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# *Hogan v. Gawker*: A Leg-Drop on the First Amendment

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## *I. Introduction*

One could argue that no right is held more dearly in our society than the freedom of speech that our First Amendment provides. Our courts have afforded speech the greatest deference, and have analyzed with the greatest scrutiny laws and claims attempting to

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curtail that right.[1] We as a nation have done this because we believe that robust conversations on these issues form the backbone of a functioning democracy.[2] This has resulted in a vast and storied line of cases where our highest court has repeatedly protected the right to speak freely.[3] Particularly, the Supreme Court has stressed that journalistic publications' speech should be afforded the greatest deference because of its contribution to society.[4] In doing so, the Court has frequently maintained that statutes seeking to restrict speech and claims seeking to hold those publications liable for speech are invalid.[5] The Court has held that public figures bringing claims against publications will be subject to an even higher standard.[6] Across decades of cases and among

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1. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 725 (1971) (Brennan, J., concurring) (opining that the government cannot prevent a newspaper from publishing a story simply on conjecture that inconvenience or inappropriateness may result); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976) (promulgating a court order preventing the reporting of a polarizing murder trial unconstitutional because the heavy burden to secure prior restraint on freedom to speak and publish had not been met); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (finding unconstitutional a statute that criminalized cross-burning because it sought to regulate the content of speech).

2. *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) (explaining that one of the undisputed goals of the First Amendment is the "free discussion of governmental affairs").

3. *See N.Y. Times Co.*, 403 U.S. at 730 (Stewart, J., concurring) (stating that the First Amendment did not permit imposing a restraint on publishing the "Pentagon Papers" when it was unclear whether publishing would "surely result in direct, immediate, and irreparable damage to our Nation or its people"); *see also* Speiser v. Randall, 357 U.S. 513, 529 (1958) (striking down a statute that required veterans to make a loyalty pledge to the government because it effectively penalized not engaging in a particular type of speech).

4. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 281 (1964) (describing the importance of First Amendment protections to society); *see also N.Y. Times Co.*, 403 U.S. at 719 (explaining the paramount role that free speech and free press has in safeguarding the American people).

5. *See* Near v. Minnesota ex rel. Olson, 283 U.S. 697, 722–23 (1931) (finding unconstitutional a state law allowing prior restraint); *see also* Garrison v. Louisiana, 379 U.S. 64, 77–78 (1964) (overturning a Louisiana law that punished true statements made with "actual malice").

6. *See Sullivan*, 376 U.S. at 279 (requiring a public official to reach a higher threshold for establishing a defamation claim); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (declining to deny First Amendment protections to speech that is clearly offensive and intended to inflict emotional injury when the speech could not reasonably have been interpreted as stating true facts about a public figure).

tort claims ranging from libel to infliction of emotional distress, the Court has repeatedly defended the media's ability to publish free from fear of civil liability.[7] To do otherwise would chill the free exchange of ideas and expressions that these publications contribute so strongly towards.[8] In fact, it was a reaction to the restrictions put upon publications through licensing agreements by Great Britain that contributed to the codification of our First Amendment.[9] This tradition shows that the decision in *Bollea v. Gawker*[10] is objectively wrong. It is without precedent and violates the very nature of our constitution. In fact it directly contradicts precedent set in this particular area of law.[11] It features a publication that published truthful facts about a public figure that had held himself out as a role model for children.[12] For the publicized facts the publication was found liable for damages exceeding $100 million, which led to its bankruptcy and auctioning of its assets.[13] Under no circumstance is this result just, in line

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7. *See Sullivan*, 376 U.S. at 279 (invalidating civil penalties for a libel claim against a newspaper because otherwise it would chill free speech); *see also Falwell*, 485 U.S. at 108 (describing how imposing strict liability on a publisher for false facts would have a chilling effect on speech relating to public figures).

8. *See Sullivan*, 376 U.S. at 281–82 (indicating that the courts must protect First Amendment rights to criticize public officials, lest a chilling effect develop over the criticism of public officials).

9. *See generally* HIS MAJESTY'S STATIONARY OFFICE, ACTS AND ORDINANCES OF THE INTERREGNUM 1642–60, 184–86 (C.H. Firth & R.S. Rai eds. 1911) (authorizing the search, seizure, and destruction of materials offensive to the government).

10. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1204 (Fla. Dist. Ct. App. 2014) (holding that the "circuit court's order granting Mr. Bollea's motion for temporary injunction is reversed because it acts as an unconstitutional prior restraint under the First Amendment").

11. *See* Michaels v. Internet Entm't Grp., No. CV 98-0583 DDP (CWx), 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) (granting summary judgment for defendants in a publication of private facts because showing short clips of a celebrity sex tape constituted newsworthy content); *see also* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1234 (7th Cir. 1993) (granting summary judgment for defendants in a publication of private facts because publishing the facts of the plaintiff's private "bedroom" life served a legitimate public interest).

12. *See generally* Eve Vawter, *Hulk Hogan's Apology Can Never Bring His Role Model Status Back,* CAFEMOM (July 24, 2015), http://thestir.cafemom.com/parenting_news/188369/hulk_hogans_apology_can_never (describing Hulk Hogan's status as a role model in the 1980s) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

13. *See* Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan*

with precedent, or commensurate with public policy. Without freedom of speech, all other constitutionally protected rights may be undermined. This is about protecting the free press, which in turn protects the populace by informing them of the truth so that they can make judgments for themselves. After all, an informed populace is essential to a functioning democracy. As Thomas Jefferson wrote "[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost."[14]

## *II. Background*

### *A. The Tape*

In the mid-2000s, Terry Bollea (Bollea) was visiting with his friend, Bubba the Love Sponge (Bubba), and Bubba's wife, Heather Clem (Clem).[15] Bubba convinced Bollea to engage in sexual activities with Clem.[16] Bollea and Clem then proceeded to enter a bedroom where Bubba filmed their sexual encounter.[17] Bollea's awareness of the camera is disputed, but the tape lay inert for several years.[18] In 2012, the film disappeared from Bubba's home; it is unknown who took the tape and how the tape was removed from the home.[19] The tape eventually made its way to the offices of

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*Suit, Is for Sale*, N.Y. TIMES (June 10, 2016), https://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html?mcubz=1 (reporting Gawker's filing for bankruptcy following its suit with Bollea) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

14. THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON, 12 VOLS. 503 (Paul Leicester Ford ed., 1904).

15. *See* Nick Madigan, *Hulk Hogan Takes Stand in His Sex-Tape Lawsuit Against Gawker*, N.Y. TIMES (Mar. 7, 2016), https://www.nytimes.com/2016/03/08/business/media/hulk-hogan-sex-tape-gawker-lawsuit.html?mcubz=1 (establishing the background facts of the Bollea-Gawker suit) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

16. *See id.* (regretting now that Bubba had convinced Bollea to engage in sexual activities with Clem).

17. *See id.* ("In his testimony, Mr. Bollea said he had been stunned to learn that the man he considered his best friend, who acknowledged having an 'open marriage,' might have used a camera installed in the bedroom to record the sexual encounter.").

18. *See id.* (indicating that Bollea was unaware that a camera was recording the encounter).

19. *See id.* (suggesting the uncertainty as to how the tape was removed from

Gawker Media, LLC (Gawker), which released a short segment of the recording on their website with a corresponding article.[20]

### *B. The Trial*

Following the release of the tape, Bollea initiated a suit in federal court for invasion of privacy, intentional infliction of emotional distress, and copyright infringement.[21] He asked the court for a temporary injunction to prevent the publication of the recording.[22] The court summarily denied the temporary injunction.[23] Following his loss in the Middle District of Florida, Bollea voluntarily dismissed his claim and brought a new claim in the state courts of Florida.[24] The new claim was essentially identical to the one previously brought in federal court.[25] The state appellate court similarly thwarted his attempts at another preliminary injunction by reversing the circuit court's decision.[26] The state appellate court criticized the state circuit court's understanding of privacy rights of public figures, noting

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the home and who actually recorded the tape).

20. *See id.* ("Mr. Bollea, who will continue testifying on Tuesday, openly discussed the video at issue in an appearance on a television show run by the website . . . .").

21. *See* Bollea v. Gawker Media, LLC, 913 F. Supp. 2d 1325, 1327 (M.D. Fla. 2012) (addressing Bollea's claims of invasion of privacy by intrusion upon seclusion, publication of private facts, violation of the Florida common law right of publicity, intentional infliction of emotional distress, and negligent infliction of emotional distress).

22. *See id.* (discussing that, to prevent his own irreparable harm, Bollea asked for a preliminary injunction to remove published excerpts of the video and to enjoin further publication of the video).

23. *See id.* at 1331 ("Plaintiff has introduced no evidence establishing that he would suffer irreparable harm . . . absent injunctive relief . . . . [A]ny violation is best redressed after a trial on the merits rather than by a prior restraint in derogation of the First Amendment.").

24. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014) (explaining that on the same day that Bollea voluntarily dismissed his claim in federal court he instituted a claim in the state circuit court).

25. *See id.* (indicating that the claim brought in state court was "essentially the same" as the claim brought in federal court).

26. *See id.* at 1204 (concluding that the state circuit court's granting of the preliminary injunction was invalid as an "unconstitutional prior restraint on speech under the First Amendment").

particularly that Bollea had opened his private life up to the public through his wrestling celebrity status and his starring in a reality television program centered around his life and family.[27] The court concluded that the interests of the First Amendment far outweighed the value of the injunction.[28]

In March 2016, the trial finally began in the state courts of Florida.[29] After two weeks of testimony and argument, the court tasked the jury with reaching a decision.[30] The jury returned with a verdict in favor of Bollea, awarding him $140.1 million in damages.[31] The unravelling of Gawker thus began. Following the massive jury award, both Gawker and its Chief Executive Officer Nick Denton filed for Chapter 11 bankruptcy protection.[32] Univision subsequently acquired Gawker's assets in the August 2016 auction that followed.[33] After the sale, both parties reached a settlement for $31 million.[34] But, the damage was done: civil

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27. *See id.* at 1200 (establishing that Bollea meets the very definition of a public figure, and explaining that, as compared to private individuals, the privacy concerns of public figures often warrant a different standard of First Amendment protections).

28. *See id.* at 1204 (concluding that the temporary injunction violated the First Amendment as a prior restraint on speech).

