

# THE VALUE OF DETECTIVE STORIES

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On a recent Sunday morning, *The Times-Picayune*, a newspaper from New Orleans, carried news that two young people had been arrested for an arson death, that a jury had convicted a man of killing a waitress in a robbery, and that a 15-year-old escapee from a youth detention facility had been recaptured. Those three stories were among the six main stories making up the first two pages of the local section of the newspaper.<sup>1</sup>

That same day, the main website pages of *The New York Times*, *The Washington Post*, and the *Chicago Tribune* featured similar police-related coverage. In New York, the *Times* reported that a suspect in a weekend murder spree had been arrested.<sup>2</sup> In Washington, D.C., a highly-placed story focused on the sentencing hearing for the man convicted in the murder of Chandra Levy, a congressional intern murdered by someone who had kidnapped her while she was jogging ten years earlier.<sup>3</sup> And in Chicago, all six “breaking news” stories on the *Tribune’s* website had some connection with a police investigation: charges in a double homicide, charges in a girl’s death, an arrest for animal neglect, a missing girl found, a death in a parking garage, and a house fire.<sup>4</sup>

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1. Kari Dequine, *Two Booked in Woman’s Death*, TIMES-PICAYUNE, Feb. 13, 2011, at B1 (Metro Edition); *Jury Finds Man Guilty of Second-Degree Murder*, TIMES-PICAYUNE, Feb. 13, 2011, at B2; *Youth Escapee Apprehended*, TIMES-PICAYUNE, Feb. 13, 2011, at B2.

2. Robert D. McFadden & Al Baker, *Suspect in Brooklyn Stabbing Rampage is Captured*, N.Y. TIMES (Feb. 12, 2011), [http://www.nytimes.com/2011/02/13/nyregion/13stab.html?\\_r=1&hp](http://www.nytimes.com/2011/02/13/nyregion/13stab.html?_r=1&hp).

3. Keith L. Alexander, *Guandique Sentenced to 60 Years for Levy Murder*, WASH. POST (Feb. 12, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/11/AR2011021103591.html?hpid=topnews>.

4. *Chicago Breaking News*, CHI. TRIB., <http://www.chicagotribune.com> (last visited Feb. 13, 2011, 7:20 AM).

If there is one type of news that is routinely covered in media, it is what I am calling here “detective stories”: news items that report the details of a crime or a criminal investigation or an arrest or a trial or a sentencing. For those living near the scene of the crime or some other police activity, the stories offer an important alert to neighborhood trouble, update residents as the investigation moves forward, and offer them some comfort when a perpetrator is eventually caught. The stories detail human relationships gone terribly wrong, drug dangers, and an inexplicable disregard for humanity. They also often detail bold courage. *The New York Times*’ story on the murder spree arrest, for example, outlined investigating officers’ fearless moves to apprehend the suspect in a subway train after a worried witness spotted the fugitive onboard. Even though *The New York Times* has a decidedly national readership, the story of the subway arrest was the eighth most-viewed by readers that Sunday morning,<sup>5</sup> indicating great public interest in a story that directly affected only a few.

And yet recent decisions by a handful of courts seem to hint at a limit to such coverage. These courts have punished media for reporting the arrest of a prosecutor, for publishing nude photos of a murder victim, and for reporting on somewhat mundane criminal matters.<sup>6</sup> In many of the decisions, the courts criticize media both soundly and broadly, with great implications both for future cases and for editorial decisions on news coverage. This symposium piece offers a historical perspective on detective stories, it explores recent cases that seem to push some detective stories back to a time when patrician attitudes quashed similar coverage, and it warns ultimately that courts deciding such cases need to recognize that they have a marked and potentially unconstitutional chilling effect on press freedoms.

## I. A HISTORY OF DETECTIVE STORIES AND LAW

In 1890 Samuel D. Warren and Louis Brandeis wrote *The Right to Privacy*<sup>7</sup> and, though it took decades, ultimately changed privacy law as we know it. Their message was a simple one: all persons deserved the right to be let alone and an out-of-control media threatened that sanctuary. The two authors criticized news reporting that they argued had invaded domestic tranquility,<sup>8</sup> lowered social standards and

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5. *Most Popular*, N.Y. TIMES, <http://www.nytimes.com/gst/mostpopular.html?src=hp1-0-M> (last visited Feb. 13, 2011 7:30 AM).

6. See, e.g., *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008); *Toffoloni v. LFP Publ'g Grp., LLC*, 572 F.3d 1201, 1204 (11th Cir. 2009).

