *Florida Star*, the Court wrote that no automatic constitutional protection exists for truthful publication, explaining that there is a “zone of personal privacy” to which every person is entitled and one that the State can indeed protect.<sup>134</sup> The Court even conceded that circumstances may occur in which the government can punish the publication of a rape victim’s name.<sup>135</sup> In *Florida Star*, the problem in part was that the State itself had revealed the information to the journalists; liability against the journalists, therefore, would be untenable.

In *Bartnicki*, the Court wrote that a publication could well be punished for reporting “domestic gossip or other information of purely private concern” that was sufficiently intrusive such that it invaded an individual’s privacy interests.<sup>136</sup> There, the taped phone conversation that was aired by a radio station was newsworthy in that it involved a threat of violence in a contentious union negotiation.<sup>137</sup> “The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West High School were unquestionably a matter of public concern,” the Court wrote, “and respondents were clearly engaged in debate about that concern.”<sup>138</sup>

Moreover, as I have observed previously,<sup>139</sup> the two Justices who concurred in the *Bartnicki* case used the publication of a sex tape featuring a celebrity as an example of a without-question privacy invasion.<sup>140</sup> The Justices labeled such a scenario a “truly private matter”<sup>141</sup> long before Gawker published what it did. Those two concurring Justices added to the three who dissented in the underlying case seemingly make *Bartnicki* at least a 5-4 outcome in favor of Hulk Hogan and the privacy in his sex tape over Gawker’s news decision. This means that had Hulk Hogan brought his claim to the Court, it would likely have decided in his favor.

This review of the law of the press-privacy clash suggests that it is possible—and arguably likely—that Hulk Hogan would have won his

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134. 491 U.S. at 541.

135. *Id.*

136. 532 U.S. at 533.

137. *Id.* at 518, 525.

138. *Id.* at 535.

139. See Amy Gajda, *Privacy vs. Press*, SLATE (Mar. 21, 2016, 5:55 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/03/what\\_might\\_happen\\_if\\_the\\_hogan\\_gawker\\_case\\_reaches\\_the\\_supreme\\_court.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/what_might_happen_if_the_hogan_gawker_case_reaches_the_supreme_court.html).

140. 532 U.S. at 540 (Breyer, J., concurring) (explaining that a sex tape is not of legitimate public concern).

141. *Id.*

case against Gawker even without Peter Thiel's financial intervention had the case somehow proceeded as a typical contingent fee case.<sup>142</sup> Longstanding privacy law that protects plaintiffs against overzealous publishers, including those who would publish explicit sexual information, supported, at least in part, a plaintiff's victory.

And, key here, without such a law that balances a right to certain privacies with a right to publish truthful information, privacy would fail to protect even a woman who had suffered great harm because someone who was amused or held a grudge published her most intimate sexual or medical secrets on the internet.

This is why Peter Thiel deserves our sympathy as well.

### III. THE POTENTIAL TAKEAWAY

One way to combat this shift toward privacy and against press freedom is to presume all truthful information newsworthy.<sup>143</sup> Only when plaintiffs could show publication of information that has strongly been protected on privacy grounds in the United States—graphic sexual information, deeply private medical information, and the like—would a judge who is not convinced of the information's news value give the question to a jury.<sup>144</sup> This would mean that some sex tapes would be found newsworthy,<sup>145</sup> as would some medical charts<sup>146</sup> and

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142. See Levi, *supra* note 2, at 774–76 (explaining that Thiel, a co-founder of PayPal, funded Hulk Hogan's litigation possibly in amounts upwards of \$10 million). Admittedly, it is not clear that an attorney would have taken the matter on contingent fee, given that the press had typically won lawsuits that hinged on newsworthiness and given the amount of work that would have been required to move the case forward. Nonetheless, the law was there that could well have supported such an enterprising attorney.

