

GAWKING LEGALLY

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Does the United States need new regulations to defend individual privacy in a world where Internet news spreads like wildfire? The first step to answering that question is to understand the incommensurability problem inherent in alleviating the tension between freedom of expression and privacy. Weighing values such as privacy against ones like national security or free speech is difficult.¹ It is even more complex to have conversations and debates about these balancing acts. How many people can define their own utility function regarding the relative value of privacy as opposed to speech, much less defend that function against the competing versions of other individuals? Even an individual who has a fairly clear grasp of his own vision and who possesses strong argumentative and rhetorical skills will struggle to convince others because, in addition to disagreements regarding important empirical questions and the best tools of measurement in that area, eventually a clash of prior values will emerge. The most straightforward path from there is an emphasis on crafting regulations that maximize individual choice and on having the modesty to admit when the common law is better able to do so than new statutes.

I. ADOPTING AN INDIVIDUAL CHOICE FRAMEWORK

As evidenced by many facts, including the most recent presidential election and its aftermath, America is a value-

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1. See generally Irina D. Manta, *Choosing Privacy*, N.Y.U. J. LEGIS. & PUB. POL'Y (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925660 [<https://perma.cc/R5CM-96Q6>]; Irina D. Manta & Cassandra Burke Robertson, *Secret Jurisdiction*, 65 EMORY L.J. 1313 (2016).

pluralistic society.² And the following scenario is likely even in the best case in a society like ours when two people of good faith and with a high degree of commitment to reaching the correct result converse about policy. They argue regularly, sometimes for years, about the pros and cons of a particular policy. Let us assume that they manage to iron out any logical inconsistencies in each other's arguments, agree on a common system of epistemology, overcome the significant challenges of cognitive bias, and arrive at a similar approach to resolving empirical questions. After all this, they continue to disagree once they have crystallized the heart of the dispute, which is that the prior values they chose or were taught do not mesh with the other person's. At the end of the day, these priors are largely arbitrary, and that is why the conversation cannot continue at that stage.³

Recognizing the arbitrariness of individuals' values militates toward adopting a framework in which we simply let people make as many choices as possible about their own lives. The maximization of individual choice thus becomes the North Star when it comes to evaluating the costs and benefits of existing or new regulations.⁴ Using choice is a matter of epistemological and ethical agnosticism. Like any value system, one that bases itself on choice cannot help but rely itself on some assumptions, but it minimizes the number of these assumptions and holds the promise of creating a world in which individuals can coexist more easily than in alternative systems.

II. APPLYING THE INDIVIDUAL CHOICE FRAMEWORK TO PRIVACY AND SPEECH

The reports of the death of privacy may be exaggerated. We did not transition from a world in which individuals were able to keep all information about themselves secret to one in which

2. See generally David W. Scott, *The Problem with Pluralism*, POSTS FROM THE FRONTIER (July 7, 2011, 3:55 PM), <http://blogs.bu.edu/dscott/2011/07/07/the-problem-of-pluralism> [<https://perma.cc/TSN2-URGP>].

3. See *Manta*, *supra* note 1, at 4.

4. See *id.*

everything is fair game.⁵ New technologies have certainly changed the landscape by modifying the types and extent of the harms that can be inflicted on people when spreading negative information about them. That said, the level of privacy that the average person has at her disposal underwent rises and falls rather than a steady decline.

Consider a person who lived in a small village centuries ago. If he did anything embarrassing or shameful, his entire world—as defined by the people with whom he would interact daily—could find out about it and remember it for a long time, even for life. Mobility used to be more limited, and so that individual might be stuck with the negative repercussions forever, with little way out. There was no enforceable “right to be forgotten” of the type recognized in the European Union where one can ask to have information about oneself removed from (today Google) search.⁶ In the past as now, the right to privacy did not mean that one had the right to be liked by everyone, and knowledge about one’s actions could lead to a life sentence of exclusion.

It is only with modern urbanization that society became more anonymous and the landscape of individual choice changed. People had the choice to engage in some types of anti-social behaviors in villages, but then others had the choice to engage in ostracism of varying severity in response. In an urban setting, however, the choice to engage in anti-social behaviors existed and in fact was potentially easier to hide at times. Even if the culprit was later caught, the ability to ostracize someone in a larger as opposed to smaller community is reduced. Part of the reason for this is that information is much less likely to trickle to everyone in a larger community. This increases the ability to choose of some individuals who want to behave anti-socially, but it reduces the ability of others to make informed decisions about those with whom they are

5. See Greg Ferenstein, *Why People Probably Won't Pay to Keep Their Web History Secret*, ATLANTIC (Feb. 23, 2015), <https://www.theatlantic.com/technology/archive/2015/02/why-people-probably-wont-pay-to-keep-their-web-history-secret/385765> [<https://perma.cc/96D3-627Z>].