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

8. *Id.* at 195.

morality,<sup>9</sup> and threatened to crush enthusiasm for the robustness of life.<sup>10</sup>

But in spite of this railing against the news media of the day, even Warren and Brandeis recognized the value in a different sort of newspaper reporting. The right to privacy, the two authors wrote, “does not prohibit any publication of matter which is of public or general interest.”<sup>11</sup> They seemed to suggest that persons of their own stature, intellect, and station in life should decide what should become news, suggesting that “personal gossip” of great interest to the uneducated masses had lowered social standards and morality.<sup>12</sup> Their guidance would assist those “ignorant” and “thoughtless” who hungered for gossip, unwitting victims of the newspaper enterprise.<sup>13</sup> But even cultured would-be editors like Warren and Brandeis recognized the news value in stories in the public interest, those involving people who have, in some way, “renounced the right to live their lives screened from public observation.”<sup>14</sup>

William Prosser attempted to categorize existing privacy cases in a law review article that came 70 years later, *Privacy*.<sup>15</sup> Prosser developed a more explicit exception for stories involving crime, suggesting strongly that those who reported on criminal activity and the resulting investigation should never be liable for what they had published. News, he explained without equivocation, includes homicides and other crimes, arrests, public raids, suicides, accidents, and police reports.<sup>16</sup> He suggested that “the accused criminal” who, of course, would assiduously try to avoid publicity and would strongly desire privacy after his wrongdoing should not have his wishes fulfilled. Publishers could, in Prosser’s mind, satisfy the public’s obvious and understandable curiosity about their villains and victims and still stay comfortably within the bounds of law.<sup>17</sup>

The Second Restatement of Torts, greatly influenced by Prosser, contains similar sentiments but goes even further. Publicity Given to Private Life<sup>18</sup>—one of the four privacy torts outlined in the Restatement—defines explicitly those stories Warren and Brandeis suggested would be in the legitimate public interest. These would include crime stories, even those that report the names of rape victims.

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9. *Id.* at 196.

10. *Id.*

11. *Id.* at 214.

12. *See id.*

13. *See id.* at 196, 214.

14. *Id.* at 214.

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

16. *Id.* at 412.

17. *Id.* at 413-14 (listing as examples multiple cases involving crime stories).

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

Crime's unfortunate victims, the Restatement authors explain, have sadly become part of a news event and, therefore, have properly become persons of public interest and an important part of a news story.<sup>19</sup> "[P]ublishers," the authors wrote, "are permitted to satisfy the curiosity of the public as to its . . . victims[ ] and those who are closely associated with them."<sup>20</sup>

But the Restatement saves the greatest wave of available news coverage for those persons police believe are responsible for criminal activity: "Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it," the Restatement notes, echoing Prosser in *Privacy*, "but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed."<sup>21</sup>

The illustrations used in the Restatement help show the depth of possible news coverage relating to crime, with many examples based on actual cases decided by courts: murder coverage that includes a suspect later acquitted whose "past history and daily life" is explored in news accounts;<sup>22</sup> a photograph of a woman whose husband is murdered;<sup>23</sup> a police raid and resulting coverage of an unconnected customer;<sup>24</sup> a man on trial for sedition who, it is reported, works where he can overhear key government conversations;<sup>25</sup> and reports of an illegal street race with an accompanying photo of a driver's father who refused to be interviewed.<sup>26</sup> Admittedly, the Restatement suggests that some former criminals who have been rehabilitated over many years may have a cause of action against journalists who report their criminal past, but the Restatement authors purposefully make such liability conditional and, therefore, not certain.<sup>27</sup>

Finally, the Restatement adds additional detective stories to the category of acceptable news, broadening Prosser's list to include "publications concerning homicide and other crimes, arrests, police raids, suicides, . . . accidents, fires, . . . a death from the use of narcotics," police reports, "and many other similar matters of genuine, even if more or less deplorable, popular appeal."<sup>28</sup>

The clear message from the Restatement, commonly accepted by

19. *Id.* cmt. f.

20. *Id.*

21. *Id.*

22. *Id.* cmt. f, illus. 13.

23. *Id.* cmt. f, illus. 16.

24. *Id.* cmt. f, illus. 17.

25. *Id.* cmt. h, illus. 18.

26. *Id.* cmt. i, illus. 21.

27. *Id.* cmt. k, illus. 26.

28. *Id.* cmt. g.

courts in privacy cases across the nation, is that crime news, even crime news that is reported robustly, is protected under the First Amendment for its news value.

But the rich history of protection for detective stories goes beyond mere scholarly definition. Interestingly, in both 1931 and again in 1948, the United States Supreme Court decided cases involving detective stories and drafted opinions very much in line with the reasoning put forth by Warren and Brandeis and, later, Prosser. Both cases found unconstitutional statutes that made the selling of salacious detective stories against the law.

*Near v. Minnesota*<sup>29</sup> was the first of these cases. The Minnesota statute at issue made it a public nuisance to sell any “malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>30</sup> As in *The Right to Privacy*, the authors of the statute wished to help promote the public welfare and to stop physical assaults at the angry hands of those featured in sleazy, push-the-envelope detective publications; the statute condemned scandalous reporting as “detrimental to public morals and to the general welfare”<sup>31</sup> and aimed to better society by ridding it of scandal sheets.

