DRAFT

Not for publication, general circulation, or citation

The Reality of Reality: Judges' Trouble with True TV

Amy Gajda

NOTE: The following is an excerpt from the fifth chapter in my forthcoming book, *The First Amendment Bubble: How Privacy and Paparazzi Threaten a Free Press* (Harvard University Press 2014). In the book, I argue that courts are limiting First Amendment protections for all media more often today because of certain push-the-envelope media practices. The manuscript is still in draft form, as is the following excerpt, so I welcome all comments and suggestions.

The Rise, and Lows, of Quasi-Journalism

If developments in mainstream media have the potential to push the protective First Amendment bubble even closer to the breaking point, then emerging practices of quasi-journalism seem determined to break it. In some ways, they already have.

Quasi-journalism is a term meant here to describe the publication of truthful information outside the context of traditional mainstream journalism. Traditionally, journalism's qualities are said to be "impact, immediacy, proximity, prominence, novelty, conflict, and emotion."[1] Some experts add "mystery, drama, adventure, celebration, [and] self-improvement."[2] As noted previously, in making news decisions, traditional journalists also exercise ethics-related judgments beyond those qualities, including the story's "truth, its importance, its public value or utility,"[3] and its potential harm. If it is true that the "mystique of the editorial process" is based upon "intuitive judgment and competitive strategy,"[4] then many with the intuition today make judgments far different from those in the mainstream press.

Though there is no perfect way to draw the line, many quasi-journalists do not seem to follow an established mainstream ethics code and some would not consider themselves journalists, even though they publish what many readers consider truth.[5] Here, a tabloid like the *National Enquirer* is a form of quasi-journalism because of its highly sensational stories that at times push the envelope of propriety and truth, even though its reporters work under some editorial control and ethics principles, perhaps closest to mainstream journalism here. Websites like *Gawker*, blogs that operate more as free-form thoughts or diaries, or those that more clearly lack an ethics foundation in the traditional sense, and many reality television programs also fall into this category. Those sorts of publications contrast with New York's daily tabloids, for example, because the latter report traditional news including crime and political news in addition to more sensational articles and seem more restricted by ethics. This quasi-journalism category, in contrast, includes publishers that mostly publish outside the traditionally mainstream.

In other words, both mainstream and quasi-journalism publish truth-based information but quasi-journalism 1) often excludes what we might consider traditional news in favor of sensational news items

more likely to inflict the emotional harm and 2) often seemingly fails to consider traditional journalistic ethics principles when doing so.

This chapter collects numerous examples of push-the-envelope quasi-journalism and courts' negative responses. Today, protection based upon First Amendment principles is not as robust as it once was and quasi-journalism is at least partly responsible.

. . . .

The Law and Girls Gone Wild

Long before The Dirty and Gawker and other websites with a mission to expose, in 1997, there was Girls Gone Wild. The videotape series was "[c]reated by entrepreneur Joe Francis," one court explained, and "feature[d] young, and sometimes underage, women in states of partial or total nudity."[6] Girls Gone Wild's focus was helped along by the women themselves: They "commonly consent[ed] to be photographed and videotaped in various stages of undress," one court explained, "for a nominal gift in the form of costume jewelry, usually consisting of brightly-colored plastic beads and trinkets."[7] Each videotape in the series consists of carefully edited clips of girls and young women lifting their shirts to expose their breasts, sometimes interspersed with far more graphic clips of girls and women engaged in sexual activity.

The facts as described by the plaintiffs in the cases that made their way to court were often heinous. Some claimed that producers had taken advantage of their intoxication[8] or had provided them with drugs and/or liquor,[9] pressuring them to perform while promising that their images would not appear on the Girls Gone Wild series.[10] Most of the girls who brought claims in reported cases against Francis and his production company were underage: 17, 16, 15, 14, and even 13 years old.[11] Some were stopped by a photographer on the street, others were brought to a party and allegedly plied with alcohol. Some knew that a photographer was present but others insisted they did not or did not fully understand what the photographer was up to.

In other words, the series seemed designed to give courts good reason to extend privacy law to protect these plaintiffs whose mistakes had life-altering privacy implications: these momentary lapses of discretion by apparently trusting underage girls had been immortalized forever as part of a tawdry series of videotapes.

