The First Amendment Bubble

AMY GAJDA

How Privacy and Paparazzi Threaten a Free Press

THE FIRST AMENDMENT BUBBLE

How Privacy and Paparazzi Threaten a Free Press

Amy Gajda

HARVARD UNIVERSITY PRESS
Cambridge, Massachusetts
London, England
2015

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Gajda, Amy, author.
The First Amendment bubble: how privacy and paparazzi threaten a free press / Amy Gajda.
pages cm
Includes bibliographical references and index.
ISBN 978-0-674-36832-3
1. Freedom of the press—United States. 2. Freedom of information—United States.
3. United States. Constitution. 1st Amendment. 4. Privacy, Right of—United States.
5. Paparazzi—United States. I. Title.
KF4774.G35 2015
342.7308'53—dc23 2014014450

For Louise, whose appreciation for the daily morning newspaper and the nightly evening news helped to inspire my career path.

For Marie and Margaret, who taught me to appreciate the rich culture of the Old Country and the exciting media of the New.

And for Clare, who led the way.

Preface

I am now a law professor, but for a significant part of my adult life, I was tasked with news judgments.

When I worked as a television news anchor and producer at the PBS station in Harrisburg, Pennsylvania, in the 1980s, our camera crew was on the scene when the state treasurer killed himself during a news conference. We decided to air part of the video—but only to the point where he took the gun from his briefcase. The fact that such a high-ranking public official had committed suicide in front of others was national news, but to show anything more than a small part of the news conference seemed utterly without benefit and potentially harmful to his family and to our viewers.

Similarly, when I worked for the NBC station in Charlottesville, Virginia, a man had a heart attack on the plaza just outside our offices and a cameraperson recorded the man's medical care. The man eventually died. Some in the newsroom pushed to make that video a part of our nightly newscast, arguing that there was news value in watching hardworking EMTs serve the public. Others, like me, disagreed, weighing the family's privacy more heavily. It did not air.

And when I worked at the ABC station in Salisbury, Maryland, with tangential help from an inside source we confirmed the dalliances of an elected official that surely would have been of interest to the community. We decided not to pursue the story, however, weighing the person's privacy more strongly than the story's newsworthiness. That was only one of a number of secrets and

alleged secrets my colleagues and I learned throughout my career but did not report or investigate for privacy's sake.

Before becoming a law professor, I worked in journalism in some capacity for nearly a decade, and, throughout that time, had to make newsworthiness determinations nearly daily. My career in journalism took me from Ann Arbor, Michigan, to Toledo, Ohio, to Salisbury, Maryland, to Charlottesville, Virginia, to Harrisburg, Pennsylvania, and to Detroit, and I covered car crashes, drownings, fatal fires, political life, and kittens stuck in pipes. Once I started teaching law, I worked as the weekly legal commentator for Illinois Public Radio and there, too, had to decide what information was appropriate for broadcast and what was not. I taught journalism for part of that time; my joint appointment at the University of Illinois meant that my teaching load routinely included both Reporting I and Journalism Ethics.

Since I traded work as a full-time journalist for law practice and teaching, the work of editors and reporters in deciding what is newsworthy and how to report it has become harder still. Economic pressures in traditional media have left newsrooms with far fewer resources to evaluate developing stories and increasing competitive pressures to capture the fleeting attention of readers and viewers. The rise of digital media and the twenty-four-hour news cycle have ratcheted up the demand for instant decisions; and the explosion of new media and "citizen journalists," often playing by their own rules, means that editors know that any story they sit on will work its way into the public eye by other means. (Indeed, the graphic footage of the Pennsylvania treasurer's suicide that we elected to withhold from viewers in 1987 is now freely available on at least a half-dozen websites, ranging from YouTube to Best Gore.) And, finally, significant advances in technology have shifted popular notions of what is beyond the pale of public exposure, at once giving rise to an unprecedented culture of self-disclosure through social media and otherwise, but also stoking growing anxieties about the need to draw clearer privacy-related boundaries through law.

My experiences helped to shape my research agenda. They also inspired this book. I write from significant personal experience, knowing how little journalism understands law, but also how little law understands journalism.