The publication at issue—*The Saturday Press*—had published a story about a Minneapolis Jewish “gangster” and how law enforcement officials apparently allowed his criminal deeds to continue. The article, quoted at length by the dissent, was decidedly anti-Semitic and admittedly disgusting at times. Such an article would necessarily violate the statute because it “circulate[d] charges of reprehensible [criminal] conduct,”<sup>32</sup> be they true or false.

But the Supreme Court found the statute a violation of the constitutional right to a free press. While the case was very much focused on the constitutionality of a preliminary injunction, the Court quoted the Continental Congress more generally and lauded the press and its importance in reporting wrongdoing, especially the wrongdoing of government leaders: “The importance of this [reporting] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments . . . whereby oppressive officers are shamed or intimidated, into more honourable [sic] and just modes of conducting affairs.”<sup>33</sup> Though the statute had a commendable purpose, the Court decided it would not fit within the confines of the Constitution.

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29. *Near v. Minnesota*, 283 U.S. 697 (1931).

30. *Id.* at 701-02 (quoting 1927 Minn. Stat. 10123-1 to 10123-3 (Mason’s)).

31. *Id.* at 709 (quoting *State ex rel. Olson v. Guilford*, 174 Minn. 457, 461-62 (1928)).

32. *Id.* at 710.

33. *Id.* at 717 (quoting I JOURNAL OF THE CONTINENTAL CONGRESS, 1774-1789 104, 108 (1904)).

*Winters v. New York*<sup>34</sup> came seventeen years later. There, a similar statute made it a crime to publish anything “principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime[.]”<sup>35</sup> Lawmakers had hoped that such a prohibition would protect minors from the exciting “criminal news and stories of bloodshed, lust or crime.”<sup>36</sup>

Here, the publication at issue was titled more sensationally: *Headquarters Detective, True Cases from the Police Blotter, June 1940*<sup>37</sup> and, as an earlier appeals court explained, “[t]he stories [were] embellished with pictures of fiendish and gruesome crimes, and [were] besprinkled with lurid [p]hotographs of victims and perpetrators.”<sup>38</sup> Headlined articles included the decidedly sensational *Bargains in Bodies, Girl Slave to a Love Cult*, and *Girls’ Reformatory*.<sup>39</sup> The appeals court had found the statute constitutional because it protected community morals through the paternalistically guiding editorial hand of the legislature.<sup>40</sup>

But here again the Supreme Court upheld the right of the magazine to publish the crime news it wanted to publish. “Though we can see nothing of any possible value to society in these magazines,” the Court wrote, “they are as much entitled to the protection of free speech as the best of literature.”<sup>41</sup> The statute, it found, was unconstitutional.

The Court later would later affirm protection for detective stories in a series of cases involving more traditional crime coverage. In *Time v. Hill*, where the plaintiffs’ claim arose from an article that sensationalized a home invasion and kidnapping, the justices wrote that they had “no doubt” that such coverage was “a matter of public interest[.]”<sup>42</sup> even though the article focused on a reenactment of the crime and not the crime itself. A little more than a decade later, in *Smith v. Daily Mail Publishing Company*,<sup>43</sup> the Court rejected a claim brought against a newspaper that had published a juvenile offender’s name as part of crime coverage. And a few years after that, the Court protected even more explicit news coverage of a rape, holding that it “involved a matter of paramount public import: the commission, and investigation, of a violent crime which had been reported to authorities.”<sup>44</sup>

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34. *Winters v. New York*, 333 U.S. 507 (1948).

35. *Id.* at 508 (quoting N.Y. PENAL LAW § 1141 (McKinney 1946)).

36. *Id.* at 511.

37. *Id.* at 508 n.1.

38. *People v. Winters*, 48 N.Y.S.2d 230, 231 (N.Y. App. Div. 1944).

39. *Id.*

40. *Id.*

41. *Winters*, 333 U.S. at 510.

42. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

43. *Smith v. Daily Mail Publ’g Co.* (“*Daily Mail*”), 443 U.S. 97 (1979).

44. *Fla. Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989). In this case, a small Florida newspaper published a rape victim’s name despite a statute making such a publication a crime.

As the court synthesized in *Daily Mail*, “[o]ur recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.”<sup>45</sup> Detective stories, even scandalous and salacious ones, even ones involving identities of crime victims, identities of juvenile criminal defendants, and sensationalized details of crimes, were protected expression. The press that reported them, it seemed, was free.

## II. A PROSECUTOR’S FALL AND A MODEL’S MURDER: NEWS OR PUNISHABLE SENSATIONALISM?

In the years that followed earlier privacy scholarship, the publication of the Second Restatement, and the somewhat parallel reasoning protecting sensationalistic news media in Supreme Court jurisprudence regarding crime news, most news stories reporting crime events have been protected by courts. As painful as such stories may be for both perpetrators and victims, the “newspaper enterprise,” as Warren and Brandeis called it,<sup>46</sup> could report deeply and sometimes embarrassingly about criminal actors and even crime victims without fearing liability. When a perpetrator or a victim argued that the press had gone too far and brought a lawsuit for damages, such plaintiffs generally lost because the news media was able to shield itself with the First Amendment and argue that, above all, crime news is news and is, therefore, protected.

