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## Tort Law and Journalism Ethics

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# Tort Law and Journalism Ethics

By Richard T. Karcher\*

## I. INTRODUCTION

Journalists learn in journalism school that, in disseminating the news, they have an ethical obligation to “seek the truth,” avoid sensationalism and trivia, and protect individual privacy interests. Yet, when it comes to matters involving high-profile people, these ethical obligations routinely get swept under the rug. Compromising ethics in journalism appears to be an acceptable industry norm that has continued to evolve because (1) the media determines what information is “newsworthy,” (2) there is no external mechanism or independent body to enforce journalism ethics codes, and (3) tort privacy and defamation law standards applicable to the press that were developed nearly half a century ago conflict with journalism ethics codes and do not create incentives for journalists to comply with such codes. These observations raise important questions for society, journalists, and judges. What is the role of journalism ethics in today’s journalism marketplace that is driven by bottom-line economics and vigorous competition among multiple media sources delivering news in a variety of formats seeking to grab the public’s attention? It is debatable whether journalism ethics principles can co-exist in a time-pressured environment in which media sources have the additional pressure to “out sell” their competitors. If it is acknowledged that journalism ethics principles have inherent social value, a question this Article attempts to answer is whether the press and free market principles are capable of regulating ethics in today’s journalism marketplace.

Part II of this Article compares and contrasts the ethical obligations of news reporters under journalism ethics codes with their reporting obligations under state defamation and privacy tort laws.<sup>1</sup> Part III discusses the infiltration of tabloid journalism into traditional media

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1. See *infra* Part II (discussing the tension between journalism ethics codes and tort law).

sources, including the proliferation of sensationalism, triviality, and disregard for privacy, with a particular emphasis on news coverage of the sports and entertainment industries.<sup>2</sup> This section also addresses the different standards for public figures created by the media, whether such standards promote justifiable social policy objectives, and how the media's creation of such standards impacts society's views and treatment of public figures.<sup>3</sup> Part IV highlights evidence from a 2008 survey of journalists conducted by The Pew Research Center for the People & the Press that convincingly demonstrates why the journalism marketplace in the twenty-first century encourages a "tabloid" news media and fails to provide the press with appropriate incentives to adhere to journalism ethics codes.<sup>4</sup> The time is ripe to revisit the stricter tort law standards that shield the press, developed over forty years ago in a remarkably different free market and technological journalism environment. Finally, Part V provides suggestions for incorporating journalism ethics codes into tort law standards in a manner that would create incentives for the press to internally regulate journalism ethics and give some teeth to journalism ethics codes without compromising the First Amendment.<sup>5</sup>

## II. THE TENSION BETWEEN JOURNALISM ETHICS CODES AND TORT LAW

Although journalism ethics codes are universally adopted by media outlets, their impact on the media is questionable. As this section will demonstrate, the duties of the press under self-regulatory journalism ethics codes tend to clash with the duties of the press imposed by law.<sup>6</sup> Journalists are caught in a quagmire between journalism ethics standards that are generally concerned about the effects on the citizenry of an *unrestrained* free press and legal standards that are more concerned about the consequences of a *restrained* free press on the citizenry. In contrast to public regulatory standards created and enforced under state defamation and privacy tort laws that are binding on the press—though the application of the First Amendment has pulled much of the teeth out of those standards—journalism ethics codes lack

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2. See *infra* Part III (examining the proliferation of tabloid journalism in traditional news media sources).

3. See *infra* Part III (looking at the implications of standards created by the media for public figures).

4. See *infra* Part IV (showing how current market forces are insufficient to regulate journalism ethics).

5. See *infra* Part V (exploring how journalism ethics codes can be incorporated into tort law standards without compromising the First Amendment).

6. See *infra* Part II (examining the discrepancy between press duties under self-regulatory journalism ethics codes and press duties under law).

any external enforcement mechanism.<sup>7</sup> Thus, it is highly suspect whether these self-regulatory industry standards provide sports journalists with a functioning compass to guide their investigation and reporting and to serve as an adequate deterrent to unethical journalism practices.<sup>8</sup>

Before defining ethical standards for journalists, a preliminary question is the definition of journalism ethics. Journalism ethics can be described as a system of moral principles and values, or a set of principles governing righteous conduct, recognized and understood within the culture of journalism. Its necessity is probably best summarized by Professor Blake Morant:

Democracy that fosters mutual respect for the autonomous rights of others tacitly encourages citizens, including members of the press, to exercise their rights responsibly. . . . Respect for others and the preservation of societal norms or institutions require media to behave ethically as it exercises its functions as both governmental monitor and responsible citizen.<sup>9</sup>

Journalism ethics are defined within written journalism ethics codes that establish industry-wide norms, and virtually every media source has an established code of conduct.<sup>10</sup> Ethics codes are self-policing mechanisms designed to ensure more responsible journalism, and they serve to guide press behavior and symbolize the industry's good faith in its reporting conduct.<sup>11</sup>

The Committee of Concerned Journalists (CCJ), affiliated with the University of Missouri School of Journalism, is a consortium of reporters, editors, producers, publishers, owners, and academics

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7. See Blake D. Morant, *The Endemic Reality of Media Ethics and Self-Restraint*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 595, 613 (2005) ("Without some external mechanism that compels compliance, journalistic codes of ethics and, to a certain extent, agreements that limit dissemination of certain sensitive information appear hollow and largely symbolic."). See also Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 471 (2001) (discussing the vague standards of ethics enforcement codes, as well as the lack of enforcement mechanisms).

8. See Morant, *supra* note 7, at 612–15. Professor Morant notes that the lack of an external enforcement mechanism distinguishes journalism ethics codes from similar standards adopted by other professions, such as law and medicine, whereby the ethical codes applicable to such professions are more precisely drafted and enforced by an independent regulatory authority. *Id.* at 613 (citing Bruce W. Sanford, *Ethics, Codes and the Law*, QUILL, Nov.-Dec., 1994, at 43, 43 (stating that codes governing other professions are more specific and derive their power from the government's power to license)). See also Storey, *supra* note 7, at 471 nn.30–31 (noting that many journalists, convinced that journalists should be left to solve their own problems, balked at the notion of creating "common law" of journalistic practices).

9. Morant, *supra* note 7, at 603–04.

10. *Id.* at 611.

11. *Id.* at 597.

organized for the purpose of creating a national conversation to more clearly define a set of core principles that set journalists apart from other professions.<sup>12</sup> In 1997, CCJ, which at the time was administered by the Project for Excellence in Journalism (PEJ), released a *Statement of Shared Purpose* identifying nine core journalism principles.<sup>13</sup>

The *Statement of Shared Purpose* defines the central purpose of journalism as providing citizens with accurate and reliable information they need to function in a free society.<sup>14</sup> It identifies nine “Core Principles”:

- (1) Journalism’s first obligation is to the truth;
- (2) Its first loyalty is to citizens;
- (3) Its essence is a discipline of verification;
- (4) Its practitioners must maintain an independence from those they cover;
- (5) It must serve as an independent monitor of power;
- (6) It must provide a forum for public criticism and compromise;
- (7) It must strive to make the significant interesting and relevant;
- (8) It must keep the news comprehensive and proportional; and
- (9) Its practitioners must be allowed to exercise their personal conscience.<sup>15</sup>

For purposes of this Article, these nine Core Principles will be summarized into three primary ethical obligations of the press: (1) an

12. See Journalism.org, The Committee of Concerned Journalists, [http://www.journalism.org/resources/about\\_ccj](http://www.journalism.org/resources/about_ccj) (last visited Sept. 19, 2008) (calling for a national conversation amongst media professionals about the goals and future of journalism). There are numerous journalism ethics codes that have been adopted by various news organizations and trade associations, setting forth similar guidelines, principles, and obligations for the journalism industry. See, e.g., Associated Press Managing Editors, Statement of Ethical Principles, <http://www.apme.com/ethics/> (last visited June 26, 2008) (setting forth the Associated Press’s Ethical Principles); Society of Professional Journalists, Code of Ethics, <http://www.spj.org/ethicscode.asp> (last visited June 26, 2008) [hereinafter SPJ Code of Ethics] (setting forth a Code of Ethics for the Society of Professional Journalists); The New York Times Company Policy on Ethics in Journalism, <http://www.nytc.com/company-properties-times-coe.html> (last visited June 26, 2008) (setting forth the company policy on ethics in journalism).

13. Project for Excellence in Journalism, Principles of Journalism, <http://www.journalism.org/resources/principles> (last visited Sept. 19, 2008) [hereinafter Statement of Shared Purpose]. The Statement of Shared Purpose is the product of four years of research, including twenty public forums, a reading of journalism history, and a national survey of journalists. *Id.* The Core Principles subsequently became the basis for the book *The Elements of Journalism* by PEJ Director Tom Rosenstiel and CCJ Chairman and PEJ Senior Counselor Bill Kovach. BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* (2d ed. 2007). The most recent edition of the book, published in April 2007, includes a tenth journalism principle: the rights and responsibilities of citizens, flowing from new power conveyed by technology to the citizen as a consumer and editor of his or her own news and information. *Id.* at 9.

14. Statement of Shared Purpose, *supra* note 13.

15. *Id.*

obligation to speak truthfully and accurately,<sup>16</sup> (2) an obligation to maintain independence and loyalty to the citizenry,<sup>17</sup> and (3) an obligation to avoid sensationalism and trivia and to protect individual privacy interests in the dissemination of “newsworthy” information.<sup>18</sup> These ethical obligations exist in virtually all ethics codes in some form or another.<sup>19</sup> Moreover, these rules of behavior codified by the media create an express, almost moral, obligation to the public to act ethically and responsibly.<sup>20</sup>

### A. Reporting Truthfully and Accurately

The ethical obligation in the first category, to speak truthfully and accurately, essentially reiterates the CCJ’s definition of journalism’s central purpose of providing accurate and reliable information. Simply put, “accuracy is the foundation upon which everything else is built—context, interpretation, comment, criticism, analysis and debate.”<sup>21</sup> The “journalistic truth” is a process that begins with the professional discipline of assembling and verifying facts, and then conveying a fair and reliable account of their meaning, currently valid but subject to further investigation.<sup>22</sup> The method of testing and verifying the information used by journalists must be transparent and objective so that personal and cultural biases do not undermine the accuracy of their work and audiences can make their own assessments of the information.<sup>23</sup> This discipline of verification—seeking out multiple witnesses, disclosing as much as possible about sources, or asking various sides for comment—“is what separates journalism from other modes of communication, such as propaganda, fiction or entertainment.”<sup>24</sup> The ethical obligation to report truthfully and accurately, and to diligently verify the information, arises out of concern for the citizenry and creates an implied duty to properly inform

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16. *See id.* (combining Core Principles 1, 3, and 6 to form this obligation).

17. *See id.* (combining Core Principles 2, 4, 5, 7, and 9 to form this obligation).

18. *See id.* (combining Core Principles 7–8 to form this obligation).

19. *See supra* note 12 and accompanying text (discussing journalism ethics codes).

20. Morant, *supra* note 7, at 612.

21. Statement of Shared Purpose, *supra* note 13, at Core Principle 1.

22. *See id.* at Core Principle 1 (discussing journalism’s first obligation to pursue “journalistic truth”).

23. *See id.* at Core Principles 1, 3 (emphasizing that journalists rely on a professional discipline for verifying information).

24. *See id.* at Core Principle 3 (discussing the journalistic discipline of verification). *See also* SPJ Code of Ethics, *supra* note 12 (providing that journalists should “[t]est the accuracy of information from all sources and exercise care to avoid inadvertent error. . . . Diligently seek out subjects of news stories to give them the opportunity to respond to allegations of wrongdoing. . . . [and] [a]lways question sources’ motives before promising anonymity.”).

the citizenry: "As citizens encounter an ever greater flow of data, they have more need—not less—for identifiable sources dedicated to verifying that information and putting it in context."<sup>25</sup>

However, the duty owed by the press to the citizenry to inform it truthfully and accurately, as reflected in journalism ethics codes, is not recognized in the law. The public does not have any enforceable legal right against the press when it receives untruthful and inaccurate information. The First Amendment does not provide that citizens have a right to be accurately informed; rather, it serves to protect the disseminators of inaccurate information in certain contexts. Furthermore, when an individual is harmed as a result of the press's dissemination of inaccurate information to the public, tort defamation law may provide a remedy if the false information about that individual is defamatory.<sup>26</sup> It is often said that truth is a complete defense to defamation liability.<sup>27</sup> Under common law defamation principles, private-figure plaintiffs have recourse against the press if the press is unable to meet its burden of proving that the defamatory information disseminated was true.<sup>28</sup> However, the Supreme Court has held, in *Philadelphia Newspapers, Inc. v. Hepps*, that where a newspaper publishes speech of public concern, allowing a private-figure plaintiff to

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25. See Statement of Shared Purpose, *supra* note 13, at Core Principle 1 (arguing that democracy depends on citizens having reliable, accurate facts put in a meaningful context). See also SPJ Code of Ethics, *supra* note 12 (providing that journalists should "[i]dentify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.").

26. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 965 (3d ed. 2005) ("Not all false statements about the plaintiff give rise to a defamation claim: a statement must injure the plaintiff's reputation to be actionable."). A defamatory statement is defined as one that tends "to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559 (1977).

27. JOHNSON & GUNN, *supra* note 26, at 971.

28. See *id.* ("At common law, the defendant had the burden of proving that the statement was true. . . . In some cases, imposing the burden of proving falsity upon the plaintiff may make it virtually impossible to establish defamation."). Moreover, at common law, if a private-figure plaintiff in a libel case established that the statement disseminated was defamatory, damages were presumed—thus eliminating the necessity for the plaintiff to prove actual harm. *Id.* at 985. Some states have limited this rule to certain types of statements or to only when the statement is defamatory on its face. *Id.* at note 4 (citing *Lega Siciliana Social Club, Inc. v. St. Germaine*, 825 A.2d 827 (Conn. App. Ct. 2003) (holding that a written statement linking a private club to the Mafia was libelous per se and it was therefore unnecessary for the plaintiff to prove actual damages)). Section 558 of the Restatement (Second) of Torts lists the elements of defamation as "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." RESTATEMENT (SECOND) OF TORTS § 558 (1977).

recover damages without showing that the statements in question were false is a violation of the First Amendment.<sup>29</sup> But as one commentator noted, it remains to be seen whether the *Hepps* rule “will be extended to cases involving non-media defendants or matters not of ‘public concern.’”<sup>30</sup>

The duty owed by the press to private figures under defamation law tends to be more in line with the duty of the press under journalism ethics principles because both duties generally seek to ensure the truthful and accurate dissemination of information to the citizenry. However, there frequently exists an inherent conflict between tort law and journalism ethics codes when the press reports on matters involving public figures and public officials. The conflict arises from the actual-malice burden created by the seminal 1964 decision in *New York Times Co. v. Sullivan*,<sup>31</sup> where the United States Supreme Court articulated the oft-cited standard:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.<sup>32</sup>

The Supreme Court thereafter extended the *New York Times* actual-malice standard to public figures—those who “by reason of their fame, shape events in areas of concern to society at large”—including entertainers and sports participants, such as athletes, coaches, league officials, athletic directors, and front office personnel.<sup>33</sup>

Thus, while the press has an ethical duty to be truthful and accurate, defamation law’s actual malice standard adds a scienter component and imposes a duty only when the press *knowingly* disseminates untruthful and inaccurate information about public officials and public figures<sup>34</sup> or

29. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

30. JOHNSON & GUNN, *supra* note 26, at 971.

31. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

32. *Id.* at 279–80.

33. *See Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 164 (1967) (holding that an athletic director accused of conspiring to “fix” a college football game by the *Saturday Evening Post* was a public figure). “Consonant with this definition, a college athletic director, a basketball coach, a professional boxer and a professional baseball player, among others, have all been held to be ‘public figures.’” *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971).

34. In *St. Amant v. Thompson*, the United States Supreme Court clarified that only defendants who publish with subjective “awareness of probable falsity” are “reckless.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (“The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a ‘high degree of awareness of . . . probable falsity.’” (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964))). As noted by one



“where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”<sup>35</sup> Relying on a single, and perhaps unreliable, source without verifying the accuracy of the statement has been held not to be “reckless.”<sup>36</sup> Moreover, under the actual malice standard, courts have held that there is no duty or obligation on the part of the press to (1) talk to the subject of the defamatory publication to obtain that person’s version of the events described,<sup>37</sup> (2) endeavor to present an objective picture,<sup>38</sup> or (3) not engage in speculative or even sloppy reporting.<sup>39</sup> The duty of the press under these holdings is inconsistent with the ethical obligation of the press to diligently test and verify information, to disclose as much as possible about sources, to seek out multiple witnesses, and to ask various sides for comment.<sup>40</sup>

A plaintiff who is unable to establish a defamation claim against the press may prevail on a false light claim, which tends to be much broader than defamation. First, while truth is a defense to a publisher in a defamation action, the literal truth of published facts is not a defense in a false light action.<sup>41</sup> In other words, a publisher may be subject to liability if the facts are presented from an angle, or an erroneous or misleading impression is created, that renders the publication susceptible to inferences casting the plaintiff in a false light.<sup>42</sup> Second,

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commentator, “[b]ecause the actual-malice standard makes constitutional protection depend upon the defendant’s state of mind, the focus of the litigation often shifts away from the issue of whether the defamatory statement was true or false.” JOHNSON & GUNN, *supra* note 26, at 992.

35. *Harte-Hanks*, 491 U.S. at 688 (quoting *St. Amant*, 390 U.S. at 732).

36. *See St. Amant*, 390 U.S. at 732–33 (finding that the failure to investigate the source of information did not in itself establish bad faith). *But see Curtis Publ’g Co.*, 388 U.S. at 169–70 (holding that a publisher’s reliance on a single unreliable source and refusal to interview another factual witness constituted recklessness sufficient to meet the actual malice standard).

37. *See Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) (finding that a libel action by a private individual against a radio station for a defamatory newscast may be sustained only by clear and convincing evidence that the falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not), *abrogated by Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

38. *See N.Y. Times Co. v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966) (noting that the protection of the First Amendment is not limited to statements which reflect an objective picture of the reported events).

39. *See Oliver v. Vill. Voice, Inc.*, 417 F. Supp. 235, 238 (S.D.N.Y. 1976) (finding that to establish recklessness, it is not sufficient to show that the reporting was speculative or even sloppy, but that there was an extreme departure from the standards of responsible publishing and investigation).

40. *See supra* note 25 and accompanying text (discussing ethical obligations imposed by various journalism organizations).

41. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 645–46 n.5 (Tenn. 2001) (noting the differences between defamation and false light).