Nonetheless, Francis had the First Amendment and decades of privacy law jurisprudence on his side. First, he argued that he was simply covering a newsworthy part of American culture -- the phenomenon of females willing to disrobe for an item of little value – making the same argument as would a journalist who had covered a riot on the streets. "[T]he defendant [Girls Gone Wild] suggests it merely used videotape of the crowd at Mardi Gras," one court wrote, "as part of a true and accurate depiction of a newsworthy event – much as CBS might cover a presidential speech or Fox might cover the Super Bowl."[12]

Moreover, the defendant producers noted, the girls had exposed themselves in public, either at the beach or at parties, and, therefore, privacy law would not apply. One young woman, for example, was on "a public part of the lake, stood on top of a boat and removed her bikini bathing suit top"[13] and another

was "at a 'party' on the second floor of a Bourbon Street bar" in New Orleans.[14] Their "flashing," Francis argued, was a newsworthy, public event[15] and he was but the documentarian.

One court sided with Francis in a case involving a 17-year-old who had argued that she would not have exposed herself had she known of the cameraman's plan. The court rejected her privacy claim, finding that the Girls Gone Wild series was "an expressive work created solely for entertainment purposes" in which the girl had "voluntarily participated."[16] The videotape, like any television news story, the judge wrote, was a "truthful and accurate description of [the plaintiff] voluntarily exposing her breasts to a camera just as she did on Labor Day Weekend in Panama City Beach, Florida" in a public place "while several pedestrians were in the general vicinity," even though the cameraman was a complete stranger.

That decision stood alone, however. From the first reported case brought against Girls Gone Wild in 2002, in which the court wrote that "[t]he First Amendment provides no right to make an unconsenting individual the poster-person for a commercial product,"[17] to one of the last, decided in 2013, and involving a 14-year-old girl, in which the court reasoned that "[t]he men to whom [the plaintiff] exposed her breasts never indicated to [the plaintiff] that they worked for, had any connection with, or had any intention of giving [the plaintiff's] image to" Girls Gone Wild producers,[18] the decisions are uniformly in favor of the plaintiffs' claims, which mostly sounded in privacy and intentional infliction of emotional distress.

The remaining courts in reported cases rejected the Girls Gone Wild producers' newsworthiness arguments either implicitly or explicitly. "Since plaintiff is not a public figure," one such court wrote, the producers are "not participating in a public dialogue about the condition of American society in general."[19]

Two courts also rejected the defendants' argument that they were protected because what had happened with the young women had happened in public. One court held that someone at a party attended by others could, in fact, be in private even though the bar in question was on Bourbon Street in New Orleans and even though the establishment was open to the public and strangers were in attendance.[20] Another flatly rejected the idea that by taking off one's top in public puts the person in the public eye.[21]

And one federal appeals court worried openly about what might happen to these girls and young women in the age of the internet where visual depictions of their indiscretion might remain forever. It warned that Girls Gone Wild girls "faced the very real danger of becoming internet sensations" and it pointed to the example of the 17-year-old who had failed to convince the judge to rule in her favor.[22] That plaintiff was now "permanently identified in the IMDB.com database for one of the Girls Gone Wild movies," the court wrote, by name and with the title of "17-year-old public breast-flasher." For that reason, over First Amendment-based objections by Girls Gone Wild producers, the court held that the plaintiffs in the case could remain anonymous throughout the duration of the lawsuit.[23]

The legacy of quasi-journalist Joe Francis and his Girls Gone Wild series, then, can be seen as three-fold. First, people who are at a public gathering may, in fact, be considered in a private space for purposes of invasion of privacy; second, newsworthiness's sweep is more limited and presumably does not include a news item with video of young women who flash for beads in public; and, third, courts can

restrict media from learning lawsuit parties' names if there is a danger that privacy will be forever wiped away by internet mentions.

Mainstream news media organizations recognized the implications these cases had for traditional news gathering and reporting and filed First Amendment amici briefs in at least one of the cases.[24] But, not surprisingly, those arguments, too, were drowned out by privacy claims of girls who found themselves more exposed than they thought possible.

The Law and Borat

"Borat" was a 2006 Hollywood film starring Sacha Baron Cohen, subtitled "Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan." On the Internet Movie Database, it is described this way: "Kazakh TV talking head Borat is dispatched to the United States to report on the greatest country in the world. With a documentary crew in tow, Borat becomes more interested in locating and marrying [television star] Pamela Anderson." In the real-life making of the film, Baron Cohen traveled across the United States pretending to be a foreign journalist and interacting with very real people who had no idea they were being tricked: What they thought was a Kazakhstan-produced documentary would later appear in theaters across the United States. The film, then, was very real in that real businesspeople, real etiquette experts, and real fraternity brothers were featured in non-scripted ways, but also quite fictionalized in that Borat, the journalist, was a figment of Baron Cohen's imagination, as was the general script.