29. *See* Yanan Wang, *'Whatcha Gonna Do Gawker?' Trials Begins on Hulk Hogan's $100 Million Sex Tape Suit Against Gawker Media*, WASH. POST (Mar. 2, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/03/02/whatcha-gonna-do-gawker-trial-to-begin-on-hulk-hogans-sex-tapes/?utm_term=.8ff49eb425ef (noting that this would be the first ever celebrity sex tape case to make it to trial) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

30. *See* Tamara Lush, *A Jury Sided with Ex-Pro Wrestler Hulk Hogan on Friday and Awarded Him $115 Million in his Sex Tape Lawsuit Against Gawker Media*, U.S. NEWS & WORLD REP. (Mar. 18, 2016), http://www.usnews.com/news/entertainment/articles/2016-03-18/closing-arguments-expected-in-hogan-gawker-trial (describing the Bollea-Gawker trial) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

31. *See* Les Neuhaus, *Total Damages in Hulk Hogan Sex Tape Case: $140.1 Million*, L.A. TIMES (Mar. 21, 2016), http://www.latimes.com/nation/la-na-hulk-hogan-20160321-story.html (detailing the aftermath of the Bollea-Gawker suit) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

32. Ember, *supra* note 13.

33. *See* 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?mcubz=1 (reporting on the settlement reached between the parties) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

34. *See id.* ("Gawker capitulated, settling with Hulk Hogan, whose real name

liability destroyed the publication.[35] Liability had been imposed not for slander, libel, or defamation, but for the publication of truths.[36] It signaled to some that Florida's media laws had returned to the despotic ways of our persecuted forbearers.[37] It is clear that this decision is not in line with precedent, public policy, or our nation's goal of a free exchange of ideas.

### *C. The History of Hulk Hogan*

One key factor that makes this case so divergent from precedent is that Bollea is a public figure.[38] In order to fully understand Bollea's role as a public figure, a brief history of his public career within the wrestling industry is required. Bollea began his wrestling career in Florida in the mid-1970s.[39] Wrestling at that time was not as open as it is today; in fact, it functioned more as a closed business, similar to that of the mafia.[40] Each region of the country was broken into several "territories," with each territory typically controlled by a single promoter or a

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is Terry G. Bollea, for $31 million, according to court documents, and bringing to a close a multiyear dispute that stripped the company of much that once defined it.").

35. *See id.* (indicating that the large award granted to Bollea forced Gawker into a bankruptcy auction).

36. *See* Neuhaus, *supra* note 31 (explaining that Bollea's claim was based on the publication of a truthful video and not for inaccurate or libelous speech).

37. *See* Michael McCann, *Hogan Lawsuit vs. Gawker Could have Massive Impact on Journalism*, SPORTS ILLUSTRATED (May 26, 2016), https://www.si.com/more-sports/2016/05/26/hulk-hogan-gawker-lawsuit-litigation-finance-journalism (recognizing that the decision in *Gawker* presents troubling ramifications for the field of journalism as a whole) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

38. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1200 (Fla. Dist. Ct. App. 2014) (establishing Bollea's undisputed status as a public figure).

39. *See* SCOTT M. BEEKMAN, RINGSIDE: A HISTORY OF PROFESSIONAL WRESTLING IN AMERICA 120 (2006) (presenting a history of professional wrestling in the United States).

40. *See id.* at 84–85 (explaining how the territories banded together and colluded to protect the NWA Championship title); *see also* Graham Flanagan, *The Epic Story of How Vince McMahon Created WWE and Conquered Pro Wrestling*, BUS. INSIDER (Nov. 10, 2016), http://www.businessinsider.com/vince-mcmahon-wwe-wrestling-territories-wcw-ted-turner-2016-11 (explaining the nature of the business of professional wrestling before McMahon purchased WWF from his father) (on file with Washington & Lee Journal of Civil Rights & Social Justice).

syndicate of promoters.[41] These territories were virtual monopolies in their respective areas and a territory's respective promoter protected its value.[42] Given the closed-off nature of this industry, it is unsurprising that Bollea experienced some difficulty in his introduction. During his first training session with Hiro Matsuda (Matsuda), a legendary Japanese shoot wrestler,[43] Bollea suffered a broken leg.[44] The business was so protected at that point that one would have to suffer an injury and return to show commitment to the sport and a willingness to protect its dirty secret. Although it is now known that professional wrestling is predetermined, that veil was first lifted publicly in 1989 by World Wrestling Entertainment's (WWE) Vince K. McMahon (McMahon).[45] McMahon admitted to the predetermined nature of the sport to evade taxes associated with state athletic commissions.[46] But, when Bollea began his professional wrestling career, the mystery of "kayfabe" still veiled the sport.[47] "Kayfabe" is the concept of predetermined events being portrayed as legitimate sporting events.[48] This is represented in the wrestling industry in many

41. *See* BEEKMAN, *supra* note 39, at 118 (explaining the closed-off, territorial nature of professional wrestling pre-WWE expansion).

42. *See id.* at 118 (indicating that the "sanctity" of each promoter's territory lay in their understanding that other promoters would not encroach on their territory).

43. *See id.* at 39 (describing "shoot" wrestlers as professional wrestlers who have real fighting skills).

44. *See* James Montgomery, *Hulk Hogan on 'Tough Enough' and How Kevin Owens Made Him a Believer*, ROLLING STONE (June 23, 2015), http://www.rollingstone.com/sports/features/hulk-hogan-on-tough-enough-and-how-kevin-owens-made-him-a-believer-20150623 (expanding on the significant developments in wrestling training that have occurred since Hulk Hogan entered the business) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *see also* X-Wrestling Online, *Hulk Hogan Talks About Hiro Matsuda Breaking His Leg*, YOUTUBE (Sept. 19, 2016), https://www.youtube.com/watch?v=L294k7N3NM0 (providing Bollea's own recounting of the Matsuda training incident) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

45. *See* BEEKMAN, *supra* note 39, at 131 (describing McMahon's tactics in protecting the growing commercialization of his wrestling empire).

46. *See id.* at 131 (conceding that professional wrestling did not represent legitimate athletic competition).

47. *See id.* (explaining that many promotions viewed McMahon's revelation to be the death knell of the business).

48. *See id.* at 40 (stating that "kayfabe" generally held up until the 1980s).

ways, but none is more telling than the motto of many wrestlers at the time: "keep kayfabe."[49] To "keep kayfabe" is to keep the public in the dark as to the true nature of the sport.[50] The intense devotion to this credo partially results from the tremendous damage done to the sport following scandals that resulted in several Department of Justice investigations in the 1950s.[51] The damage led to the sport's fall from national prominence as it continued to lose ground to football and baseball in television markets across the country.[52]

The popularity of wrestling would again rise to national prominence. The catalyst behind this return was the combination of two men: McMahon and Bollea. Following his recovery from his broken leg, Bollea returned to Matsuda to finish his training and begin his career in the Florida wrestling territories.[53] After achieving some success in the Florida territories, the demand from other promoters for Bollea began to increase.[54] Bollea was in a very advantageous position in that he was young, handsome, and gigantic. As a "blonde former bodybuilder," he was the complete package that these promoters were looking for.[55] His first exposure to McMahon took place in 1980, when McMahon's father, Vincent J. McMahon (the promoter of the north east territory at the time) brought him in to work at Madison Square Garden (their promotions main hub).[56] Over time, Bollea's character, better known as Hulk Hogan, began to fully develop.[57] He was given the Hulk moniker following a joint radio interview where both he and

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49. *See id.* (reporting that "kayfabe" endured as long as it did despite exposés, defections, and governmental investigations).

50. *See id.* (tracing the "carnivalesque" roots of keeping business secrets from paying customers).

51. *See id.* at 98–99 (describing the DOJ investigations into cutthroat, monopolistic business practices aimed at independent promoters).

52. *See id.* at 93 (explaining the rise of baseball and football as a consequence of the advent of television).

53. *See id.* at 120 (noting Bollea's early career in Florida).

54. *See id.* (describing Bollea's progressive rise in the industry).

55. *See id.* (explaining that Bollea was McMahon's most "important acquisition").

56. *See id.* at 120 (detailing Bollea's first encounter with Vincent K. McMahon).

57. *See generally* HULK HOGAN & MARK DAGOSTINO, MY LIFE OUTSIDE THE RING (2009).

Lou Ferrigno (Ferrigno), the star of the *Incredible Hulk* at the time, had been present.[58] The host had remarked that Bollea was substantially larger than Ferrigno, and the "Hulkster" was born.[59] As his popularity increased internationally, Bollea was eventually brought into another one of the large American territories in Minnesota, the American Wrestling Association (AWA).[60] Bollea did not return to New York because he had a falling out with Vincent J. McMahon over Bollea's desire to play a role in the film *Rocky III*.[61] Vincent J. McMahon did not want Bollea to perform the role and their professional relationship ended.[62] The role proved to increase Bollea's popularity in Minnesota and beyond, giving the wrestler his first exposure in the mainstream.[63] He became one of the most popular and well compensated professional wrestlers in the history of the sport.[64] However, his success, popularity, and wealth were only in its infancy, for he was yet to combine his efforts fully with McMahon. This combination would lead to wrestling reaching its greatest heights in popularity, profitability, and publicity.

To understand what happens next in the story, you have to understand a little about the structure of professional wrestling in the country in the early 1980s. As stated above, the industry was divided into regional territories with each functioning as a mini-monopoly in its small region.[65] Some of these territories were very

58. *See id.* at 76–77 ("One day, I went on a local talk show and wound up sitting on-air right next to Lou Ferrigno.").

59. *See id.* ("[S]itting next to me at that point in my life, the guy looked kinda [sic.] small. That blew Jerry Jarrett away. I got back to the dressing room after the show and Jarrett was like, 'Good God, Terry! You were sitting on TV and you were bigger than the Hulk!'").

60. BEEKMAN, *supra* note 39, at 131.

61. *See* Silver Screen Artists, *HULK HOGAN in Rocky III . . . What Did It Do for Hogan's Career?*, SILVER SCREEN ARTISTS, http://silverscreenartists.com/hulk-hogan-in-rocky-3-what-did-it-do-for-hogans-career/ (last visited Dec. 1, 2017) (explaining that Bollea was fired from the WWF following his role in *Rocky III*) (on file with the Washington & Lee Journal of Civil Rights & Justice).

62. *See id.* ("After filming his scene for Rocky III against the wishes of Vince McMahon Sr., then-owner of WWF, Hulk Hogan was mysteriously ostracized by the organization shortly after the big screen appearance.").

63. *See* BEEKMAN, *supra* note 39, at 131 (explaining how Bollea steadily increased his popularity through the role in *Rocky III*).

64. *Id.*

65. *Id.* at 118.

small, sometimes only existing in the metro area surrounding a major city.[66] One such example included Houston Wrestling, run by Paul Bosch in the 1970s and 1980s.[67] Houston Wrestling would run wrestling shows in and around the city of Houston.[68] Their shows ranged in size and prestige from small shows in high school gyms to huge blockbuster shows in the Sam Houston Coliseum.[69] Along with running those shows, each territory would typically have a television program whose purpose was to promote the live shows held each week.[70] Essentially the television program would serve as a commercial for the promotion's weekly shows while also providing some advertising revenue to the promotion from the television station.[71] Larger territories, such as the AWA and WWE, while having much larger geographic footprints than organizations like Houston Wrestling, typically respected the television rights of the smaller organizations.[72] WWE and AWA traditionally only sold their television programs to networks within their geographical region (the Northeast and Midwest respectively).[73] This all changed when McMahon took over the WWE from his father.[74] McMahon had a strategy to take wrestling national again and return it to its historical prominence.[75] Bollea, as Hulk Hogan, was essential to this plan.[76] The plan had several elements. First McMahon would begin by attempting to acquire the most popular

66. *Id.* at 110 (indicating that some territories consisted of a single metro area such as Dallas or Kansas City).