42. *See, e.g., Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (holding that the plaintiff’s posing for Playboy Magazine was consistent with respectability for a model and

in a false light claim, the published facts need not rise to the level of being defamatory in nature, but must only be “highly offensive to a reasonable person.”<sup>43</sup>

The jurisprudence in the false light area has made it difficult for plaintiffs to succeed on a false light claim. First, because the claim tends to resemble defamation, many courts have rejected false light, and a little more than half of the states treat it as a viable claim.<sup>44</sup> Second, in states that recognize the claim of false light, when the publication pertains to a false report involving a matter of public interest, the plaintiff has the difficult burden of proving actual malice—that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.<sup>45</sup> Moreover, when the publication

actress but that posing nude in *Hustler Magazine* was not, so that to portray the plaintiff as voluntarily posing nude for *Hustler* could be thought to place her in a false light even though she had voluntarily posed nude for *Playboy* only). In *Leverton v. Curtis Publishing Co.*, the plaintiff, a ten-year old girl, was injured in a traffic accident that was not her fault, and the defendant published a picture of the accident scene in a story about pedestrian carelessness. *Leverton v. Curtis Publ'g Co.*, 192 F.2d 974, 974–75 (3d Cir. 1951). The *Leverton* court held the false light claim to be actionable because the publisher created a misleading impression that the plaintiff was careless. *Id.* at 977.

43. Section 652E of the Restatement (Second) of Torts defines the false light tort:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 652E (1977). See *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9 (1967) (“In the ‘right of privacy’ cases the primary damage is the mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damage . . . the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery.”).

44. See *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 903 (Colo. 2002) (refusing to recognize false light, but noting that thirty state courts treat it as a viable claim); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 584 (Tex. 1994) (refusing to recognize false light because defamation encompasses most false light claims and false light “lacks many of the procedural limitations that accompany actions for defamation, thus unacceptably increasing the tension that already exists between free speech constitutional guarantees and tort law”).

45. In *Time, Inc. v. Hill*, the United States Supreme Court extended the actual malice standard to false reports about matters of public interest. *Time, Inc.*, 385 U.S. at 390–91. “[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.” *Id.* at 387–88. See also *West*, 53 S.W.3d at 647 (“We hold that actual malice is the appropriate standard for false light claims when the plaintiff is a public official or public figure, or when the claim is asserted by a private individual about a matter of public concern.”). The *Time* case involved a magazine article about a play that was based on a crime in which the plaintiffs were held hostage in their home for nineteen hours. *Time, Inc.*, 385 U.S. at 377–79. The article falsely reported that the plaintiffs had been subjected to violent and brutal treatment while being held hostage. *Id.* at 378. Although the statements were most likely not defamatory, the statements were factually

pertains to a private individual involving a matter of private concern, some states impose a negligence standard.<sup>46</sup> Indeed, there is inconsistency among the states that recognize false light regarding the appropriate standard because some states have adopted the *Restatement (Second) of Torts*' view that the actual malice standard applies to *all* false light claims, even when the claim is brought by a private individual involving a matter of private concern.<sup>47</sup>

### B. Maintaining Independence and Loyalty to the Citizenry

While journalism's first *obligation* is to the truth, its first *loyalty* is to the citizenry.<sup>48</sup> The ethical obligation to maintain independence and loyalty to the citizenry is essential to a news organization's *credibility*—"the implied covenant that tells the audience the coverage is not slanted for friends or advertisers."<sup>49</sup> News organizations have many constituents, including shareholders and advertisers, and "journalists must maintain allegiance to citizens and the larger public interest above any other if they are to provide the news without fear or favor."<sup>50</sup> Citizens rely on an independent press to serve as watchdog over those whose power and position most affects them, and journalists "have an obligation to protect this watchdog freedom by not demeaning it in

inaccurate. *Id.* at 393–94. The false light claim in *Time* should be distinguished from a false light claim in which the statements about the plaintiff are literally true, but create a misleading impression that is degrading to the plaintiff or makes the plaintiff seem pathetic or ridiculous or that he lacks good taste or moral judgment. *Id.* at 394.

46. See *West*, 53 S.W.3d at 648 (noting that "when false light invasion of privacy claims are asserted by a private plaintiff regarding a matter of private concern, the plaintiff need only prove that the defendant publisher was negligent in placing the plaintiff in a false light").

47. See RESTATEMENT (SECOND) OF TORTS § 652E (1977) (stating that an individual who gives publicity concerning another in a false light is subject to liability if the false light is highly offensive to the reasonable person and the actor had knowledge of the falsity of the publicized matter). See also *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 647 (Tenn. 2001) ("In light of the uncertain position of the United States Supreme Court with respect to the constitutional standard for false light claims brought by private individuals about matters of private interest, many courts and Section 652E of the Restatement (Second) of Torts adopt actual malice as the standard for all false light claims.").

48. See Statement of Shared Purpose, *supra* note 13, at Core Principles 1 and 2 (providing journalists' obligations to truth and loyalty to the citizenry).

49. See *id.* at Core Principle 2 (setting forth loyalty to citizens as the basis for a news organization's credibility). "[L]oyalty is one of the key considerations in ethical decision-making." Amit Schejter, *Jacob's Voice, Esau's Hands: Transparency As a First Amendment Right in an Age of Deceit and Impersonation*, 35 HOFSTRA L. REV. 1489, 1509 (2007).

50. See Statement of Shared Purpose, *supra* note 13, at Core Principle 2 (noting that this implied covenant to citizens tells the audience that coverage is not slanted for friends or advertisers). See also SPJ Code of Ethics, *supra* note 12 ("Journalists should be free of obligations to any interest other than the public's right to know.").

frivolous use or exploiting it for commercial gain.”<sup>51</sup> Maintaining independence requires diligence in avoiding conflicts of interest and disclosing conflicts that are unavoidable.<sup>52</sup>

The Associated Press has even adopted ethics guidelines specifically for sports editors that address conflicts of interest.<sup>53</sup> For example, sports editors and reporters are discouraged from receiving benefits, gifts, or discounts (e.g., game tickets, travel expenses, accommodations, food, and drink) from the teams they are covering.<sup>54</sup> They are also discouraged from taking part in outside activities or employment that might create an actual or perceived conflict of interest, such as serving as an official scorer at baseball games or writing for team or league media guides or publications.<sup>55</sup> The Associated Press also suggests that newspapers “should carefully consider the implications of voting for all awards and all-star teams and decide if such voting creates a conflict of interest.”<sup>56</sup>

But here again, although a self-regulatory ethical duty exists, there is no comparable enforceable legal duty of the press to maintain independence and loyalty to the citizenry. Although tort common law generally recognizes a duty of loyalty, which encompasses the duty to avoid conflicts of interest, the duty of loyalty only applies in the context of a confidential or fiduciary relationship.<sup>57</sup> Without imposition of a legal duty, the press lacks an incentive to comply with an ethical obligation that lacks any enforcement mechanism.

Another distinction between the ethical and tort duties of the press lies in the relevance of motive. For example, the ethical obligation to maintain independence and loyalty to the citizenry requires the press to

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51. Statement of Shared Purpose, *supra* note 13, at Core Principle 5.

52. See SPJ Code of Ethics, *supra* note 12 (providing that journalists should “[a]void conflicts of interest, real or perceived. . . . Remain free of associations and activities that may compromise integrity or damage credibility. . . . [and] [d]isclose unavoidable conflicts.”).

53. See Associated Press Sports Editors, APSE Ethics Guidelines, <http://apse.dallasnews.com/main/codeofethics.html> (last visited July 5, 2008) (setting forth ethics guidelines for the Associated Press Sports Editors).

54. *Id.* ¶¶ 1, 3, 4 (“The newspaper pays its staffer’s way for travel, accommodations, food and drink. . . . No deals, discounts or gifts except those of insignificant value or those available to the public. . . . A newspaper should not accept free tickets, although press credentials needed for coverage and coordination are acceptable.”).

55. *Id.* ¶ 2.

56. *Id.* ¶ 5.

57. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Therefore, the duty of loyalty, including the duty to avoid conflicts of interest, recognized under tort common law in fiduciary relationships, is consistent with the ethical obligation of attorneys imposed by the legal ethics rules to avoid conflicts of interest. MODEL RULES OF PROFESSIONAL CONDUCT §§ 1.7–1.9 (2002).

avoid exploitation for commercial gain. However, publishing a story for the purpose, or with the motive, of financial gain does not meet the actual malice standard for establishing a defamation cause of action; “a profit motive does not strip communications of constitutional protections.”<sup>58</sup> In addition, the press has an ethical obligation to “minimize harm,” for example by showing “compassion for those who may be affected adversely by news coverage” and recognizing “that gathering and reporting information may cause harm or discomfort [and that] [p]ursuit of the news is not a license for arrogance.”<sup>59</sup> However, a finding of actual malice based upon proof of bad motive, ill will, hatred, vindictiveness, enmity, or desire to injure is constitutionally defective.<sup>60</sup>

*C. Avoiding Sensationalism and Trivia, and Protecting Privacy, in the Dissemination of “Newsworthy” Information*

The third primary ethical obligation, to avoid sensationalism and trivia and to protect individual privacy interests in the dissemination of “newsworthy” information, concerns *what* information is being conveyed and in *what form*. It could be the most vital ethical obligation because the press has unfettered discretion to determine both. The press not only tells society what to think about, but it also has a huge influence on how we think about it. Therefore, the press carries a huge ethical responsibility.

According to the CCJ, journalists have a responsibility to “balance what readers know they want with what they cannot anticipate but need” and to “continually ask what information has most value to citizens and in what form.”<sup>61</sup> This ethical obligation is consistent with journalism’s central purpose, as defined by the CCJ, of providing information that citizens “*need* to function in a free society.”<sup>62</sup> It requires that journalists keep news in proportion and not omit important facts and events.<sup>63</sup> As appropriately noted by the CCJ, “[j]ournalism is

58. *Peter Scalamanire & Sons, Inc. v. Kaufman*, 113 F.3d 556, 561 (5th Cir. 1997). *See also Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (finding that “a newspaper’s motive in publishing a story—whether to promote an opponent’s candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice”).

59. SPJ Code of Ethics, *supra* note 12.

60. *JOHNSON & GUNN*, *supra* note 26, at 992. *See Garrison v. State of La.*, 379 U.S. 64, 73–75 (1964) (“Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”).

61. Statement of Shared Purpose, *supra* note 13, at Core Principle 7.

62. *See id.* (emphasis added) (stating that journalism must balance what readers know they want with what they cannot anticipate, and yet need).

63. *See id.* at Core Principle 8 (stating that journalism should proportionately disseminate

a form of cartography: it creates a map for citizens to navigate society. Inflating events for sensation, neglecting others, stereotyping or being disproportionately negative all make a less reliable map."<sup>64</sup> Journalism is most effective when it both engages and enlightens its audience.<sup>65</sup> However, "a journalism overwhelmed by trivia and false significance ultimately engenders a trivial society."<sup>66</sup>

The ethics code adopted by the Society of Professional Journalists (SPJ) contains similar obligations on the part of the press to use good judgment in deciding what constitutes newsworthy information and to avoid sensationalism, stereotyping, and disseminating trivial information. It provides that journalists should:

- Make certain that headlines, news teases and promotional material, photos, video, audio, graphics, sound bites and quotations do not misrepresent. They should not oversimplify or highlight incidents out of context.
- Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public.
- Examine their own cultural values and avoid imposing those values on others.
- Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.
- Distinguish between advocacy and news reporting. Analysis and commentary should be labeled and not misrepresent fact or content.<sup>67</sup>

In determining whether information is newsworthy, the SPJ's ethics code also requires journalists to consider the privacy interest of the subject and the potential harm to individuals who may be adversely affected by news coverage.<sup>68</sup> It states that "[o]nly an overriding public need can justify intrusion into anyone's privacy."<sup>69</sup> It further provides

news of all communities, and not only those communities with appealing demographics).

64. *Id.*

65. *See id.* at Core Principle 7 ("While journalism should reach beyond such topics as government and public safety, a journalism overwhelmed by trivia and false significance ultimately engenders a trivial society.").

66. *Id.*

67. SPJ Code of Ethics, *supra* note 12.

68. *Id.* *See also* Associated Press Managing Editors, Statement of Ethical Principles, <http://www.apme.com/ethics/> (last visited July 9, 2008) ("The newspaper should uphold the right of free speech and freedom of the press and should respect the individual's right to privacy.").

69. SPJ Code of Ethics, *supra* note 12.

that journalists should “[a]void pandering to lurid curiosity” and “[b]e judicious about naming criminal suspects before the formal filing of charges.”<sup>70</sup>

Unfortunately, tort privacy laws do not afford an adequate legal remedy for an individual whose privacy interest has been affected when the press oversteps its bounds from an ethics standpoint. The idea that tort law should reign in all the gossip issued by the press and afford redress when the press violates an individual’s privacy interest was first advocated by Charles Warren and Louis Brandeis in 1890:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. . . . To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.<sup>71</sup>

Warren and Brandeis were convinced that there ought to be limitations placed on the press’s ability to publish *truthful* personal information regarding the private lives of individuals in society, even when the individual is a public figure.<sup>72</sup> Seventy years later, William Prosser suggested that the “privacy” tort be classified into four types of invasion: (1) public disclosure of private facts; (2) intrusion; (3) false light; and (4) appropriation of name or likeness.<sup>73</sup> Warren and Brandeis were primarily concerned about the invasion into Prosser’s first classification, the public disclosure of private facts.

In the public disclosure of private facts claim, courts have difficulty balancing privacy with the freedom of expression under the First Amendment. This balancing act—weighing an individual’s privacy interest against the newsworthiness of the information—is set forth in section 652D of the *Restatement (Second) of Torts*:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.<sup>74</sup>

The comment to the *Restatement* illustrates the nature of facts that would tend to be considered “highly offensive:”

70. *Id.*

71. Charles D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

72. *Id.* at 216.

73. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

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

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.<sup>75</sup>

It is interesting to note how the definition of “newsworthy” in section 652D (“legitimate concern to the public”) differs from that used in the comment (“legitimate public interest”). The use of the word “concern” tends to connote more of a public *need* for the information or that the information contains some level of *importance* to the public, which is consistent with the ethical obligation of the press to provide information that citizens need to function in a free society.<sup>76</sup> On the other hand, information that is of “interest” to the public can be construed much broader to include trivial information that is not vital to the public. Courts have struggled with both how to define newsworthiness and how to balance an individual’s right to privacy with the public’s right to information, which has led to inconsistent definitions and holdings.

For example, in one case, the Court of Appeals for the Ninth Circuit applied a rather complicated standard for newsworthiness that involved balancing three factors: “(1) the social value of the facts published, (2) the depth of the publication’s intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily assumed a position of public notoriety.”<sup>77</sup> In another case, the Second Circuit held:

[T]he misfortunes and frailties of neighbors and “public figures” are subjects of considerable interest and discussion to the rest of the population[ ] [a]nd 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.<sup>78</sup>

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75. *Id.* § 652D cmt. b.

76. *See supra* note 13 (discussing The Statement of Shared Purpose as defining the core purpose of journalism as providing citizens with accurate and reliable information they need to function in a free society).

77. *Capra v. Thoroughbred Racing Ass’n*, 787 F.2d 463, 464–65 (9th Cir. 1986).

78. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (rejecting a privacy claim by a once famous child prodigy who cloaked himself in obscurity as an adult and became the unwilling subject of a brief biographical sketch and cartoon printed in the *New Yorker* weekly magazine).



In defining newsworthiness, the Court of Appeals for the District of Columbia Circuit stated that public interest is “not limited to dissemination of news about current events or public affairs, but also protects ‘information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that that individual may cope with the exigencies of their period.’”<sup>79</sup> All three of the foregoing standards for determining newsworthiness are not very practical or workable standards for the courts because they entail a normative or value assessment of the facts published, which is entirely subjective.

Modern notions of freedom of speech have substantially reduced the deterrence component that the disclosure of private facts claim once served for the press. The modernization of free speech has permitted the press to reveal some very private information that most individuals in society would choose to keep secret or to at least not have disclosed to the entire world.<sup>80</sup> Some state courts have even gone so far as to refuse to recognize a disclosure of private facts claim due to its conflict with the First Amendment.<sup>81</sup> Also, courts generally defer to the First Amendment when a public figure is involved or a matter of public concern is at issue. In essence, the greater the extent to which the plaintiff is a public figure or the matter is one of public concern, the more newsworthy it becomes. As one commentator noted, a disclosure of private facts claim “has a serious chance of success only if the facts have nothing to do with the plaintiff’s conduct as a public figure or with a matter of legitimate public interest.”<sup>82</sup> For example, in *Diaz v. Oakland Tribune, Inc.*,<sup>83</sup> a newspaper published that the plaintiff, the

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79. *Vassiliades v. Garfinckel’s*, 492 A.2d 580, 589 (D.C. 1985) (quoting *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980)). However, the *Vassiliades* court also recognized that “the privilege to publicize matters of legitimate public interest is not absolute. Certain private facts about a person should never be publicized, even if the facts concern matters which are, or relate to persons who are, of legitimate public interest.” *Id.* (citing *Gilbert v. Med. Econs. Co.*, 665 F.2d 305, 307 (10th Cir. 1981) and *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975)). The *Vassiliades* court held that the plaintiff’s privacy interest in the unauthorized use of “before” and “after” photographs of her cosmetic face-lift surgery in a department store presentation outweighed the public’s interest in the subject. *Id.* at 589.

80. See, e.g., *infra* notes 94–97, 114–20 and accompanying text (discussing public disclosure of professional athlete misconduct and personal issues).

81. See *Hall v. Post*, 372 S.E.2d 711, 717 (N.C. 1988) (noting that “it would be entirely unrealistic to suggest that adoption of the private facts tort would do other than ‘add to the tension already existing between the First Amendment and the law of torts’” (citing *Renwick v. News & Observer*, 312 S.E.2d 405, 412 (N.C. 1984)). See also *Doe v. Methodist Hosp.*, 690 N.E.2d 681, 693 (Ind. 1997) (noting that “torts involving disclosure of truthful but private facts encounter[] a considerable obstacle in the truth-in-defense provisions of the Indiana Constitution”).