After the film's release, multiple people featured in the film sued for privacy-related reasons. Some argued that they had been made to appear silly, others that their anti-social behavior had been revealed. The trouble was that many of them had signed releases that, upon reflection, should have raised red flags. In exchange for up to $350, the participants had agreed to appear in the film which was described as one "meant to reach a young adult audience by using entertaining content and formats" and those signing a participation contract had promised not to sue for invasion of privacy or intentional infliction of emotional distress.[25] The releases mostly protected the producers. In one case, for example, the court analyzed the news value of the film as a trump to the plaintiff's privacy claims, finding it to be a newsworthy "ironic commentary of modern American culture, contrasting the backwardness of its protagonist with the social ills [that] afflict supposedly sophisticated society."[26]

But Borat's travels had led him to a Pentecostal church camp meeting, one attended by a deeply religious woman named Ellen Johnson. As a court would explain, in the film "Borat . . . seeks redemption at the camp meeting during which he acts as if he is converted by the minister and begins speaking in tongues along with other Pentecostals doing the same."[27] Johnson appears in the film for three seconds. "While Borat appears to be experiencing this religious conversion," the court explained, "several members of the camp meeting, including the plaintiff, are shown in the film raising their arms to praise God for Borat's conversion."

There was no conversion, of course, and, after seeing the film, Johnson felt that she was made to look as if she did not take her religion seriously. She sued the filmmakers for invasion of privacy and intentional infliction of emotional distress in a federal trial court in Mississippi. They had, she argued, filmed her without her consent, had portrayed her in a way that suggested that she knowingly mocked her church, had released the film without her signed waiver, had tricked her into believing that the film was a

documentary on American religion to be shown in a foreign country, and had not told her that Borat was not real. The defendants, in turn, argued that they were protected by the First Amendment.

The court that would hear the case called it "a battle between the defendants' assertion of their free speech rights and the plaintiff's right to privacy."[28] And here, privacy won out.

The decision is remarkable in that the court found two separate privacy-related torts actionable even though case law supported the opposite conclusion. First, the court agreed with the plaintiff that she had a valid false light claim even though the court found that Mississippi had never before explicitly recognized false light as a valid cause of action. The producers had argued that the three seconds of hand-raising had truthfully occurred and that, therefore, there could be no false light claim, but the court ruled that the issue was whether viewers of the movie might believe that Johnson had knowingly mocked her religion. The court reasoned that the film could well be misunderstood: "There are indeed many reasonable Americans," the court wrote, "especially those who are of an older generation, who are not familiar with the type of humor/satire that is depicted in the film Borat."

Even more remarkable, however, was the court's decision to allow the plaintiff's privacy-related misappropriation claim to continue as well, even though it was based solely on a three-second image of the plaintiff in an 84-minute film. The court reasoned that those three seconds could support misappropriation because the film itself was a commercial enterprise, because producers had not received her explicit permission, and because producers had misled church leaders. Multiple courts had previously decided that a small focus within a considerably larger project would not support such a claim, but the court's focus was on the film's commercial nature.

As for the defendants' First Amendment claims, the court ruled that Supreme Court precedent that protected fictionalized motion pictures did not apply to one involving "an invasion of privacy claim by a private citizen":

> [T]he nature of the film Borat is different from a purely fictional work since, although the viewer is aware that the plot itself is fictional and that the characters of Borat and his producer are fictional, the viewer is also aware that the vast majority, if not all, of the other people featured in the movie are non-public figures who are not actors and are likely unaware that Borat is not a Kazakhstani reporter filming a documentary for Kazakhstan.

As in the previous examples in this chapter, the actions of the pretend journalist Borat and the court's reaction to his shenanigans, therefore, have implications for mainstream journalists. First, the court officially recognized the false light privacy tort in the jurisdiction in order to protect citizens from mischief-making media, here a quasi-journalist. Second, misappropriation was extended to include what many would consider incidental use – three seconds within a much longer film –simply because the end product had a commercial nature. And finally, and perhaps most importantly, the defendants' calls for First Amendment protection went unheard because the court's very strong focus was not on freedom of expression but on the protection of the plaintiff's privacy interests.

. . .

The Law and Reality Television

It cannot be good for all journalism that, at a time when courts have moved to restrict police records like mug shots and accident reports on privacy grounds, a series titled "Panic 9-1-1" exists. "Panic 9-1-1" is a cable television show described as one that

> take[s] 911 calls to a whole new level never seen or heard before on television. Unlike emergency shows of the past, viewers will live inside the calls and experience every harrowing and terrifying moment along with the caller. Every second is real.[29]

The premiere episode made clear that "harrowing" and "terrifying" are apt descriptors: viewers listened to a real 911 tape and watched a reenactment as "9-1-1 dispatchers receive[d] a frantic call from a Colorado mother who [had] barricade[d] herself and her teenage son inside an upstairs closet with no lock as an unknown intruder searche[d] for their hiding place." One clip on the program's website is titled, "Don't Let Me Die." Such sensationalized real-life moments of agonizing terror could make even media-sympathetic courts think twice about releasing 911 tapes to media generally, lest the recorded calls end up as voiceover for a television program more about horror than news.

