PLACING THE PUBLIC FIGURE IN THE PUBLIC SPHERE:
FROM LEGAL SOLUTION TO INTERNET SCAPEGOAT

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Abstract

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This study applies the field theory of Pierre Bourdieu to show how the irresolvable conflict between free speech and privacy is managed by U.S. courts, newspaper editors, and Web publishers. How do the courts and media actors justify invasive storytelling about private people who are drawn involuntarily into the news? Power relations of the state, media, and public are examined in the context of the social construction of *newsworthiness*. The related meanings of *newsworthiness, public sphere, and public figure* are traced as they are negotiated over time and across fields of power. Through analysis of the story of an involuntary public figure who accidentally influenced a baseball game, it is shown that the decline in journalism standards in the Internet era is not entirely attributable to market and technological forces. The decline is also explained by non-legal or cultural uses of the public figure doctrine in popular jurisprudence.
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I.

INTRODUCTION

In recent years, mainstream media outlets have decided to name private people who are drawn involuntarily in the news, despite the possibility of harm to them resulting from identification. The mainstream media also now appears to be more willing to publish in-depth coverage about private people, and, in some cases, to publish provocative rumors about them, without seeking verification or employing the standards of objective reporting (balance, fairness, opportunity to respond, etc.). While the U.S. courts will not prohibit media outlets from naming private people who become involuntary public figures, when the stories are deemed “newsworthy”—because to do so would be unconstitutional under the First Amendment—the mainstream media, as a matter of ethics and professional standards, traditionally has withheld the names of private persons who might be harmed by identification and follow-up coverage.

Stories about the “involuntary public figure” typically involve juvenile criminal defendants and alleged rape victims, but they also can involve private people who have been drawn into the public eye in other ways, such as adults who are the subject of criminal investigations, victims of crime and accidents,
and various types of bystanders, such as witnesses and co-workers, who happened to be present when tragedy struck or scandal broke. Nowadays, mainstream media outlets not only identify and describe these people, they also publish in-depth personal profiles about their lives that go beyond the scope of initial events. Journalists are treating private people as “public figures,” despite the fact these people have taken no or just the minimum of steps into public discourse. Journalists are also using the public-figure designation to justify a broad scope of coverage into private lives; by so doing, journalists are begging the question of whether these people are properly the subject of “personality” or celebrity-style coverage.

Begging the question, a phrase often misused, means to assume as a premise the very answer to the question posed. Arguing that a person’s identity is the story does not address the ethical issue or the power relations for journalists, the state, and the public. Such an argument—an argument that details of the lives of private people are the story for public consumption—takes the marker of declining journalism standards and uses it to justify the decline. And as journalism standards decline, so does journalism power.

The overarching question to be addressed in this essay is: why have journalism standards been in decline? The answer might be found by analyzing how the enduring, irresolvable problem of free speech versus privacy has been
handled in different fields of human endeavor: comparing legal solutions to media and public solutions, for instance. This is the approach to be taken here, in an analysis that will turn on the interpretation of a number of constructs: public figure, public sphere, and newsworthiness. How has the meaning of the public figure changed in recent years? Is a public figure someone who steps intentionally into public discourse—or just anyone that the public and journalists are interested in discussing? How has the meaning of the public sphere changed in recent years? Is the public sphere a social space located in between the state and the elites where people can take part in rational-critical discourse about how to order society, how to manage state-citizen relations, and how to improve quality of life? Or, is the public sphere just a place for exchanging mediated messages, including messages that commodify the private person for consumption?

How has the meaning of newsworthiness changed in recent years? Is newsworthiness a normative term or is it merely descriptive of the level of interest in a story? What factors are influencing the recent, historic changes in journalism practices regarding newsworthiness? This essay will address the meaning of the newsworthy public figure, as a social construct, by examining legal texts and news stories, as well as, in less detail, important, recent shifts in technological and market conditions. It will be argued that field-level influences from the state (specifically the First Amendment law known as the public-figure doctrine),
combined with the strong influence of technological and market shifts, have so transformed the construct of the public figure that it is now meaningless in some cases. The term is bandied about to legitimate invasive news stories about people that touch the minimum of First Amendment freedoms. Anyone can be forced to become a public figure, so long as there is public interest in the person’s story.