82. JOHNSON & GUNN, *supra* note 26, at 1037–38.

83. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Ct. App. 1983).

president of the student body at her college, had once been a man and had a sex change operation before entering college. The court held that although the plaintiff “waived” her right to privacy about her public life as president of the student body, it did not “warrant that her entire private life be open to public inspection.”<sup>84</sup>

### III. THE PROLIFERATION OF TABLOID JOURNALISM IN TRADITIONAL NEWS MEDIA SOURCES

#### A. *Infotainment*

The entertainment format of news reporting has been termed “infotainment.” Infotainment refers to a general type of media broadcast program containing a mixture of current events news and entertainment news such as “feature stories,” interviews, commentaries, and reviews.<sup>85</sup> Infotainment also refers to the segments of television news programming which consist of both “hard news” segments and interviews, along with celebrity interviews and human drama stories. Simply, news conflicts with entertainment and infotainment conflicts with journalism ethics principles. Infotainment may have value if the news is presented in a format that more people will read and watch, thus creating a greater public interest and awareness about major events. However, the mixture of news and entertainment poses ethical problems for journalism because this format tends to skew the information and makes it very difficult for the public to separate fact from fiction or opinion, which can lead to a misinformed society.

There are other ethical problems associated with infotainment. Infotainment is oftentimes “opinion-oriented” and pits one side against another. While this adversarial format can be an effective way to flush out varying sides and points of view, it also tends to legitimize negativity, anger, and hatred and creates an “us against them” mentality. Society’s attention is diverted from the content of the news and the primary focus for the audience is to decide who won, or to decide who or which is better. Infotainment plays on the emotions of the audience and advocates certain positions. It is also geared towards persuading the audience to feel or think a certain way about the information or the manner in which the information is presented. However, when the entertainment portion is absent, the audience can digest the information and make its own independent assessment and judgment.

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84. *Id.* at 773.

85. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006), available at <http://dictionary.reference.com/browse/infotainment>.

Another ethical problem flowing from infotainment is that it leads to the generation of powerful stereotypes. When “feature stories,” commentary, opinions, and advocacy are mixed with news, the media directly and indirectly labels individuals in society according to their backgrounds and experiences and, based upon these labels, makes generalizations about how these individuals think or act. The audience becomes brainwashed into thinking that Republicans, Democrats, lawyers, doctors, athletes, entertainers, rich people, and poor people think and act a certain way or *should* think and act a certain way. In the process, different standards are created by the media, and thereby society as well, for various individuals depending upon the label they are assigned.

News reporting in the area of sports and entertainment epitomizes the effects of infotainment. Compromising journalism ethics in sports and entertainment news coverage is a topic that requires discussion and attention. Sensationalism, reporting trivial information, compromising the privacy interests of athletes and entertainers, holding participants in the sports and entertainment industries to a different standard, and inaccurate reporting are disturbing trends, as well as increasingly acceptable norms. The root of the ethical problems is that news about sports and entertainment, including athletes and entertainers, results in a “double dose” of entertainment. In other words, the media apparently feels that news about entertaining events must be presented in an entertaining format for the consumer to buy it. Indeed, the entertainment format in which news on sports and entertainment is presented is filtering into other segments of news reporting as well. Infotainment’s future impact on news reporting in other segments of news coverage can be assessed and evaluated through the lens of sports and entertainment news coverage. The next sub-section explores the ethical implications arising from infotainment in the coverage of the sports and entertainment industries.<sup>86</sup>

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86. See *infra* Part III.B (exploring the concepts of sensationalism, triviality, and privacy).

### B. Sensationalism, Triviality, and Privacy

One needs to look no further than the latest sport news headlines to realize that journalists are engaged in something other than simply reporting news. The front cover of *Golfweek Magazine's* January 19, 2008 issue featured the image of a noose against a purple sky background accompanied with the headline, *Caught in a Noose: Tilghman Slips Up, and Golf Channel Can't Wriggle Free*. Some might attempt to legitimize this headline by characterizing it as an effective visual representation describing a public controversy involving Kelly Tilghman's offensive statement made two weeks earlier on the Golf Channel that the only hope for young, up and coming professional golfers to compete with the great Tiger Woods would be to "lynch him in a back alley." However, the harsh reality is that the image and headline were used by *Golfweek* to sell more magazines. To be certain, profiting from disseminating and reporting news, in and of itself, is not a contentious issue from an ethical standpoint. But it becomes contentious when a media outlet sensationalizes its news reporting or reports trivial information such that the dissemination of news becomes secondary to the *primary* motive of outselling competitors.<sup>87</sup> *Golfweek's* headline is just one example among many of sensationalism and highlighting incidents out of context in sports journalism.<sup>88</sup>

The ethical obligation to be diligent in protecting an individual's

87. PGA Tour Commissioner Tim Finchem said in a statement:

Clearly, what Kelly said was inappropriate and unfortunate, and she obviously regrets her choice of words. . . . But we consider *Golfweek's* imagery of a swinging noose on its cover to be outrageous and irresponsible. It smacks of tabloid journalism. It was a naked attempt to inflame and keep alive an incident that was heading to an appropriate conclusion.

*Golfweek Fires Editor Responsible for 'Noose' Imagery*, ESPN.COM, Jan. 20, 2008, <http://sports.espn.go.com/golf/news/story?id=3202573>. According to Tiger Woods, Tilghman's controversial statement "was more media-driven than anything else." *Woods Says He Considers Tilghman Matter Closed*, USATODAY.COM, Jan. 21, 2008, [http://www.usatoday.com/sports/golf/pga/2008-01-21-woods-golf-channel\\_N.htm](http://www.usatoday.com/sports/golf/pga/2008-01-21-woods-golf-channel_N.htm).

88. To demonstrate an analogous use of infotainment outside of the sports and entertainment industry, the cover of the July 21, 2008 issue of the *New Yorker* magazine contained an illustration depicting Democratic presidential candidate Barack Obama dressed as a Muslim wearing sandals, a robe, and a turban and his wife Michelle dressed in camouflage and combat boots, with an assault rifle strapped over her shoulder—both standing in the Oval Office doing a fist tap in front of a fireplace in which an American flag is burning and a portrait of Osama bin Laden is hanging over the mantel. Alex Mooney, *New Yorker Editor Defends Controversial Obama Cover*, CNN.COM, July 14, 2008, <http://edition.cnn.com/2008/POLITICS/07/14/obama.cover/>. An Obama campaign spokesman commented, "*The New Yorker* may think, as one of their staff explained to us, that their cover is a satirical lampoon of the caricature Senator Obama's right-wing critics have tried to create. . . . But most readers will see it as tasteless and offensive. And we agree." *Id.*

privacy interest, to “avoid pandering to lurid curiosity,”<sup>89</sup> and to be judicious about naming criminal suspects before the formal filing of charges, is frequently compromised by journalists who report on the lives of athletes and entertainers. Compromising these journalism ethics principles originated in tabloid and gossip publications. Journalists, as well as society in general, have legitimized unethical reporting within those media sources to the point at which it became an acceptable norm. However, the twenty-first century represents a turning point for the proliferation of tabloid journalism in traditional mainstream news media sources.<sup>90</sup> The tabloid news sources and the mainstream news media are now covering the same stories.<sup>91</sup> Indeed, in their news reports, the mainstream news media has even begun to specifically reference tabloid magazines, such as *People Magazine*, and merely report the tabloid information published in those magazines.<sup>92</sup>

Today’s sports journalists are relentless in their efforts to uncover incidents of misconduct involving professional and amateur athletes, whether it involves (1) alleged felony or misdemeanor criminal behavior *before the formal filing of charges*, (2) allegations of non-criminal behavior that may impact competition on the field or the integrity of the game, such as alleged use of performance enhancing drugs and other forms of “cheating,” or (3) even a failure to exercise “good moral character and judgment” that does not constitute a crime and has no connection whatsoever with performance on the field.<sup>93</sup> The

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89. SPJ Code of Ethics, *supra* note 12.

90. See Morant, *supra* note 7, at 629 (“Sex scandals and bizarre lifestyle stories, which in the past were handled by the once profitable, but not necessarily respectable supermarket tabloids, are increasingly covered by more mainstream media.”).

91. See David A. Logan, “Stunt Journalism,” *Professional Norms, and Public Mistrust of the Media*, 9 U. FLA. J.L. & PUB. POL’Y 151, 166 (1998) (“The tabloid shows and the mainstream media often cover the same stories, and the mainstream outlets now often scramble to keep up with the tabloids.”). See also Monica! *Bill Clinton Had an Affair, and the Tabloid Tail Began Wagging the Mainstream Dog*, 40 COLUM. JOURNALISM REV. 124–25 (2001) (opining that the coverage of the Clinton-Lewinsky scandal by the mainstream media demonstrated the extent to which tabloid-style journalism has infiltrated the mainstream media).

92. See, e.g., Vito Stellino, *Pay Disparity Presents Prickly Problem*, FLA. TIMES-UNION, July 27, 2008, at C-8 (“Dallas Cowboys quarterback Tony Romo and his girlfriend, singer Jessica Simpson, were recently spotted having dinner with his folks at an Olive Garden in Janesville, Wisconsin. According to *People Magazine*, the restaurant staff thought it was a joke when the reservation was made.”). See also Lorena Blas, *Simpson: Just a Country Girl Who’s in Love*, USA TODAY, July 31, 2008, at 3D (containing an article in the sports section reporting on a story published in *Elle* magazine about actress and singer Jessica Simpson’s relationship with Dallas Cowboys quarterback Tony Romo, taking direct quotes from Simpson that were published in the magazine); Cindy Clark, *Portrait of a Family—Jolie-Pitt Photos Are a Study in Nonchalance*, USA TODAY, Aug. 8, 2008, at 13D (reporting that pictures of Angelina Jolie and Brad Pitt’s newborn twins would be unveiled for the first time by *People Magazine*).

93. See, e.g., Jorge L. Ortiz, *Martinez, Marichal Ripped for Attending Legal Cockfight*,

sports media diligently keeps society informed on a daily basis, exposing events of an entirely personal, and oftentimes very private nature occurring off the field within the lives of sports participants, including drug addictions, financial difficulties, and family problems.<sup>94</sup> Moreover, as this Part will discuss, sports journalists frequently engage in surreptitious methods of pursuing information involving sports participants and entertainers, particularly when the matter involves possible misconduct or questionable moral character and judgment. In recent years, the media has become obsessed with every indiscretion involving a famous person.<sup>95</sup>

In June 2007, the Associated Press released a report about an offensive line coach with the Pittsburgh Steelers who accidentally distributed by email an explicit sex video to numerous league personnel, including the commissioner of the NFL.<sup>96</sup> ChicagoSports.com, an affiliate of the *Chicago Tribune*, ran the story with the headline, *Sorry for the Porn, Mr. Commissioner*.<sup>97</sup> Not only does this headline involve sensationalism and pandering to lurid curiosity, but the news value of the information is highly suspect when weighed against the privacy interest in publicly exposing a sixty-one year-old grandfather who inadvertently hit the wrong computer key. In addressing the ethical question, what particular value does this information have for society, and is this information that the public *needs*? The offensive line coach for the Pittsburgh Steelers is certainly not a well-known person nationally, and he is not even a household name among Steelers fans living in Pittsburgh. Yet, the Associated Press and the *Chicago Tribune* deemed the event newsworthy. This report is just one example among many involving the publication of an event that was once the exclusive

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USATODAY.COM, Feb. 8, 2008, [http://www.usatoday.com/sports/baseball/2008-02-06-martinez-cockfight\\_N.htm#uslPageReturn](http://www.usatoday.com/sports/baseball/2008-02-06-martinez-cockfight_N.htm#uslPageReturn) (describing attendance at a legal cockfighting event in the Dominican Republic two years earlier by New York Mets pitcher Pedro Martinez and Hall of Famer Juan Marichal).

94. See, e.g., *Reid's Son to Leave Prison, Enter Drug Program*, USATODAY.COM, Feb. 2, 2008, [http://www.usatoday.com/sports/football/nfl/eagles/2008-02-01-reid-son-treatment-program\\_N.htm](http://www.usatoday.com/sports/football/nfl/eagles/2008-02-01-reid-son-treatment-program_N.htm) (reporting that the son of Philadelphia Eagles coach Andy Reid was leaving prison early and entering drug rehabilitation).

95. In an interview with the *Washington Post*, former star quarterback Joe Theismann said, "There is no anonymity anymore." Les Carpenter, *Poor Sports: Risking Livelihood and Reputation, Some Stars Don't Play by the Rules*, WASH. POST, July 29, 2007, at A-01. According to Theismann, we have become a culture obsessed with celebrity, and in his playing days in the 1980s, there were fifteen teammates who could have been arrested and subject to suspensions by current standards but the spotlight was different then; the culture was less celebrity-driven, and every indiscretion by a famous person did not spin in a twenty-four-hour news cycle. *Id.*

96. Article removed from website (on file with author).

97. Article removed from website (on file with author).

domain of the tabloid media sources and has now worked its way into the primary news sources.

Even if the email had instead been sent by a widely-recognized national figure, such as the starting quarterback for the Steelers, the justification for publication by the traditional news sources would not be compelling. Whether this matter involves an unknown assistant football coach or the star quarterback, in either case it has nothing to do with the Steelers' performance and it has very limited value for society otherwise—any value that exists is purely entertainment or lurid curiosity. Much of today's news coverage frequently involves the publication of purely trivial information and events regarding public figures and public officials, including everything from child custody battles to failure to pay their debts. The publication of such trivial information does not serve the primary purpose of *informing* society about professional athletes' individual roles or performances, but instead serves to *criticize* athletes for the decisions they make and actions they take in their own personal lives. With the headline, *Being Manny*, a primary news source in Jacksonville, Florida reported that Boston Red Sox slugger Manny Ramirez recently "came into \$10,000, courtesy of the state of Massachusetts . . . which had languished as unclaimed property," and the newspaper added, "Hey, when you're making \$20 million it's easy to forget \$10,000 here or \$10,000 there."<sup>98</sup>

News reports that critique and even heavily criticize professional athletes or entertainers regarding their public performances in sporting events, movies, and television might be rationalized on the same basis as that of the *New York Times* privilege—that "debate on public issues should be uninhibited, robust, and wide-open . . ."<sup>99</sup> But the rationale for the *New York Times* privilege becomes less convincing when the media's criticism goes beyond a critique or opinion regarding athletes' public performances and evolves into nothing more than a pun motivated by making a mockery of an individual purely for the sake of entertainment, and not debate. For example, in an opinion column critiquing Bon Jovi's newly-released compact disc, the author singled out the band's guitarist, Richie Sambora, and asked "[w]ho else can pull a 25-year pop-metal flashback off with such a straight and Botoxed face?"<sup>100</sup> The rationale for the *New York Times* privilege is even more tenuous when the media's criticism pertains to purely private matters

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98. David Johnson, *T-U-2*, FLA. TIMES-UNION, July 13, 2008, at C-2.

99. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

100. Jeff Vrabel, *Bon Jovi, You're to Blame, You Give Cheese a Good Name; Have a Nice Day CD Is Everything We Could Hope For—Or Perhaps Fear*, FLA. TIMES-UNION, Sept. 21, 2005, at C-8.

involving the lives of celebrity athletes and entertainers—private in the sense of not pertaining to matters that relate to carrying out their duties as public performers.<sup>101</sup> Indeed, the United States Supreme Court in *New York Times* drew a line between the public and private life of a public official and made clear that the stricter actual malice standard only applies to defamatory falsehoods of public officials relating to their “official conduct.”<sup>102</sup>

### 1. The Public Figure “Double Standard” Created by the Media

Studies show that sports editors operate by a different set of norms from those of other parts of the newsroom, and that many sports departments do not even follow a journalism ethics code.<sup>103</sup> While evidence suggests that ethics are discussed among editors within sports departments, albeit on an infrequent basis,<sup>104</sup> the pertinent questions are: What ethical issues are editors discussing? What ethical standards are editors self-imposing upon their journalism practices? Are editors in fact adhering to those standards? The evidence suggests that today’s sports news reporting is different than in the past in many respects. A recent analysis of 1,141 articles involving different cases of sports reporting in four different German daily newspapers, on five high-profile German athletes, from different periods of time, suggests that: (1) today the status of the athlete counts far more than it did in the past, and that the media’s focus is not just on the athlete himself but also on other protagonists such as the coach, the psychologist, and others

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101. This reference to private matters should not be confused with matters so private that one desires to keep them secret because it would be highly offensive if the matters were disclosed, which may result in a right of privacy tort cause of action.

102. *N.Y. Times*, 376 U.S. at 279, 280–83 (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct . . . . We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”).

103. See, e.g., Marie Hardin, *Survey Finds Boosterism, Freebies Remain Problem for Newspaper Sports Departments*, 26 NEWSPAPER RES. J. 66, 66 (2005) (“[S]ports departments still vary in their use of ethical codes and professional standards . . . [and] [s]ports editors, especially those at small-circulation dailies, may operate by a set of norms not acceptable in other parts of the newsroom.”). Out of 285 participating newspapers, Hardin’s survey revealed that fifty-six percent of the editors indicated that their staffs follow an ethics code. *Id.*

104. When editors were asked in Hardin’s survey to indicate how often ethics are discussed in their sports departments, six percent of editors said that ethics are discussed every day, twenty-six percent said less than once a month, thirty percent said once or twice a week, and thirty-seven percent said once or twice a month. *Id.* However, forty-three percent of editors with more than thirty years experience responded that ethical issues were rarely or never discussed. *Id.* According to Hardin, “Given the importance of such discussions to promoting ethical behavior and the likelihood that editors are faced with ethical quandaries daily, whether they recognize them as such or not, lack of dialogue could promote poor decision-making.” *Id.*



associated with the athlete; (2) today's media is looking for interesting stories with public appeal, and there are no longer any clear limits regarding privacy and intimacy; (3) today the journalists' opinions and reporting of objective information are not sufficiently separated; and (4) statistics are showing a lack of accurate research and a decline in journalists exercising their duty to work carefully.<sup>105</sup>

The media's treatment of athletes and entertainers has impacted society's treatment of them as well. The mainstream news media has essentially created a different standard for participants in the sports and entertainment industries, which largely influences how society perceives and treats these individuals.<sup>106</sup> A media that heavily criticizes and "judges" people fuels a society that does the same. Two days after Jacksonville Jaguars' wide receiver Matt Jones told reporters during training camp that he was "embarrassed" over his recent arrest on cocaine charges, the press reported under the headline, *Not-So-Warm Welcome*, that "it didn't take long for hecklers to come after Jaguars wide receiver Matt Jones, who said Friday he was 'embarrassed' over his recent arrest on felony cocaine charges but hasn't apologized."<sup>107</sup> In the article, the newspaper highlighted the fact that a fan wearing a T-shirt imprinted with Jones's mug shot snuck behind a fence where the players were working and taunted Jones.<sup>108</sup> This news report went beyond informing the public that Jones had been charged and arrested. It implicitly criticized Jones for not making a public apology for his arrest, or, at a minimum, insinuated that a public apology was warranted by Jones. Thus, the press was holding Jones to a different set of rules and standards than exist for other individuals in society, who are not expected to publicly apologize for being arrested. Perhaps Jones's lawyers advised him that a public apology could be deemed an admission and detrimental in the pending criminal case against him, or perhaps Jones just simply did not feel that he *owed* society an apology. In addition, there are some questions raised by the reporting of the

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105. Josef Hackforth & Simone Schlegel, *Ethics in Sports-Journalism? On (Sportive) Fairness in Press Coverage*, AUDI INST. FOR SPORTS COMM., July 11, 2007, available at <http://www.audi-institut-sportkommunikation.de/press/index.php?id=160&tree=-6-29-&ebene=2>.