Most lawsuits brought against reality television programs, however, are those based upon newsgathering and the push-the-envelope production behavior at places like hospitals or with police at crime scenes. Contrary to James O'Keefe's interpretation of constitutional law, most courts have found no First Amendment protection for newsgathering itself, despite the newsworthiness of the underlying story. Even in intrusion-into-seclusion tort cases in which courts could easily decide that the offensiveness of any intrusion should be offset by the value of the underlying news story, most courts refuse to allow newsworthiness to enter the intrusion determination at all.

Most of the intrusion decisions, however, stem not from *60 Minutes* or some other well-respected investigative journalism, but from reality television programming and O'Keefe-like behavior. A California appeals court in 2002, for example, reiterated what the *Shulman* court had held four years before:

> [N]o constitutional precedent or principle of which we are aware gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.[30]

In that case, the plaintiffs had alleged that reporters had disguised themselves as hospital workers in order to get video for the reality television program "Trauma: Life in the ER" and had featured within the program itself a man who had ingested a drug known as Blue Nitro. Despite the fact that the court recognized the newsworthiness of the dangers of so-called "rave" drugs, it allowed the lawsuit to continue over the producers' First Amendment arguments.

Even though these programs have had a negative impact on mainstream journalism, they often do not seem to follow the same ethics restrictions. In a lawsuit brought against the reality television program "Inside American Jail," for example, the complaint noted that the show's producers had donated money to the sheriff's reelection campaign, reasoning that since the sheriff had agreed to the filming, the producers would help with his reelection.[31] In contrast, mainstream news reporters are strongly encouraged to be

apolitical lest their reporting be perceived as biased and subjective. Many mainstream journalists do not campaign for any candidate and some refuse to vote in primary elections in which they would be forced to reveal their political allegiance. Indeed, reporters have been fired for covering political rallies while wearing political paraphernalia[32] or for revealing their political beliefs in some other fashion.[33]

Even so, when a California court holds that newsgathering itself has no constitutional protection, as did the California court in the Blue Nitro reality television case, the holding applies to all journalism. And when a federal appeals court in California decides that the identity of a police informant is not newsworthy in a case springing from a reality television program's alleged failure to digitize the man's face, the holding can be applied more generally; the court had noted that others' faces had been digitized and reasoned that, therefore, there was little news value in the person's precise identity.[34]

Troubling, too, are those times in which a reality television program aligns itself with mainstream news reporting in an effort to piggyback on mainstream journalism's stronger reputation. In a case from Tennessee heard in federal court in 2011, for example, the plaintiff complained that a reality television program titled "The Squad: Prison Police" had placed her in a false light and had defamed her by suggesting that she had carried drugs into prison while visiting her inmate husband.[35] The court described the program's use of hidden video as it followed the plaintiff, with the voiceover provided by a government agent assigned to the case. "I think we got her . . . inmates have found a weakness in our security," the agent said as the woman's driver's license picture was shown in mug shot-like fashion, "we're expecting this lady today." When there was little physical interaction between the couple at first, the official suggested that "it [the drug exchange] don't look like it's been done yet, so now it's just a waiting game." Later, after the couple kisses, he predicted that time for the "nitty gritty" had begun: "[H]old on now," he noted after the kiss, "she's going to the bathroom [and] [t]ypically these woman hide stuff up in their vaginal cavity and then go to the restroom to take it out." When the woman left the bathroom quickly, he suggested that that move implicated her further: "She didn't have time to pee. She went in and came right back out." After more kissing, the agent seemed certain that "some [expletive] just happened [and] I think we got 'em." At various points, as the video focused in on the woman and her behavior, the producers used ominous sounds and background music to enhance the crime-fighting theme.

As might be expected given her false light and defamation claims, nothing was found on the woman (despite, as the program explained, a "strip search of the suspect") or on her husband (despite, as the program noted, a 24-hour "dry cell" hold in which he had no access to running water). Even so, the agent warned at the end, "We might not get you today, maybe next week, next month, next year, but eventually we're going to catch up with you, and we're gonna get you."

The woman argued that the program suggested that she had and would smuggle drugs into prison. The court agreed that her case was a valid one and, in doing so, rejected the main defenses put forth by the producers. First, they had argued that a notice at the beginning of the program suggesting that all were innocent until proven guilty and the ultimate "false alarm" conclusion of the narrative at the program's end negated the overall effect of the videotape and voiceover. The court skeptically rejected that argument, pointing to the heavy focus on the plaintiff and the suggestion at the end that officials had not caught anyone yet, but would. The court also rejected the defense argument that the voiceover comments were merely opinions, noting that even opinions are not necessarily protected when they implicate someone in wrongdoing.