One common explanation for the decline in journalism standards is to blame the Internet, in particular “Internet competition” coming from self-publishers who are acting as journalists in their use of blogs, parody news sites, scandal reporting, message boards, and the like. Certainly it is easy to peg recent decisions about the newsworthiness of details about private people to Internet and market forces. The speed of the Internet, combined with side-by-side, “search-screen” competition among mainstream media, self-publishers, and tabloid-news producers, do carry a lot of explanation for the decline in journalism standards. The Internet—a communications tool, not a social actor—becomes the scapegoat.

Another common explanation is to blame the person who is involuntarily drawn into the news. The individual becomes the scapegoat, and he or she is used to justify his or her own exploitation by media outlets. This process of legitimization blames the person, instead of the larger social forces or random chances that brought the person into the vortex of a news story. In a form of popular jurisprudence, journalists and other publishers are using filtered
versions of First Amendment standards (that is, the legal “tests” for determining who is and is not a public figure) to legitimate invasive coverage by blaming the person for “voluntarily” stepping into the spotlight and becoming a part of public discourse. Almost any move or step by the person is considered a volitional step into the limelight, whether that step is seeking damages for assault, making an apology buried in a request to be left alone, or, even, declaring innocence.

So long as the general public on the Internet is discussing a story about a person, then that person is considered newsworthy and deemed a public figure. While the involuntary public figure is a person of interest, merely being of interest has not always been equated with being a public figure. It used to be that public figures were those people who intentionally took a role in public affairs: public officials, celebrities, and activists. In current power dynamics, however, a loosely constructed version of the public figure doctrine is being used to justify wide-ranging coverage about involuntary news subjects, as above-board and appropriate, although the doctrine sets a minimum standard of lawful reporting that privileges free speech over privacy and dignity claims in nearly every case.

One key point of this essay is that, instead of blaming technology, or blaming the person, social actors in the fields of law and journalism, as well as members of the general public acting in the public sphere, might do better to
recognize that field-level forces, that is, the competitive, operating logics of their various areas of endeavor, including internal and external competition and practices, are influencing their decisions about involuntary public figures.

Why is it important to understand how stories about involuntary public figures are legitimated? Why analyze how the meaning of *newsworthiness* is negotiated when placing public figure in the public sphere? The way that meaning is negotiated across fields of power, from law to media, to public discourse, is important because news publications and other mass communications about private people, who are forced to become public figures, are commodifying private lives for public consumption, without regard for individual privacy and dignity, and in some cases, without regard for truth. Moreover, the dominance of celebrity-style news about public figures and involuntary public figures leaves less room for critical discourse about society.

To recognize the nature and dynamics of field-level influences on *newsworthiness* determinations, two points of background are required. These points will be presented next, in Part II. First, what is *newsworthiness*? And second, what is a field-level force? To provide that background, this essay will start by detailing what is already known about *newsworthiness* as a construct. Next, theories of journalism at the field level will be outlined, including Pierre Bourdieu’s field theory and Jürgen Habermas’s concept of the *public sphere* as
addressed in his early work ([1962] 1991) on the structural transformation of the public sphere. There Habermas employed historical interpretation to argue that a new social space had emerged, for discussion of questions of social order, by equals, that is, by persons who were not from the state or the elite.

Once that background is presented, in Part III, the method of inquiry used in this essay will be explained. The method used in this study is historical sociology, more specifically the version of historical sociology known as reiterative problem-solving (Haydu 1998; Sztompka 1986). Next, in Part IV, the social problem at issue will be outlined: free speech versus privacy. Then, the core argument will be made in three steps (Parts V, VI, and VII). A mezzo-level view of journalism as a field of power will taken as the lens for analysis of the involuntary public figure cases. The field of journalism will be situated in relation to other fields of power: the state, in particular U.S. courts of law, and the public sphere, that is, the social space of discourse by equals.

In Part V, the legal solution to the problem of free speech versus privacy will be presented. This solution—the public figure doctrine—was introduced in 1974 by the United States Supreme Court in the case of Gertz v. Robert Welch. In Part VI, changes in the media power dynamic, specifically, field shifts caused by market and technology changes, will be summarized. In Part VII, the journalistic solution to the problem of free speech versus privacy will be presented—and
tested. As will be discussed, the solution offered by traditional journalism, which is embodied in the code of ethics of the Society of Professional Journalists, and elsewhere, does not resolve the conflict between free speech versus privacy.