In very recent times, however, a handful of courts have troublingly questioned and criticized the depth of certain crime reporting. They have sided, sometimes surprisingly, with plaintiffs in cases that parallel some examples of what is considered appropriate coverage in the Restatement and elsewhere. In some of those decisions, the courts have held publications potentially liable for reporting things that seem to be somewhat routine detective stories.

Perhaps the best example of this is a case from a federal district court involving the *To Catch a Predator* segment of the *Dateline* television program that aired on NBC and continues in reruns. During the production of a typical *To Catch a Predator* episode, anchor Chris Hansen worked with the vigilante group that calls itself Perverted Justice and with local police. Each production was a televised sting operation: Perverted Justice workers and actors pretended to be young teenagers and posted chatty things online, occasionally reaching adults only too happy

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The Court sided with the newspaper. See also *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975), a case involving a rape and murder and the publication of the victim’s name, in which the Court found for the newspaper and wrote that the press brings the “beneficial effects of public scrutiny upon the administration of justice.”

45. *Daily Mail*, 443 U.S. at 102.

46. Warren & Brandeis, *supra* note 7, at 195.

to hit on them in cyberspace. These unsuspecting adults—overwhelmingly male and seemingly in droves, no matter the city in which the *To Catch a Predator* program was taped—communicated online with the “teens,” sometimes sending explicit photographs of their genitalia and often using explicit sexual language in suggesting a meeting at what they believed to be a house empty of anyone except the teenager. The Perverted Justice workers posing as children would then agree to meet the men. Much to the surprise of these suspected pedophiles, the house was wired for video and sound, NBC reporter Chris Hansen appeared instead of the child and confronted the men with transcripts of their online sex talk, and police arrested the men as they attempted to leave the home. Men caught in *To Catch a Predator* television episodes have included soldiers, police officers, teachers, a medical doctor, a minister, and a rabbi.<sup>47</sup>

In 2006, *To Catch a Predator* set up a sting in Murphy, Texas, north of Dallas. A man calling himself Wil—a 56-year-old who pretended to be a 19-year-old college student—contacted an actor who, with Perverted Justice’s guidance, pretended to be a lonely 13-year-old boy with divorced parents, a “neglectful” father, and a “no good” stepfather. The “boy” pretended to be accessing the Internet from a neighbor’s empty house where he was dog sitting.

At first, the online conversations between 56-year-old “Wil” and the “child” were friendly, but they soon turned sexual. Here are a few of the communications sent by the adult to the boy over the course of their two-week online relationship, as reported by *Esquire* magazine: “could I feel your cock”; “how thick are you”; “i want to feel your cock”; “maybe you can fuck me several times”; “has anyone sucked you”; and “just talking about this has me hard.” The man had confessed to the child at the computer that “he liked young boys.”<sup>48</sup>

This 56-year-old man was a surprising suspect, even for the seasoned *To Catch a Predator* workers: he was William Conratt, a Texas prosecutor, the chief felony officer for a nearby county. He had once run unsuccessfully for a county judgeship. “Wil” had given the boy enough information about him so that he was easily outed as Conratt by Perverted Justice researchers behind the scenes.

Communicating with an underage person on the Internet in a sexual manner is a crime in itself, and the police and *To Catch a Predator* producers eventually went to Conratt’s house to arrest him. Conratt apparently realized that an arrest was imminent and shot himself as

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47. For a somewhat biased description of the Perverted Justice process, see Luke Dittrich, *Tonight on Dateline This Man Will Die*, *ESQUIRE*, Sept. 1, 2007, at 232. The facts described herein are taken from this magazine article.

48. *Id.*



police entered his home. He died from a self-inflicted gunshot wound to the head.

As I have suggested previously,<sup>49</sup> there is no question that it is important news when a prosecutor breaks the law, even if the law that is broken is one with no physical victim other than society as a whole. Prosecutors take an oath to uphold the law and protect citizens, so when that oath is broken, constituents deserve to know about the criminal violation and it necessarily makes headlines.

When the law that a prosecutor breaks involves a potential sexual encounter with a child—a crime of an extraordinarily harmful sort—the news value of the story and the public’s need to know is that much greater. Before his own fall from grace and suicide, in fact, Prosecutor Conratt had been interviewed in a news story about a preschool teacher’s arrest on sexual abuse charges.<sup>50</sup> If it was news (news that Conratt himself obviously embraced) that a preschool teacher had been arrested, there is no question that it was news that a prosecutor would be charged as part of a sting against pedophiles.