But what the court called the most "important" defense argument was the producers' claim that the program – a reality television show – was merely doing real-time news reporting, as would a television news station during a breaking news event. In effect, the defense seems to have argued, the viewer was carried along by the narrative as the criminal investigation moved forward, just as a television station presumably would cover a bank robbery or some other crime as it happened. But the court rejected this defense as well. It recognized that the program had been taped well in advance and had then been edited down into the thirty-minute program that the viewers saw, with producers having full control over the end product. As a "canned" program, then, the court found that it was very different from typical coverage of a breaking news event in which journalists are given little control over how a suspect might ultimately be portrayed.

That decision, though clearly finding a distinction between mainstream news reporting and this type of reality television, still has the potential to affect future journalism cases in which the editing and narrative of a news story implicates a suspect until the end.

The problem with reality television – one in which its methods have a lasting legal impact on journalism generally – is likely to continue. Today's courts seem quite averse not only to some of its newsgathering techniques but also to the format and its impact on American values. "In popular culture," one Rhode Island court wrote in 2011, "we see reality television constantly lowering the bar of civility and common courtesy."[36] A court in New York suggested that the genre "offers opportunities for embarrassing and insulting participants and the more outlandish the conduct, the higher the ratings," lamenting that "[t]here does not seem to be a bottom to the viewing public's appetite for this brand of entertainment."[37] A federal court in Indiana – hearing a case involving college students who had lured a fellow student to a fake Facebook page and then had recorded and posted on YouTube the point at which the fellow student learned that the Facebook girl did not exist – linked the students' video prank to reality television. It quoted a psychology article that had characterized such shows as like "'freeway car accident[s] or train wreck[s]' that 'seem to exploit and reward outrageous behavior' and allow viewers to 'take delight in the problems and misfortunes of others.'"[38] "Indeed," the judge in that case wrote, "the very objectionable or offensive nature of the show's subject matter can make it a hit." A federal judge in Kansas also joined in the criticism of the genre, writing that "the reality TV business . . . (whether the shows involve bachelorettes, stranded survivors on faraway islands, or hunting game in the wild) . . . is inconsistent with the notion of always telling the truth."[39]

That is the real problem with much of quasi-journalism: it cannot be trusted as much as mainstream journalism should be trusted. And yet the negative opinions in its cases can be read to affect even strongly ethical media.

Meantime, a casting call went out for what producers promised would be an "upcoming premium reality television series." It described the planned program this way:

> The upcoming series will be based loosely on the theme of blackmail and deceit. The series will primarily focus on the entrapment of rich and affluential [sic] married men. Chosen actresses will be provided a team of analysts which will generate dossier's [sic] on these men in order to aide [sic] in each man's entrapment by our actresses. There will also be an added sense of competition between the actresses of different cities revolving around a $500,000 cash prize

> and vacation to a location of the winners choosing for one week. . . . The overall goal of the actress towards her target should be to entrap the target so much that the target becomes so entangled in the deceit that they lavish the actress with gifts, trips, etc. obsessing with the actress to the point where they are infatuated.
>
> Then comes the blackmail portion[:] the men are given the suggestion of making a substantial donation to a charity or the information being turned over for public viewing.
>
> During the course of the entrapment the gentleman's face will be blurred however if he chooses to donate time or funding to charity his face will not be revealed. If the entrap [sic] chooses to refrain from the donation his face will be revealed.[40]

If that "premium reality television series" is not an O'Keefe undercover experiment – or even if it is – the courts are likely to hear more about it and, afterward, be forced to make decisions that will have the potential to harm all reporting of truth, including mainstream journalism.

Quasi-Journalism and Journalism: The Difference Between "Reality" and News

The struggle to decide which publications should be considered "true" journalism – how we delineate between mainstream journalism and quasi-journalism – is more than an academic exercise. As discussed in greater detail in Chapter Eight, currently, journalists are protected in important ways that quasi-journalists are not. State laws shielding them from forced court testimony, for example, recognize that journalists bring something special to society and that journalism's role should be protected so the public can be informed both about government from press releases and about government wrongs from inside sources who would not come forward but for a shield of protection.