THE FIRST AMENDMENT BUBBLE

Contents

	Preface	*ix*
1	An Introduction	*1*
2	Legal Protections for News and Truthful Information: The Past	*24*
3	Legal Protections for News and Truthful Information: The Present	*50*
4	The Devolution of Mainstream Journalism	*88*
5	The Rise, and Lows, of Quasi-Journalism	*122*
6	The New Old Legal Call for Privacy	*156*
7	The First Amendment Bubble, Absolutism, and Hazardous Growth	*191*
8	Drawing Difficult Lines	*222*
	Notes	*263*
	Acknowledgments	*293*
	Index	*295*

1

An Introduction

Hulk Hogan, born Terry Bollea, is a professional wrestler. His bigger-than-life personality, halo of long white hair, and career that includes professional wrestling and reality television—both of which can be as far from real as can be—have made him an American icon.

They have also made him a media magnet.

In fall of 2012, Gawker, a website that boasts that its gossip today will make mainstream news headlines tomorrow, posted parts of a hidden camera video with audio of Hulk Hogan fully nude and engaging in sexual activity with a woman on a bed in somebody else's house. Approximately thirty seconds of the tape featured explicit sex. Gawker headlined the story "Even for a Minute, Watching Hulk Hogan Have Sex in a Canopy Bed Is Not Safe For Work, but Watch it Anyway."[1] At last count, more than four million people had, making the story the third most clicked on Gawker that year.

Then a judge ordered that the tape be taken down on privacy grounds.

Gawker grudgingly removed the tape, but left up its writer's full description, suggesting that both the video and its accompanying play-by-play essay were newsworthy and, therefore, constitutionally protected. "[T]he Constitution does unambiguously accord us the right to publish true things about public figures," a Gawker writer wrote, "[a]nd [the judge's] order requiring us to take down not only a very brief, highly edited video excerpt from a 30-minute Hulk Hogan [expletive] session but also a lengthy written account from someone who had watched the entirety of that [expletive] session, is risible and contemptuous of centuries of First Amendment jurisprudence."[2]

Whether Gawker is correct regarding the First Amendment and, if not, where the law should draw the line between free disclosure and legally punishable invasions is part of the larger question that this book explores. What legal and ethical restrictions exist, and should exist, regarding the publication of truthful news and information in today's privacy-interested yet overexposure society?

Gawker's interpretation of its First Amendment protection is not that ludicrous. Previously, law and social understandings had been premised on a certain bargain: Journalists were accorded broad latitude to decide for themselves what was sufficiently newsworthy and to publish accordingly. Individuals, in turn, were entitled to keep their private affairs to themselves and to guard against unwarranted intrusions unless they actively sought publicity or somehow became entangled in a newsworthy event.

This bargain rested on the assumptions that journalists could be trusted to regulate themselves through professional norms and standards, and that ordinary individuals would naturally take care to preserve their own privacy. On these assumptions, courts felt secure in construing the First Amendment broadly to favor truthful public disclosure by the press and to quash the temptation to second-guess the editorial judgment of journalists. The highly influential Restatement of Torts, capturing the prevailing sentiment under both common and constitutional law, helpfully defined news as any information "of more or less deplorable popular appeal" and stopped short only at the point of "morbid and sensational prying for its own sake."[3] With such a capacious definition, courts understandably rarely found a violation.

In recent years, however, there has been an erosion of both fundamental assumptions underlying this balance between press rights and personal rights. Journalism as a whole has become less reliably professional as its ranks have expanded to include push-the-envelope websites like Gawker and other new media—and even traditional media outlets have buckled ethically in response to intense competition. Evolving public tastes and market pressures have led to a melding of news and entertainment, reshaping programming decisions in ways that discourage self-restraint and encourage use of unfiltered, audience-generated content. Citing constitutional freedoms, reporters have welcomed or begrudgingly accepted free-wheeling websites and untrained bloggers within their protective First Amendment shield. At the same time, the sense of decorum or fear of social sanctions that once inhibited individuals from sharing intimate details of their private lives is giving ground to a stream of

confessional internet posts and reality television shows. Rapid technological advances, meantime, are accelerating both of these trends, making possible unprecedented new harmful intrusions and enabling their world-wide dissemination in an instant.

The result is that courts and other legal actors are beginning to rethink the balance between privacy rights and public interests in free disclosure. The deference that once shielded journalists from editorial control by the government is eroding as courts are showing a new willingness to limit public disclosure of truthful information. Increasingly, personal privacy seems deeply vulnerable and deserving of new, more potent protections, just as the expansive new practices and identity of media are stretching the credibility of journalism's claim to occupy a distinctive and privileged place in democratic life. The combined effect creates a sort of First Amendment bubble, in which constitutional protection for press and news media continually expands to the breaking point, jeopardizing future protection not only at the margins but also for the core.