But in the case stemming from NBC’s news coverage, one filed by Conratt’s sister claiming that the prosecutor suffered intentional infliction of emotional distress at the hands of the *Dateline NBC* journalists, the federal trial court judge saw little or no news value in the story that a prosecutor allegedly broke the law by using strongly sexual language while communicating with a person he thought was a 13-year-old boy. Instead, in an opinion that does not include the language written by Conratt to the child, the judge strongly criticized NBC for putting Conratt in the position that it had, concluding that “reasonable minds could differ as to whether NBC’s conduct was so ‘outrageous and extreme’ as to exceed all possible bounds of decency” and deciding against NBC in its motion to dismiss the proceedings.<sup>51</sup>

A jury, the judge explained, could decide that what happened to Conratt was not news and that NBC was in a unique “position of power” to recognize that Conratt would be emotionally harmed by NBC’s actions.<sup>52</sup> Suddenly, the crime reporting recognized as absolutely legitimate by the Restatement authors and Supreme Court justices had suffered a serious setback.

Moreover, the court used highly abstract journalism ethics provisions against NBC. The opinion includes principles from the

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49. Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039 (2009).

50. Bill Lodge, *Ex-Mabank Teacher is Named in Abuse Suit*, DALLAS MORNING NEWS, Sept. 22, 1993, at 31A.

51. *Conratt v. NBC*, 536 F. Supp. 2d 380, 396 (S.D.N.Y. 2008).

52. *Id.* at 397.

Society for Professional Journalists' Code of Ethics and finds that not only could NBC be liable for violating them, but that such violations could be the basis for the intentional infliction of emotional distress claim.<sup>53</sup>

Such a decision is especially troubling because the ethics provisions on which the court relied are purposefully ethereal, incapable of objective definition, and not mandatory. These provisions include the highly subjective suggestion that journalists "[s]how good taste [and] [a]void pandering to lurid curiosity."<sup>54</sup> *Dateline's To Catch a Predator*, the judge wrote, could be liable because a reasonable jury could find that it failed to show good taste and pandered to lurid curiosity in its coverage of *Conrad*.<sup>55</sup> NBC, the judge suggested, had taken on a cause, had "fail[ed] to be judicious about publicizing allegations before the filing of charges," and had not lived up to journalism's ethics principles by making news instead of reporting it.<sup>56</sup> The court walked through the journalistic analysis and decided for itself that the news of a prosecutor's arrest is of no news value.

Moreover, the language in the decision is arguably broad enough to allow any judge to cast a critical eye and analyze nearly every on-the-scene news story involving crime in the same way. As long as reporters are tipped off by police, it seems, under the *Conrad* decision, a reasonable jury could find a valid intentional infliction of emotional distress claim based on the news media's failure to show good taste, its pandering, its lack of judiciousness, and its creating, rather than reporting, news.

It is also remarkable that the trial court decision in *Conrad* contradicts decades of privacy law. Certainly the arrest of a prosecutor on child sex charges is the sort of "public interest" news Warren and Brandeis hinted at in 1890 when they suggested that some news would in fact be in the public interest, and what Prosser had suggested more strongly in 1960 when he purposefully included crime within his definition of matters of popular appeal. It also completely contradicts the way in which the Restatement defines news today when it lists crime stories as newsworthy matters, even if they are of more or less deplorable popular appeal. But in allowing the intentional-infliction-of-emotional-distress case to go forward, the trial court judge very clearly rejected those broad and traditional—in both a legal and a journalistic sense—parameters of news. In fact, the decision allows for exactly the situation

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53. *Id.* at 397-98.

54. *Id.* at 397 (quoting SOCIETY OF PROFESSIONAL JOURNALISTS, CODE OF ETHICS (1996), available at <http://www.spj.org/pdf/ethicscode.pdf>).

55. *Id.* at 398.

56. *Id.*

of which the Restatement authors warn: the successful stifling of news decidedly in the public interest by one who would “not only not seek publicity but [would] make every possible effort to avoid it,” i.e., the alleged perpetrator of a crime and his family.<sup>57</sup>

The *Conradt* decision is not the only recent case in which a court has sided with a plaintiff over news media in a crime-related news reporting case. A second example concerns the 2007 spousal murder of a female professional wrestler and *Hustler* magazine’s use of nude photos taken years before to illustrate its story about the murder.

In that case,<sup>58</sup> Christopher Benoit, also a professional wrestler, killed his wife, Nancy Benoit, and their child, and then committed suicide. Nancy Benoit had modeled in the years before her wrestling career and had posed nude for a photographer. After her murder, which was international news,<sup>59</sup> *Hustler* magazine published ten photographs from that nude sitting in two pages of its magazine. Nancy Benoit’s mother brought a right-to-publicity claim against *Hustler*.