67. *See generally* Ken Hoffman, *Glory Day of Paul Boesch's 'Houston Wrestling' Now Online*, HOUS. CHRON. (July 17, 2015), http://www.houstonchronicle.com/life/columnists/Hoffman/article/Glory-days-of-Paul-Boesch-s-Houston-Wrestling-6391434.php (describing author's visits to Houston Wrestling and his experiences watching the events) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* BEEKMAN, *supra* note 39, at 131 (describing the relationship between larger and smaller territories in the national wrestling industry).

73. *Id.*

74. *Id.* at 119.

75. *Id.*

76. *Id.*

wrestlers from around the country.[77] These wrestlers were the current stars of the regional territories and were directly responsible for bringing in the audiences the smaller promotions required to maintain profitability.[78] McMahon also contacted local television affiliates and made them an offer they could not refuse: McMahon offered to pay the affiliates to air his programs in the time slots occupied by regional promotional shows that the affiliates were currently paying for.[79] Thereby the affiliates were turning an expense into an additional revenue stream. By doing this he stymied his competitors' revenue generation in two ways: by signing their stars he diminished their live event revenue and by taking their television contracts he prevented ad revenue from reaching the promotions.[80] The national rollout that would follow would completely transform the industry from one based on small regional promotions to that of national juggernauts competing for national attention.[81] McMahon was not without competitors in his venture. Two of the other larger regional promotions also attempted to go national: Crocket Promotions (Crocket) out of North Carolina and Virginia and AWA out of Minnesota.[82] Neither organization was able to compete, which led to the closure of AWA and the sale of Crocket to Turner Broadcasting (which was rebranded as World Championship Wrestling (WCW) and went on to compete with WWE successfully for nearly two decades before suffering a similar fate to other promotions and being forced to sell to WWE).[83]

The creation of superstar that could captivate the country was central to McMahon's plan. No man better fit that description at the time than Bollea as Hulk Hogan. Hulk Hogan was portrayed as good guy.[84] This is important because wrestlers are typically

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77. *Id.* at 121.

78. *Id.*

79. *Id.*

80. *See id.* at 121–22 (discussing that through this strategy, McMahon was able to pick "off promoters one by one").

81. *See id.* at 121–24 (explaining the consolidation of promotions that was occurring at that time).

82. *Id.* at 122.

83. *Id.* at 129–30.

84. *Id.* at 123.

portrayed as either babyfaces (heroes) or heels (villains).[85] Promoters effectuate this distinction by portraying the characters in different lights and the characters' actions.[86] Hulk Hogan was portrayed as the ultimate babyface, an American hero who explained to his followers (the Hulkamaniancs) that if one "eats their vitamins and says their prayers" they will grow up to be as big and strong as the Hulk.[87] Because of the "kayfabe" nature of the business, this was portrayed to be Bollea nature in real life.[88] As the centerpiece of McMahon's plan to dominate the world of wrestling, Bollea was depicted as beating challenger after challenger.[89] Because of his victories he served as a role model to a generation and became a household name around the world.[90] Bollea would go on to parlay the celebrity status he achieved as a role model in the WWE into many movie and television deals including: *No Holds Barred*, *Mr. Nanny*, and Eponymous *Hogan Knows Best*, among many others.[91]

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85. *See Torch Glossary of Insider Terms*, PRO WRESTLING TORCH (2008), https://www.pwtorch.com/insiderglossary.shtml (providing the definitions for various wrestling terms) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

86. *See* Kaizar Cantu, *Realism in Pro Wrestling: A Change of Heart, or the Babyface-Heel Dilemma*, BLEACHER REP. (Dec. 17, 2011), http://bleacherreport.com/articles/987346-realism-in-pro-wrestling-a-change-of-heart-or-the-babyface-heel-dilemma ("Through actions, technique and color schemes in ring attire, the average pro wrestling fan can define heel and face roles in a particular match from the very start.") (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

87. BEEKMAN, *supra* note 39, at 131.

88. *See* Frank Pallotta, *Hulk Hogan on How Wrestling's 'Kayfabe' Went Big Time*, CNN, http://money.cnn.com/2016/03/07/media/hulk-hogan-wrestling-testimony-gawker-trial/index.html (discussing how wrestlers stayed in character outside of the ring in front of fans) (on file with the Washington & Lee Journal of Civil Rights & Justice).

89. *See id.* (describing Bollea's WWE character).

90. *See* Vawter, *supra* note 12 (explaining that Hulk Hogan fame was so great that he was the celebrity most often requested by the Make-a-Wish Foundation).

91. *See Hulk Hogan*, IMDB, http://www.imdb.com/name/nm0001356/ (last visited Dec. 4, 2017) (detailing a biography about Bollea and providing his filmography) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

### *D. The Tort*

Bollea's role as a voluntary public figure and role model for children is important to this particular case because the actions of public figures are more likely to be found newsworthy. The invasion of privacy tort is an invention of the twentieth and twenty-first centuries.[92] The concept developed following Louis Brandies and Samuel Warren's article entitled *The Right to Privacy*.[93] Their argument for a tort based on an invasion of privacy has slowly entered the legal field over the past 130 years.[94] The invasion of privacy tort comes in several flavors each governing different modes that the invasion could take.[95] The Bollea case was brought under invasion of privacy by publication of private facts.[96] One who "gives publicity to a matter concerning the private life of another is subject to liability if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of a legitimate public concern."[97] The tort implicates fundamental First Amendment issues and therefore has presented difficulties to plaintiff actions.[98]

Publication of private facts contains three essential elements. The first requirement is that the fact be publicized—it must be disclosed to a third party in some manner.[99] Second, the tort requires identification—the plaintiff must be identified in the disclosure to the third party.[100] The third and final element of the

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92. BRUCE M. SANFORD, LIBEL AND PRIVACY, 11–12 (2d ed. Supp. 2015).

93. *See id.* (explaining that tort finds its origin in the law review article and that it has developed over time).

94. *See id.* (explaining that the tort has evolved over time with the development of technology and new mediums for news transmission).

95. *See id.* (indicating that there are "four judicially recognized types of invasion of privacy—intrusion, publication of private facts, false light and appropriation").

96. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1199 (Fla. Dist. Ct. App. 2014) (indicating that a portion of Bollea's claim against Gawker was for invasion of privacy by publication of private facts).

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

98. *See* 1 ROBERT D. SACK, SACK ON DEFAMATION 12–36 (3d ed. Supp. 2009) (explaining that some states have not adopted the tort and others have questioned its constitutionality).

99. *Id.*

100. *Id.* at 12–42.

tort requires that the facts disclosed to the third party be private in nature.[101] The tort also requires that the private facts not concern a matter of public concern.[102] This provision serves more as a defense to the tort than as an element and is frequently what prevents plaintiffs from collecting damages.[103] It becomes an even more pertinent defense and higher hurdle for plaintiffs to overcome when the plaintiff is a public figure.[104] Courts have allowed almost all truthful statements about public figures to fall into the newsworthiness exception.[105] It has been nearly impossible for public figures to recover monetary damages from publications based on the publication of private facts tort because of the newsworthy exception.[106]

## *III. Argument*

Bollea is a public figure.[107] He has been enriched by his fame and gained public goodwill as a role model for children.[108] Being a celebrity does have some downsides that one must endure along with its benefits. One of those downsides is that your actions and inactions suddenly become matters of public concern.[109] There is additional interest when the public figure occupies a special place

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101. *See id.* at 12–34 (indicating that the facts disclosed must be both private "as a matter of fact and as a matter of law").

102. *See id.* at 12–47 (explaining that newsworthiness could be more generally understood to mean of "general interest" to the public).

103. *See id.* (explaining that the newsworthiness exception provides "broad protection for publication of what otherwise appear to be embarrassing private matters").

104. *See id.* at 12–49 (explaining that the lives of public officials and public figures are generally "subject to the greatest scrutiny").

105. *See id.* (indicating because of the public's general interest in the lives of public figures few statements about their private lives have been found to not fall in the newsworthiness exception).

106. *See id.* at 12–53 n.225 (listing the many times public figures have failed to succeed with the claim).

107. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1200 (Fla. Dist. Ct. App. 2014) (explaining that it was undisputed that Bollea was a public figure).

108. Vawter, *supra* note 12.

109. *See generally* Rawlins v. Hutchinson Pub. Co., 218 Kan. 295 (1975) (explaining that both public figures' and officials' actions are a matter of public concern).

in society as role models do, particularly role models of children.[110] The public has a compelling interest in being able to learn if the public figure acts the same in their private lives as they claim to in their public lives.[111] Because of that, Bollea's actions were of public concern and fit squarely in the newsworthy exception. It would be highly likely that a parent would be interested in knowing if their children's role model was involved in an adulterous affair with his purported best friend's wife.

As mentioned above, invasion of privacy by publication of private facts is an incredibly difficult tort from which to derive recovery.[112] There are a number of reasons for why plaintiffs find recovery so difficult. The tort creates numerous First Amendment issues just from its existence.[113] To lessen the torts impingement on the First Amendment, the courts through the common law have created the newsworthy exception.[114] Newsworthiness traditionally carries several definitions. It has been "defined broadly to include not only matters of public policy, but any matter of public concern, including the accomplishments, everyday lives, and romantic involvements of famous people."[115] The plaintiff has the burden of proving that the information revealed was not newsworthy.[116]

While there is no precedent that is based off facts identical to those of the Bollea and Gawker case, there are many others that have similar themes. Those cases almost always have ended with verdicts protecting the rights of publishers to broadcast, either in print or video, those truthful facts.[117] From television producers

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110. *See id.* at 298–300 (applying that reasoning to a police officer).

111. *See generally id.*

112. *See* SACK, *supra* note 98, at 12–53 n.225 (listing the many times public figures have failed to succeed with the claim).

113. *See* Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (stating that "Indiana Constitution commands real caution about proposals to recognize a civil cause of action for libel that impose liability for truthful statements").

114. *See* Michaels v. Internet Entm't Grp. Inc., 1998 WL 882848, at *7 (C.D. Cal. 1998) (indicating that the purpose of the "newsworthy privilege" is to protect the "First Amendment freedom to report on matters of public concern").

115. *Id.*

116. *See id.* (stating "plaintiff has the burden of proof to demonstrate that the matters publicized are not newsworthy, or that the depth of intrusion in private matters was 'in great disproportion to their relevance' to").