106. Jim Fisher, Assistant Professor of Communication at the University of Utah, commented, "You get this hero-worship of athletes which leads to 'jockitis' in high school and to a certain extent in college, too. Athletes are simply held to a different standard than others in society. In sports reporting, you've generally seen a whole different ethical standard." Holly Mullen, *KUTV Sports Anchor's Legal Snarl Says Something Bigger About Squishy Ethics in Sports Journalism*, SALT LAKE CITY WEEKLY.NET, Oct. 3, 2007, [http://www.cityweekly.net/utah/article-5570-news\\_media-out-foxed.html](http://www.cityweekly.net/utah/article-5570-news_media-out-foxed.html).

107. Michael C. Wright, *Not-So-Warm Welcome*, FLA. TIMES-UNION, July 27, 2008, at C-8.

108. *Id.*

heckling fan incident. Is it acceptable to show up at an individual's place of work and publicly "taunt" that person for their mishaps or misdeeds, let alone wear a shirt with that person's mug shot? Through the media's constant criticizing and highlighting of the mishaps and misdeeds of professional athletes and entertainers, has the media convinced society that it is acceptable to do so the same?

The media's constant scrutiny of athletes and entertainers has even influenced judges in their opinions. For example, in a lease dispute between the Seattle Supersonics and the City of Seattle regarding the applicability of an arbitration clause, the judge stated in the ruling: "[The owners'] attempt to side-step Article II and shoot for Article XXVI is as errant as a typical Shaquille O'Neal free throw."<sup>109</sup> O'Neal was not a party to the case, he did not play for the Sonics, and his skills as a basketball player were obviously irrelevant to the issue in the case, but the judge publicly and openly criticized O'Neal's free throw shooting ability. Perhaps the judge felt it would add some light humor to the opinion. Should this personal insult be shrugged off on the grounds that "it's just sports"? Regardless, it appears to be an acceptable norm for a judge, in a written opinion, to criticize a high profile professional athlete in the performance of his job duties. But it would most certainly not be acceptable for a judge to do so with other people in society. Indeed, a judge would not even criticize a high-profile person such as Bill Gates in the performance of his duties, especially if Gates was not a party in the case.

Sometimes such criticism from judges is more subtle, such as when they hold professional athletes to a different standard by citing the fact that they are highly compensated. As part of the basis for rejecting a right of publicity claim by major league baseball players in the unauthorized use of their names and performance statistics by fantasy sports leagues, the Court of Appeals for the Eighth Circuit in *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*<sup>110</sup> indicated that "major league baseball players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsements and sponsorship arrangements."<sup>111</sup> In essence, the court was of the view that the players do not "deserve" to be compensated when fantasy leagues use their names and performance statistics, in part, because they already make

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109. *City of Seattle v. Prof'l Basketball Club, LLC*, No. C07-1620RSM, 2007 WL 3217556, at \*7 (W.D. Wash. Oct. 29, 2007).

110. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007).

111. *Id.*

enough money.<sup>112</sup> Here again, why was the court creating a different standard under the law for athletes from other individuals in society who are highly compensated? Perhaps the media's frequent criticism of player salaries has influenced judges in their decision-making. A Florida newspaper columnist added his "two cents" in connection with reporting a few recent signings in professional baseball:

It really is a testament to the craziness of baseball salaries (heck, of all sports) that these pay raises barely raise an eyebrow. I mean, there really is some kind of disconnect between pro athletes and the public. Especially when millions of dollars are being thrown around for, let's face it, just doing your job. Only in pro sports can you do your job just OK and be rewarded.<sup>113</sup>

The media has also created a different standard for athletes and entertainers as it relates to their expectations of privacy. Sports is entirely unique as the only industry whereby the press interviews subjects in their dressing rooms, which implicitly suggests that the news media views sports participants as having a diminished privacy interest from that of others in society, and that the public has a "right of access" to them anytime.<sup>114</sup> Simply, there are no privacy limits when it comes to sports participants, even when the matter involves an unknown athlete and it is obvious that the athlete does not want the matter disclosed to the public. For example, in a lawsuit brought by a cyclist

112. The district court in *C.B.C. Distribution & Marketing, Inc.* made similar comments: "[T]he additional *inducement for achievement* produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated . . . [F]or example . . . major league baseball players' salaries currently average over one million dollars per year." *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1097 (E.D. Mo. 2006) (quoting *Cartoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 974 (10th Cir. 1996)). "Indeed, professional athletes have responsibility for their celebrity status based on their athletic achievements; their fame, however, is nonetheless 'largely [a] creation of the media or the audience.'" *Id.* (quoting *Cartoons*, 95 F.3d at 975).

113. Michael Cummings, *2 Cents*, FLA. TIMES-UNION, Jan. 21, 2008, at C-2.

114. The press blasted New England Patriots quarterback Tom Brady when he left the locker room after practice during the week prior to the Super Bowl before reporters had the chance to question him about a photo that surfaced depicting Brady with his girlfriend, super model Gisele Bundchen, walking around Manhattan with his foot in a walking boot. Jarrett Bell, *The Bell Tolls: Brady Drama Is Great Super Bowl Hype*, USATODAY.COM, Jan. 25, 2008, [http://www.usatoday.com/sports/football/nfl/2008-01-25-the-bell-tolls\\_N.htm#uslPageReturn](http://www.usatoday.com/sports/football/nfl/2008-01-25-the-bell-tolls_N.htm#uslPageReturn). Upset about not getting access to Brady, Bell instead chose to criticize Brady:

At least there was evidence of his presence. A pair of tired-looking jeans lay folded over a chair in front of Brady's locker. It looked like a wallet bulged from the back pocket. A fat wallet, fitting for a *GQ* quarterback worth millions. No one dared to touch those pants. They'd probably get caught on camera.

*Id.* In the article, Bell twice tried to justify such tabloid "Brady Drama" as a newsworthy event because Brady was the league MVP, a three-time Super Bowl MVP, and the Patriots had an 18-0 record. *Id.*

claiming that the United States Anti-Doping Agency broke its own rules and damaged him in connection with a doping investigation, the plaintiff sealed his identity and filed the lawsuit as "John Doe" in order to prevent his name from being widely circulated.<sup>115</sup> Two days after the lawsuit was filed, the press published the identity of the plaintiff, obtained the plaintiff's cell phone number, and called the plaintiff to inquire about the lawsuit.<sup>116</sup> While it is not entirely clear why, the expectation of privacy of athletes and entertainers has increasingly diminished in recent years. According to one sports editor, "In the past, as long as it didn't interfere with what was going on on the field, [reporters] kept it to themselves. . . . Now it's open season."<sup>117</sup>

One would certainly believe that the subject matter of statements made by an individual to a psychologist would be off limits to the press. But apparently that is not the case when the individual is a professional athlete. A Nashville newspaper published information from a police report it obtained that Tennessee Titans quarterback Vince Young "mentioned suicide several times" to a psychologist.<sup>118</sup> The publication stated that the psychologist determined that Young was depressed and expressed concerns about his safety to the team.<sup>119</sup> The publication further stated that when Young abruptly left home later in his Mercedes with a gun and without his cell phone, Titans coach Jeff Fisher was alerted and he contacted the police to inform them about information that he had received from the psychologist.<sup>120</sup> The publication directly quoted the officer's statements in the police report: "I asked him (Fisher), 'What made her worry about him?' He stated, 'His mood, his emotions, he is injured, he wants to quit, and he mentioned suicide several times.'"<sup>121</sup> This press release raises a smorgasbord of journalism ethics issues and questions. Is there a legitimate public interest in the publication of this information? Is the justification for publication that professional athletes seek attention (e.g. by endorsing products) or assume a position of notoriety and, thereby, "assume the risk" that every aspect of their private lives will be exposed by the

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115. Eddie Pells, *'John Doe' ID'd in Lawsuit Against USADA*, USATODAY.COM, Jan. 26, 2008, [http://www.usatoday.com/sports/cycling/2008-01-26-usada-leogrande\\_N.htm](http://www.usatoday.com/sports/cycling/2008-01-26-usada-leogrande_N.htm).

116. *Id.*

117. Teddy Greenstein, *Tabloids Change Rules on Athletes: Coverage of A-Rod's Personal Life Shows New Philosophy*, CHI. TRIB., June 1, 2007, at Sports 2.

118. Jim Wyatt, *Police: Suicide Talks Prompted Search for Titans' Young*, TENNESSEAN, reprinted in USATODAY.COM, Sept. 13, 2008, [http://www.usatoday.com/sports/football/nfl/titans/2008-09-12-young-search\\_N.htm](http://www.usatoday.com/sports/football/nfl/titans/2008-09-12-young-search_N.htm).

119. *Id.*

120. *Id.*

121. *Id.*

media? Is the justification for publication that the public is entitled to know about a player's thoughts of suicide revealed to his psychologist because it tangentially relates to the player's performance on the field? Is the justification for publication that professional athletes are "role models"? Even if one takes the position that there is a legitimate public interest in this information (albeit slight at best), the pertinent issue is whether the public interest outweighs Young's high privacy interest in confidentiality.

What if the police report is inaccurate? As it turns out, the very next day it was reported that, according to Fisher, the police report contained many inaccuracies, including the fact that (1) Young's local marketing manager, Mike Mu, called the team psychologist with the alarm that Young had left his home without his cell phone, threatening to quit, and was speeding down the interstate with a gun in his car after talking to Mu (not the psychologist) about suicide and (2) the team psychologist, in turn, called Fisher with Mu's account but she never spoke directly with Young, as indicated in the police report, until the end of the night.<sup>122</sup> As to Young's state of mind regarding possible suicide, Fisher said, "I don't buy it," and he was irritated with Mu's involvement with Young.<sup>123</sup> Journalists have an ethical obligation to seek the truth, which entails a discipline of verification—seeking out multiple witnesses, disclosing as much as possible about sources, or asking various sides for comment.<sup>124</sup> This "is what separates journalism from other modes of communication, such as propaganda, fiction or entertainment."<sup>125</sup> Before publishing the information in the police report, the accuracy of the report could have been verified by merely picking up the phone and asking Fisher whether the police report was accurate as to what Fisher told the police. Instead, the economic incentives in today's news media marketplace have created an environment in which reporters are vigorously competing to be the first to get the story out. This "report it and fix it later" mentality simply does not square with journalism ethics principles.

Without an external mechanism to encourage the press to adhere to journalism ethics standards, tabloid journalism will continue to progress and evolve. This is evident by the press's recent quest to go beyond the athlete or entertainer and report trivial information about the friends and

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122. Chris Mortensen, *Fisher Says Young Needs Time to Learn from Collins*, ESPN.COM, Sept. 14, 2008, <http://sports.espn.go.com/nfl/news/story?id=3586215>.

123. *Id.*

124. See *supra* Part II.A (discussing reporting truthful and accurate information).

125. See Statement of Shared Purpose, *supra* note 13, at Core Principle 3 (discussing journalism's essence as a discipline of verification).

family members of celebrities. An example is the media hysteria surrounding Michael Phelps's accomplishments at the 2008 Summer Olympics in Beijing, which went far beyond reporting on Phelps's athletic achievements and other events occurring at the site of the Olympics. As the entire world watched a proud mother and her daughters support Phelps in his quest to achieve something that no other Olympic athlete has ever done, the press surreptitiously gathered information as to the whereabouts of Phelps's "delinquent" father in search for a reason for what the press considered a lack of support on his part.<sup>126</sup> Does the public need to know that Phelps's father is a state trooper, divorced his mother fifteen years ago, and since then remarried and had little contact with Phelps?<sup>127</sup> The proliferation of tabloid journalism in the traditional media sources prompts the question of what important information and events are we not being told, or are we not focusing on, when the press is diverting our attention to trivial information? Phelps's father voluntarily chose to avoid the public scrutiny of his estranged relationship with his son, but the press completely disregarded his privacy interest in doing so. Another question raised by the proliferation of tabloid journalism is whether the media's constant focus on criticism, speculation, and triviality fosters a society that does the same.

The media treats athletes and entertainers differently from other members of society. There are two oft-asserted justifications for athletes and entertainers to be subjected to different standards by the media: (1) that they are "role models" and (2) that they assume the risk of different treatment by voluntarily choosing to become an athlete or entertainer.

#### a. "Role Model" Status

The "role model" justification is that athletes and entertainers are obligated, or have a responsibility, to adhere to a certain standard of behavior and, because of that, the public has the right to be informed about what they are doing in their personal, non-public, lives. In reference to a story in the *New York Post* with the front-page headline "*STRAY-ROD . . . Alex Hits Strip Club with Mystery Blonde*," one sports editor told ChicagoSports.com:

Here you have the highest-paid player in the game who put out a children's book earlier this year. Some of these people are buying his

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126. Chris Chase, *The Mystery of Michael Phelps' Missing Father*, YAHOO! SPORTS, Aug. 20, 2008, [http://sports.yahoo.com/olympics/beijing/blog/fourth\\_place\\_medal/post/The-mystery-of-Michael-Phelps-missing-father?urn=oly,102215](http://sports.yahoo.com/olympics/beijing/blog/fourth_place_medal/post/The-mystery-of-Michael-Phelps-missing-father?urn=oly,102215).

127. See *id.* (discussing Michael Phelps's family troubles).

jerseys and looking at him as a role model. I'm not so sure parents will appreciate that some of their sons want to be like A-Rod when they see things like this.<sup>128</sup>

Another sports writer agreed: "Ballplayers better understand . . . [that] their sex lives and off-the-field conduct may hold far more import with the general public than their batting or earned-run averages."<sup>129</sup>

In recent years, role model status has even been utilized as a basis in judicial decisionmaking.<sup>130</sup> For example, in a perjury case, when Federal District Judge Kenneth Karas gave former Olympic gold medalist Marion Jones the maximum sentence recommended under Jones's plea deal, he said in court that the use of performance-enhancing drugs "sends all the wrong messages to all who follow the athlete's every move. Athletes in society have an elevated status. They entertain, they inspire and, perhaps most important, they serve as role models."<sup>131</sup> Judge Karas also said he gave Jones the maximum under the plea deal to send a message to athletes who have abused drugs and overlooked the values of "hard work, dedication, teamwork and sportsmanship."<sup>132</sup> He further commented that the wide use of steroids "affects the integrity of athletic competition."<sup>133</sup> It is clear from the judge's comments that, in deciding Jones's sentence, he was holding her to different standard as a high profile athlete. Not only was Jones being held to a different and higher standard, but merely her status as a high profile athlete formed part of the basis of her prison sentence—her status was being used to "send a message" to other athletes.

Judge Karas is not the only judge to have used a celebrity's role model status as a basis for a legal outcome. In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*,<sup>134</sup> the California Supreme Court considered the role model status of athletes and entertainers in weighing First Amendment considerations against a state right of publicity claim in

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128. Greenstein, *supra* note 117 (quoting Leon Carter, sports editor of the *New York Daily News*).

129. *Id.* (quoting Bill Madden, *New York Daily News* columnist).

130. In commending Andy Pettitte for admitting in an affidavit to having used human growth hormones, Henry Waxman, chairman of the House Committee on Oversight and Government Reform, proclaimed that "Mr. Pettitte's consistency makes him a role model on and off the field." Ronald Blum, *Pettitte Admits Using HGH in 2004*, USATODAY.COM, Feb. 13, 2008, [http://www.usatoday.com/sports/baseball/2008-02-13-pettitte-affadavit\\_N.htm?POE=click-refer](http://www.usatoday.com/sports/baseball/2008-02-13-pettitte-affadavit_N.htm?POE=click-refer).

131. *Marion Jones Sentenced to 6 Months in Prison*, NBCSPORTS.COM, Jan. 11, 2008, <http://nbcsports.msnbc.com/id/22508286/>.

132. *Six-Month Jail Sentence for Jones*, BBCNEWS.CO.UK, Jan. 11, 2008, <http://news.bbc.co.uk/1/hi/world/americas/7182969.stm>.

133. Traci Billingsley, *Jones Turns Herself in to Federal Prison*, USATODAY.COM, Mar. 7, 2008, [http://www.usatoday.com/sports/olympics/2008-03-07-jones-prison\\_N.htm](http://www.usatoday.com/sports/olympics/2008-03-07-jones-prison_N.htm).

134. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797 (Cal. 2001).

connection with the unauthorized use of their identities for commercial purposes:

Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. Whether or not celebrities are ‘the chief agents of moral change in the United States,’ they certainly are widely used—far more than are institutionally anchored elites—to symbolize individual aspirations, group identities, and cultural values. Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.<sup>135</sup>

Considering the role model status of an athlete or entertainer to assess the validity of a right of publicity claim may be warranted because such claim is not based upon notions of “privacy,” but is based upon notions of unjust enrichment flowing from the economic value in their *public* identities and personas. Thus, to the extent a third party is using the public identity or persona of a celebrity (i.e. their names and likenesses) in an expressive context, First Amendment considerations may warrant protecting such speech over the celebrity’s economic interest in his or her identity or persona.<sup>136</sup> Examples of uses involving expressive speech protected by the First Amendment include use of a celebrity’s name or likeness in entertainment and other creative works (fiction and nonfiction), in news reporting, and in print or broadcast biographies, novels, plays, or motion pictures.<sup>137</sup> Even though the third party in these contexts is reaping the economic value by using the celebrity’s identity, the celebrity’s right to be compensated for such use of his or her public identity is outweighed by the high social value of the third party’s expressive use. Thus, there is a plausible legal justification for courts to acknowledge and consider the role model status of celebrities in the context of evaluating right of publicity claims as the court did in *Comedy III*.

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135. *Id.* at 803 (quoting Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 128 (1993)).

136. See *infra* note 137 and accompanying text (discussing protected speech under the First Amendment using a celebrity’s name or likeness).

137. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (2005) (discussing the use of name, likeness, and other indicia of a person’s identity used for purposes of trade in news, entertainment, and creative works). See also *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 930–31 (6th Cir. 2003) (following Restatement (Third) of Unfair Competition § 47 in determining that Ohio is “inclined to give substantial weight to the public interest in freedom of expression when balancing it against the personal and proprietary interests recognized by the right of publicity”).