Even though the right to publicity is a property-based action, it generally contains an exception for newsworthiness. In other words, if a photograph itself has news value or that photograph has a connection with a published and valid news story, a person featured in the photograph would have no viable claim for a property right in his or her image and would not have a viable action against media that published it: “[W]here the publication is newsworthy, the right of publicity gives way to freedom of the press.”<sup>60</sup>

The Eleventh Circuit decided the Benoit matter and necessarily had to consider the news value of the photographs and of the *Hustler* story itself. In a unanimous decision, the judges decided in favor of Nancy Benoit’s family and against *Hustler*.<sup>61</sup>

First, the court decided, the photographs had absolutely no news value themselves; the three judges suggested that had the photos been published by a magazine without an accompanying story, “the publication would not qualify within the newsworthiness exception” to the right to publicity in Georgia.<sup>62</sup> “Indeed,” the court wrote in explaining its news judgment regarding the photographs, “people are nude every day, and the news media does not typically find the occurrence worth reporting.”<sup>63</sup>

Second, the court held, the news story that accompanied the

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57. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977).

58. *Toffoloni v. LFP Publ’g Grp., LLC*, 572 F.3d 1201, 1204 (11th Cir. 2009).

59. *Id.* at 1204, 1209.

60. *Id.* at 1208.

61. *Id.* at 1213.

62. *Id.* at 1209.

63. *Id.*

photos—a “brief biography”—was “merely incidental” to the publication of the photographs, and, therefore, could not itself make the nude photographs into anything of news value.<sup>64</sup> The biography may have had some news value alone but not enough to bring the photographs into the newsworthiness exception, the court decided, despite the fact that the article specifically mentioned Ms. Benoit’s modeling days and focused on her life story.

Finally and most troublingly, the court wrote that it was convinced that the nude photos were not connected to any matter of public concern.<sup>65</sup> Interpreting Georgia law, it suggested that “timeliness” and “relatedness boundaries” could put an end to public scrutiny even when an incident may be one in the public interest.<sup>66</sup> The court explained,

[Hustler] would have us rule that someone’s notorious death constitutes a *carte blanche* for the publication of any and all images of that person during his or her life, regardless of whether those images were intentionally kept private and regardless of whether those images are of any relation to the incident of public concern. We disagree.<sup>67</sup>

The court then turned to the Restatement and offered its own assessment of the newsworthiness provisions under these facts. It focused on language that suggests that some actresses may keep some matters private, that news ends when it becomes morbid and sensational prying for its own sake, and that the newsworthiness of a story ends when those with decency would have no interest in it.<sup>68</sup> The court then explained that, under reasoning based upon the Restatement, the photographs “in no conceivable way” related to the murder.<sup>69</sup> “The photographs bear no relevance” to the news story, the court wrote, and explained that it worried that should it decide the case any other way, all magazines “would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as ‘newsworthy.’”<sup>70</sup>

The court closed its opinion with a brief paragraph repeating its decision that the photos did not qualify for the right to publicity’s exception for newsworthiness: “These private, nude photographs were not incident to a newsworthy article; rather, the brief biography was

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64. *Id.* at 1210.

65. *Id.* at 1212.

66. *Id.* at 1210.

67. *Id.*

68. *See id.* at 1211.

69. *Id.*

70. *Id.* at 1212.

incident to the photographs” and “these photographs were neither related in time nor concept to the current incident of public interest.”<sup>71</sup>

What is remarkable about the *Benoit* case is not so much its decision that a right to publicity existed in the photographs of Nancy Benoit or that the magazine seemed to have created a story in an effort to use the images. Instead, it is the strength of the court’s language that the photographs rated an absolute zero on any conceivable news value scale. The photos, in the court’s mind, bore “no relevance” to news and were completely unrelated to anything that had been reported in the news media, despite the fact that the murders made international headlines and even though the court found Nancy Benoit to be a public figure.<sup>72</sup>

The trial court hearing the case would later quote experts who opined that Ms. Benoit was such a “celebrity,” in fact, that the photographs themselves would be valued at up to \$200,000 and that by publishing the photos *Hustler* had ruined the market for a tribute DVD that could have brought nearly \$300,000 in profits to Nancy Benoit’s estate.<sup>73</sup> These are indeed remarkable sums for photographs that the appeals court found had absolutely no news value.

It is also remarkable that the court would find Ms. Benoit’s life story, at least in the court’s concluding language, not newsworthy. Clearly there is some value to the life story of someone who is murdered, given that such news coverage is routine in news media today and given that the story of Benoit’s own murder became international news.

Moreover, there is at least some potential journalistic link between the nude photographs and the news article—one the court complained took up only one-sixth of the two-page spread. Any life story of a celebrity would necessarily include the celebrity’s past, and that past would include some embarrassing moments, including decisions made for publicity’s sake alone. Here, the fact that Ms. Benoit posed nude may have indicated at least an initial strong desire on her part for any and all publicity, something that may explain her involvement with professional wrestling and ultimately the professional wrestler who became her husband and murderer. The fact that she posed nude, even if she later changed her mind, may reveal an important and relevant dimension to her life. It may also evidence the sometimes-held belief that women must take off their clothing to achieve celebrity. This link between the photos and something more acceptably newsworthy gives some potential news value, albeit minimal, to the photos themselves. As the Restatement authors repeatedly note, but as the judge in the *Benoit*

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71. *Id.* at 1213.