After looking at the journalistic solution, then the story of a particular involuntary public figure will be examined: the story of a sports fan who accidentally tipped away a ball from a major league baseball player at a Chicago Cubs game in 2003, and became an “Internet scapegoat” for supposedly causing the Cubs to lose a World Series bid. The story illustrates how the construct of the public figure as applied in the legal field, has been so transformed by non-legal or cultural uses by media analysts and members of the general public, as to become meaningless. The story illuminates the problem of the involuntary public figure in the Internet era, where disparate field logics, operating in the spheres of law and media, and in the public sphere, combine to the detriment of private persons and of journalists. The private person loses privacy and dignity, while the journalists lose the autonomous power that can be derived from maintaining field-unique standards and practices. Media outlets can establish and wield greater power, if competitive space is available, by operating closer to professional ideals and building cultural capital. This strength is created, of course, by aiming well above the minimum standard of free speech.
II.

NEWsworthiness AT THE FIELD LEVEL

Even though journalism is influenced by larger social forces, the literature about *newsworthiness*, as a journalism practice, focuses on the micro-level interactions that take place within editorial offices or on the beat. For example, in their seminal study, Galtung and Ruge (1964) used content analysis to examine foreign affairs reporting in newspapers. After examining a number of print-media outcomes, Galtung and Ruge inferred that a set of factors, or news values, were being used by editors and reporters during the publication process to determine if an event qualified as news. The news values they identified are now well-known: frequency, proximity, references to elites, and so forth.

Other media scholars have examined *newsworthiness* at the micro-level through the use of surveys, interviews, ethnography, and conversation analysis. (Shoemaker, Eichholz, Kim and Wrigley 2001; Sumpter 2000; Clayman and Reisner 1998; Reisner 1992; Lester 1980; Molotoch and Lester 1974; Johnstone, Slawski, and Bowman 1972). In the social movements arena, scholars have examined “selection bias” or the non-coverage of events by mass-media outlets.
(Myers and Caniglia 2004; McCarthy, McPhail, and Smith 1996); as well as the
effect of media coverage decisions on collective behavior (Roscigno and Danher
2001; Molotch 1979). Newsworthiness also has been analyzed in terms of space
(Brooker-Gross 1983); time (Schlesinger 1977); privacy (Pember 1968); and
proximity (Luttbeg 1983).

All of these studies tacitly acknowledge that newsworthiness decision
making is the defining behavior of journalism. Determining newsworthiness is the
central point of meaning for journalists because their job, rather obviously, is to
gather news and report it. The work of journalists in determining which stories
are newsworthy, managing the depth of coverage, and putting the stories in order,
draws on the journalists' interpretations of events, as well as on institutional
practices (Lau 2004: 695; Schudson 1989, 1996; Tuchman 1978). In completing
their daily tasks, journalists ask “what is news?” and “how do we decide?” These
newsworthiness questions are asked specifically—if not explicitly—during news
conferences held in media outlets of all types (print, radio, television, and
Internet). When not being asked specifically, questions of newsworthiness
nevertheless characterize the practice of journalism because asking “what is
news?” is the logic that separates journalists from other media workers, such as
software developers and TV actors.
The social spaces where *newsworthiness* is negotiated span from the macro-level, in the vast historical dialectics of conflict, synthesis, and problem-solving worked out across institutions and time, to the mezzo-level of professional associations and workplace dynamics, to the internal social processes of the cultural unconscious.¹

Despite the many angles taken on *newsworthiness*, scholars have remained focused on micro-level interactions of journalists and the content that results from newsworthiness decisions. There have been few studies examining mezzo-level influences on newsworthiness decisions.² Even so, some media scholars looking at the micro-level negotiation of newsworthiness have pointed up to the mezzo-level—for example, when they incidentally portray journalists as “gatekeepers” who wield social control over information flowing in the market or in the public sphere. The characterizations of journalists as gatekeepers often include a nod to Kurt Lewin’s (1947, 1951) pioneering work on small-group dynamics (see Shoemaker et al. 2001: 234; and Clayman and Reisner 1998: 179). Passing references to Lewin, however, do not lift existing scholarship on *newsworthiness* to the mezzo- or macro-level.