But there is questionable validity in a judge basing a sentencing decision on the celebrity defendant's status as a role model. In that context, the judge is imposing a harsher criminal sanction upon an individual on the basis that the celebrity defendant did not live up to a different and elevated standard of behavior specifically created for high profile athletes, which raises many questions. Who, by definition, constitutes a role model? What defines role model status is entirely subjective, and many would say that merely possessing a superior skill does not emulate the qualities and characteristics of a role model. Although a segment of the population may view athletes as "heroes" on the field and may admire superior athletic skill and performance, and even that premise is accepted, it does not lead to the conclusion that all, or a portion of that segment of society, also views them as role models. Indeed, perhaps athletes and entertainers are not, in fact, role models at all but have merely been portrayed as such by the media. One commentator, a psychological consultant to many college and Olympic teams, believes that the media helps "to create images of players as gods," and that "[t]oo often television, newspapers and magazines mythologize athletes giving an illusion that they have some kind of superior integrity when in reality they aren't much different than anyone else."<sup>138</sup> Does a role model include the unknown high school or collegiate athlete who suddenly becomes "known" solely because the media publicizes a matter entirely unrelated to his or her athletic performance?

Even if the premise is accepted that athletes are role models, there are further concerns raised by Judge Karas's use of role model status as a basis for his sentencing decision. Other "role models" in society, such as doctors, teachers and firemen, are not typically held to different and elevated standards under the law or treated differently under sentencing guidelines as well. How is the standard of behavior defined for a particular role model? If criminal sanctions are determined on the basis that the elevated standard of behavior for a role model was not met, that standard should be clearly defined somewhere. But more importantly, "integrity of athletic competition," which is a purely a sporting concern, arguably should not even be a consideration for a judge in a prison sentencing decision. Indeed, it is astounding that Judge Karas used Jones to "send a message" to other athletes who have "overlooked the values of 'hard work, dedication, teamwork and sportsmanship.'"<sup>139</sup>

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138. See Carpenter, *supra* note 95 (discussing professional athletes who risked their lives and reputations by breaking laws and not playing by the rules).

139. See *supra* notes 131-32 and accompanying text (discussing Marion Jones's six-month sentence in jail after lying to investigators about using performance-enhancing drugs and her role

Perhaps the media's relentless coverage of performance-enhancing drugs influenced Judge Karas's decision in sentencing Marion Jones. Regardless, it is fundamentally unfair for a judge to interject competitive balance in sports as well as concepts of hard work, dedication, teamwork, and sportsmanship as a justification or basis for critical decisions regarding the extent of an individual's fundamental right to liberty and freedom.

If the premise is accepted that a celebrity's role model status has legal relevance in some contexts (e.g., right of publicity claims) but not in others (e.g., sentencing decisions), then similar distinctions can be drawn between legitimate and illegitimate use and treatment of public figures by the media as well. As previously noted, in the context of right of publicity claims, role model status may support First Amendment protection involving a third party's unauthorized use of a celebrity's *public* identity and persona in certain contexts. However, that same justification does not apply to third party disclosure and use of *private* information concerning celebrities. When a celebrity is claiming a violation of privacy as a result of the media's disclosure of private facts, the relevant legal consideration is whether the information or event is newsworthy, and not whether the plaintiff is a role model.

To the extent the news media justifies its coverage of athletes and entertainers not on the basis that the information or event is newsworthy but because the people involved are role models, it can create fundamental problems from a journalism ethics standpoint. When the media is concerned about the role model status of its subjects, the news necessarily becomes much more trivial and, thus, more "tabloid" in nature. The coverage tends to be more critical and negative of the celebrity's personal life, rather than focusing on the individual's public performance and persona.<sup>140</sup> Furthermore, when the news media uses role model status as a basis for its coverage, it is de-emphasizing any privacy interest of the celebrity and focusing more on "shock value;" in other words, "Look what we found out about this individual!" The end result is that the press is losing sight of its ethical obligation to avoid sensationalism and trivia as well as to protect the privacy interest of its subjects.<sup>141</sup>

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in a check-fraud scam).

140. See, e.g., *Jags' Jones Has Hearing Monday on Cocaine Charge*, CBSSPORTS.COM, Aug. 11, 2008, <http://www.cbssports.com/nfl/story/10927258/sportsprofileplus> ("Jacksonville Jaguars receiver Matt Jones has been getting notice in training camp for his improved performance. However, his cocaine bust remains the primary reason his name is in the headlines.").

141. According to Tim McGuire, Professor of Business Journalism at Arizona State

b. Assuming a Position of Notoriety

The second commonly asserted justification for the media subjecting athletes and entertainers to a different standard is that they assume the risk of different treatment by voluntarily choosing to become a public figure.<sup>142</sup> It is often asserted that, by merely engaging in the activity of an athlete or entertainer, these individuals take on a responsibility to conduct their private lives according to a particular standard, which relates back to the role model issue. But, in addition, it is asserted that they “assume the risk” that matters relating to their public *and private* lives will be exposed by the media—even inaccurately at times. So the assumption of risk argument goes, “if you do not want this special treatment, then do not become a public figure.” Proponents of this argument reason that public figures must take the good with the bad and they cannot have it both ways—if they want to benefit and profit from having their achievements and accomplishments highlighted and exposed by the media, they cannot expect their mishaps and misdeeds in their personal lives to go unscathed. But this reasoning is an emotionally-based opinion, and is not supported by any sound public policy rationale.

The assumption of risk argument is most likely a byproduct of the United States Supreme Court’s rationale for extending the stricter actual malice standard to public figures in defamation actions—that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and that those who have become public figures have done so voluntarily and therefore “invite attention and comment.”<sup>143</sup> However, the actual malice standard addresses the conditions under which the press will be liable in civil damages for inaccurate statements. The rationale for differential treatment of public figures in defamation actions is based on the notion that the press

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University’s Walter Cronkite’s School of Journalism and Mass Communications:

The mandate to “do no harm,” or at least minimize harm, gets kicked around pretty brutally in sports coverage. I am sure some of the players implicated in the steroids scandals are going to be pretty surprised that sports media tries to avoid doing harm. I sometimes argue to my students that the media seems to take a “celebrity” exception when it comes to many ethical standards in celebrity coverage. I fear that mirage of an “exception” is starting to apply to sports. Privacy is another ethical concept getting banged around pretty hard in sports journalism. Witness Alex Rodriguez’ alleged affair. At the Star Tribune many years ago we heard many stories about alleged bedroom escapades of a star player, but we never saw the relevance. Apparently relevance has become quaint.

McGuire on Media, <http://cronkite.asu.edu/mcguireblog/?p=36> (Mar. 2, 2009, 5:47 pm).

142. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974).

143. *Id.* at 345.

should be shielded from civil damages so that it is encouraged to vigorously report on matters involving public figures without fear of liability if the report ends up being inaccurate without the press's knowledge. While the assumption of risk argument may have validity when asserted by the press as a shield from exposure to liability in defamation actions, it should not be used as a sword to expose the misdeeds and mishaps of celebrities simply because they are public figures. In addition, while the assumption of risk argument may have a bearing on the defamation issue, it simply has no relevance or application to journalists' ethical responsibilities and the concerns that accompany tabloid journalism—unsubstantiated reporting, citing unnamed sources, speculation, sensationalism, triviality, and disregard for privacy. In other words, despite the defamation standard which provides that the press must not *knowingly* (or recklessly) report inaccurate information pertaining to matters involving public figures, the ethical obligation of the press requires it to make every effort to report truthfully and accurately and to diligently verify the information, which is lacking in today's news reporting.<sup>144</sup>

The “tabloidization” of news reporting in the sports and entertainment industry has already taken hold. The important question for society, journalists and the legal system is to what extent tabloid journalism should be permitted to infiltrate news reporting. Indeed, the data indicates that a majority of Americans have already lost faith in the traditional mainstream news sources.<sup>145</sup> Journalism itself is not capable of ethical self-regulation. The next section will demonstrate that the combination of financial pressures and an increasing level of corporate influence have made it necessary in the twenty-first century to revisit current tort standards and provide appropriate incentives for the press to

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144. See Felicity Barringer, *Sports Reporting: Rules on Rumors*, N.Y. TIMES, Feb. 18, 2002, at C6 (“[R]igorous attribution rules are relaxed when journalists are reporting accusations of corrupt deals in a world like figure skating, which has a reputation for unsavory dealings.”).

145. See PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED 4 (2004) [hereinafter 2004 PEW STUDY], available at <http://people-press.org/reports/pdf/215.pdf> (“More than half (53%) agree with the statement ‘I often don’t trust what news organizations are saying.’ Nearly as many (48%) believe people who decide on news content are ‘out of touch.’”). See also Christine Urban, Am. Soc’y of Newspaper Editors (ASNE), *Tracking Public Attitudes*, in BUILDING READER TRUST, Aug. 12, 2002, available at <http://www.asne.org/credibilityhandbook/brt/publicattitudes.htm> (providing a 1999 study that found that irrespective of the diversity in size, demography, and geography represented by eight markets, more than eighty percent of adults in each market agreed with the statement “I believe that newspapers frequently overdramatize some news stories just to sell more papers,” and more than two-thirds believed that “Lately I have become more skeptical about the accuracy of anything I hear or read in the news”). Amazingly, “69 percent say newspapers are ‘concerned mainly with making profits’ rather than the public interest (up 12 percentage points from 1998).” *Id.*

adhere to journalism ethics codes.<sup>146</sup>

#### IV. CURRENT MARKET FORCES ARE INSUFFICIENT TO REGULATE JOURNALISM ETHICS

News reporting is a business, and it always has been. But the notion that free market principles, in which news media outlets vigorously compete for the attention of an audience, can sufficiently regulate journalism ethics is flawed. The free market concept is first based on the assumption that an audience prefers an ethical press and seeks out information that is both newsworthy and truthful.<sup>147</sup> This leads to a second assumption that if the media perceives that to be the case, then the media will regulate its behavior to attain these ends out of a desire to garner higher ratings and thereby maximize profits.<sup>148</sup> These assumptions are oxymoronic. First, the press decides for the public what information is newsworthy and truthful, so the public does not have the capability to *seek out* information that is newsworthy and truthful—the public simply takes what the media gives it. Moreover, to implicitly suggest that the public can choose between ethical news providers and ones that are not so ethical is flawed. If the news is not newsworthy and truthful, and if the providers of it are not acting ethically, then it is not news. Second, higher ratings and profits are generated by getting the audience's attention, which may or may not include publication of newsworthy and truthful information. If these assumptions are in fact true, unfortunately it means that the media apparently perceives that the public does not necessarily prefer an ethical press but prefers one that is more tabloid in nature. Is the media's perception accurate?

A 2004 survey of three thousand adults conducted by the Pew Research Center for the People and the Press revealed that a majority of Americans are only "moderately" interested in the traditional "hard news" subjects consisting of international affairs, politics, local government, and business and finance, and that approximately one-in-ten Americans (thirteen percent) have absolutely no interest in these

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146. See *infra* Part IV (arguing that current market forces are not enough to regulate journalism ethics).

147. See Morant, *supra* note 7, at 605 ("An audience generally prefers information that is both newsworthy and truthful.").

148. See *id.* ("If media perceives that the dissemination of truthful and universally appealing information enlarges its audience (and, therefore, maximizes profits), then it will regulate its behavior to attain these ends. Those media sources that provide news and information that audiences seek will *generally* garner higher ratings.").

subjects.<sup>149</sup> More significantly, less than one-third of Americans (thirty-one percent) even follow hard news stories on a consistent basis, and of those who follow these stories consistently, one half prefer in-depth analysis and the other half prefer headlines plus some coverage of the facts or just headlines.<sup>150</sup> Furthermore, the availability and abundance of twenty-four hour on-demand news sources has resulted in an increase in the number of people who cram the news into their busy schedules by “checking in from time to time” as opposed to getting the news at a regular time each day, which appears to be an increasing trend with the younger generation.<sup>151</sup> The public’s attention span for the news also appears to be affected by cable television:

[F]ewer than one-in-four Americans (23%) are steady news watchers, saying they watch on a regular schedule and don’t flip channels [and] [a]t the other end of the spectrum are 33% who truly graze the news—checking in from time to time when convenient, and ready to change the channel whenever they don’t find the subject interesting.<sup>152</sup>

The survey also asked participants whether they preferred news that is “enjoyable and entertaining” and forty-eight percent responded that they like it that way, forty-five percent responded that it does not matter, and only six percent responded that they dislike it that way.<sup>153</sup>

Based on the foregoing data regarding consumers’ preferred content, as well as the desired form of the content, presenting the news as “infotainment” makes the most business sense for the media from a purely market driven perspective.<sup>154</sup> An alarming survey of journalists conducted in 1999 revealed that “[t]wo-thirds of those in national and local news say that news organizations’ attempts to attract readers or viewers has pushed them toward infotainment instead of news.”<sup>155</sup> Perhaps even more disturbing, a March 2008 survey of journalists conducted by the Pew Research Center revealed that financial and business bottom-line pressure is now the overriding concern among

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149. 2004 PEW STUDY, *supra* note 145, at 27.

150. *Id.*

151. *Id.* at 29.

152. *Id.* at 29–30.

153. *Id.* at 32.

154. See Jill Rosen, *Et Tu, “Nightline”?*, AM. JOURNALISM REV., Feb.-Mar. 2004, at 20–23 (noting that, due to today’s celebrity-obsessed media market, it is not surprising that Nightline bumped coverage of President Bush’s trip to London for coverage of Michael Jackson’s arrest for child molestation, which became the program’s highest-rated show of the year).

155. PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, STRIKING THE BALANCE, AUDIENCE INTERESTS, BUSINESS PRESSURES AND JOURNALISTS’ VALUES SECTION III: VIEWS ON PERFORMANCE (1999), available at <http://people-press.org/report/67/striking-the-balance-audience-interests-business-p pressures-and-journalists-values> (follow “Section III. Views on Performance”).

journalists.<sup>156</sup> Approximately two-thirds of national and local journalists believe that increased bottom-line pressure is not only changing the way news organizations operate but is seriously hurting the quality of news coverage, and that the pressure is intensifying.<sup>157</sup> Moreover, sixty-two percent of national journalists in the 2008 Pew Survey said that journalism is going in the wrong direction, compared with fifty-one percent in 2004.<sup>158</sup> The 2008 Pew Survey also shows that slightly less than fifty percent of national and local internet journalists believe that both corporate media owners and advertisers have a great deal or fair amount of influence over coverage, which is a very significant percentage considering that most of the internet journalists in the sample work for the online operations of traditional news outlets.<sup>159</sup> As noted by one commentator, “[i]t comes as no surprise, therefore, that 80% of journalists surveyed feel that market pressures often kill relevant or socially pertinent stories that are judged as dull or less attention-grabbing.”<sup>160</sup>

While some commentators have posited that profit maximization affords proper incentives for the press to engage in the positive behavior that journalism ethics codes promote,<sup>161</sup> the evidence from the 2008 Pew Survey demonstrates that free market principles cannot sufficiently regulate journalism ethics. As the press continues to be confronted with increasing competition in the marketplace, as well as increasing financial pressures, journalism ethics will continue to spiral downward.<sup>162</sup> Simply, profit maximization and social values butt heads with each other.<sup>163</sup> As the incentive to maximize profits leads to the press’s quest for sensationalism and increased readership, it decreases the media’s incentive to enforce their own journalism ethics codes,

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156. PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS, FINANCIAL WOES NOW OVERSHADOW ALL OTHER CONCERNS FOR JOURNALISTS 5 (2008) [hereinafter 2008 PEW STUDY], available at <http://people-press.org/reports/pdf/403.pdf>.

157. *Id.*

158. *Id.* at 14.

159. *Id.* at 8.

160. Morant, *supra* note 7, at 626–27.

161. *See id.* at 630–33 (arguing that profit-maximization is a fundamental incentive for positive ethical behavior in journalism).

162. *See* Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 J. DEPAUL-LCA J. ART & ENT. L. & POL’Y 1, 7 (1998) (“The pressure to maintain or boost circulation and broadcast ratings in a marketplace with ever increasing competitive pressures may tend to make serious journalists more tabloid-like.”).

163. *See* Robert M. Entman & Steven S. Wildman, *Reconciling Economic and Non-Economic Perspectives on Media Policy: Transcending the “Marketplace of Ideas,”* 42 J. COMM. 5, 5–6 (1992) (promoting economic efficiency and social values simultaneously under the umbrella of the “marketplace of ideas” metaphor results in bad policy and a flawed policy analysis).

often leading to compromised privacy interests, inaccurate reporting, and incomplete source verification.<sup>164</sup> The increased competition for audience and ratings overshadows the objectives of journalism ethics codes.<sup>165</sup> While it appears that advertisers are decreasing their spending in traditional media, they are increasing their spending in tabloid magazines,<sup>166</sup> which adds pressure on the traditional media outlets to be more “tabloid” in nature in order to attract advertising dollars.<sup>167</sup> As a result of these market forces, economic pressures, and budget constraints, as well as increased competition and quest for higher ratings, the journalist becomes caught in an ethical quagmire in attempting to balance what the public *wants* to know and what it *needs* to know.<sup>168</sup> When only forty percent of journalists themselves believe

164. See Marge Injasoulian & Gregory L. Leisse, *Media Crises*, 36 CATH. LAW. 97, 106–07 (1995) (noting that the hysteria surrounding the press’s quest for sensationalism and, thus, increased readership and viewership, often leads to “inaccurate reporting and incomplete source verification”). The link between sensationalism and inaccurate reporting and incomplete source verification is evident in sports news reporting, as demonstrated by recent reports on the steroid controversy in baseball:

The Los Angeles Times was forced to issue a correction and apology for getting the names wrong in a story about Jason Grimsley’s testimony to federal investigators. One of the names they messed up was Roger Clemens.’ Contrary to what was reported in October 2006, Clemens wasn’t on the Grimsley affidavit, which was released Thursday. And that L.A. Times story was cited in the Mitchell Report in the chapter on Clemens . . . . There was also WNBC in New York, which put Albert Pujols and Johnny Damon on the Mitchell Report based on a source hours before the report was released. One big problem: They weren’t on it.