This much is clear: the *New York Times*, in contrast, did not publish the Hulk Hogan sex tape on its website. Lending significant credibility to Gawker's motto about it sourcing mainstream news, however, the venerable newspaper published a graphic containing risqué celebrity tweets about it above a single short paragraph suggesting that the tape was "horrible" to watch but "delightful to discuss."[4] The fact that it did not publish or link to the tape was to be expected; today's mainstream media maintain privacy-based ethics provisions that would caution against such publication, even if a single journalist's internal ethics code would push for it, and even if its attorneys would approve such coverage. The fact that the *Times* published others' humorous tweets, however (including one that suggested that Hogan had already gone "one-on-one" with someone who was "faking it," another about him "finishing" without using wrestling moves, and a third commenting on Hogan's "performance"), reflects the pressure that mainstream publications feel in covering sensational stories published by other, less ethically bound publications. Today, even the loftiest of reads must fight for the four-million Gawker readers, and others who know of the Hulk Hogan sex tape, and wonder why mainstream publications have not reported on it in a significant way.

The law, meantime, is playing catch-up. It grew responsively in a decades-old world where journalism was credited with pushing democracy forward and where Supreme Court Justices wrote in their powerful opinions that law

that was too restrictive would chill journalists who needed significant breathing space to report robustly. Given that sort of legal and journalistic history, it is not surprising that the law today remains deferential. But the jurists who wrote and followed those words in their opinions had not faced a First Amendment-based argument that an explicit sex tape was in the public interest for its news value and therefore should be allowed to remain on a gossip website, no matter its celebrity star's apparent embarrassment and his wishes that it be taken down. Courts in such situations, then, are left with flowery pro-press language but a decreasing sense that such press deserves support. The Hulk Hogan case is not the Pentagon Papers case, one that involved the publication of information about war, after all; it involves an act so intimate that even the media-protective Restatement suggests that celebrities should be able to keep their sex lives private.

Abner Mikva, a retired judge who once sat on the federal appeals court for the District of Columbia, predicted that this would be our future, and that there would come an anti-media shift in the courts. He warned in a 1995 law review article that changes were afoot in First Amendment doctrine because of what judges perceived as an "irresponsible" press:

> I think that I can say that a feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamation actions resulting from instances of irresponsible journalism. That sounds like a scary message for me to deliver. . . . I have been a judge for fifteen years, and now that I have taken off my robes, one of the first things I must say is: "Watch out! There's a backlash coming in First Amendment doctrine."[5]

That backlash and the resulting impact may well be here—and the Hulk Hogan case itself offers a circuitous example.

A New Newsworthiness

The Florida state court judge's order to Gawker to take down the Hulk Hogan sex tape was not the first or last legal proceeding arising from the publication of the video. Hulk Hogan had initially brought his claim to federal court, arguing that the court should suppress publication of the tape on invasion-of-privacy grounds. Gawker argued in response that it should be allowed to leave the tape up because, among other things, it showed a television star engaging

in sexual activity in a very human way, a contribution to public understanding that Gawker considered newsworthy.

Perhaps not as shockingly as it might otherwise be, given strong First Amendment protection for journalism, the federal district court judge sided with Gawker. The judge explained that he was hesitant to do anything that might violate constitutionally protected expression and refused to grant what he considered an unconstitutional prior restraint.[6] The court's analysis offered a window into the power of the press and the related danger of seeking celebrity today. It found that the sex videotape itself was newsworthy, in part, based upon Hogan's work as a reality television star:

> Plaintiff's public persona, including the publicity he and his family derived from a television reality show detailing their personal life, his own book describing an affair he had during his marriage, prior reports by other parties of the existence and content of the Video, and Plaintiff's own public discussion of issues relating to his marriage, sex life, and the Video all demonstrate that the Video is a subject of general interest and concern to the community.