Another branch of field theory—not Kurt Lewin’s, but rather, the version shaped by Pierre Bourdieu (1996, 1993, 1985, and 1969)³—can be aptly applied to situate journalism behaviors in a larger dynamic (Benson 2006, 2000, 1998;
Benson and Neveu 2005; Couldry 2003; Marlière 1998). In developing his version of field theory, Bourdieu took, as one of many starting points, an earlier discussion of “value spheres” that was presented by Max Weber in an article about religious rejections of the world. Weber ([1915] 1946) lists a number of value spheres operating in society—the religious, economic, political, esthetic, erotic, and intellectual. Through that typology, Weber explains the cause of strains that result when people, who have a base of operations in the religious sphere, wander off into other realms of endeavor (read: fields). As seen in Weber’s article, a theory of value spheres, or field theory, does a good job of explaining human conflict.

Rather than use field theory to explain conflict, however, this essay will use field theory to explain changes over time in the meaning of the term *newsworthy public figure*. Those changes, in turn, explain how shifts in levels of privacy are processed at the field level. The *newsworthiness* construct is a central point in the problem-solving attempts of social actors dealing with the competing interests of free speech and privacy. For purposes here, Bourdieu’s field theory, although complex, will be reduced to its premise: there exists a topology of social domains or fields, each with its own operating logic or “working consensus,” which influences, but does not mechanistically determine, how meanings are interpreted and decisions are made (Couldry 2003: 23).
As will be seen, Bourdieu’s field theory is useful for explaining the social process of interpreting the meaning of *newsworthiness*, as that process is influenced by mezzo-level forces coming from outside journalism, as well as by social patterns operating *within* the field of journalism. Instead of seeing journalists as the gatekeepers they may have been thirty years ago, Bourdieu’s field theory allows us to examine the mezzo-level influences that effect mainstream media decisions on questions of *newsworthiness*. Thus, field theory is useful for explaining mezzo-level changes in important social constructs, in terms of both within-field logics and between-field dynamics.

For Bourdieu, the topology of fields is not so much a structure, as it is an analytic approach to examining mezzo-level influences on social actors and their behaviors (Couldry 2003: 24). Bourdieu argues that the internal logic of a field moves between two poles of influence: *political economy* or *economic capital*, on the one hand, and *cultural capital*, on the other. The operating logic of each field (such as law, academia, media, etc.) is shaped by relative distances from the two poles, political-economic and cultural. When situated closer to the political-economic pole, for example, market powers are dominant over a field logic, while when closer to the cultural capital pole, the autonomous powers of the particular field—whether law, academia, media, etc.—are dominant (Bourdieu 1996: 70; Benson 2006: 189-90; Benson 1998: 464-67). The autonomous powers operating in
each field derive from practices particular to the field. Thus, for journalists, autonomous power is derived from those practices that provide journalists with credibility: objectivity, truth seeking, accountability, avoiding harmful sensationalism, and the like.

There are no rigid procedures about how to apply field theory concepts—or even what its concepts are. Precisely which spheres of activity, institutions, or professions constitute a “field” remains an open question, and a subfield is called simply a “field” (Benson and Neveu 2005). The boundary lines and hierarchies of the various fields are not as important as understanding that, within each field, there is a different cultural consensus, or set of norms and standards of behavior particular to that field of endeavor. Within a field, there are tensions between the competing values or poles of economic and cultural capital; however, actors operating within a field still have a common set of rules, logics, and routines that allow them to move between competing values within their fields: for example, from political-economic logics to the cultural logics specific to their profession.

The social domains or fields can sliced in various directions. Bourdieu, for example, once divided the fields into the dimensions of capital: economic capital, cultural capital, social capital, and symbolic capital (Martin 2003: 23). For his part, Couldry (2003) offers a partial hierarchy of fields, pointing out that some fields are more powerful than others: the “meta-capital” fields, he argues, are
media and state, as those fields exercise power over all other fields of power. Dividing the fields vertically, and using Couldry’s meta-capital criteria, another possible topology of fields might be: state, media, and technology. Technology is arguably a meta-capital field, along with state and media. After all, technological changes in human capacities (which are produced in accord with a field logic that posits virtually no difference between “can do” and “should do”) exert a strong influence on the practices of many other fields of human organization.