Scott Kendrick, *2 Cents*, FLA. TIMES-UNION, Dec. 23, 2007, at C-2. See also McGuire on Media, <http://cronkite.asu.edu/mcguireblog/?p=38> (Dec. 3, 2007, 4:39 pm) (discussing ESPN analyst Kirk Herbstreit’s violation of journalism ethical rules regarding use of confidential sources in connection with inaccurately reporting that Louisiana State University head football coach Les Miles and two of his assistants were leaving for the University of Michigan). As noted by McGuire: “Too often sports reporters do not give careful attention to the motives of their sources or the potential consequences of being wrong. One of the reasons for that may be the lack of organizational consequences when a sports reporter is wrong in this kind of case.” *Id.*

165. Morant, *supra* note 7, at 614.

166. See Jeremy Herron, *An Economy Grows Around Britney Spears*, USATODAY.COM, Jan. 29, 2008, [http://www.usatoday.com/life/people/2008-01-28-britney-spears-economy\\_N.htm](http://www.usatoday.com/life/people/2008-01-28-britney-spears-economy_N.htm) (“At a time when advertising spending in traditional media is declining, celebrity gossip titles such as *Star*, *Us Weekly* and *In Touch Weekly* are growing. That helped overall newsstand sales for magazines edge 1% higher, to \$2.39 billion, in the first half of 2007.”).

167. See generally C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992) (discussing the impact that advertising has on the media).

168. See Andrew Calabrese, *Political Space and the Trade in Television News*, in TABLOID TALES: GLOBAL DEBATES OVER MEDIA STANDARDS 43 (Colin Sparks & John Tulloch eds., 2000) (discussing how the media increasingly relies on tabloid formats because of budget constraints and competition); Lyrisa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 218 (1998) (noting that news programs can get by with using questionable newsgathering techniques because they are motivated by high ratings that result in higher profits); David A. Logan, *Masked Media:*



that journalism is doing a good or excellent job at striking the balance,<sup>169</sup> there is an inherent flaw created by the system. If the status quo is maintained, the percentage of journalists who believe that journalism is currently doing a good or excellent job of striking this balance is likely to increase over time as a younger generation of journalists, who generally seem less concerned about the commingling of news and entertainment, continues to infiltrate the industry.<sup>170</sup>

Market forces in combination with state tort laws typically provide proper incentives for corporate enterprises to comply with duties owed to the public. For example, if the consumer is at risk of damage or harm, manufacturers and service providers have an incentive to reduce or eliminate that risk through adequate insurance or production of safer products and services. The producer engages in a simple risk-burden analysis, weighing the magnitude of a particular risk of harm to the public against the cost or burden to the producer in reducing or eliminating that risk. If the extent and magnitude of the risk of harm are great, the producer has an incentive to take extra precautions and incur the cost to alleviate the risk of liability. In essence, the duty of the producer under tort negligence and strict liability standards normally encourages, or at least attempts to encourage, the elimination or reduction of risk of harm to the public.

Violation of journalism ethics principles imposes a risk of harm to society at large to various extents and magnitudes. However, in the journalism industry, market forces, in combination with tort law, do not provide the press with the same incentives to minimize harm, protect privacy, seek the truth, and avoid sensationalism and triviality.

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*Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 161–62 (1997) (noting that undercover reporting by newsmagazine programs raises serious journalism ethics issues and has proliferated due to the media's quest for increased ratings and profits).

169. 2008 PEW STUDY, *supra* note 156, at 17.

170. Furthermore:

Unlike newsroom veterans, today's young journalism students seem less concerned about the commingling of news, sports and entertainment, perhaps because they grew up in an era dominated by large corporations. They seem to have a general understanding that companies need to worry about investments such as broadcasting rights in order to keep news operations in the black. "They seem to accept more of a business sense. There is not this same outrage."

Kelly Heyboer, *Fair Game?*, AM. JOURNALISM REV., Oct. 1999, at 46, 46–50 (quoting Bill Evans, a media ethicist at Southern Methodist University). *See also* Hardin, *supra* note 103, at 67 ("Younger journalists could represent a 'new breed with professional aspirations.'" (quoting Bruce Garrison & Michael Salwen, *Newspaper Sports Journalists: A Profile of the "Profession,"* J. SPORT & SOC. ISSUES, Fall 1989, at 57)). Hardin's survey revealed that "[e]ditors at smaller papers, who were generally younger and less experienced, were less likely to see ethical problems with freebies, were more likely to support boosterism and were more likely to work without a code than were editors at larger papers." *Id.* at 71.

Applying a risk-burden analysis, tort law does not threaten the media with risk of liability because either (1) there is no duty to avoid any risk of harm or (2) the duties of the press that are imposed (e.g. under defamation or privacy tort laws) contain much more lenient standards of care and are not consistent with the duties imposed under journalism ethics codes and, thus, do not encourage the elimination of such risks. Therefore, tort law would not appear to provide the press with the necessary incentives to minimize harm to society posed by violating journalism ethics codes. But, ironically, the cost or burden to the press to alleviate the risk of harm through stricter adherence to journalism ethics codes is minimal in comparison to the damage to society as a whole that emulates from shoddy investigative practices, not identifying sources, highlighting sensational and trivial items, inaccurate reporting, and not respecting individuals' privacy. While state defamation laws *may* afford relief to a targeted individual when the damage rises to the level of a defamatory and false report, tort laws do not afford relief when the resulting harm falls short of that level but ends up affecting an entire society of people as opposed to a targeted individual.

The 2008 Pew Survey contains stark evidence that the journalism marketplace in the twenty-first century is operating substantially differently than in the past.<sup>171</sup> It is a significant turning point from a legal standpoint. It should serve as a wake-up call to the legal community that the social values journalism ethics codes seek to promote simply cannot survive in today's economic and technological environment in which media outlets are vigorously competing with one another in print, cable television, internet, and real time platforms amounting to thousands of available news sources. For the first time in history, society is actually confused about basic questions concerning what constitutes "news" and who are the legitimate sources of the news. To be a viable enterprise in the twenty-first century's media environment, the press is focused on how to best "grab the audience's attention," which compromises journalism ethics principles.

The pertinent question for society is whether a competitive free market system in the twenty-first century can effectively provide the best quality news product. If news quality is measured by consumer preference and/or higher ratings and profit maximization, then the answer is most likely yes. But if we acknowledge that news is a uniquely-situated product for which quality is instead measured by an ethical component concerned about society's best interest that entails an

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171. See *supra* notes 156–59 and accompanying text (discussing and analyzing the 2008 Pew Study).

ethical duty of loyalty to the citizenry, then the answer is most likely no. To put it a different way, journalism has reached a fork in the road and the press simply cannot continue to operate in today's market environment under the guise that it strictly adheres to a code of journalism ethics principles.<sup>172</sup> The market environment has become increasingly competitive, economically strained, and time-sensitive, and the law must react accordingly to ensure, or at least encourage, adherence to universally-adopted journalism ethics codes. However, if the status quo is maintained and the press can continue to produce the news in a virtually *unrestrained* free market under the First Amendment's protective wings, the tabloid format of the news media will only escalate. The next Part will propose how journalism ethics codes can be incorporated into tort law standards without compromising the First Amendment, and provide appropriate incentives for the press to adhere to journalism ethics principles in a free market system.<sup>173</sup>

#### V. INCORPORATING JOURNALISM ETHICS CODES INTO TORT LAW STANDARDS WITHOUT COMPROMISING THE FIRST AMENDMENT

The Supreme Court in *Miami Herald Publishing Co. v. Tornillo*<sup>174</sup> stated, "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."<sup>175</sup> However, press responsibility can certainly be encouraged by the courts via their application of legal standards and what considerations they take into account in the application of those standards. Indeed, courts have recognized that credibility is an essential component to the journalism product.<sup>176</sup> While press responsibility is not mandated by the Constitution, the basis for constitutional protection of a free press becomes less compelling when journalism lacks credibility.<sup>177</sup> As noted by Professor Clay

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172. See Brian C. Murchison et al., *Sullivan's Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 101 (1994) ("The paradox, then, is that while journalists oppose self regulation through detailed professional rules of behavior, they have been silent about regulation by the judiciary through libel decisions.").

173. See *infra* Part V (discussing how journalism ethics codes may be incorporated into tort law standards without resulting in the compromise of the First Amendment).

174. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

175. *Id.* at 256.

176. The United States Court of Appeals for the District of Columbia Circuit has noted that "[a]t least with respect to most news publications, credibility is central to their ultimate product and to the conduct of the enterprise." *Newspaper Guild of Greater Phila. v. NLRB*, 636 F.2d 550, 560 (D.C. Cir. 1980). See also *Nelson v. McClatchy Newspapers, Inc.*, 936 P.2d 1123, 1131 (Wash. 1997) ("Editorial integrity and credibility are core objectives of editorial control and thus merit protection under the free press clauses.").

177. See Clay Calvert, *The First Amendment, Journalism & Credibility: A Trio of Reforms for*

Calvert:

When a free press lacks credibility, however, the credibility justification for maintaining its absolute protection and autonomy against government intervention loses its truism-like appeal. As press credibility crumbles, it begins to render hollow and meaningless the value of the special constitutional shield and security afforded the press under the First Amendment. Why should we privilege and provide a profit-making private entity like the press with special constitutional safeguards that are not given to other entities if the press is seen as untrustworthy by many people? Some form of government regulation may be necessary for the press to gain or regain credibility.<sup>178</sup>

In order for the press to regain credibility, it must be acknowledged by the courts that the press has lost credibility. Above, this Article discussed how the changing journalism marketplace in the twenty-first century is fueling tabloid journalism by the traditional media sources and affecting the media's level of compliance with ethics codes.<sup>179</sup> Tort standards for the press incorporating First Amendment considerations that were developed during the third quarter of the twentieth century and that are still in existence today may need to be revisited. It can hardly be debated that today's press is less credible, and, therefore, the *basis* for constitutional protection has become less compelling than it once was. The press can no longer operate under the status quo while maintaining that journalism ethics are a paramount concern.<sup>180</sup>

Some state courts have recognized journalism ethics codes in defining the standard of care for journalists.<sup>181</sup> In relying upon the

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*a Meaningful Free Press More Than Three Decades After Tornillo*, 4 FIRST AMEND. L. REV. 9, 17 (2005) ("[C]redibility is more than just a journalistic goal. The fact that the press is no longer seen as credible by many journalists and members of the public has major implications for the First Amendment. Press credibility is a central, if not critical, rationale for the constitutional protection of a free press.").

178. *Id.* at 18 (internal citation omitted). See also Daniel Schorr, *Journalism and the Public Interest*, NIEMAN REPORTS, Summer 2005, at 13 ("The press (now more commonly called the news media) continue to insist on constitutional shelter in the public interest while primarily serving substantial private interests and sometimes being accused of acting against the public interest.").

179. See *supra* Part IV (discussing how the current market forces are not enough to regulate journalism ethics).

180. See McGuire on Media, <http://cronkite.asu.edu/mcguireblog/?p=37> (Nov. 28, 2007, 2:39 pm) ("As journalism standards are weakened by blogs and the 24/7 rush of news, mainstream media has to be the standard-bearer for ethics and impeccable behavior. Certainly we have a long way to go.").

181. For example, in holding that the defendant was negligent in the publication of its article, the court in *Khawar v. Globe Int'l, Inc.*, 54 Cal. Rptr. 2d 92 (Cal. App. 2d Dist. 1996), relied on expert testimony that the defendant's conduct fell below the acceptable standard of care for journalism based upon the Society of Professional Journalists Code of Ethics and the American

Society of Professional Journalists Code of Ethics, the Supreme Court of Rhode Island expressed: "A responsible news medium scrutinizes; it does not unjustly or irresponsibly incite a wildfire of insinuation. This court believes that these highlighted sections, and the entire code of ethics, accurately define the professionalism we would expect, and in fact the public should demand, from a responsible media."<sup>182</sup> However, one of the dissenting judges opined that "[t]he majority's pious reference to the Canons of Ethics for Journalists gives little assurance in these times where tabloid journalism is becoming the rule rather than the exception."<sup>183</sup> While the dissenting judge was certainly correct fourteen years ago that tabloid journalism was becoming the rule rather than the exception, it is incumbent upon the judiciary to ensure adherence to journalism ethics codes so that tabloid journalism goes back to being the exception rather than the rule. This Part explains how journalism ethics codes can be taken into consideration by courts when deciding defamation and privacy cases that affords sufficient constitutional protection without deviating from First Amendment norms.<sup>184</sup>

#### A. *The Newsworthiness Standard Under the Disclosure of Private Facts Tort*

The disclosure of private facts tort claim subjects the press to liability for the publication of *truthful* private matters that would be highly offensive to a reasonable person and that are not of legitimate public concern.<sup>185</sup> Whether something is of a legitimate public concern turns on a determination of newsworthiness, and courts struggle with balancing conflicting interests of individual privacy and press

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Society of Newspaper Editors Statement of Principles. See also *Brown v. Kelly Broad. Co.*, 771 P.2d 406, 430 (Cal. 1989) (noting that the media should not strive to be accurate to avoid liability but to preserve "high standards of professional craftsmanship" as required by journalistic canons of ethics adopted by the American Society of Newspaper Editors and the Society of Professional Journalists); *State v. Krueger*, 975 P.2d 489, 497 n.11 (Utah Ct. App. 1999) (noting that the Professional Journalism Organization Codes of Ethics does not approve of the defendant publisher's activity).

182. *In re Access to Certain Records of R.I. Advisory Comm. on the Code of Judicial Conduct*, 637 A.2d 1063, 1067 n.1 (R.I. 1994).

183. *Id.* at 1070.

184. See Todd F. Simon, *Libel As Malpractice: News Media Ethics and the Standard of Care*, 53 FORDHAM L. REV. 449, 452 (1984) (advocating for a journalistic malpractice standard utilizing uniform journalistic practices); see also Jeff Storey, *Does Ethics Make Good Law? A Case Study*, 19 CARDOZO ARTS & ENT. L.J. 467, 476 ("The role of ethical codes may become more important in cases to the extent the codes define detailed and enforceable *practices* rather than vague aspirations."). See also *infra* Part V.A-C (examining the impact journalism ethics codes could have on courts).

185. RESTATEMENT (SECOND) OF TORTS § 652D (1965).

freedom.<sup>186</sup> As discussed above, courts have applied varying tests and factors in balancing the newsworthy value with an individual's privacy interest in non-disclosure.<sup>187</sup> Thus, courts are certainly capable of defining newsworthiness; it is simply a matter of courts' adoption and consistent application of an appropriate test or standard.

The Supreme Court has given very limited attention to the constitutional privilege of the press to publish truthful private facts, and has addressed the issue in only one case involving a public disclosure of private facts tort claim.<sup>188</sup> In *Cox Broadcasting Corp. v. Cohn*,<sup>189</sup> a criminal court clerk allowed a television reporter to see an indictment containing the name of a rape-murder victim, and the television station broadcast an account of the court proceedings using the victim's name.<sup>190</sup> In upholding the press's privilege in this case, the Supreme Court proceeded cautiously in addressing the newsworthiness issue and accordingly, narrowed its holding:

Rather than address the broader question of whether truthful publications may ever be subjected to civil or criminal liability consistently with the First and Fourteenth Amendments, or to put it a different way, whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents, namely, whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.<sup>191</sup>

The most significant aspect of the decision, at least for purposes of this Article, is the reason for the Court's ruling upholding the privilege of the press in this instance, which was based on the "responsibility of

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186. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) ("It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.").

187. See *supra* Part II.C (discussing the tests used by courts in balancing the private interest of individual privacy and the newsworthiness of published or broadcast material).

188. *Shulman*, 955 P.2d at 479 ("Delineating the exact contours of the constitutional privilege of the press in publication of private facts is, however, particularly problematic, because this privilege has not received extensive attention from the United States Supreme Court. The high court has considered the issue in only one case involving the common law public disclosure tort, *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 . . . and its holding in that case was deliberately and explicitly narrow.").

189. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

190. *Id.* at 471–74.

191. *Id.* at 491.

the press to report the operations of government,"<sup>192</sup> including judicial proceedings regarding crimes, and the premise that "[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served."<sup>193</sup>

Fourteen years later in *Florida Star v. B.J.F.*,<sup>194</sup> a case factually similar to *Cox Broadcasting*, the Supreme Court reached a similar conclusion in a negligence claim involving a Florida statute that criminally punished the publication of a sexual assault victim's name, used as a predicate for application of the negligence per se doctrine. Here, again, the high court was cautious in addressing the newsworthiness issue, "relying on limited principles that sweep no more broadly than the appropriate context of the instant case."<sup>195</sup> The "limited principle" relied upon was that "[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."<sup>196</sup>

Both Supreme Court decisions provide little guidance in determining whether a private matter is of sufficient "public interest" (*Cox Broadcasting*) or "public significance" (*Florida Star*)—in other words, "newsworthy"—the disclosure of which would be constitutionally privileged and protected from civil liability pursuant to a common law tort action. Such little guidance naturally leaves the high court's rulings open to numerous interpretations by state and federal courts. For example, the Court of Appeals for the Seventh Circuit broadly interpreted both Supreme Court decisions to privilege the publication by the press of any newsworthy facts concerning any individual, even when they are facts that people typically very much desire to keep concealed.<sup>197</sup>

However, the Supreme Court of California in *Shulman v. Group W*

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192. *Id.* at 492.

193. *Id.* at 495.

194. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989).

195. *Id.* at 533.

196. *Id.* (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

197. *See* *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993) ("The implications of [*Cox Broadcasting* and *Florida Star*] for the branch of the right of privacy that limits the publication of private facts are profound. . . . The 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.").

*Productions, Inc.*<sup>198</sup> interpreted the decisions much more narrowly. The court reasoned that in both cases the press “had obtained the victim’s name from a public records source” and the high court’s rulings “rested in large part on the fact the government had, by making the information available to the press, impliedly determined its dissemination was in the public interest, and could not then punish a newspaper for ‘rely[ing] on the government’s implied representations of the lawfulness of dissemination.’”<sup>199</sup>

The California high court further explained that both United States Supreme Court decisions

establish that truthful reporting on current judicial proceedings, using material drawn from public records, is generally within the scope of constitutional protection [but] [t]he decisions do not, however, enunciate a general test of newsworthiness applicable to other factual circumstances or provide a broad theoretical basis for discovery of such a general constitutional standard.<sup>200</sup>

The United States Court of Appeals for the Seventh Circuit appears to interpret newsworthiness to mean essentially any information that an individual has been unable to keep secret and for which the press seeks to publish (i.e., if it is in the “public domain” then it is “fair game”). This definition of newsworthiness contains no privacy parameters whatsoever and provides the media with unfettered discretion to determine whether the information is of sufficient public interest or significance, which, in essence, amounts to coverage that most effectively sells papers or boosts ratings. The public domain view neglects to take into consideration whether the matter is highly offensive to the ordinary person, which is a necessary element of the disclosure of private facts tort that cannot be overlooked. As noted by the California Supreme Court in *Shulman*, which spent considerable time evaluating various standards of newsworthiness applied in previous cases, if newsworthiness is defined as a completely descriptive term, based upon whether there is widespread public interest, “it would seem to swallow the publication of private facts tort, for ‘it would be difficult to suppose that publishers were in the habit of reporting occurrences of little interest.’”<sup>201</sup> Moreover, the public domain view is

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198. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

199. *Id.* at 480 (quoting *Fla. Star*, 491 U.S. at 536).