117. *See* SACK, *supra* note 98, at 12–53 n.225 (noting the general trend of cases

who showed clips of a celebrity sex tape on a news program,[118] to a former child prodigy whose privacy was invaded and had unflattering facts published about him in an article,[119] to a man's public outing in an article after he helped prevent the assassination of the President of the United States,[120] every time a media publisher and her authors' rights to publish truthful private facts have been upheld.[121] In each one of these cases, and many more we will examine, the publisher's right to publish has been defended by the privilege attached to reporting truthfully on newsworthy events. The threshold for the newsworthiness privilege is not particularly high, and it should have protected the Gawker organization, its editors, and its journalists.

## *IV. The Genesis of the Tort and the Precedent*

### *A. Application of the Tort to the Old Media*

Privacy law is a relatively new invention of the twentieth century and therefore there is limited precedent from which to draw upon.[122] From its inception, courts have attempted to balance the both the personal interest of the plaintiff in privacy with the public interest of dissemination of newsworthy information.[123] California's first blush, but certainly not its last, with invasion of

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that deal with publishers' rights to broadcast).

118. *See Michaels*, 1998 WL 882848, at *1 (explaining the facts of the case where clips of a celebrity plaintiff's sex tape were shown on a news program and held to be newsworthy).

119. *See* Sidis v. F-R Pub. Corp., 113 F.2d 806, 807 (2d Cir. 1940) (explaining the facts of the case where a reclusive former child prodigy was made the subject of a publicly embarrassing article and cartoon despite his wishes to the contrary).

120. *See* Sipple v. Chron. Pub. Co., 201 Cal. Rptr. 665, 666 (Cal. Ct. App. 1984) (describing the facts of the case where a homosexual man had his sexual orientation revealed in an article against his wishes following his help in preventing the assassination of President Gerald Ford).

121. *See Sidis*, 113 F.2d at 807 (dismissing claim of former child prodigy); *see id.* at 1043–44 (upholding dismissal of claim brought by an involuntary public figure whose sexual orientation had been revealed).

122. *See* SANFORD, *supra* note 92, at 11–22 (explaining that privacy law is a relatively new field).

123. *See Sidis*, 113 F.2d 806 at 809 (attempting to balance the privacy interest of individuals with the press's right to publish newsworthy stories).

privacy law occurred in 1931 with the production and release of the film *The Red Kimono*.[124] Before reforming her life, the plaintiff, Gabrielle Melvin (Melvin), had been a prostitute.[125] During her time as a prostitute she had been accused and later acquitted of murder.[126] Sometime after the criminal trial, Melvin reformed her life and married, living in the words of the court an "exemplary, virtuous, honorable, and righteous life."[127] The film depicted her earlier life while using the plaintiff's maiden name for the role of the title character.[128] The plaintiff then claimed that the publication of these earlier facts about her life caused her great hardship through loss of reputation and abandonment by her friends when they recognized her name from the film.[129] The court first had to determine whether California would recognize an invasion of privacy claim; after determining that it would, it then found for the plaintiff.[130] The court explained their decision by stating that no moral or ethical code would permit or justify the publication of these facts about the private life of Melvin.[131] Here, we see the genesis for the newsworthy exception in California. The court explains that if the film only contained facts from the murder trial that Melvin was acquitted of, it would have been immune to the invasion of privacy suit.[132] By including details concerning Melvin's life that were outside of the public record, the producers had crossed over into a forbidden territory and invaded the privacy

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124. *See* Melvin v. Reid, 112 Cal. App. 285, 287, 291–92 (Cal. Ct. App. 1931) (explaining the facts of the case where a woman's life was depicted in an unflattering film titled *The Red Kimono*).

125. *See id.* (explaining that the plaintiff's former occupation was a source of embarrassment for the plaintiff).

126. *See id.* at 286 ("It is alleged that appellant's maiden name was Gabrielle Darley; that a number of years ago she was a prostitute and was tried for murder, the trial resulting in her acquittal.").

127. *Id.*

128. *See id.* (explaining that it was easy to discern for those in plaintiff's community that she was the subject of the film).

129. *See id.* at 291–92 (indicating that plaintiff has suffered numerous harms in her community from the film's revelations about her past).

130. *See id.* at 292 (articulating that the invasion of privacy by the defendants was not justified by any standard of "morals or ethics").

131. *See id.* (indicating that the court could find no policy justification for using the name of the plaintiff in the film).

132. *See id.* at 291 (noting that the facts of the trial were a matter of public record and thereby implying that they are of a matter of public concern).

of Melvin.[133] While not termed by the court at the time, one can easily interpret this decision to read that the defendants were being punished for publishing facts that were not of a public concern. If they had limited themselves simply to facts that were of public concern, the privacy suit would have failed. As we will see, a similar formulation for the yet unnamed newsworthy exception will be developed in several states over the decades following Melvin's victory.

When the courts of New York approached the same problem, they came to a different result, but used a similar methodology.[134] The New York court was interpreting a recently passed statute that would allow suit for use of the likeness of an individual "for trade purposes."[135] The court found that there was no violation of the statute because it did "not contemplate the publication of a newspaper, magazine, or book which imparts truthful news or other factual information to the public."[136] The court would also go on to explain their thoughts on the invasion of privacy tort itself, responding to the article written by Samuel Warren and Louis Brandeis some fifty-five years earlier.[137] The court stated:

> [W]e are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press. Everyone will agree that at some point the public interest in obtaining information becomes dominant over the individual's desire for privacy. Warren and Brandeis were willing to lift the veil somewhat in the case of public officers. We would go further, though we are not yet prepared to say how far. At least we would permit limited scrutiny of the 'private'

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133. *See id.* (explaining that the court's decision lies in the fact that the defendant's publicized facts about the plaintiff that were not included in the trial).

134. *See* Sidis v. F-R Pub. Corp., 113 F.2d 806, 809 (2d Cir. 1940) ("But despite eminent opinion to the contrary, we are not yet disposed to afford to all of the intimate details of private life an absolute immunity from the prying of the press.").

135. *See id.* at 810 (explaining that because a common cause of action for invasion for privacy had not yet been accepted by New York, the plaintiff's claim would have to come under the statute).

136. *Id.*

137. *See id.* at 809 (indicating that the court's belief over what would constitute an invasion of privacy is different from the on proposed in Warren and Brandies' article *The Right to Privacy*).

> life of any person who has achieved, or has had thrust upon him, the questionable and indefinable status of a "public figure."[138]

Herein lies the genesis of the newsworthy exception. Although not yet named as such, the court clearly contemplated that if the private facts publicized are of interest to the public at large, the interest of the public outweighs the privacy interest of the individual.[139] The court expands the interpretation of Warren and Brandies to not just public officials, but also to those whose lives are of interest to the public: "public figure[s]".[140] William James Siddis, a former child prodigy of mathematics, was a public figure for the purposes of the court's interpretation of an invasion of privacy tort.[141] The court goes on to note that the article contained a "considerable popular news interest" that would qualify for newsworthiness.[142] Probably because the court was in fairly uncharted territory, it cautioned its earlier statements with a disclaimer:

> We express no comment on whether or not the news worthiness of the matter printed will always constitute a complete defense. Revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notions of decency . . . . Regrettably or not, the misfortunes and frailties of neighbors and 'public figures' are subjects of considerable interest and discussion to the rest of the population. And when such are the mores of the community, it would be unwise for a court to bar their expression in the newspapers, books, and magazines of the day.[143]

This cautionary statement served as an early bound to the liberality the newsworthiness exception was granted. The exception would continue over the rest of the twentieth century to

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138. *Id.*

139. *See id.* at 809 (explaining the delicate balance between the right of the public and the private person's right to privacy while also contemplating the different privacy rights of private persons and public figures).

140. *See id.* (stating that the court believes information of interest to the public about those individuals that have become public figures is newsworthy).

141. *See id.* (explaining briefly the nature of Sidis' celebrity and his unusual and reclusive life that had made him the subject of the article).

142. *See id.* (describing that a former child prodigy's status was newsworthy because it was the result of radical parenting methods that were publicized and the validity of those methods was newsworthy).

143. *Id.*

be expanded and further fleshed out, with boundaries and limits tested through litigation. The now charted boundaries of the exception should have shielded the publishers of Gawker from liability stemming from the publication of the Bollea tape.

The Supreme Court approached this question in 1975 with its decision in *Cox Broadcasting Corp. v. Cohn*.[144] The publication at issue in *Cox* was the dissemination of the identity of a deceased rape victim by a reporter.[145] The Court fully understood the gravity of its decision and the two prime interests that were at stake, stating:

> Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press. The face-off is apparent, and the appellants urge upon us the broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities.[146]

The perpetual balancing act that our First Amendment requires had again reared its ugly head and required the Court to determine if journalists could be punished for publishing true facts.[147] The Court held that because those facts were publicly available, there was no invasion of privacy.[148] Nonetheless, in addition to this decision, the Court indicated that a privilege exists for journalist

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144. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975) (holding that "the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records").

145. *See id.* at 471–73 (stating the background of the case, that the reporter had learned the identity of the victim from court documents that were in public record).

146. *Id.* at 489.

147. *See id.* at 471–74 ("[W]hether, consistently with the First and Fourteenth Amendments, a State may extend a cause of action for damages for invasion of privacy caused by the publication of the name of a deceased rape victim which was publicly revealed in connection with the prosecution of the crime.").

148. *See id.* at 495–96 (explaining that the information contained in public records has presumably been placed there for the public good and therefore its dissemination neither harms the public nor constitutes an invasion of privacy).

publicizing truthful facts.[149] The Court recognized the important function that the press plays in a functioning democracy, and to fully function in that role the press must be free to publicize truthful newsworthy facts without fear of civil liability.[150] Because of this important function of the press, this First Amendment privilege would be entrenched in the common law as the newsworthy exception.

In 1989 the Supreme Court again weighed in on a claim against a publication for printing private facts.[151] This time, the Court examined a negligence per se claim based on a misdemeanor statute that criminalized the publication of the names of sexual assault victims.[152] The case involved the publication of a rape victim's name from a police report that was in the police department's pressroom.[153] A reporter-trainee from *The Florida Star* then transcribed the police report and passed it on to a journalist, who then wrote a short news story on the crime and included the victim's name.[154] The named victim then brought a negligence per se claim against the paper and was awarded $100,000 in damages.[155] On appeal the Supreme Court ruled that imposing civil penalties based on the facts of the case violated the First Amendment.[156] In doing so the Supreme Court applied the

149. *See id.* at 489–90 (recognizing a privilege exists and applying it to a publication of private facts tort claim).

150. *See id.* at 491–92 (stating that the press plays an important role in providing oversight and disseminating information about the courts to the public).

151. *See* Florida Star v. B.J.F., 491 U.S. 524, 528–29 (1989) (explaining that court was determining if damages awarded for publishing private facts were appropriate).