6. See generally *Factsheet on the “Right to be Forgotten” ruling*, EUR. COMMISSION, http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [<https://perma.cc/GF5X-9ZAN>] (last visited Sept. 21, 2017).

dealing to minimize, for instance, the risk of being misled or cheated in some way.

With this background in mind, how should we view websites that either produce news, such as Gawker, or aggregate information contributed by various individuals? On the news-production side, the case that famously made waves concerned a sex tape depicting professional wrestler Hulk Hogan having an affair with his best friend's wife.⁷ Gawker publicized a 101-second excerpt from the half-hour tape⁸ that Hogan's best friend had filmed.⁹ Hogan sued Gawker for invading his privacy, and the key question that the courts had to resolve under the common law was whether the disclosed materials were newsworthy.¹⁰ The trial court decided that Hulk Hogan had indeed been harmed and that the tape excerpt was not newsworthy, and it awarded him \$140 million.¹¹ It is rather questionable whether this decision would have been upheld on appeal, but as so often, we will never know because the case settled rather than making its way into higher levels of the court system.¹² This court battle and settlement nevertheless played a major role in financially sinking Gawker.¹³

The current laws, and the ways in which courts already potentially interpret them in overly broad ways—as may have occurred here at the trial level—can have a deep impact on news sites.¹⁴ Creating additional regulations runs the risk of increasing possible chilling effects, which reduce the ability to

7. See Julia Greenberg, *Court Orders Gawker to Pay Hulk Hogan \$115M for Posting His Sex Tape*, WIRED (Mar. 18, 2016), <https://www.wired.com/2016/03/jury-awards-hulk-hogan-115-million-gawker-sex-tape-post/> [<https://perma.cc/3ACDDKUT>].

8. *Id.*

9. Nick Madigan & Ravi Somaiya, *Hulk Hogan Awarded \$115 Million in Privacy Suit Against Gawker*, N.Y. TIMES (Mar. 18, 2016), <https://www.nytimes.com/2016/03/19/business/media/gawker-hulk-hogan-verdict.html> [<https://perma.cc/99SU-WXSP>].

10. Danny Cevallos, *Is Hulk Hogan's sex tape newsworthy?*, CNN (Mar. 15, 2016), <http://www.cnn.com/2016/03/15/opinions/hulk-hogans-sex-tape-newsworthy-opinion-cevallos/index.html> [<https://perma.cc/A99A-JFXV>].

11. Madigan & Somaiya, *supra* note 9.

12. See Sydney Ember, *Gawker and Hulk Hogan Reach \$31 Million Settlement*, N.Y. TIMES (Nov. 3, 2016), <https://www.nytimes.com/2016/11/03/business/media/gawker-hulk-hogan-settlement.html> [<https://perma.cc/T3D9-DNYD>].

13. *See id.*

14. *See generally* RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014).

choose to speak and the ability to receive the information being spoken. The counter is that increased regulations can maximize the choices of individuals in Hulk Hogan's situation to engage in the behaviors they desire. The existing newsworthiness doctrine, however, already seeks to mediate in the area of who will be protected and for which activities.¹⁵

III. WHY NOT MORE PRIVACY FOR HULK HOGAN?

Not all possible sexual interactions of Hulk Hogan's would be treated the same way. These potential interactions lie on a spectrum even for celebrities. On the one hand, if Hulk Hogan had sex with his own wife at home, that would clearly not be considered newsworthy, and the publication of a tape depicting it would be found to be a violation of his privacy. On the other end of the spectrum, Hulk Hogan having sexual intercourse with a prostitute in the middle of the town square and a site like Gawker publishing a sex tape showing the act would be legally protected. The case that took place in real life is between these two extremes on the spectrum, and reasonable minds may differ on whether the event was newsworthy and hence Gawker had the right to publicize the tape excerpt.

To some, the public's interest in this story is prurient and essentially constitutes rubbernecking. Yet, to others Hulk Hogan was a positive figure to whom a significant number of individuals looked up historically, and he is one of the most requested celebrities of all times for the Make-a-Wish Foundation, which grants wishes to terminally ill children.¹⁶ The fact that a celebrity of this stature appeared in a sex tape under the circumstances at bar, combined with the racist and homophobic remarks that he allegedly made on the tape, shocked many and led Mattel to withdraw its Hulk Hogan action figures.¹⁷ As mentioned

15. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 581 (2d ed. 2011).

16. Gavin Evans, *25 Things You (Probably) Didn't Know About Hulk Hogan*, COMPLEX (July 24, 2015), <http://www.complex.com/sports/2015/07/25-hulk-hogan-facts/> [https://perma.cc/4DTC-GYFP].