200. *Id.* at 480–81 (citing Woito & McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 199–202 (1978)).

201. *Shulman*, 955 P.2d at 481 (quoting Comment, *The Right of Privacy: Normative-Descriptive Confusion in the Defense of Newsworthiness*, 30 U. CHI. L. REV. 722, 734 (1963)).



inconsistent with journalism ethical duties of (1) providing not only information that citizens want but information citizens “need to function in a free society”<sup>202</sup> and (2) considering harm to individual privacy interests such that “[o]nly an overriding public need can justify intrusion into anyone’s privacy.”<sup>203</sup>

Rationalizing a constitutional privilege on the grounds that the information is in the “public domain” may be a growing trend by courts that seem overwhelmed as to how to apply the First Amendment in the twenty-first century “new media” era. For example, in the *Major League Baseball Advanced Media* case discussed above, which involved the unauthorized use of professional baseball players’ names and performance statistics by a fantasy league operator, the Court of Appeals for the Eighth Circuit balanced the players’ rights of publicity against the First Amendment and held that the use of the information was privileged on the grounds that the information was in the public domain.<sup>204</sup> According to the Eighth Circuit, “the information used in [defendant’s] fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.”<sup>205</sup> Although this case involved a right of publicity claim (which addresses an individual’s economic interest) as opposed to a public disclosure of private facts claim (which addresses an individual’s right to be left alone), the court’s broad interpretation of the First Amendment seems identical to that of the Seventh Circuit.<sup>206</sup> In other words, the rationale is that if the information is readily available to the public, then it is constitutionally privileged. Just as the California Supreme Court recognized that the “public domain” view of the First Amendment privilege would seem to swallow the public disclosure of private facts claim, the Eighth Circuit’s public domain standard effectively swallows the right of publicity tort as well.<sup>207</sup>

In its discussion of various standards for determining newsworthiness, the California Supreme Court in *Shulman* also

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202. Statement of Shared Purpose, *supra* note 13, at A Statement of Purpose.

203. SPJ Code of Ethics, *supra* note 12, at Minimize Harm.

204. *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 823 (8th Cir. 2007).

205. *Id.*

206. *Id.*

207. *See Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (reserving, in a false light privacy case, the question of whether truthful publication of offensive private facts may constitutionally be punished, and noting a commentator’s view that newsworthiness privilege may be so “overpowering as virtually to swallow the [privacy] tort”).

expressed concern regarding a definition of newsworthiness “at the other extreme” that would be based on a value predicate, noting that “if newsworthiness is viewed as a purely normative concept, the courts could become to an unacceptable degree editors of the news and self-appointed guardians of public taste.”<sup>208</sup> Such a standard of newsworthiness is similar to, and about as problematic in application as, the “mores of the community” standard.<sup>209</sup> Giving some credence to the normative component, according to the court, the balance is somewhere in between:

[T]he analysis of newsworthiness does involve courts to some degree in a normative assessment of the “social value” of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest. Second, the evaluation of newsworthiness depends on the degree of intrusion and the extent to which the plaintiff played an important role in public events, and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. “Some reasonable proportion is . . . to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given.”<sup>210</sup>

Citing the case of *Kapellas v. Kofman*,<sup>211</sup> in which the California high court found that, in the context of political candidacy, truthful information is generally protected if it “may be relevant” to qualifications for office, the *Shulman* court recognized that this balancing approach “echoes the Restatement commentators’ widely quoted and cited view that legitimate public interest does not include ‘a morbid and sensational prying into private lives *for its own sake*.’”<sup>212</sup>

The California Supreme Court’s exhaustive analysis of the meaning of “newsworthy” in *Shulman* is instructive in at least three respects. First, the opinion convincingly demonstrates that newsworthiness does not exist in a vacuum and, thus, the First Amendment does not clothe

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208. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 481 (1998) (“The difficulty of finding a workable standard in the middle ground between the extremes of normative and descriptive analysis, and the variety of factual circumstances in which the issue has been presented, have led to considerable variation in judicial descriptions of the newsworthiness concept.”).

209. *See Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940) (utilizing the mores of the community standard). *See also Melvin v. Reid*, 112 Cal. App. 285, 292 (Ct. App. 1931) (holding that the defendant’s use was “not justified by any standard of morals or ethics known to us”).

210. *Shulman*, 955 P.2d at 483–84 (citing *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969)) (citation omitted).

211. *Kapellas v. Kofman*, 459 P.2d 912 (Cal. 1969).

212. *Shulman*, 955 P.2d at 485 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1965)).

the press with the privilege to publish all truthful information in the public domain. Second, the court's recognition that "legitimate public interest does not include a morbid and sensational prying into private lives for its own sake" reinforces the view that journalism ethics can and should be incorporated into tort law standards. Finally, the court recognized that the truthful information being published must be relevant, or reasonably proportioned, to the event or activity that brought the plaintiff to public attention or that made the plaintiff a public figure.<sup>213</sup> In other words, there must be a "nexus" or "connection" between the truthful information and the public activity or event.<sup>214</sup>

The relevance/nexus factor is a critical component in balancing the First Amendment and journalism ethics standards because such an inquiry takes into account the purpose, or reason, for the publication of the matter. If there is a remote nexus or connection between the truthful matter and the event or activity that brought the plaintiff to public attention or that made him or her a public figure, then the societal First Amendment interest in the information is much less compelling because the purpose for publication becomes primarily one of sensational prying into private affairs for its own sake or one of pandering to lurid curiosity. Furthermore, a nexus inquiry does not require judges to embark upon a normative assessment of the social value of the information, and, thus, does not infringe upon or compromise the constitutional protection afforded information that entertains.<sup>215</sup> While courts have universally held that information that entertains is afforded the same constitutional protection as information that informs, the constitutional protection afforded entertainment is not compromised by merely recognizing the relatively weak societal First Amendment interest in protecting the sensational prying into private affairs for its own sake or pandering to lurid curiosity. Moreover, a nexus or relevance inquiry is practical in application and one very familiar to courts in weighing the admissibility of evidence.

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213. See also *Diaz v. Oakland Tribune Co.*, 188 Cal. Rptr. 762, 773 (Ct. App. 1983) (rejecting the newsworthy value in an article directed to the students at a college about their newly elected student body president that truthfully revealed she was a transsexual). The *Diaz* court noted that "[t]he tenor of the article was by no means an attempt to enlighten the public on a contemporary social issue. . . . The social utility of the information must be viewed in context, and not based upon some arguably meritorious and unintended purpose." *Id.*

214. *Shulman*, 955 P.2d at 483-84.

215. See *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The line between the informing and the entertaining is too elusive for the protection of [freedom of the press].") (quoting *Winters v. People of State of N.Y.*, 333 U.S. 507, 510 (1948)).

## B. Defamation

### 1. The Actual Malice Standard

On the heels of the *New York Times* decision, the United States Supreme Court decided *Curtis Publishing Co. v. Butts*,<sup>216</sup> a significant defamation law case because the high court extended the actual malice standard for public officials to “public figures.” The case has particular significance for this Article because the Supreme Court for the first time grappled with the question of what role professional standards of journalism, and a publisher’s departure from those standards, should have in determining liability for defamation involving public figures. In *Butts*, the evidence showed that the *Saturday Evening Post* had published an accurate account of an unreliable informant’s false description of the University of Georgia athletic director’s purported agreement to “fix” a college football game.<sup>217</sup> Although there was reason to question the informant’s veracity, the editors did not interview a witness who had the same access to the facts as the informant and did not look at films that revealed what actually happened at the game in question.<sup>218</sup> This evidence of the defendant’s intent to avoid the truth would most certainly constitute a violation of codes of journalism ethics. But this evidence was also sufficient to convince Justice Harlan, who wrote the plurality opinion, that liability should be imposed for defamation because there had been “a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.”<sup>219</sup> Justice Harlan opined that this professional standards rule be used in place of the *New York Times* actual malice standard.<sup>220</sup>

In Justice Harlan’s view, the stricter actual malice standard is more appropriate for cases involving seditious libel—defamatory material pertaining to governmental policies and the conduct of governmental officials and candidates for public office—which demands “extreme caution in imposing liability.”<sup>221</sup> Justice Harlan’s suggestion that

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216. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

217. *Id.* at 156–58.

218. *Id.* at 157.

219. *Id.* at 155.

220. *Id.* at 153–55.

221. *Id.* at 153–54. Justice Harlan wrote:

In *New York Times* we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability. The plaintiff in that case was an official whose position in government was such “that the public [had] an independent interest in the qualifications and performance of the person who [held] it.”

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sedition libel may warrant a different level of treatment under the First Amendment was not a novel idea. For example, James Madison made a similar observation in 1800 shortly after ratification of the First Amendment:

Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.<sup>222</sup>

Supreme Court decisions following *Butts* even legitimized what Justice Harlan advocated: "There is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.'"<sup>223</sup>

However, Justice Harlan's proposed professional standards rule for public figures was rejected by a majority of the Supreme Court.<sup>224</sup> In his concurring opinion, Chief Justice Warren, speaking for a majority of the Court, explained the justification for extending the actual malice standard to public figures.<sup>225</sup> For example, he discussed developments since the depression of the 1930s and World War II—specifically "a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds"—in which the distinctions between the governmental and private sectors became

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In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel.

*Id.* at 153–54 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

222. Madison's Report on the Virginia Resolutions (1800), in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 575 (Jonathan Elliot ed., 2d. ed. 1861).

223. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (quoting *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971)). "Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty." *Id.* at 687.

224. Chief Justice Warren was highly critical of Justice Harlan's professional standards rule: "I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of laymen or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment." *Butts*, 388 U.S. at 163 (Warren, J., concurring).

225. *Id.* at 163–64.

increasingly blurred, resulting in not only a consolidation of governmental power but also the organization of power in the private sector.<sup>226</sup> Chief Justice Warren wrote that the effect of this “blending of positions and power”<sup>227</sup> between the governmental and private sectors was the increasing societal role that public figures have in making policy determinations such that “many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”<sup>228</sup> The Chief Justice further explained:

Viewed in this context, then, it is plain that although they are not subject to the restraints of the political process, “public figures,” like “public officials,” often play an influential role in ordering society. And surely as a class these “public figures” have as ready access as “public officials” to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of “public officials.” The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.<sup>229</sup>

Chief Justice Warren’s justification for application of the actual malice standard involving public figures is consistent with the rationale for its application involving public officials as provided by the Supreme Court in *New York Times*: “[A] profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>230</sup>

While a majority of the Supreme Court strongly opposed Justice Harlan’s proposed professional standards rule involving public figures, the majority nevertheless reached the same result, applying the actual

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226. *Id.* at 163.

227. Chief Justice Warren explained that “[i]n many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government.” *Id.*

228. *Id.* at 163–64.

229. *Id.* at 164.

230. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

malice standard by finding that the defendant's unethical journalistic practices, specifically referring to them as "slipshod and sketchy investigatory techniques," amounted to "reckless disregard for the truth."<sup>231</sup> The majority was also troubled by evidence presented in the case indicating that the publisher's motive in making the defamatory statement appeared to be based primarily upon financial gain.<sup>232</sup> The majority opinion raises some questions. What is the majority's substantive disagreement with Justice Harlan in this case, if any? Perhaps the majority was concerned that Justice Harlan's proposed standard for public figures would amount to the imposition of a negligence standard of reasonable care, despite the fact that his proposed standard required evidence of "*highly* unreasonable conduct constituting an *extreme departure* from the standards of investigation and reporting ordinarily adhered to by responsible publishers."<sup>233</sup> Is Justice Harlan's standard that far removed, if removed at all, from a standard of reckless disregard? The majority was most likely not concerned that Justice Harlan's standard put undue emphasis on the *conduct* of the publisher as opposed to the publisher's state of mind, because the majority acknowledged that "'[r]eckless disregard' for the truth or falsity, [is] measured by the conduct of the publisher."<sup>234</sup> Perhaps Chief Justice Warren's suggestion that Justice Harlan's proposed standard is "based on such an unusual and uncertain formulation"<sup>235</sup> indicates that the majority was concerned about defining the parameters of journalistic professional standards of investigation and reporting ordinarily followed by responsible publishers. Yet, the majority had no difficulty whatsoever in making the determination, in the end, that the defendant did not adhere to such standards.<sup>236</sup>

Ironically, Justice Harlan's proposed standard was consistent with, and merely overtly stated, the manner in which the majority *applied* the actual malice standard. Justice Harlan expressly stated his view that defamation cases involving public figures do not warrant the "extreme caution in imposing liability" presented by a *New York Times* situation

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231. *Butts*, 388 U.S. at 169–70 (Warren, J., concurring).

232. *Id.* at 169 ("Apparently because of declining advertising revenues, an editorial decision was made to 'change the image' of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of 'sophisticated muckraking,' designed to 'provoke people, make them mad.'").

233. *Id.* at 155 (plurality opinion) (emphasis added).

234. *Id.* at 164 (Warren, J., concurring).

235. *Id.* at 163.

236. *Id.* at 169–70.

involving seditious libel.<sup>237</sup> While the majority did not expressly acknowledge this sentiment, its holding tends to suggest that it implicitly agreed with Justice Harlan. In other words, the majority expressly advocated a stricter actual malice standard for public figures but it did not *apply* the standard as “strictly” in this particular case, in essence, applying the less strict standard proposed by Justice Harlan. Did the majority apply the actual malice standard slightly more leniently in this case because the plaintiff was an athletic director and not a public official? Perhaps the fact that the plaintiff was a public figure as opposed to a public official provided a less compelling reason in the minds of the majority to permit the press to use the *New York Times* privilege as a shield. What we do not know is whether the majority would have reached the same holding *on the same evidence*, had the defamatory statement involved one of seditious libel.

In a case analogous to *Butts*, the Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton*<sup>238</sup> reviewed a decision in which the Sixth Circuit applied Justice Harlan’s proposed professional standards rule in a defamation case involving a public figure who was running as a candidate for judicial office. In *Connaughton*, the Sixth Circuit ruled that a newspaper’s decision to rely on one witness’s highly questionable and condemning allegations without first verifying those accusations and without independent supporting evidence constituted “an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,” thereby satisfying the actual malice standard.<sup>239</sup> The Sixth Circuit also attributed considerable weight to evidence presented that the newspaper “was motivated by its interest in the reelection of the candidate it supported and its [own] economic interest in gaining a competitive advantage over . . . its bitter rival in the local market.”<sup>240</sup> The Supreme Court, relying on its holding in *Butts*, emphatically rejected the professional standards rule in defamation cases involving public figures and also emphasized that the actual malice standard cannot be satisfied merely through a showing of ill will or “malice” in the ordinary sense of the term, nor through a showing that the defendant published the defamatory material in order to increase its profits.<sup>241</sup>

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237. *Id.* at 153 (plurality opinion).

238. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989).

239. *Id.* at 664.

240. *Id.* at 664–65, 665 n.6.

241. *Id.* at 666–67. “If a profit motive could somehow strip communications of the otherwise available constitutional protection, our cases from *New York Times* to *Hustler Magazine* would be little more than empty vessels.” *Id.* at 667.



*Connaughton* and *Butts* are remarkably similar, a fact which was acknowledged by the Supreme Court itself.<sup>242</sup> As in *Butts*, despite its refusal to acknowledge that a departure from journalistic professional standards could satisfy the actual malice standard, the Supreme Court in *Connaughton* nevertheless affirmed the Sixth Circuit's ruling because it was convinced that the evidence concerning the newspaper's "departure from accepted standards and the evidence of motive" supported the conclusion that the newspaper acted in "reckless disregard as to the truth or falsity" of the witness's allegations.<sup>243</sup> However, the holding in *Connaughton* is arguably even more peculiar than the majority opinion in *Butts* because the Supreme Court even went so far as to say that "we are satisfied that the Court of Appeals judged the case by the correct substantive standard," noting that evidence concerning a publisher's motive or care can have a bearing on the actual malice inquiry.<sup>244</sup> Indeed, even Justice Harlan may not have gone this far, as the public figure in *Connaughton* was a candidate for judicial office and, thus, the case was closer to one involving seditious libel. Another peculiar aspect about the holding is that the Supreme Court even acknowledged that the actual malice standard, and in particular the term "reckless disregard," are rather "elusive constitutional standards" that cannot readily be captured in "one infallible definition," thus demanding a case-by-case adjudication.<sup>245</sup>

The actual malice standard, and in particular the meaning of "reckless disregard for truth or falsity of the statement," should not be left in an elusive state that confuses courts and leads to inconsistent holdings.<sup>246</sup>

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242. *Id.* at 692.

243. *Id.* at 667-68. "There was unquestionably ample evidence in the record to support a finding that [the witness's] principal charges were false, either because she misinterpreted remarks by Connaughton and his wife, or because [the witness] was deliberately lying." *Id.* at 681.

244. *Id.* at 668.

245. *Id.* at 686.

246. See, e.g., *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1293 (D.C. Cir. 1988) (holding that actual malice can be established "[t]hrough the defendant's own actions or statements, the dubious nature of his sources, [and] the inherent improbability of the story [among] other circumstantial evidence"); *Goldwater v. Ginzburg*, 414 F.2d 324, 342 (2d Cir. 1969) ("There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."). But see *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968) ("Failure to investigate does not in itself establish bad faith."). Compare *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1198 n.17 (11th Cir. 1999) ("Ill-will, improper motive or personal animosity plays no role in determining whether a defendant acted with 'actual malice.'"), with *Tavoulaareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (holding that evidence of ill will combined with other circumstantial evidence indicating that the defendant acted with reckless disregard of the truth or falsity of a defamatory statement may also support a finding of

The *Butts* and *Connaughton* decisions stand for the proposition that evidence of a publisher's "slipshod and sketchy investigatory techniques" will establish "reckless disregard for the truth." Both Supreme Court decisions seem to support the consideration of journalism ethics principles by courts in the application of the actual malice standard. Therefore, it would not be a deviation from Supreme Court precedent for courts to take into account the duties of the press under journalism ethics codes in determining whether a publisher acted in reckless disregard for truth or falsity of the statement. Indeed, just the mere recognition of journalism ethics codes by the courts would be a significant step towards establishing a more credible press and providing a greater incentive for the press to pay closer attention to, and comply with, their duties under ethics codes.<sup>247</sup>

## 2. Expansion of Public Figure Status and Scope of the Privilege

In *Butts*, public figure status was not a contentious issue in the case, as seven members of the Court conceded that the athletic director at a major university is a public figure.<sup>248</sup> However, in extending the *New York Times* privilege to public figures, the high court referred to public figures as those in the private sector who have a significant role in making public policy decisions even though they do not hold public office and are not subject to the restraints of the political process.<sup>249</sup> What is not entirely clear from the *Butts* decision is the scope of the *New York Times* privilege as it relates to public figures. Or, to put it a different way, for what purposes or in what contexts is the plaintiff a public figure? Here again, this was not a contentious issue in the case because the published statement concerned the athletic director's purported agreement to "fix" a college football game, which undoubtedly related to the plaintiff's discharge of his official duties as athletic director.<sup>250</sup> Seven years after *Butts* was decided, the Supreme Court addressed both issues in *Gertz v. Robert Welch, Inc.*<sup>251</sup>

In addressing these issues, the Supreme Court in *Gertz* first looked to the definition and scope of the public official designation. The Court noted that a governmental official voluntarily accepts "certain necessary consequences" of his involvement in public affairs and "runs the risk of

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actual malice).