152. *See id.* (discussing whether a local newspaper disclosing a rape victim's name after receiving if from the police constitutes as a misdemeanor).

153. *See id.* at 527 (explaining that the police report containing the victim's name was left in the pressroom and that the department put no restrictions on who could enter the pressroom).

154. *See id.* (describing the chain of events that resulted in the publication of the victim's name).

155. *See id.* at 528–29 (explaining that the trial court denied defendant's motion for a directed verdict and allowed the jury to award $75,000 in compensatory damages and $25,000 in punitive damages).

156. *See id.* at 541 (holding that a statute cannot impose punishment on a newspaper for publishing the legally obtained truthful facts unless the statute is narrowly tailored to serve a state interest of the "highest order").

test from *Smith v. Daily Mail Pub. Co.*,[157] which stated "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[158] The Court stressed the fear that imposing liability in cases such as this would lead to "timidity and self-censorship" within the press itself.[159] The Court explained that while protection of rape victims' identity was a "highly significant" interest, the means applied were not narrowly tailored to effectuate their goal.[160] While the Court was examining a negligence per se action based on a criminal statute here, it did take the opportunity to discuss briefly some implications of the publication of private facts tort.[161] The Court noted that the negligence per se claim brought here had a very low threshold for imposing civil sanctions.[162] This observation seemed to trouble the Court, which stated "there [is no] scienter requirement of any kind under § 794.03, engendering the perverse result that truthful publications challenged pursuant to this cause of action are less protected by the First Amendment than even the least protected defamatory falsehoods."[163] This disturbing observation could also directly apply to the publication of private facts tort, where there similarly is no scienter, actual malice, or bad faith requirement to impose liability, making truthful speech less protected than defamation.[164]

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157. *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97, 105–06 (1979) (holding narrowly that the asserted state interest could not justify the statute's imposition of criminal sanctions on the truthful publication of an alleged juvenile delinquent's name lawfully obtained by the newspaper).

158. Florida Star v. B.J.F., 491 U.S. 524, 533 (1989).

159. *See id.* at 535–36 (explaining that a justification for *Daily Mail*'s test is the potential chilling effect of the punishment of legally obtained truthful facts would create).

160. *See id.* at 537 (indicating that the interest did not create a "need" to impose liability and thereby infringe upon the First Amendment).

161. *See id.* at 539 (discussing the differences between this claim and one that would be brought under publication of private facts).

162. *See id.* (explaining that under the negligence per se standard employed by the lower courts, punishment was imposed simply for publishing the name without any other requirements).

163. *Id.*

164. *See* RESTATEMENT (SECOND) OF TORTS § 652D (providing the definition and elements of the publication of private facts tort).

As the newsworthy exception became further cemented into the common law, its definition would continue to evolve. In Alabama, the United States Court of Appeals for the Fifth Circuit employed a nexus test to determine if the revealed private fact had a valid connection with the public interest served by its revelation.[165] The Fifth Circuit court heard a case based on the publication of private details about the marriage between the plaintiff and the author's brother.[166] The court applied the fairly recent decision by the Supreme Court and held that the disclosure here was protected by the newsworthy exception.[167] In doing so the appellate court gave some bounds to the qualification for the newsworthiness privilege derived from the First Amendment, stating:

> [The] privilege is not merely limited to the dissemination of news either in the sense of current events or commentary upon public affairs. Rather, the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period.[168]

The Fifth Circuit provided a rather expansive view of the scope of the privilege and its resulting newsworthy exception, explaining that newsworthiness can apply to almost anything of public interest.[169] The court explained that once that public interest element has been recognized, a logical nexus between the publicized facts and the matter of public interest must be established to avoid liability.[170] The court quickly disposed of the

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165. *See* Campbell v. Seabury Press, 614 F.2d 395, 397 (5th Cir. 1980) (explaining that a logical nexus existed between the facts complained and the public interest that the book in question promoted).

166. *See id.* at 396–97 (describing the nature of the claim brought, which was based on the publication of facts concerning the author's brother and how he influenced the religious and civil rights beliefs of the author).

167. *See id.* at 397 (discussing that a First Amendment privilege exists, that it applies to the tort of invasion of privacy, and that it protects the speech in question).

168. *Id.*

169. *See id.* (indicating that the privilege is adaptable and may be used to combat intrusions on the First Amendment as they are encountered).

170. *See id.* (articulating that requiring a logical nexus protects the privacy of those whose actions may be of public interest, but are not logically related to the public interest promoted by the revelation of those details).

nexus issue, explaining that the effects of the plaintiff's relationship with the author's brother or the author were clearly appropriate to be published in a book about the author's life.[171]

In 1969 the California Supreme Court again was presented with an invasion of privacy by publication of true facts claim, this time with a voluntary public figure in *Kapellas v. Kofman*.[172] The plaintiff, a candidate for city council, brought a claim for invasion of privacy against a newspaper after an article was published featuring unflattering facts about her qualifications for city council and her children.[173] The Supreme Court of California affirmed the dismissal of the invasion of privacy claim because of how important it was that the press disseminate of information about political candidates.[174] In doing so, the court distinguished between voluntary and involuntary public figures, stating:

> In determining whether a particular incident is "newsworthy" and thus whether the privilege shields its truthful publication from liability, the courts consider a variety of factors, including the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety . . . . [W]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned, especially if the individual willingly entered into the public sphere.[175]

Here we have an apparent divergence in standards for plaintiffs, those that are voluntary public figures and those that are involuntary.[176] This distinction is well within the tradition of torts that potentially encroach on the First Amendment, where libel,

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171. *See id.* (rejecting the plaintiff's argument that a logical nexus did not exist between the publicized facts and the public interest served by their publication).

172. *See* Kapellas v. Kofman, 459 P.2d 912, 914 (Cal. 1969) (explaining that the plaintiff, a politician running for office, had brought the claim for invasion of privacy on behalf of both herself and her children).

173. *See id.* (indicating that the claim was brought as a result of facts stated about both the plaintiff's qualifications for city council and her children).

174. *See id.* at 924 (affirming the dismissal of the invasion of privacy claim because of the categorical importance of the information conveyed).

175. *Id.* at 922.

176. *See id.* (indicating that the court would allow greater intrusions into the privacy of voluntary public figures).

slander, and defamation law all hold similar standards.[177] As we will see in the next case, involuntary public figures have a similar difficulties in claims for invasion of privacy claim as the newsworthiness exception has been read very broadly to encompass almost any publication of facts the public would find interesting.

In 1984, the California Court of Appeals applied the newsworthy exception to a case involving an involuntary public figure.[178] That court adopted the Restatement (Second) of Torts definition for an involuntary public figure and their corresponding privacy rights.[179] The Restatement (Second) of Torts defines an involuntary public figure as:

> There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news.' Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed. The same is true as to those who are the victims of crime or are so unfortunate as to be present when it is committed, as well as those who are the victims of catastrophes or accidents or are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.[180]

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177. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268 (1964) (distinguishing between the remedies of a public official and a private person in a civil libel action); *see also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 49–50 (1988) (differentiating between the pleading standard required for a public figure and a private figure in an intentional infliction of emotional distress claim).

178. *See* Sipple v. Chron. Pub. Co., 201 Cal. Rptr. 665, 666 (Cal. Ct. App. 1984) (explaining the involuntary nature of the plaintiff's status as a public figure).

179. *See id.* (discussing that the court is employing the definition from the Restatement to determine if the plaintiff is now a voluntary public figure).

180. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f.

In *Sipple v. Chronicle Publishing Company*,[181] the California Court of Appeals heard a claim from a gay man who had helped avert an assassination attempt on President Gerald Ford in 1975.[182] An article was then written about Oliver W. Sipple (Sipple) that revealed his sexual orientation and he brought this claim following its publication.[183] The court ruled that no invasion of privacy had occurred because knowledge of Sipple's sexual orientation was known by several hundred people.[184] The court went on to suggest that even if his sexual orientation had been a closely-guarded secret, his claim would have still failed because the information was newsworthy.[185] The court explained that the motivation for the publication of the document can be helpful to the determination of whether the newsworthy exception applies.[186] The court again quoted the Restatement (Second) of Torts:

> *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.[187]

As one can see, the contours and boundaries of the newsworthy exception have begun to be drawn. Not only is the newsworthy value of the news being used as a factor, but also the motivation that surrounds the release of that information. The information

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181. *See Sipple*, 201 Cal. Rptr. at 671 (affirming summary judgment because the "trial court could determine as a matter of law that the facts contained in the articles were not private facts within the purview of the law and also that the publications relative to the appellant were newsworthy").

182. *See id.* at 666 (explaining the facts of the case, that Sipple pushed the arm of Ford's would be assassin as she raised and shot a gun at the President).

183. *See id.* at 670 n.2 (indicating that the article revealed that Sipple was gay, with the hope that perhaps this revelation would help break traditional homosexual stereotypes).

184. *See id.* (discussing that the large number of individuals in multiple cities with knowledge of the plaintiff's sexual orientation precluded a suit because the facts were not private).

185. *See id.* at 669 (articulating that even if the plaintiff's sexual orientation was not known by the public the publication of the fact would have been protected by the newsworthy exception).

186. *See id.* at 668 (explaining that because the publications motives were not in bad faith and the information was newsworthy, the plaintiff's claim was not valid).

187. *Id.* at 670 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h.

alone, being of interest to the general public, is not the only factor to be considered, but also whether the release of the private information directly serves the public interest purpose proffered for its dissemination.

When Delaware first encountered a claim for invasion of privacy due to publication of private facts in 1963, it reached a familiar result.[188] This case concerned an article written following a state senator's proposed bill reinstating whipping as a punishment for certain crimes.[189] The article mentioned that the last time that punishment was administered was eleven years earlier to a John Barbieri for breaking and entering.[190] The Delaware court employed a similar reasoning to that in *Sipple*, explaining that one who has become a public figure has lost certain privacy rights.[191] The court aptly stated "One who seeks the public eye cannot complain of publicity if the publication does not violate ordinary notions of decency."[192] Because Senator Barbieri had been thrust into the public eye due to his criminal conviction, he was a public figure for the purposes of his claim.[193]

The Supreme Court of Kansas used similar reasoning when it examined a claim that a newspaper publishing alleged private facts in 1975.[194] In the case, a former police officer's dismissal was publicized in a paper's column that focused on events that took place ten years earlier to the day in the town.[195] The Kansas court

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188. *See* Barbieri v. News-Journal Co., 189 A.2d 773 (Del. 1963) (stating that this is the first time an invasion of privacy claim of this type has been brought in Delaware).

189. *See id.* at 773–74 (discussing that the article was written following and in response to a state senator's proposal to reinstate whipping as a punishment).

190. *See id.* (describing that in the course of the article, Barbieri was mentioned because he was the last recorded person officially punished by whipping in Delaware).