17. Brian Fritz, *WWE Reportedly Tells Mattel to Scrap Production of Hulk Hogan Action Figures*, BETWEEN THE ROPES (July 27, 2015), <http://www.betweentheropes.com/2015/07/27/wwe-reportedly-tells-mattel-scrap-production-hulk-hogan-action-figures-17-things-we-learned-san-diego-comic-con/> [https://perma.cc/WH9Y-RZ9S].

above, the right to privacy does not entail the right to be liked, and within the frameworks of choice and of current law, the public's interest in factual information about one of its idols may have outweighed his interest in keeping that information to himself.

Situations of this sort are intensely sensitive to factual distinctions, which makes them prime candidates for the imposition of standards rather than rules. A rule in this area could provide greater clarity, especially if it states something along the lines that a news site may never disclose sexually explicit materials without the consent of the individuals involved. Would we want that applied to a situation in which a politician who speaks out against homosexual rights was filmed having same-sex intimate relations, however? Given that a picture can be worth a thousand words, a written summary of the event may not provide the same information as the actual footage and may leave more room for misinterpretation of what truly took place. The application of standards under the newsworthiness doctrine has a better chance to promote the public interest under such circumstances.

Law students, lawyers, and judges are frequently frustrated by the real difficulties in applying precedent in these areas.¹⁸ This is compounded by the significant impact that such cases can have on the lives of the individuals involved. The newsworthiness doctrine undoubtedly makes for complex application, but some areas of the law are messy because they must be so, and the battle between speech and privacy interests will likely rage on indefinitely.

IV. THE TREATMENT OF INFORMATION AGGREGATORS

Before closing, it is worth noting how sites that aggregate information fit into the question of new regulations. The Communications Decency Act shields several types of Internet intermediaries from liability for publishing defamatory content.¹⁹ This certainly produces some unsavory outcomes, such as when individuals see incorrect information about themselves

18. See generally Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1 (2016).

19. 47 U.S.C. § 230 (2012).

on websites like reportmyex.com.²⁰ While it is worth investigating the robustness of individuals' ability to pursue legally those who make false, defamatory statements against them, there are strong arguments for continuing to provide safe harbors to intermediaries.

At first blush, such websites are a privacy nightmare in that the sexual details of any individual's life can be displayed for public viewing.²¹ Nonetheless, one must keep in mind that the Internet can provide not only tools to anonymize oneself but also weapons to fight back against the cloak of urban and other anonymization. An unethical individual armed with Tinder in a large city can harm an untold number of people through a variety of scams, including financial ones.²² Dating apps and social networking tools, for all their benefits, open the doors to exploitation in unprecedented ways, and platforms that allow for the reporting of unethical or dangerous behaviors provide a partial way to fight back.²³ In doing so, they enable individuals to make choices with their eyes opened more widely.

V. CONCLUSION

Websites like Gawker and reportmyex.com can wreak havoc on individuals' lives. They have the ability, however, to provide more than just juicy gossip to entertain the bored. In many situations, they engage in or publish speech that is precisely of the type that the Constitution intended to protect: that which properly informs the political process or individual decision-

20. REPORT MY EX, <http://www.reportmyex.com> [https://perma.cc/TK5Y-CHTF] (last visited Nov. 11, 2017).

21. See Charlotte Alter, *'It's Like Having an Incurable Disease': Inside the Fight Against Revenge Porn*, TIME (June 13, 2017), <http://time.com/4811561/revenge-porn/> [https://perma.cc/LLS7-R9RT].

22. See Matt Novak, *These Stories of People Who Got Scammed on Tinder Are Heart-breaking*, GIZMODO (Oct. 26, 2016), <https://gizmodo.com/these-stories-of-people-who-got-scammed-on-tinder-are-h-1788207405> [https://perma.cc/VXF8-Z5MK]; *Online Dating Can Be Dangerous*, ABC NEWS (June 16, 2007), <http://abcnews.go.com/GMA/story?id=3285863&page=1> [https://perma.cc/HQR3-RT3G].

23. See, e.g., ROMANCE SCAMS NOW, <http://romancescamsnow.com> [https://perma.cc/5GNZ-D4H9] (last visited Nov. 11, 2017).

making.²⁴ Shrinking courts' ability to apply standards in an area fraught with difficult trade-offs would likely foreclose more choices than it would create.

24. E.g., Hannah Gold, *Clinton Campaign Manager Says Trump Might be Putin "Puppet,"* GAWKER (Aug. 21, 2016), <http://gawker.com/clinton-campaign-manager-says-trump-might-be-putin-pupp-1785563561> [<https://perma.cc/Q6K3-LW74>].