72. *See id.* at 1212.

73. *Toffoloni v. LFP Publ’g Grp.*, No. 1:08-CV-421-TWT, 2010 U.S. Dist. LEXIS 124733, at \*5-6 (N.D. Ga. Nov. 23, 2010).

case overlooked, crime victims have sadly become a part of our local or even national dialogue. Inquiry into their lives—including inquiry into events outside of the crime itself—is an appropriate part of the news and, therefore, protected by the First Amendment.<sup>74</sup>

This is, of course, not to suggest that Hustler made the correct, ethical decision to publish the photographs, or that people have no right to bring claims based upon publication of certain nude photographs. What it does suggest is that the court went unnecessarily far when it wrote that the story was not newsworthy and that the photos had no news value whatsoever. The court leapt to characterize the images as those in which only persons without any sense of decency would be interested. Hustler, at least, believed that many persons would be interested in the story and, admittedly, the photos; the court itself noted as much when it quoted the headlines on the magazine's cover. Are these people at whom the headlines were aimed the mysterious people without a sense of decency who do not understand what real news is? Is their interest instead morbid and sensational prying for its own sake? Do we lump anyone interested in learning of Nancy Benoit's decision to take nude photos into the group that Warren and Brandeis believed required a more cultured guiding hand in news decisions? Would a mention in a news story of such a nude photo session be a privacy invasion?

And, finally, is this story of a murder and nude photographs the sort of thing that is decidedly morbid and sensational prying for its own sake? Or is it simply one of those things that is, under the First Amendment, of more or less deplorable popular appeal and, therefore, protected?

Because these questions are not answered in any way that protects news publications, the *Benoit* decision too could have a chilling effect. It holds that there are some things from a celebrity crime victim's past that are off limits, even when photographs of the event or events exist. Any wise news editor, it seems, should think twice before publishing decades-old photographs of a celebrity, as there is a possibility that a court could find them both not newsworthy and unrelated to the underlying news story. Because involuntary public figures have an even greater right to privacy, that same editor would also be wise to consider carefully any photograph from a crime victim's past given the court's broad rejection of the photographs' news value in *Benoit*.

The opinion then, though deciding a seemingly property-rights-oriented, right-to-publicity matter, can be read far more broadly and could have a crushing effect on news media. The opinions in the *Conradt* and *Benoit* cases also suggest that courts are feeling far freer to decide the news value of all stories, including those involving crime and including

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

those with accompanying photographs or video.

Two recent additional examples from Chicago are similarly telling and troubling. Chicago is one of the nation's largest cities and one in which crime is reported heavily on a daily basis. One federal judge there, however, rejected a motion to dismiss in a case involving a woman whose arrest was depicted on a reality television program; the woman's intentional infliction of emotional distress claim was based in part upon the broadcast of her arrest and the way police described her as a "[p]retty little blond[e] girl . . . driving a Jaguar."<sup>75</sup> And in a newsgathering case, a federal trial court judge decided that journalists could potentially be liable for the privacy tort of intrusion because they had used a telephoto lens to record people in a fenced backyard. The persons recorded included a reporter fraternizing with a man then believed to be involved in the disappearance of his wife, one of the biggest news stories of the summer. The court wrote that a reasonable jury could find that the videotaping of the event was extreme and outrageous conduct—even though it took place on the man's sister's property, even though the man himself was present, and even though the event took place outside.<sup>76</sup>

What unites all of these recent cases is an underlying detective story. And even though these detective tales of true crime have routinely been protected by scholars and courts as those most newsworthy and most in the public interest, recently courts have, at least initially, ruled against the media.

### III. A CHILL IN REPORTING CRIME NEWS

It seems as if it should be completely unnecessary to argue that detective stories are especially protected under the First Amendment. Even Samuel Warren and Louis Brandeis, certainly no fans of news media, recognized that at some point the public's interest in a particular news story outweighs the privacy sought by those involved. That's all the more true in a criminal matter, one directly affecting the public in its prosecution, one that violates the law put in place for the protection of the public, and one that is routinely of great public interest.

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75. *Best v. Malec*, No. 09 C 7749, 2010 U.S. Dist. LEXIS 58996, at \*5, \*17-18 (N.D. Ill. June 11, 2010).