The court explained that strong legal precedent led it to defer to Gawker's editorial discretion in posting the explicit tape, quoting an earlier deferential court in a very different case that had held that "the judgment of what is newsworthy is primarily a function of the publisher, not the courts." Any other outcome, the Florida federal court implied in line with that earlier case, would cause Gawker to suffer a loss of First Amendment press freedom that, based on years of precedent, rightly trumps such an individual's privacy concerns. The decision to post the Hulk Hogan sex tape, it found, was "appropriately left to [Gawker's own] editorial discretion" and, in keeping with older legal precedent, the court refused to sit as a sort of superior editor and order that it be taken down.

That decision, if not completely surprising given strong legal precedent, was notable. It marked the first time that a court had decided that a plaintiff who would normally be protectively cloaked heavily in privacy—a man explicitly pictured nude and engaged in sexual activity in a video taken surreptitiously in a private bedroom—must defer to a proudly push-the-envelope news website that had decided that such information was appropriate for excerpted but otherwise unedited public viewing.

The decision also shows the lasting legacy of First Amendment jurisprudence built when the *New York Times* and news organizations of its kind were

the defendants who stood before the courts. To defer to a respected and generally respectful publication and its well-trained journalists took little effort when a story had real news value; protective language remains from the Pentagon Papers case, for example, when the *New York Times* successfully argued that it had the First Amendment right to publish a trove of documents on the conduct of a controversial war. In fact, when Hogan brought a second, copyright-based claim in federal court against Gawker, the court similarly rejected it, noting that even though the sex tape depicted "explicit sexual activity" and nudity against his wishes, "[t]he Supreme Court has repeatedly recognized that even minimal interference with the First Amendment freedom of the press causes an irreparable injury."[7] The court then cited as support for that principle two cases that involved unconstitutional prior restraints on crime-related news, traditionally among the most newsworthy of stories.

Some evidence in the Hogan case of the backlash of which Judge Mikva warned came when Hogan brought his privacy claims to a Florida state trial-level court. There, in contrast, the judge granted Hogan's request for a preliminary injunction and ordered Gawker to take the tape down. Gawker's attorney is quoted in the court hearing's transcript—published as part of a Gawker webpage titled "A Judge Told Us to Take Down Our Hulk Hogan Sex Tape Post. We Won't"[8]—as arguing that the judge was "not permitted to make an editorial judgment" about what news is publishable and what is not. But the court rejected that longstanding First Amendment argument and sided with what it said was the "public interest" in protecting the plaintiff's "private sexual encounter."

In doing so, of course, the court flatly rejected in spirit if not in language the federal district court's constitutional worries and that court's reliance on past Supreme Court precedent, lifting an individual's privacy, at least for the moment, above Gawker's strident and traditionally powerful First Amendment press freedom arguments.

This may have been a very good thing for individual privacy, but it was also a very, very bad thing for the press. After all, a decision admonishing Gawker and granting an extraordinarily rare preliminary injunction to a plaintiff on privacy grounds could well have had far-reaching effects for all media, even in cases involving different and perhaps far less heinous facts.

In early 2014, privacy, in turn, suffered a loss. A Florida state appeals court reversed the trial court's decision and, in doing so, supported in part Gawker's claim that it could publish whatever truthful thing it wished regarding

celebrities. The court wrote that such "arguably inappropriate and otherwise sexually explicit content" could well be of legitimate public interest because it addressed "matters of public concern"—and that Gawker enjoyed the "editorial discretion" to publish the explicit tape. This court too blamed Hulk Hogan in large part for making his sex life of public interest, pointing to media appearances and—in a surprisingly broad critique that affects expression of a different sort—his autobiography in which he had written about an affair in a repentant and decidedly innocuous way.[9]

Should that reasoning stand as the case continues, it could well be that any public figure's private life in its most explicit sense will be fair game should the celebrity be seen as courting media interest or discussing personal relationships. The privacy implications for many are enormous.

No matter the outcome, the Hulk Hogan case exemplifies the clash between a bolder media and the privacy it can decimate. Consider this: Gawker's founder and owner, Nick Denton, boasted in 2014 that his website routinely published private information that an ethics-abiding newspaper would not and suggested that the crowd-sourced ratting out of anyone and the "spilling of secrets" including sex pictures would be healthy for most people.[10] Just a few months earlier, in contrast, U.S. Supreme Court Justice Sonia Sotomayor had written in her autobiography that with her ascent to the nation's highest court had come the "notorious," "profoundly disconcerting" and "overwhelming" experience of being suddenly propelled into the public eye, a life that brought with it what she called "psychological hazards."[11]

The one behind the computer keyboard with the power of the press, therefore, buoyantly works toward an end to privacy while the one behind the bench with the power to interpret that freedom considers privacy necessary for personal well-being.