247. Morant, *supra* note 7, at 620 ("Yet, the most persuasive signal of the functionality of ethical codes as standards of liability would be their adoption by the judiciary.").

248. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967) (Warren, J., concurring).

249. *Id.* at 163-64.

250. *Id.* at 136 (plurality opinion).

251. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

closer public scrutiny than might otherwise be the case.”<sup>252</sup> The Court further opined that the scope of the subject matter covered by the *New York Times* privilege “is not strictly limited to the formal discharge of official duties . . . [but] extends to ‘anything which might touch on an official’s fitness for office.’”<sup>253</sup> Using the same risk assumption reasoning, the Court described two types of voluntary public figures, both of whom “invite attention and comment,”<sup>254</sup> and the Court also defined the scope of each type.

The first type of voluntary public figure consists of the “famous” public figure—those who “have assumed roles of especial prominence in the affairs of society [and] [s]ome occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”<sup>255</sup> Later in the opinion, in reference to this type of public figure, the Court noted that “[i]n some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.”<sup>256</sup> The Supreme Court in *New York Times* limited the privilege to defamatory falsehoods relating to the “official conduct” of public officials,<sup>257</sup> thus drawing a distinction between their public and private lives. In other words, there must be a nexus between the falsehood and an event or activity of the plaintiff in his or her role or capacity as a public official. Moreover, there is nothing in the *Butts* decision even remotely suggesting that the Court intended to expand the scope of the *New York Times* privilege beyond the public life of a public figure and into the private life.<sup>258</sup> To the contrary, there is language from the opinion strongly suggesting that the Court meant to extend the privilege only to the public life of a public figure: “Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate *about their involvement in public issues and events* is as crucial as it is in the case of ‘public officials.’”<sup>259</sup> However, the Supreme Court in *Gertz*, in defining the scope of the privilege with regards to defamatory falsehoods involving the famous public figure, curiously did not draw that same public-private line of demarcation and

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252. *Id.* at 344.

253. *Id.* at 344–45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964)).

254. *Id.* at 345.

255. *Id.*

256. *Id.* at 351.

257. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

258. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, J., concurring).

259. *Id.* (emphasis added).

broadened its scope to “all purposes and in all contexts.”<sup>260</sup>

In regards to the famous public figure, the landmark *Gertz* decision left two important questions that remain unanswered by the Supreme Court to this day. First, why did the Court veer away from its holdings in *New York Times* and *Butts* by broadening the scope of the privilege involving the famous public figure to “all purposes and in all contexts”? There is no compelling justification for treating the public official differently from the famous public figure under the *New York Times* privilege. An argument can be made that the *public life* of a famous public figure should be subject to the same scrutiny as the public life of a public official on the grounds that public figures assume the same risk as public officials that activities and events relating to their public lives are going to be subjected to public scrutiny. However, the *private life* of a famous public figure is no less deserving of protection than that of a public official and, therefore, the nexus requirement that is afforded public officials in applying the *New York Times* privilege should also be afforded the famous public figure. Ironically, while the Supreme Court has acknowledged that “[t]here is little doubt that ‘public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule,’”<sup>261</sup> the scope of the privilege as applied to public figures (“all purposes and in all contexts”) is actually broader than its scope in relation to public officials.<sup>262</sup> What is perhaps most curious about *Gertz* is that the plaintiff did not even come close to the status of the newly-established “famous public figure”—the plaintiff was a relatively unknown low-profile attorney.<sup>263</sup> So not only did the Supreme Court in *Gertz* go beyond the facts in its creation of a new category for public figures that undoubtedly did not even apply to the plaintiff, but the Court expanded the scope of the *New York Times* privilege in a case in

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260. *Gertz*, 418 U.S. at 351.

261. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 686 (1989) (quoting *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300 (1971)).

262. Indeed, one commentator has posited the question whether public officials and public figures actually deserve *more* protection of their reputations rather than less:

Justice Powell’s opinion in *Gertz* suggests that one who voluntarily enters public life must accept the risk of closer public scrutiny. Does that justify leaving public figures practically without remedy for defamatory falsehoods, as the actual-malice standard and related rules do? Why not hold that the risk of closer public scrutiny justifies more protection for a public official’s or public figure’s reputation, rather than less?

JOHNSON & GUNN, *supra* note 26, at 1001.

263. See *Gertz*, 418 U.S. at 351–52 (“Although petitioner was consequently well known in some circles, he had achieved no general fame or notoriety in the community. . . . In this context it is plain that petitioner was not a public figure.”).

which the *New York Times* privilege was not even applicable.<sup>264</sup>

Second, while the Supreme Court made clear that only “some” public figures occupy such a position in which they will be deemed public figures for all purposes and in all contexts, who are those individuals? The Supreme Court in *Gertz* provided no guidelines for courts to determine whether a particular individual has met the criteria to be a famous public figure.<sup>265</sup> Although a very fact-intensive inquiry, courts have generally regarded the determination of whether an individual is a public figure or a public official as a question of law for the court to decide.<sup>266</sup>

The other type of voluntary public figure defined by the Court in *Gertz* for which the *New York Times* privilege applies is the “limited” public figure—those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”<sup>267</sup> In this situation, “an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.”<sup>268</sup> According to the Supreme Court, both types of voluntary public figures “assume special prominence in the resolution of public questions.”<sup>269</sup> Although the greater burden on public figures was rationalized by the Supreme Court in *Gertz* on the grounds that they voluntarily assume the risk and have access to the media, in recent years courts have expanded the public figure classification to even include individuals who were drawn involuntarily into a public controversy.<sup>270</sup>

The ethical dilemmas confronted by the journalism marketplace in the twenty-first century may require courts to start rethinking the goals and policies that once supported a dense constitutional shield for the

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264. *Id.* at 352 (“We therefore conclude that the *New York Times* standard is inapplicable to this case . . .”).

265. See VICTOR SCHWARTZ, KATHRYN KELLY & DAVID PARLETT, PROSSER, WADE AND SCHWARTZ’S TORTS 912, (11th ed. 2005) (“Beginning in *Gertz*, through many a long decision, the courts have searched for a definition of the term ‘public figure.’ A completion of the journey will likely cause students to agree that an articulation of the distinction is much like trying to nail a jellyfish to a wall.” (citing *Rosanova v. Playboy Enters.*, 411 F. Supp. 440 (S.D. Ga. 1976))).

266. *Id.* at 915.

267. *Gertz*, 418 U.S. at 345.

268. *Id.* at 351.

269. *Id.*

270. SCHWARTZ, KELLY & PARTLETT, *supra* note 265, at 913 (citing *Atlanta Journal-Constitution v. Jewell*, 555 S.E.2d 175 (Ga. Ct. App. 2001) (holding that Richard Jewell, who was caught up in the Atlanta Olympic bombing, was a public figure) and *Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003) (holding that one of first women combat pilots in the Navy was a public figure)).

press in reporting on public figures.<sup>271</sup> Indeed, *Gertz* left the door open for courts to revisit the issue due to the Supreme Court's reluctance to (1) provide any explanation for extending the scope of the *New York Times* privilege involving the famous public figure to "all purposes and in all contexts" in a case in which it was "plain that [the plaintiff] was not a public figure" and in which the privilege was not even applicable and (2) provide any guidelines for courts to determine whether a particular individual has met the criteria to be a famous public figure. Courts should consider whether the First Amendment demands two categories of voluntary public figures, the famous public figure and the limited public figure, as both types involve individuals who have voluntarily injected themselves into the public arena.

In order for the *New York Times* privilege to apply to an individual who is deemed a famous public figure, there should be a nexus requirement similar to that discussed above in the context of assessing newsworthiness—in other words, a nexus between the subject matter of the publication and an activity of the individual in his or her role or capacity as a public performer. The nexus requirement would at least put the famous public figure on equal footing with the limited public figure and the public official by recognizing a line of demarcation between public and private life.<sup>272</sup> If the nexus is lacking, the First Amendment justification for the actual malice standard—that "debate on public issues should be uninhibited, robust, and wide-open"<sup>273</sup>—becomes less compelling. Therefore, when the nexus is lacking, the burden on the plaintiff to prove knowledge of the falsity, or reckless disregard for the truth or falsity under the actual malice standard can be supplanted with an ordinary negligence standard of care. Such a standard would not protect unreasonable conduct constituting a departure from standards of investigation and reporting ordinarily adhered to by responsible publishers.

### C. False Light

States have had difficulty determining false light's role in tort law. Indeed, approximately twenty states have refused to recognize false

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271. See, e.g., Clay Calvert & Robert D. Richards, *Journalism, Libel Law and a Reputation Tarnished: A Dialogue With Richard Jewell and His Attorney, L. Lin Wood*, 35 MCGEORGE L. REV. 1, 5 (2004) (noting that defamation lawsuits involving the involuntary public figure "are increasingly likely to arise in an age in which the media are quick to pounce on and heap saturation coverage upon individuals who initially are cast as suspects in high-profile tragedies").

272. See SCHWARTZ, KELLY & PARTLETT, *supra* note 265, at 915 ("Note that a publication not attaching to a public official's public status does not attract constitutional protection.").

273. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

light as a cause of action.<sup>274</sup> False light's resemblance to defamation has caused confusion in the courts as to the proper balance of the First Amendment as well. The source for much of the courts' confusion appears to have emanated from the Supreme Court's holding in *Time, Inc. v. Hill*,<sup>275</sup> that the actual malice standard applies to false light claims involving false publications of matters of public interest.<sup>276</sup> The actual malice standard, which requires a showing that the defendant published a report with knowledge of its falsity or in reckless disregard of the truth, can be applicable *only* when the false light claim involves a publication that contains factual inaccuracies.<sup>277</sup> In a case in which the plaintiff is alleging that a publication contains false factual statements, in addition to asserting a defamation claim, the plaintiff may alternatively assert a false light claim because a cause of action for false light can be established without a showing that the published matter was defamatory.<sup>278</sup> In that context, the actual malice standard is applicable and it achieves the same First Amendment goals as in the context of defamation actions. However, the false light tort is not limited to publications that contain factual inaccuracies; it also encompasses a publication that is literally or substantially true but which creates an erroneous or misleading impression that renders the publication susceptible to inferences casting the plaintiff in a "highly offensive" false light or making the plaintiff out to be something he or she is not.<sup>279</sup> In that context, the actual malice standard simply does not work; it is not capable of being applied because the standard is premised on the publication of false information.

In essence, false light affords a remedy when the press oversteps its bounds by the careless or highly offensive manner in which the facts are presented. Consider the following examples previously discussed in

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274. See *supra* note 44 (discussing cases where courts refused to recognize false light claims as a cause of action).

275. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

276. See *supra* notes 45, 47 (discussing the Supreme Court's decision in *Time*, which extended the actual malice standard to false reports about matters of public interest, and the subsequent adoption of this standard by the Restatement (Second) of Torts and other courts).

277. See RESTATEMENT (SECOND) OF TORTS § 652E (1977) ("One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if . . . the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.") (emphasis added).

278. See *Time, Inc.*, 385 U.S. at 386 n.9 (1967) ("In the 'right of privacy' cases . . . the published matter need not be defamatory, on its face or otherwise, and might even be laudatory and still warrant recovery.").

279. See *supra* note 43 and accompanying text (discussing the tort of false light as defined in the Restatement (Second) of Torts).

this paper:

- The Pittsburgh Steelers's coach who inadvertently emailed pornographic material to the commissioner, with the headline, *Sorry for the Porn, Mr. Commissioner*.<sup>280</sup> Even if the statements in the publication are true or even substantially true, the publication infers that the sixty-one year-old coach is extremely careless or possibly that he is a sex pervert.
- The publication that Manny Ramirez "came into \$10,000, courtesy of the state of Massachusetts . . . which had languished as unclaimed property" and further added, "Hey, when you're making \$20 million it's easy to forget \$10,000 here or there."<sup>281</sup> The publication infers that Ramirez is careless with his finances and that he is overpaid and inattentive.
- The opinion column critiquing Bon Jovi's newly-released disc, that for no apparent reason singled out guitarist Richie Sambora and asked, "Who else can pull a 25-year pop-metal flashback off with such a straight and Botoxed face?"<sup>282</sup> It is one thing to critique the band's new disc as well as Sambora's guitar playing skills, but it is another thing to make Sambora out to be a "has-been" caught in the past (and who received a terrible face lift to boot).
- The report that Michael Phelps's father divorced his mother fifteen years ago, remarried, has had little contact with his son over the years, and did not even attend the Olympic Games in Beijing.<sup>283</sup> The publication infers that Phelps's father is a "delinquent dad" who failed in his responsibilities as a parent.

Certainly, reasonable minds may differ as to whether the false light in which the individuals were placed in the above examples is "highly offensive." Moreover, because damages are not presumed, proving

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280. See *supra* notes 96–97 and accompanying text (citing an article exposing a Pittsburgh Steelers coach for inadvertently emailing a pornographic video to NFL league personnel as an example of mainstream media publishing information that historically would be found in tabloid media services).

281. See *supra* note 98 and accompanying text (citing an article about Manny Ramirez receiving \$10,000 of unclaimed property from the State of Massachusetts as an example of trivial news coverage by mainstream media).

282. See *supra* note 100 and accompanying text (discussing a *Florida Union-Times* article mocking a musician for the sake of entertainment).

283. See *supra* note 126 and accompanying text (citing an article about Michael Phelps that went beyond reporting on his athletic achievements, and instead focused on personal aspects about his family, as an example of tabloid journalism).



mental distress or reputational harm may be difficult in some false light claims.<sup>284</sup> The necessity of having to prove both highly offensive and actual damage serves as a check on unlimited exposure to liability.<sup>285</sup> However, false light serves a legitimate role in tort law by filling the gap when a defamation claim fails because the statement is literally or substantially true (truth is a defense to defamation).<sup>286</sup>

From a First Amendment standpoint, courts should be cognizant of the material distinction between a critique, which is not actionable, and a misleading or an erroneous inference that makes the plaintiff out to be something he or she is not and thereby casts the plaintiff in a highly offensive false light. The former is constitutionally privileged because it has social value and entails the legitimate motive or purpose of engaging in "uninhibited and robust debate." However, the First Amendment interest is weaker when the press acts with a motive or purpose of making the plaintiff out to seem pathetic or ridiculous,<sup>287</sup> regardless of whether the plaintiff is a public or private person. Perhaps the First Amendment interest is weaker in this context because journalism ethics are being compromised—the two have a tendency to go hand in hand. Indeed, the motive of the press is certainly relevant from a journalism ethics standpoint.<sup>288</sup> Courts are sometimes hesitant to consider a publisher's motive in finding actual malice, which is understandable when the focus of the inquiry pertains to the publisher's knowledge of the falsity of the information. But motive can and should be a relevant factor for the courts in assessing the degree of offensiveness in which the plaintiff is placed in a false light.

It is widely-recognized that opinions are not actionable in defamation actions, and nothing advocated herein should be construed as suggesting otherwise. An opinion, by its very nature, is not a factual statement and therefore cannot form the basis of a defamation claim, which is

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284. See *Time, Inc. v. Hill*, 385 U.S. 374, 386 n.9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress from having been exposed to public view . . .").

285. See *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 646 (Tenn. 2001) (stating that "the 'highly offensive to a reasonable person' prong of Section 652E deters needless litigation").

286. *Id.* ("[W]here the issue is truth or falsity, the marketplace of ideas furnishes a forum in which the battle can be fought. In privacy cases, resort to the marketplace simply accentuates the injury.").

287. See *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1134 (7th Cir. 1985) ("The false-light tort, to the extent distinct from the tort of defamation (but there is indeed considerable overlap), rests on an awareness that people who are made to seem pathetic or ridiculous may be shunned, and not just people who are thought to be dishonest or incompetent or immoral.").

288. See Statement of Shared Purpose, *supra* note 13, at Core Principle 8 ("Journalism is a form of cartography: it creates a map for citizens to navigate society. . . . [S]tereotyping or being disproportionately negative . . . make[s] a less reliable map.").

premised on falsity. The pertinent question in a false light context, however, is whether an opinion rises to the level of placing the plaintiff in a highly offensive false light, which, unlike defamation, and as discussed above, is not necessarily premised on factual inaccuracies. There is no redeeming social value in protecting a publisher's opinion that the plaintiff is pathetic and ridiculous. The following recommendations would give journalists a greater incentive to comply with journalism ethics codes: (1) an increased recognition of the false light tort among the states, (2) further clarification by courts as to when the actual malice standard applies in false light claims, and (3) consideration by courts of a publisher's motive in assessing the degree of offensiveness.

## VI. CONCLUSION

So where do we go from here? When sixty-two percent of national journalists surveyed this year are of the view that journalism is going in the wrong direction, something needs to change. The 2008 Pew Survey results indicate that the press and the free market are incapable of regulating journalism ethics on their own. If the press has the responsibility of determining what is newsworthy, the mainstream news media will continue to be consumed by tabloid information. It is therefore incumbent upon the courts to ensure that the press fulfills its ethical responsibilities to society. It begins with an acknowledgement that journalism ethics and the First Amendment go hand in hand; they must co-exist in order to serve the social policies and objectives that support the First Amendment privilege. Newsworthiness can be defined to incorporate journalism ethics principles without requiring judges to embark upon a normative assessment of the social value of information. In making determinations regarding newsworthiness and whether a public figure should be subject to the stricter *New York Times* privilege, courts should require a nexus between the subject matter of the publication and the activity or event that brought the plaintiff to public attention or that made the plaintiff a public figure. The standards of investigation and source verification contained in journalism ethics codes should be recognized by courts in applying the actual malice standard in defamation actions. Finally, journalism ethics principles have relevance in assessing whether a publication rises to the level of being "highly offensive" for purposes of false light claims.