191. *See id.* at 774–75 (indicating that the actions of public figures are of public interest and should be able to be reported upon).

192. *Id.* at 774.

193. *See id.* at 774–75 (explaining that like other types of public figures, criminals were public figures for the purposes of their trial and punishment); *but see* Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 168–69 (1979) (holding that a contempt citation did not make a plaintiff a public figure when bringing a libel claim).

194. *See* Rawlins v. Hutchinson Pub. Co., 543 P.2d 988, 989 (Kan. 1975) (explaining that this is a publication of private facts claim against a newspaper).

195. *See id.* at 989–90 (explaining the nature of the article that publicized the

ruled that because of his status as a police officer, he was a public official and, as a result, his actions were of public interest.[196] As the Kansas court stated "[a] person who by his accomplishments, fame, or mode of life, or by adopting a profession or calling which gives the public a legitimate interest in his doings, affairs, or character, is said to become a public personage, and thereby relinquishes a part of his right of privacy."[197] Much like the earlier courts discussed, it is clear the Kansas court intends to create a separate standard for invasions of privacy for purely private individuals versus public figures and officials. As we will see, this distinction has very real consequences for plaintiffs, with the fate of their claim based largely on their status.

So far, these cases have concerned specific newsworthy events or actions. In 1980, the United States Court of Appeals for the Tenth Circuit encountered a case where facts tangentially related to a newsworthy event were published and the subject of the story brought a claim for publication of private facts.[198] The case concerned an article written about an anesthesiologist who was the subject of two malpractice suits.[199] The article sought to highlight the issue presented by improper medical policing that could result in severe injury or death.[200] The plaintiff alleged that the article violated her privacy rights by discussing her history of "psychiatric and related personal problems," arguing that her problems themselves were not newsworthy.[201] The Tenth Circuit concluded that the reported private facts were newsworthy because there an

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unflattering facts about the officer's dismissal ten years earlier).

196. *See id.* at 993 (indicating that both public figures and public officials give up certain privacy rights that would be afforded to other citizens).

197. *Id.* (internal citations omitted) (quoting Cohen v. Marx, 211 P.2d 320, 321 (Cal. Ct. App. 1949)).

198. *See* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308 (10th Cir. 1981) (explaining the premise of a plaintiff's argument that the information printed, while related to her, had no relation to the newsworthy event that was being covered).

199. *See id.* at 306 (specifying that both episodes of malpractice resulted in either death or extreme disability to the patient).

200. *See id.* at 306–07 (describing the article's motivation for highlighting an issue within the professional community of doctors).

201. *See id.* (indicating that the "problems" were included in the story as an explanation for the plaintiff's erratic and tortious behavior).

editor could draw a "rational inference" between the facts and the newsworthy event.[202] The court reasons:

> [T]hat a rule forbidding editors from drawing inferences from truthful newsworthy facts would result in a far too restrictive and wholly unjustifiable construction of the first amendment privilege. If the press is to have the generous breathing space that courts have accorded it thus far, editors must have freedom to make reasonable judgments and to draw one inference where others also reasonably could be drawn. This is precisely the editorial discretion contemplated by the privilege.[203]

If a reasonable editor could draw an inference between the private fact and the newsworthy event, then the publication would face no liability.[204] The reasonable editor standard for finding inferences should have protected Gawker from liability because a reasonable inference can be drawn between the sex tape and the newsworthy topic of Bollea's reputation as a role model for children. The adultery serves to directly oppose the supposition that Bollea was fit to be a role model and therefore it is newsworthy.

In the early 1990s the magniloquent Judge Posner and the United States Court of Appeals for the Seventh Circuit weighed in on an invasion of privacy claim brought over the tangential subject of a book.[205] The case involved both a libel and an invasion of privacy claim, both based on the contents of a book depicting the African-American transition that occurred during the Great Migration.[206] The book attempted to encapsulate the unique African-American experience that was present during the Great Migration.[207] The author, Nicholas Lemann, attempted to do this

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202. *See id.* at 308–09 (explaining that because an editor could infer that these private facts were related to the newsworthy event, a recovery was barred).

203. *Id.* at 309.

204. *See id.* (concluding that editorial discretion requires a reasonable editor to make inferences between private facts and newsworthy events that others potentially would not).

205. *See* Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1224 (7th Cir. 1993) (explaining the nature of the claims and that they followed from publication of a book featuring the plaintiff and his wife).

206. *See id.* (stating that the plaintiff sought relief for both libelous statements made in the book about him and for an invasion of his privacy by publicizing unflattering facts about him).

207. *See id.* (discussing that the Great Migration was a movement of five million African-Americans between 1940 and 1970 from rural areas in the South to more urban areas in the North).

by following of the story of several individuals whose experience was representative of the many.[208] These details were important because they formed the basis of Judge Posner's reasoning for the required nexus between the private facts and the social interest served by their publication.[209] Judge Posner's analysis began with a reading of the earlier precedent, leading him to draw the conclusion that "[t]he Court must believe that the First Amendment greatly circumscribes the right even of a private figure to obtain damages for the publication of newsworthy facts about him, even when they are facts of a kind that people want very much to conceal."[210] Posner recognized and read the tort to be valid only if "the private facts publicized be such as would make a reasonable person deeply offended by such publicity but also that they be facts in which the public has no legitimate interest."[211] Posner then applied his reasoning of the tort to the case and found that there is a connection between the private facts and the public interest served.[212] The facts are inseparable from the book if it is to perform the vital social function for which it was written: inform readers about The Great Migration.[213]

This interpretation implies a rather liberal nexus test, that the private facts publicized only need to have a tangential, albeit necessary, relation to public interest served. But Posner left us with a caveat that proves somewhat fortuitous "[p]hotographic invasions of privacy usually are more painful than narrative ones, and even partial nudity is a considerable aggravating factor."[214]

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208. *See id.* (discussing the journalistic method that Lemann used in his narrative, attempting to tell the story of the whole by telling the story of representative individuals).

209. *See id.* at 1233 (reasoning that because the events of the lives represent the subject matter of the book, it was necessary for the author to include the accounts, lest his work of journalism become one of fiction, frustrating the societal benefit of his work in the first place).

210. *Id.* at 1232.

211. *Id.*

212. *See id.* (explaining that the methodology used for writing the book, that of individual case studies, required that the author publish the stories about its subject).

213. *See id.* (indicating that because specific facts were necessary to the publication of the book, the publication served to establish a connection to public interest).

214. *Id.* at 1234.

Posner indicated that the medium of the publication makes a difference in the balancing of public interest and the private interest.[215] The medium of publication of many of these private facts changed to that of the new media over several years following Haynes.[216] However, the results for plaintiffs and the corresponding freedoms enjoyed by the press to publicize truthful facts would not change.

### *B. A Shift from Old Media to New and Its Effect on the Tort*

So far, the invasions of privacy claims examined have primarily taken the form of the written word. The statements the plaintiffs complained of were found in newspapers or other written publications.[217] As the primary mode of media shifted over the late twentieth century, [218] so did the medium that transmitted many of these complained invasions of privacy.[219] Media transitioned from the written word to broadcast video, and a whole new line of issues and, eventually, cases evolved with it. Still, the precedent remained familiar, and the courts still set an incredibly high bar for plaintiffs seeking to recover from the media for publication of private facts.

The new media reared its ugly head in the publication of private facts realm repeatedly during the late twentieth and early twenty-first centuries. In 1998, the Supreme Court of California

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215. *See id.* at 1224 (explaining that photographic intrusions are more painful than others and therefore through extrapolation one can assume that private facts published in the form other than the written word may have different balancing weights associated with the factors).

216. *See* Shulman v. Grp. W Prods., Inc., 955 P.2d 469, 473 (Cal. 1998) (acknowledging that the shift from print media to electronic media has become substantial).

217. *See generally* Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940).

218. See GEOFFREY COLON, DISRUPTIVE MARKETING: WHAT GROWTH HACKERS, DATA PUNKS AND OTHER HYBRID THINKERS CAN TEACH US ABOUT NAVIGATING THE NEW NORMAL 239 (2016) ("It wasn't until the early 20th century that we had our senses of sound a sight awoken by radio, television, and the birth of broadcast media. This new media shift had an easy-to-understand dynamic.").

219. *See supra* Section B (explaining that this author observed the cases that began to emerge in the 1990s tended to be from the publication of private facts over video media rather than print media).

again approached the publication of private facts question.[220] The court was keenly aware of the shift in media coverage and the effects the shift may have on the tort.[221] The change in the primary medium of media could potentially create even more offensive invasions into one's private life. However, squaring that risk with the fundamental right of the press to report on truthful facts became an even more difficult balancing act than that in which the courts had been previously engaged.[222] The Supreme Court of California eloquently stated the difficulty here:

> At what point does the publishing or broadcasting of otherwise private words, expressions and emotions cease to be protected by the press's constitutional and common law privilege—its right to report on matters of legitimate public interest—and become an unjustified, actionable invasion of the subject's private life? How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors? Publication or broadcast aside, do reporters, in their effort to *gather* the news, have any special privilege to intrude, physically or with sophisticated photographic and recording equipment, into places and conversations that would otherwise be private? Questions of this nature have concerned courts and commentators at least since Brandeis and Warren wrote their seminal article, and continue to do so to this day.[223]

Therein lies the difficulty the courts have with this issue. Individuals value privacy greatly, but a well-functioning democracy requires freedom of the press to report on factual, newsworthy events.[224] The facts the Supreme Court of California considered are enough to make anyone sympathetic to the plight

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220. *See Shulman*, 955 P.2d at 473 (discussing the nature of invasion of privacy claims brought for a publication of private facts).

221. *See id.* (expressing that the problems associated with defining a right of privacy have not changed, even though the medium has, and that the new medium may bring new problems that were not clear or developed during the written word period of the tort).

222. *See id.* (indicating that the balancing of privacy rights and the freedom of the press to report truthful, newsworthy facts created a very difficult balancing act for the courts to employ).

223. *Id.* at 473–74.

224. *See id.* (specifying the difficult position courts found themselves in regarding the balancing of privacy rights of individuals with the press's right to report on truthful matters of public interest).

of those whose privacy is limited by their involvement in an event of public interest. The plaintiff, Ruth Shulman (Shulman), was involved in a terrible car accident.[225] After the accident, a medical helicopter containing a camera man employed by the defendants was dispatched to provide medical care and transport Shulman to the hospital.[226] Shulman's ordeal was filmed and then broadcast several months later.[227] Shulman then brought a claim for invasion of privacy due to publication of the video.[228] The court, in recognizing the difficult balancing act they were required to perform, read the tort to require that the published information not be newsworthy.[229] Also, the court recognized that "newsworthiness is at the same time a constitutional defense to, or privilege against, liability for publication of truthful information."[230] Then the court analyzed what constituted a matter of public interest based on precedent.[231] The court made a "normative assessment" of the "social value" of the content while factoring in both the "degree of intrusion" into the plaintiff's privacy and the plaintiff's own contribution to being a part of the public event.[232] The court concluded that "recent decisions have generally tested newsworthiness with regard to such individuals by assessing the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed."[233] A nexus test is necessary to determine if the newsworthy event is logically related

225. *See id.* at 475 (describing how the plaintiff's car was found in a ditch and that the jaws of life were employed to extract the occupants of the car).