It seems clear which power will ultimately triumph.

"There is still a tendency among members of the media to view the courts in somewhat romantic terms," constitutional law scholar David Pozen said in 2014, nearly twenty years after Judge Mikva's warning and within a few months of Gawker's claim that it had the right to publish whatever truthful information it wanted. "I'm not confident that remains a descriptively accurate view of the courts."[12]

Selfies and Our Current Conceptions of Privacy

The Hulk Hogan saga has an interesting and relevant twist. Just a few months after Hogan had successfully argued that the sex tape should be removed from Gawker, Hogan himself posted his own set of differently graphic pictures. According to news accounts, Hogan tweeted to his followers on the Internet that a radiator had exploded on his hand—and attached a photograph of the injury. "Would you like it rare?" he asked his Twitter readers, referring to his burned and bloodied hand.[13]

After receiving several complaints, Hogan took the images down. "I apologize for posting my burned hand photos," he wrote, "with all the feedback I now realize I really should take a moment before I make a decision [to tweet]." That a star who continued to defend himself in court against Gawker's desire to post his sexually explicit tape needs such a lesson seems inconsistent.

And yet, in a privacy sense, it is the story of many Facebook "friends," Instagram users, and Twitter tweeters and, therefore, has relevance here. As media invades privacy more often with resulting criticism and backlash from courts, many people continue to willingly share information about themselves online with little regard for their own privacy and the potential public response. Consider, as a second example, journalist Geraldo Rivera's Twitter self-photograph, taken in front of a bathroom mirror with a towel only slightly covering his groin, sent to followers in summer 2013. He later removed the photo, explaining that he had learned his lesson.[14] Congressmen Chris Lee and Anthony Weiner, each of whom sent into the world highly embarrassing photographs of themselves—colloquially known as "selfies"—and each of whom were outed by what might be called quasi-journalists (a term I will use here to differentiate them from more traditional, mainstream journalists) could have told him that.

We are, therefore, at a doubly interesting time in terms of privacy and media. As some courts seem to be growing more protective of privacy, weighing it above freedom-of-the-press and freedom-of-information interests, many individuals are protecting their own privacy less, sharing personal information with the world, oblivious that there are never-friends and former friends who might want to see it and publicize it. Privacy law scholar Anita Allen has rightly called this "the era of revelation."[15] At the same time that courts are grappling with press and privacy interests in graphic sex tapes, then, they also must consider the issue of whether a sex picture freely posted to

a limited group of people or even the world can and should ever again be private.

The answers are not easy. Consider, for example, the arguments in favor of a so-called right to be forgotten, an idea now codified as law in some sense in some parts of the world. At its most protective, such a concept creates liability for those who publish photographs and information that the subjects wish removed, even if the subjects had once willingly posted it themselves. Privacy law scholar Jeffrey Rosen has written that the right to be forgotten "represents the biggest threat to free speech on the Internet in the coming decade."[16] Those in favor argue that young people do silly things that can harm their reputations as they get older; fifteen-year-olds who post to certain friends on Facebook sexually graphic information or teens who post photos of themselves with hardcore drugs would likely want those photos suppressed should they ever decide to become a teacher, run for Congress, or apply to the FBI. Those who support the right to be forgotten or the related right to erasure argue that, indeed, the bell should be able to be unrung so that we have a chance to make mistakes when we are young and then change our lives for the better. As memories fade, the argument goes, so should reminders of indiscretion. There are those who support a similar law in the United States.

And there are many in the United States who might wish to avail themselves of the opportunity to unring the bell. A 2013 Pew survey found that the number of young people who post information about themselves on social media sites is growing. According to a Pew poll released in 2013, this is what young people share with their, on average, 300 "friends"—and, for a significant minority, the world:

- 91 percent post a photo of themselves, up from 79 percent in 2006.
- 71 percent post their school name, up from 49 percent.
- 71 percent post the city or town where they live, up from 61 percent.
- 53 percent post their email address, up from 29 percent.
- 20 percent post their cell phone number, up from 2 percent.[17]

Researchers also asked several new questions and the answers are similarly revealing:

- 92 percent post their real name to the profile they use most often.
- 84 percent post their interests, such as movies, music, or books they like.