76. *Webb v. CBS*, No. 08 C 6241, 2009 U.S. Dist. LEXIS 38597, at \*12 (N.D. Ill. May 7, 2009). Perhaps it is not surprising that these cases come from Illinois, given that a few years before, an appeals court found that a plaintiff had a valid privacy claim after a news article about crime statistics in Chicago included a photograph of her murdered son and the words she spoke over his dead body. *Green v. Chi. Tribune*, 675 N.E. 2d 249 (Ill. App. Ct. 1996). A California court followed a few years later and criticized news reporting in *Sports Illustrated* about adult coaches who sexually abused child players. The article included a Little League team photograph picturing some members who had been molested by their coach. *M.G. v. Time Warner*, 89 Cal. App. 4th 623 (Cal. Ct. App. 2001).

And yet today, it seems, courts are increasingly skeptical about such news coverage. The *Conradt* court wrote explicitly that a jury could decide that NBC had overstepped its bounds and caused a would-be arrestee great emotional distress by showing up and reporting at the arrestee's home; the jury could find NBC liable for intentional infliction of emotional distress because it violated some ethereal journalistic ethics provisions to be, in a word, nice.

If a line is to be drawn—and the Supreme Court has yet to tell us with uniformity if such a line is constitutionally permissible and, if so, where news ends and an invasion into private matters begins—it is surely not in the case of a prosecutor who, it seems, strongly and repeatedly hit on, using graphic sexual terms, a person he presumably thought to be a 13-year-old boy. It violates the First Amendment and chills news reporting to hold media liable for a failure to be nice, especially in a situation involving the arrest of a public official, especially in coverage of a detective story.

And yet, given these decisions, imagine the news editor who must make the call about coverage of a particular crime story. If that news editor is to be sure that such coverage will be in line with existing law and will avoid any potential for liability, that coverage should not violate any of journalism's highly subjective, ethereal, and aspirational ethics provisions. That editor must also consider the ways in which a lay judge or jury might interpret such ethics provisions.

Imagine the questions that might be included in a news editor's analysis:

Would a court consider it advocacy or news reporting to cover an arrest if the media is tipped off by the police?

Is it a violation of the ethics provision that suggests that reporters "recognize that gathering and reporting information may cause harm or discomfort" if the news story suggests that a public official may have broken the law?

Would it be in good taste and not pander to lurid curiosity to report details of a public official's criminal attempts to communicate with a young child using graphic sexual language, including the suggestion that the prosecutor wished to feel that child's "cock"?

Should the publication include what might be considered potentially embarrassing photos taken many years before that a court could find lacked news value and a real connection to the underlying story of a crime?

Before *Conradt* and the decision in the *Benoit* case, the answers



would be clear and the news editor could move forward with covering the story. Today, the answers are not so clear and it is easy to use the word “chilling” when considering a newsroom analysis of coverage, especially in an age when news media have few financial resources to defend against legal actions and instead may decide it safer not to report the news story involving crime at all.

Finally, and as William Prosser and others have noted, what person who is arrested or is otherwise involved in some way in a crime news story would not want privacy? Reading *Conradt* and the other decisions broadly, multiple arrestees and others could have a valid claim for intentional infliction of emotional distress should their arrests be reported, even if they are public officials. There is absolutely no doubt that reporting on any such matter causes harm and discomfort to the arrestee.

I am concerned that these decisions condemning media could increase and that courts could tighten even further their definition of “news” to exclude certain crime details. A California appeals court in early 2010, for example, held police responsible for publishing on the Internet death images of a young woman killed in an accident.<sup>77</sup> The court called the spread of the images across the Internet “a malignant firestorm” and lamented that the images appeared on thousands of websites, spread around the world via e-mail, and led to the family’s great emotional harm.<sup>78</sup> The court called it “Internet sensationalism” and “lurid gossip[,]” and its desire to protect surviving family members from such emotional trauma was clear.<sup>79</sup> A concurring judge in the three-judge decision wrote explicitly that surviving family members should have a right to their own privacy in any death images taken at an accident scene or at an autopsy.<sup>80</sup>

A continued backlash against this type of publishing could lead to additional cases that further quash the reporting of detective stories by traditional media.

## CONCLUSION

It is not surprising that certain courts hold certain media responsible for certain irresponsible reporting, especially today when the Internet routinely pushes the envelope. What is surprising is that some recent courts have punished media in the context of crime reporting, a type of reporting routinely protected by courts under the First Amendment and

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77. *Catsouras v. Dep’t of Cal. Highway Patrol*, 181 Cal. App. 4th 856, 863-64 (Cal. Ct. App. 2010).

78. *Id.* at 863.

79. *Id.* at 864.

80. *Id.* at 898, 903.

by commentators since at least the time of Warren and Brandeis. News publications report on crime daily in many cities across the United States, and people read those stories in droves, proof that such reporting is in the public interest.

As the Supreme Court reiterated recently in *Snyder v. Phelps*,<sup>81</sup> “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,’ . . . [and t]he arguably ‘inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.’”<sup>82</sup>

Courts should recognize anew the value of detective stories and protect this type of journalistic coverage especially.

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81. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

82. *Id.* at 1216 (internal citations omitted).