143. See GAJDA, *supra* note 11, at 233.

144. *Id.*

145. I have used for years in my privacy classes the example of a president having sexual relations with spies, theorizing that a court would find the publication of such a tape sufficiently newsworthy, given that people would want visual proof that the activity had in fact occurred. Even there, however, I suggested that a litigation-concerned publisher would do well to block graphic nudity or graphic sex acts.

146. Here, as one example, the medical chart of an elected official that showed dementia would likely withstand a privacy-based claim. Medical information, as the Restatement notes, is often protected as deeply personal; this is reflected in various statutes as well, including the Health Insurance Portability and Accountability Act (HIPAA). The court in the *Pierre-Paul* case noted that link. Even so, a politician's health is decidedly newsworthy in that he votes on matters affecting the public, so it is difficult to imagine any such medical chart as being protected by a court on privacy grounds.

other similar private information, but some would not be. Most importantly, the vast majority of truthful information would be protected as a matter of law.

Given the uncertainty for media today as courts shift more often to embrace privacy and as they refuse to give media outlets the deference that they once enjoyed, and as litigation financing firms recognize the vulnerability of the press in privacy cases, however, perhaps the ultimate solution to the problem is to cap invasion-of-privacy awards. This was an idea mentioned at a Law and Society panel during its annual meeting in 2016.<sup>147</sup> There, experts on privacy from around the world shared their countries' legal conceptions of newsworthiness and case outcomes. Some of these examples included limitations on recovery in invasion-of-privacy actions.

A recent high-profile example involved Kate Middleton, the Duchess of Cambridge, who won the 2017 lawsuit she filed against *Closer* magazine. In 2012, *Closer* had published topless photographs of the Duchess that also included her husband, Prince William, taken with a long-range lens.<sup>148</sup> The French court awarded the couple €100,000, the equivalent of approximately \$120,000,<sup>149</sup> the maximum amount allowed by law.

Compared to U.S. standards, especially in egregious cases, such an amount seems paltry. At the same time, a similar cap would be an effective deterrent for many privacy-based lawsuits against media. Gawker, for example, would very likely still be publishing had a cap limited Hulk Hogan's damages. Plaintiffs' attorneys would more seriously question the strength of any privacy-based claim before filing, and litigation financing firms and wealthy individuals would not have strong interest in such cases. Finally, concerns about courts meddling in journalistic decisions would be resolved to some extent.

At the same time, the individual privacy plaintiff harmed by an ethics-rejecting publisher would be able to recover something from the entity that caused her emotional turmoil.

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147. Printed Program, L. & Soc'y Ass'n, 31, [http://www.lawandsociety.org/NewOrleans2016/docs/2016\\_Program.pdf](http://www.lawandsociety.org/NewOrleans2016/docs/2016_Program.pdf).

148. See Sandrine Amiel & Lauren Said-Moorhouse, *Duchess of Cambridge Topless Photos Were Privacy Invasion*, CNN (Sept. 5, 2017, 5:13 PM) (reporting that a French court found the photos were an invasion of privacy, awarded money to the Duke and Duchess, and fined the editor of *Closer* magazine and its owner with the maximum fine allowed by law).

149. *Id.*

## CONCLUSION

This Response has focused on publishers gone awry and on the law that at times favors privacy over those publishers' decisions to publish truth.

In doing so, it suggests that we might appropriately have sympathy for two devils. One is Gawker, a publisher that pushed the envelope of propriety so firmly in its quest to publish the truth that others would not that it was ripped off the internet by Peter Thiel, a motivated litigation financier who stayed in the shadows until the damage was done. But Thiel is the second sympathetic devil in this scenario. We may not have guessed his name, and what to do about his game of behind-the-scenes litigation financing is a puzzlement. Nevertheless, his privacy-interested argument is one that has been embraced in the United States in a legal sense for decades, including by the U.S. Supreme Court.

Given that conflict—a desire to protect media from those with deep pockets while at the same time protecting at least some individual privacy interests—the best possible outcome may be to cap damage awards. Such a solution could well strike the right balance by protecting both press and privacy.