But there is another reason why the distinction is an important one and why one group should be protected more than the other: decisions made by mainstream journalists based on ethics considerations help protect those who are the focus of news coverage. Ethics considerations will stop many journalists from reporting private embarrassing things about others, even when the revelation would have significant news value. Rightly or wrongly, reporters in Idaho, for example, were said to have known about Senator Larry Craig's dalliances for "decades,"[41] but no one reported on these alleged affairs likely because they felt they needed additional on-the-record sources. There are multiple other examples at all levels of government and otherwise. One cannot imagine any push-the-envelope gossip website maintaining such standards. In fact, one blogger had outed Craig well in advance of mainstream media outlets, but, lacking additional sources, mainstream media did not re-report the story.[42]

Consider too the ethics of Gawker's campaign in 2013 to raise enough money to buy a videotape that Gawker believed showed the mayor of Toronto, Canada, smoking crack. "We are Raising $200,000 to Buy and Publish the Rob Ford Crack Tape," a *Gawker* headline at the time read,[43]and the story promised that for a $1000 donation the donor would be invited for dinner with the *Gawker* staff. While the fundraising effort was successful, a few days later, *Gawker* reported that the tape was "gone" and, therefore, no longer for sale from that source that had demanded the money.[44] Traditional journalism ethics provisions suggest that exchanging money for information is wrong and would certainly not encourage crowdsourcing such funds.

But aside from such ethics protections, there is also the legal recognition that only "newsworthy" stories that invade privacy are protected while crass and morbidly sensational stories are not. A word like newsworthy necessitates that someone decide what news is and what it is not. The best one to make that call is a practicing journalist who has had experience weighing the private interests in privacy and the public interest in the information, lest the four-million viewers of the Hulk Hogan video determine our future.

Recall that the Restatement suggests that news is determined by looking at what is published by news organizations. If we allow all truth publishers, including mugshots.com and Girls Gone Wild, to make newsworthiness determinations, then someone with a laptop but no journalistic training could well decide that private medical information or private family information or private sexual information about anyone was newsworthy. The Hulk Hogan videotape? Absolutely newsworthy in a world where Gawker gets to decide what has news value and what does not.

Consider too those girls outed internationally in the Girls Gone Wild videotape series, or those whose images have been posted on revenge porn websites, or those private persons humiliated because hidden camera video of a private discussion was posted on YouTube. Traditional methods of defining newsworthiness – those that focus on a journalist's discretion – would allow those people to bring privacy claims. If news is defined more broadly, in a way that accepts all publications as capable of determining news value, then privacy as a legal claim and legal deterrent will all but disappear.

Moreover, when courts extend the definition of journalist to include everyone or of news to include everything, the First Amendment is strained. After all, if everyone is a journalist, then the foundational reasons for a reporter's shield law disappear and no one is protected; government officials with insiders' knowledge of real wrongs will fear revealing key information to journalists. If we extend journalism to cover anyone who publishes anything online, then newsworthiness necessarily includes the crass, morbidly sensational "stories" about everyday people that are published on websites like The Dirty and Gawker, but also on websites like College Wall of Shame and 4chan.

The difficulty in delineation is a key reason why Congress has yet to pass a federal shield law. "There are some major carve-outs in the [reporter's shield] legislation," *The New York Times* reported in 2013 in an article that predicted that Congress was close to enacting such a law, "limitations on what constitutes an act of journalism, most of which seem aimed at next-generation news organizations that sometimes simply post classified material, rather than report more in-depth articles based on that information."[45]

Toward a Narrower Definition for Journalist

Additional examples come from courtrooms and show courts' struggles today with deciding who is a journalist. Not surprisingly, courts seem to be inclined toward a narrower definition.

A court in a 2013 case from Texas defined journalist more narrowly. There, a labor union for service employees had published website posts as a part of a "Justice for Janitors" campaign and the union argued that such publications made it a member of the news media. It was an important issue because Texas gives electronic or print media special jurisdictional consideration, a distinction based upon the Constitution's press freedoms. The court, forced to define journalism, decided that such posts

did not qualify. "A 'journalist,'" the court wrote, quoting Texas law, "is defined as 'a person who for a substantial portion of the person's livelihood or for substantial financial gain, writes news or information that is disseminated by a news medium."[46] It also suggested that other factors would contribute to such a determination: the authors' journalistic background, how established in journalism the reporter was, the character of the posts at issue, the editorial process involved including decisions based on the newsworthiness of stories, and the size and nature of the readership. Given the Texas law and those considerations, the court found that the union should not receive the special jurisdictional considerations that a traditional journalist would.

A New Jersey state court facing the definition issue that same year defined journalist more broadly and decided that a blogger who wrote for a website called "The County Watchers" would be protected under the state's shield law, preventing her from having to testify regarding her journalistic research in a criminal case. The court found that the blogger's posts on something the community called "Generatorgate," her exposé on "Musicfest," and her stories on pension padding and theft of county property, among others, would be considered "news" under the statute. Moreover, the court decided, the blogger's purpose was to disseminate news to the community as opposed to publishing information for a limited audience. Given those considerations, the shield law – one written to protect "a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering . . . editing or disseminating news for the general public – protected the blogger. In delineating between journalist and quasi-journalist, however, the court suggested that the definition for the former would not always be inclusive; it reiterated an earlier warning that "new media should not be confused with news media." It also suggested that the legislature might further define the term within the shield law if it found it necessary given the "changing times."