226. *See id.* (explaining that the within the helicopter was a cameraman and nurse who had was wearing a microphone).

227. *See id.* at 474–76 (stating that the events following the accident were broadcast in a show entitled "On Scene: Emergency Response" shortly after the accident).

228. *See id.* at 476 (articulating how the plaintiffs brought claims against the producers of the show for invasion of privacy).

229. *See id.* at 478–79 (discussing that earlier precedent in California had recognized lack of newsworthiness as an element of the prima facie case for invasion of privacy by publication of private facts).

230. *Id.* at 479.

231. *See id.* at 479–84 (listing the different effects on precedent of the tort over the years to help define what qualifies as newsworthy).

232. *See id.* (stating the balancing test the courts must employ to determine whether the facts at issue are newsworthy).

233. *Id.* at 484–85.

to the facts disclosed.[234] Requiring a nexus draws "a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report."[235] The court cautioned that great deference must be given to the press, that it is not the job of the courts or juries to determine what is fit to publish, and that the standard for newsworthiness is whether "some reasonable members of the community could entertain a legitimate interest in it."[236] The court restrained its balancing of interests to the newsworthiness element.[237] After its analysis, the court determined that the events Shulman experienced were of public interest and her claim was precluded by that status.[238] The court concluded with warnings over the potential First Amendment issues brought forth by cases such as these, stating:

> That analytical path is dictated by the danger of the contrary approach; to allow liability because this court, or a jury, believes certain details of the story as broadcast were not important or necessary to the purpose of the documentary, or were in poor taste or overly sensational in impact, would be to assert impermissible supervisory power over the press . . . . In short, the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.[239]

These are reoccurring themes present throughout a study of the precedent: the balancing of the First Amendment interest and the individual right to privacy. As more media moved to video and away from the written word, more cases of this ilk were presented to courts around the country with similar results.

Later in 1998, the Central District of California was presented with a case very similar to *Bollea v. Gawker*, in *Michael v. Internet*

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234. *See id.* at 484 (discussing that a "logical nexus" is required for the newsworthiness exception to apply).

235. *Id.*

236. *See id.* at 485–86 (describing the difficulties in applying newsworthy standard due to differing opinions between individuals about what constitutes as general public interest).

237. *See id.* at 487 (explaining that, in order to determine if certain facts published are newsworthy, a balancing of interests must be employed).

238. *See id.* (articulating that the court agrees that the events broadcasted were of a legitimate public interest and therefore the suit fails).

239. *Id.* at 497–98.

*Entertainment Group, Inc.*[240] Celebrities Bret Michaels and Pamela Anderson Lee had made a sex tape together that was acquired by Internet Entertainment Group (IEG) who planned to sell it on the internet.[241] This announcement by IEG created intense media attention and speculation because of the status of the celebrities, and because Pamela Anderson had been involved in a similar dispute some years earlier.[242] At this point the court was determining whether to grant summary judgment to the secondary defendant Paramount, the producers of the show "Hard Copy."[243] Paramount had broadcast several short segments of the sex tape, each lasting between two and five seconds, in an episode of Hard Copy.[244] The court ruled that the facts at issue in this case were private, but the claim was barred by the newsworthiness privilege.[245] It justified its summary judgment by determining that "in cases balancing First Amendment against state law right to privacy, federal courts should resolve doubtful cases at summary judgment to prevent freedom of the press from being restricted 'at the sufferance of juries.'"[246] The court ruled that the newsworthy privilege applied because Anderson was a voluntary public figure and the "private matters bore a substantial nexus to a matter of public interest."[247] Because of Anderson's status as a voluntary public figure, the court questioned whether the nexus was

240. *See* Michaels v. Internet Entm't Grp., Inc., No. CV 98–0583 DDP (CWx), 1998 WL 882848, at *1 (C.D. Cal. Sept. 11, 1998) (granting summary judgment for defendants in a publication of private facts because showing short clips of a celebrity sex tape constituted newsworthy content).

241. *See id.* (stating that the sex tape had been made and then, through circumstances not entirely known, acquired by IEG who planned to market and sell the video through their websites).

242. *See id.* at *8 (indicating that the case had brought media attention, and briefly discussing Pamela Anderson's similar sex-tape litigation from the preceding year).

243. *See id.* at *1 (stating that the court was considering a summary judgment motion for the alleged invasion of privacy committed by Paramount, not the invasion of privacy committed by Internet Entertainment Group).

244. *See id.* (discussing that portions of the video were broadcast on Hard Copy, and that each one of those portions was between two and five seconds).

245. *See id.* at *9 (concluding that although the facts were considered private, the newsworthiness privilege applied and that summary judgment was appropriate).

246. *Id.*

247. *Id.* at *10.

required. [248] The court ultimately felt that the nexus would be satisfied even if unnecessary.[249] The court balanced the intrusion with the public interest, noting that courts must give great deference to the public interest in these matters.[250] The court then ruled that the tort will fail as a matter of law, and granted Paramount summary judgment on the invasion of privacy claim.[251]

Pamela Anderson was in the California courtrooms one year prior to the *Michaels* litigation, bringing an invasion of privacy claim against the publishers of "Penthouse Magazine" for publishing intimate pictures of both her and her now ex-husband, Tommy Lee.[252] In granting the defendant's motion for summary judgment, the United States Court for the Central District of California made two key observations. First, the court stated that the "intimate nature of the photographs and the degree to which their publication intruded upon the privacy of Plaintiffs is simply not relevant for determining newsworthiness."[253] The court essentially determined that the offensive nature of a picture or video published did not detract from its newsworthiness. The second key observation was that if a photo has already been published, it no longer qualifies as a private fact for the purposes of an invasion of privacy suit.[254] The court concluded that once the first actor has broken the seal of privacy by releasing a photo, actors who later release the photo are not liable for invading the privacy of the subject of those photos. These two points made by

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248. *See id.* at *9 ("Because Lee is a voluntary public figure, it is not clear whether the *Shulman* requirement of a substantial nexus between the matters published and reasons for her notoriety is necessary.").

249. *See id.* at *10 (discussing that the court was not sure whether to require the nexus to show if matter is newsworthy in the case of voluntary public figures, but if it was found necessary, that the element would be satisfied by the facts of this case).

250. *See id.* (explaining that even once newsworthiness is established, a balancing of the public and private interest is still necessary).

251. *See id.* (concluding that summary judgment was appropriate because the newsworthiness privilege applied).

252. *See* Lee v. Penthouse Int'l, Ltd., No. CV96–7069SVW (JGX), 1997 WL 33384309, at *1 (C.D. Cal. Mar. 19, 1997) (dissecting the nature of the claim, that the photos published were of an "intimate" nature, and were featured in an article describing Anderson's life and marriage to Tommy Lee).

253. *Id.* at *5.

254. *See id.* at *6 (describing that once a photo has been published, it is now in the public realm and no longer considered a private fact).

the court in this matter are essential to the analysis of the *Bollea* decision, and both serve to invalidate the claim against Gawker.

California is not the only state to encounter a claim brought for invasion of privacy through the broadcast of images. In 1997, a man whose arrest was filmed and broadcasted on the television show "COPS" brought a claim in Ohio against Fox Television Network.[255] The United States Court for the Northern District of Ohio granted summary judgment to the defendants, determining that the facts broadcasts were newsworthy because they related to matter of legitimate public concern.[256]

The common theme throughout these cases is the protection of journalists' rights to print legally obtained factual information without facing civil liability. Once the potential for civil liability enters the editor's mental calculus, their editorial discretion has been chilled in a way completely incompatible with our conception of First Amendment rights.[257] The right to print truthful facts relating to a newsworthy topic is essential to maintain the delicate market place of ideas that our country relies upon. This is especially true when those facts relate to a newsworthy event involving a public figure or official. The press plays a special role in providing oversight for the public, requiring that public figures and officials, who have benefitted so much from the public itself, be held to the same standard in their private lives as they claim to hold themselves to in their public lives.

### *V. Application of Precedent to Bollea v. Gawker*

After looking at the history of publication of private facts cases, it is clear that precedent would point towards no liability for Gawker for two primary reasons: Bollea is a public figure and the publication of the tape is related to a newsworthy issue. These two factors are invariably intertwined.

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255. *See* Reeves v. Fox Television Network, 983 F. Supp. 703, 707 (N.D. Ohio 1997) (explaining the background of the case, that the claim arises from a filmed arrest following a physical altercation).

256. *See id.* at 709 (stating the claim fails because the arrest of individuals is a matter of public interest).

257. *See* Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 257 (1974) (discussing that penalties for printing controversial material may result in editors avoiding printing controversial material completely).

Gawker should have faced no liability because the tape at issue related to a newsworthy event. Bollea is a public figure because of his celebrity.[258] He has been personally enriched because of this celebrity, and much of that celebrity is based on the public perception that he is the All-American hero he was portrayed to be in wrestling.[259] Bollea's image as Hulk Hogan was so entrenched in popular culture that even after a long "heel run" the fans cheered and longed for the hero Hogan character to return.[260] One such example of this occurred in Toronto at WrestleMania 18.[261] Bollea had recently returned to the WWE, playing the dastardly heel character "Hollywood" Hulk Hogan.[262] He was programmed with Dwayne "The Rock" Johnson, a babyface who was arguably the most popular wrestler at the time.[263] In order to set up the match, and portray Bollea in the most negative light possible, Bollea repeatedly attacked Johnson along with his gang and even spray painted Bollea's group logo on his back.[264] Following these events, the natural reaction of most audiences would be to "boo" Bollea. When Bollea made his entrance, the arena erupted—it was clear that plans had to changed.[265] The fans simply refused to treat Bollea as a heel; he simply meant that

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258. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1200 (Fla. Dist. Ct. App. 2014) (explaining that it was undisputed that Terry Bollea was a public figure).

259. *See* Madigan, *supra* note 15 ("Describing the former wrestler as 'a real American hero' and, when he was younger, 'the ultimate object of desire.'").

260. *See Episode 30: The NWO in WWE*, SOMETHING TO WRESTLE WITH BRUCE PRICHARD (Feb. 3, 2017) (downloaded through iTunes) (describing that Bollea had been portrayed as a heel since he joined the NWO in 1996).

261. *See id.* (indicating that WrestleMania 18 was Bollea's first WrestleMania appearance since 1993).

262. *See id.* (stating that when Bollea rejoined the WWE he was portraying the Hollywood Hogan character that he had developed while in the faction "NWO").

263. *See id.* (specifying that Johnson may have been the most popular wrestler in the world).

264. *See id.* (describing that in order to ensure that fans would boo Bollea, Bollea and his two "NWO" companions—Scott Hall and Kevin Nash—would repeatedly attempt to injure Johnson in the weeks leading up to the match, including by ramming a semi-truck into an ambulance purportedly carrying an injured Johnson).

265. *See id.* (explaining that fans, despite the company's best efforts, still viewed Bollea as a hero).

much to the audience.[266] Bollea's good guy image was so engrained in popular and wrestling culture that audiences would simply not accept him as a villain.[267] Therefore, it would be reasonable that any information directly refuting the purported good guy image of Bollea would be newsworthy.

Given Bollea's reputation as a role model for children, information directly proving his engagement in adultery would serve to disprove this reputation, or at least to couch it in realistic terms. It is important that society view its role models realistically. Knowing whether our role models' private actions comport with their public images serves as a societal check. Society deserves to know if public figures are the people they say are. Because the tape went to directly disprove, or at least throw doubt on whether Bollea was the man he publically purported to be, it is newsworthy. Hogan was not forced to become a role model. He voluntarily took on the moniker and has received countless benefits from it.[268] Because of this the public has a right to know if his character is worthy of the illustrious position he has been raised to in the public eye.

The tape itself is also newsworthy. Much like in *Michaels*, the public was aware that this tape existed and considerable curiosity had developed around it.[269] That public interest in the tape, about its existence and content, in and of itself makes it newsworthy.[270]

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266. *See id.* (indicating that because of the great nostalgia many fans hold towards Bollea it was impossible for the fans to boo him).

267. *See id.* (stating that many fans still looked at Bollea as their idol).

268. *See* Nick Schwartz, *WCW Salaries Between 1996 and 2000 Revealed, with Hulk Hogan and Dennis Rodman Big Winners*, FOX SPORTS (June 7, 2016, 6:46 PM), https://www.foxsports.com.au/what-the-fox/wcw-salaries-between-1996-and-2000-revealed-with-hulk-hogan-and-dennis-rodman-big-winners/news-story/cc0dd40421817640c1399f47a2224b89 (explaining that while working for WCW Bollea's salary was $5 million greater than the next highest salary) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

269. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1201 (Fla. Dist. Ct. App. 2014) (indicating that numerous publications had already reported the existence of the video, generating public interest and curiosity about its existence).

270. *See* Michaels v. Internet Entm't Grp., Inc., No. CV 98–0583 DDP (CWx), 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) (explaining that public interest in the existence of the tape and its creation were sufficient to make the event newsworthy).

Public knowledge of the tape creates widespread curiosity.[271] When that curiosity is then reasonably related to a matter of a public concern to the extent that a reasonable editor could draw an inference that the private fact related to the public concern, both a nexus and newsworthiness is established.[272] In our current case, that newsworthy event linked to the private facts could either be its refutation of Bollea's status as a role model, or the release of the video itself.[273] A reasonable editor could draw an inference from the tape to either of those two subjects, both being newsworthy and capable of preventing liability.

## *VI. Recommendations*

To combat the problems that juries present with these sensitive matters, I recommend that the court apply a similar summary judgment standard for invasion of privacy by publication of private facts to that laid out by Judge Dean Pregerson in *Michaels*.[274] If the plaintiff can establish that the facts reported were not newsworthy, then the summary judgment should not be granted.[275] When that is not established, it is appropriate to grant summary judgment to the defendant.[276] In order to protect defendants from sensitive juries, unable to separate themselves from these public events, it would be appropriate in my estimation to require that the facts in contest be shown to be non-newsworthy before allowing the trial to continue. The question of newsworthiness is a factual determination, but one that is too

271. *See id.* (indicating that uncertainty surrounding the existence or release of a tape of this kind creates public interest and a newsworthy story).

272. *See* Gilbert v. Med. Econ. Co., 665 F.2d 305, 308–09 (10th Cir. 1981) (describing that a publication cannot be held liable for revealing legally obtained private facts that a reasonable editor could draw in inference from relating it to the newsworthy event).

273. *See Michaels*, 1998 WL 882848, at *10 (discussing the curiosity surrounding the tape's release created a newsworthy event).

274. *See id.* (indicating that once a substantial nexus is established to a newsworthy event, the claim is precluded as a matter of law and extinguished at the summary judgment stage).

275. *See id.* at *7 (explaining that the burden to show that the facts are not newsworthy is on the plaintiff).

276. *See id.* (stating that a claim that is able to establish that the facts reported are not newsworthy would survive summary judgment).

sensitive to expect of juries. Judges should be the arbiters of that determination, and bright lines should be drawn to determine as a matter of law whether facts are newsworthy or not. The First Amendment demands a highly deferential test for newsworthiness when the case involves a public figure or official.

An appropriate test could be borrowed from *Gilbert v. Medical Economics Company*,[277] essentially allowing for a newsworthy designation to be applied to facts pertaining to a public figure or official that any reasonable editor would find newsworthy.[278] While one could argue that judges should not be making this determination, I would argue they are far more qualified than juries. Judges would be far less likely to react viscerally to the sometimes-squeamish facts. They are better equipped to distinguish between the privacy rights of public and private actors. Juries are too likely to put themselves in the shoes of the public figure or official, while judges are trained to apply the law in a far more clinical and antiseptic manner. This suggestion is not a novel approach. As the *Gilbert* court quoted in support of its summary judgment finding:

> When civil cases may have a chilling effect on First Amendment rights, special care is appropriate. Thus, a judicial examination at these states of the proceeding, closely scrutinizing the evidence to determine whether the case should be terminated in a defendant's favor, provides a buffer against possible First Amendment interferences.[279]

In this way, the courts could ensure a more standardized result, combating the chilling effect this tort can have, and hopefully avoiding results like Gawker in the future.

Another way to prevent this tort from chilling protected speech would be to preclude public figures and officials from bringing claims without a showing of actual malice. To justify this position,

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277. *See Gilbert*, 665 F.2d at 309 (affirming summary judgment because "under these circumstances the public has a very strong and immediate legitimate interest, and the first amendment protects the media's right to reveal this information").

278. *See id.* (describing that claims which infringe upon First Amendment must be carefully vetted as to not violate the Constitution).

279. *Id.* (quoting Guam Fed'n of Teachers, Local 1581, of Am. Fed'n of Teachers v. Ysrael, 492 F.2d 438, 441 (9th Cir. 1974)).

we borrow the framework *The Florida Star v. B.J.F.*[280] borrowed from *Daily Mail* to determine whether a statute the creates civil penalties for speech violates the First Amendment.[281] That test prevents imposing civil liability when a publication prints lawfully obtained, truthful facts unless the statute is narrowly tailored to promote a state interest of the highest order.[282] While examining a civil tort claim, a clear analogy can be drawn between both circumstances because both use civil penalties to punish truthful speech.[283] One can argue that the same poison that defeated B.J.F.'s claim is inherent in the publication of a private facts tort itself: its means are not narrowly tailored to achieve a state interest of the highest order. Both B.J.F.'s claim and the tort lack any scienter or actual malice requirement, leading to the same "perverse" outcome that the *Florida Star* court discussed.[284]

Because of the similarities these two claims possess, (B.J.F.'s negligence per se claim and the publication of private facts tort claim) and because of the untenable result that both claims reach in their current form, a similar reasoning should be applied to both. When one applies the reasoning from *Florida Star*, the result is fairly clear. Gawker legally obtained the information.[285] The matter was newsworthy because it pertained to a public figure and was reasonably related to a matter of public concern.[286]

Finally, the means used to punish this speech was civil penalties.[287] Under the same standard that the court employed in

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280. *See* Florida Star v. B.J.F., 491 U.S. 524, 541 (1989) (holding that a statute cannot impose punishment on a newspaper for publishing the legally obtained truthful facts unless the statute is narrowly tailored to serve a state interest of the "highest order").

281. *Id.*

282. *Id.*

283. *See id.* (explaining that this test is appropriate for examining statutes that create civil penalties for truthful speech).

284. *See id.* at 539 (discussing that B.J.F.'s claim would impose liability for publishing truth at a less strict standard than libel law).

285. *See* Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1203 (Fla. Dist. Ct. App. 2014) (explaining that Bollea has never contended that Gawker illegally obtained the tape).

286. *See* Michaels v. Internet Entm't Grp., No. CV 98-0583 DDP (CWx), 1998 WL 882848, at *10 (C.D. Cal. Sept. 11, 1998) (indicating that public curiosity surrounding the potential release of a sex tape of a celebrity constituted a newsworthy event).

287. *See* Florida Star v. B.J.F., 491 U.S. 524, 529 (1989) (stating that civil

*Florida Star* it appears that the tort itself violates the First Amendment. To cure the tort of its deficiency, it would be prudent to narrow the tort by requiring a showing of actual malice when the claim is brought by public figures or officials. The requirement could help better protect publications against these claims, ferreting out and immunizing those stories that have been published to further a public interest while still punishing malicious publication of private facts that serve no legitimate public purpose. Furthermore, it would bring the publication of private facts tort more in line with other speech-based tort claims brought by public figures or officials.[288] Several state supreme courts have already questioned the constitutionality of the tort and expressed doubts.[289] It would be prudent for other state supreme courts to examine the tort to determine if it is in line with state constitutions.

## *VII. Conclusion*

While the problems the tort of publication of private facts present can seem complicated, when boiled down to it, the policy implications are quite clear: whether it accords with our interpretations of the First Amendment to allow a publication to be sued into non-existence for publishing lawfully obtained truthful facts. When question is broken down into small parts, the answer is apparent. This supposition cannot possibly comport with public policy, our nation's interest in the free exchange of ideas, or the First Amendment. Something clearly needs to be done to bring this tort into line with constitutional jurisprudence. The next time

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damages were awarded to the plaintiff).

288. *See* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988) (illustrating that, to prevail on an intentional infliction of emotional distress claim, a public figure must show "actual malice").

289. *See* Anderson v. Fisher Broad. Companies, Inc., 712 P.2d 803, 805 (Or. 1986) (explaining the potential constitutional issues that the tort presents but not ruling on those issues because they could vacate the damages under different grounds); *see also* Doe v. Methodist Hosp., 690 N.E.2d 681, 691 (Ind. 1997) (stating that the "Indiana Constitution commands real caution about proposals to recognize a civil cause of action for libel that impose liability for truthful statements").

this issue arises, we may be defending the *New York Times'* or the *Washington Post*'s right to print potentially embarrassing truthful facts about public figures and officials.

Given the current climate in the executive branch, with their adversarial approach to the media, it has never seemed more necessary to extend additional protections to our media. By changing the summary judgment standard, or by disallowing the tort to be brought by public figures or officials without a showing of actual malice, we could take one small step in making sure that the miscarriage of justice that occurred in Florida will never happen again.