The trend seems to be going the Texas way – toward a narrower definition for journalist – even in cases far closer than that of a service union. Charles Tobin, a chair of the American Bar Association Forum on Communications Law and a media defense attorney, called the trend "disturbing" and worried that courts' or legislators' willingness to define who counts as a journalist would inevitably leave some legitimate truth-seekers outside the scope of protection.[47] These "recent decisions," Tobin wrote, "teach[] us that the First Amendment shield is perhaps less resilient for some classes of journalists than for others."

There are additional reported cases that support Tobin's assessment. In 2012, a federal trial court rejected media protection for a company website that had published a press release, finding the defendant website owners "private parties with their own websites" and not media even though the press release was picked up by 130 media outlets; the court specifically wrote that it was worried that finding otherwise would "abolish any distinction between private parties and members of the media," a distinction that was important in Florida pre-suit notice law.[48] A federal trial court in Maine made a similar determination that same year, finding that a website that advocated against a gubernatorial candidate was not entitled to a press exemption for election disclosure requirements; the website creator's First Amendment arguments failed because the court found the website much more like a negative campaign advertisement than a periodical publication.[49]

And, in particularly close case, a website known as Media Takeout, one calling itself "the most visited urban website in the world,"[50] was unable to use a newsworthiness defense because the court, in

effect, found its story not journalistic enough: incorrect, too short, and not sufficiently linked with a celebrity. The website had published a story in which the plaintiff was identified incorrectly as celebrity Kimora Lee Simmons' sister.[51] The woman featured in the story, who was not related to Simmons at all, sued on privacy-related grounds, arguing that the website had used her identity to make money. Media Takeout argued in response that the story itself was not published for commercial reasons because "a news article reporting on a celebrity . . . involves 'a matter of public interest' and thus fits comfortably within the 'newsworthiness' exception." The court, however, rejected the website's attempt to categorize itself as a journalistic enterprise. "At the outset," it wrote, "Media Takeout's contention that its article 'reported on a celebrity' is greatly exaggerated," finding that the fifty-word article only included photographs of the plaintiff, a quick mention of her desire to get into modeling, and no mention of the celebrity at all other than the misinformation that the two were sisters. The court allowed the plaintiff's invasion-of-privacy lawsuit to continue to trial, finding that the falsity within the article could make it not newsworthy and, therefore, unprotected.

In other words, there is often a need to distinguish between who is a mainstream journalist and who is a quasi-journalist in a legal sense and courts, therefore, are defining that term and newsworthiness out of necessity. As suggested in greater depth in Chapter Eight, a narrow definition, one that excludes quasi-journalistic publishers as journalists, may harm some truthful expression by refusing to give them protections afforded more mainstream reporters. But a narrow description for news, one that rejects Gawker's claim that it can publish anything it decides is newsworthy, can also help protect the privacy of many.

---

[1] Amy Gajda, "Judging Journalism," 97 Cal. L. Rev. 1039 (2009), quoting Tim Harrower, Inside Reporting (2006).
[2] Philip Patterson, Lee Wilkins Media Ethics: Issues and Cases (Boston McGraw Hill 2008) p. 35.
[3] Randall P. Bezanson, How Free Can the Press Be? (Urbana: University of Illinois Press 2003) p. 251.
[4] Randall Bezanson, "The Right to Privacy Revisited: Privacy, News, and Social Change, 1890-1990," 80 Calif. L. Rev. 1133 (1992).
[5] See, e.g., Nik Richie, who considers himself a blogger who posts information from "citizen paparazzi" on a "reality-based blog." Chris Cole, "Website The Dirty flourishing with new scandals," The Arizona Republic (Aug. 2, 2013).
[6] Bullard v. MRA Holdings, 890 F. Supp. 2d 1323 (N.D. Ga. 2012).
[7] Padilla v. Holding, 2004 Cal. App. Unpub. LEXIS 11772 (Cal. Ct. App. Dec. 28, 2004).
[8] Glaze v. M.R.A. Holding, 2003 U.S. Dist. LEXIS 25572 (M.D. Fla. July 11, 2003).
[9] Capdeboscq v. Francis, 98 Fed. Appx. 988 (5th Cir. 2004).
[10] Id.
[11] Plaintiff B v. Francis, 38 Media L. Rep. 1925 (N.D. Fla. 2010).
[12] Gritzke v. M.R.A. Holding, 2002 U.S. Dist. LEXIS 28085 (N.D. Fla. Mar. 16, 2002).
[13] Padilla v. Holding, 2004 Cal. App. Unpub. LEXIS 11772 (Cal. Ct. App. Dec. 28, 2004).
[14] Capdeboscq v. Francis, 2004 U.S. Dist. LEXIS 3790 (E.D. La. Mar. 10, 2004).
[15] Capdeboscq v. Francis, 2004 U.S. Dist. LEXIS 3790 (E.D. La. Mar. 10, 2004).
[16] Lane v. MRA Holdings, 242 F. Supp. 2d 1205 (M.D. Fla. 2002).
[17] Gritzke v. M.R.A. Holding, 2002 U.S. Dist. LEXIS 28085 (N.D. Fla. Mar. 16, 2002).
[18] Bullard v. MRA Holding, 740 S.E.2d 622 (Ga. 2013).
[19] Padilla v. Holding, 2004 Cal. App. Unpub. LEXIS 11722 (Cal. Ct. App. Dec. 28, 2004).
[20] Capdeboscq v. Francis, 2004 U.S. Dist., LEXIS 3790 (E.D. La. Mar. 10, 2004).
[21] Padilla v. Holding, 2004 Cal. App. Unpub. LEXIS 11722 (Cal. Ct. App. Dec. 28, 2004).
[22] Plaintiff B v. Francis, 631 F 3d 1310 (11th Cir. 2011).

[23] Plaintiff B v. Francis, 631 F.3d 1310 (11th Cir. 2011).
[24] See Plaintiff B, 631 F 3d 1310
[25] Ex parte Cohen, 988 So. 2d 508 (Ala. 2008).
[26] Lemerond v, Twentieth Century Fox Film Corp., 36 Media L. Rep. 1743 (S.D.N.Y. 2008).
[27] Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 62029 (N.D. Miss. Aug. 22, 2007).
[28] Johnston v. One America Productions, 2007 U.S. Dist. LEXIS 73450 (N.D. Miss. Oct. 7, 2007).
[29] www.aetv.com.
[30] Carter v. Superior Court of San Diego County, 30 Media L. Rep 1193 (Cal. Ct. App. 2002).
[31] Beall v. Turner Broadcasting Systems, 2012 U.S. Dist. LEXIS 179383 (D. Nev. Dec. 19, 2012).
[32] Tammy Stables Battaglia, "WWJ reporter fired for wearing Obama T-shirt," *Detroit Free Press* (Oct. 2, 2008).
[33] Joe Holleman, 'Fired KMOV anchor Larry Conners defends Facebook comments about IRS," *St. Louis Post-Dispatch* (May 23, 2013).
[34] Doe v. Gangland Productions, 730 F.3d 946 (9th Cir. 2013).
[35] Battle v. A&E TV Networks, 837 F. Supp. 2d 767 (M.D. Tenn. July 27, 2011).
[36] Burke v. Gregg, 2011 R.I. Super. LEXIS 15 (R.I. Super. Feb. 4, 2011).
[37] Klapper v. Graziano, 970 N.Y.S. 2d 355 (N.Y. Sup. 2013).
[38] Zimmerman v. Board of Trustees of Ball State University, 2013 U.S. Dist. LEXIS 54368 (S.D. Ind. Apr. 15, 2013).
[39] United States v. Spann, 2013 U.S. Dist. LEXIS 109230 (D. Kan. July 30, 2013).
[40] www.houston.craigslist.org (June 12, 2013).
[41] James Taranto, Best of the Web: The prurience of the Idaho press, *Wall Street Journal* (Dec. 3, 2007).
[42] James Taranto, "Unstatesmanlike Conduct," *American Spectator* (Nov. 2007).
[43] John Cook, "We are Raising $200,000 to Buy and Publish the Rob Ford Crack Tape," gawker.com (May 17, 2013).
[44] John Cook, "The Rob Ford Crack Video Might Be Gone," gawker.com (June 4, 2013).
[45] David Carr, "For Journalists, More Firepower to Protect Sources and Secrets," *N.Y. Times* (Sept. 29, 2013).
[46] SEIU v. Professional Janitorial Service of Houston, 2013 Tex. App. LEXIS 11701 (Tex. Ct. App. Sept. 17, 2013).
[47] Charles D. Tobin, "First Amendment Caste System," *Communications Lawyer* (Jan. 2012).
[48] Five for Entertainment v. Rodriguez, 877 F. Supp. 2d 1321 (S.D. Fla. 2012).
[49] Bailey v. Maine Com'n on Governmental Ethics and Election Practices, 900 F. Supp. 2d 75 (D. Maine 2012).
[50] www.mediatakeout.com
[51] Edme v. internet Brands, Inc., 2013 WL 5134124 (E.D.N.Y. Sept. 16, 2013).