Field theory is fluid and can be used in a number of ways to explain social phenomena. It is not a static social structure, nor a grand theory etched in stone. For that reason, it is suitable for improving understanding about current trends in journalistic decision making in the Internet era. Indeed, field theory lends itself well to the analysis of these historical transformations because it “posits an enveloping gravitational field that we can neither see nor measure except via its effects” (Martin 2003: 5). Field theory, with its emphasis on competing values and interests, explains in part how micro-level decisions by journalists are altered by within-field and cross-field influences. Bourdieu’s field theory of journalism practices identifies a number of influences coming from outside the newsroom: these include the within-field influences of stories published by other journalists; as well as market and technology influences (Bourdieu 1996: 68).
According to Benson (1998: 467-68), there is also an important dynamic within journalism of the “old” and the “new,” that is, the established media powers and the new entrants. In the empirical analysis of this essay, a pattern of varying behavior by traditional, established newspapers in comparison with new entrant newspapers or new-technology actors, will be outlined. In addition to new-old dynamics, it is important—in the U.S. case at least—to add the across-field influence on journalism decisions coming from the legal constructs of the First Amendment as presented by federal judges.

These state influences on media decisions in the Internet era are not easy to see, because the First Amendment is commonly understood as an absolute limit on state power. Yet, there are many First Amendment rules issued by the state that influence media decisions, because those rules provide specific criteria for justifying the use of press freedom to the fullest extent. In this essay, field theory will be used as a framework for examining how newsworthiness decisions are made by media outlets. Journalism will be examined as a particular realm of endeavor, struggling between the two poles of power (the political-economic and the cultural), that is influenced not only by technological and market shifts, but also by cross-field influences from the state, and within-journalism dynamics between traditional, established media outlets and the newer entrants.
III.

HISTORICAL PROBLEM-SOLVING

To be sure, the application of field theory to mass-media studies opens up a vast landscape of research questions and potential studies. The goal here is to look on journalism, as a field, in dynamic relation to the field of law, with a summary analysis of technological and market shifts. As will be seen, mezzo-level influences operating between, and within, the fields of state and media are revealed in the micro-level processes of decision making on newsworthiness, as those decisions are managed on a day-to-day basis in editorial newsrooms and other journalism spaces. The sociological approach taken here will improve understanding about how the private person can be forced into the status of a public figure who is discussed in great detail by the general public and media, with little or no limitations on scope of coverage. Broad coverage of private persons as public figures is taking place more and more commonly in the mediated public sphere of the Internet era.

The approach taken in this essay will not only use the aspects of field theory described above, but also a particular type of historical sociology. That method is reiterative problem-solving (Haydu 1998; Sztompka 1986). It is a
method of inquiry in which sociologists analyze events across time not only as path-dependent outcomes, but also as successive attempts to resolve a problem of group life. The particular problem of group life addressed in this essay, using reiterative problem-solving, is the problem of free speech versus privacy.

Free speech versus privacy is an enduring social problem that takes shape in many ways. One example, or instance of the problem, is the case of the private person who is forced to become the topic of public discourse, even though he or she took little or no steps into the public sphere. These cases are but one type of problem that comes under the larger umbrella of the conflict between free speech and privacy. When free speech and privacy interests clash, the public’s interest in free speech and community discourse comes into conflict with the interests of individual and groups in protecting their privacy, reputations, and dignity. Without doubt, there will always be situations in which a topic or story that one person or group wants to discuss, is in conflict with another person or group’s dignity interests. At an even broader level, speech-versus-privacy is but one example of many conflicts between “public” and “private” interests that cannot be resolved—only observed, monitored, and managed by negotiated meaning.

In fact, the tension between state and society, which is often conceptualized as a dichotomy between public and private, is a central field dynamic influencing the U.S. media. Because of the First Amendment, public
discourse is supposed to be free of state influence. But, as will be seen in the case of the private person who is drawn *involuntarily* into the news, the state does influence speech. The legal field uses public-private dichotomies in rulemaking attempts meant to resolve the speech-versus-privacy problem.

This essay will address the speech-versus-privacy problem, as made particular in cases where people are drawn involuntarily into the news. Moving across the fields of state and media, there have been multiple attempts over time at solving the problem. First, the legal solutions to the problem will be examined, in terms of the field logic of law, namely *rulemaking*; then, the media solutions to the problem will be examined in terms of the field logic of media (which, as it turns out reflects the logic of the general public), namely *storytelling*. In between the legal solution devised in 1974, and media solution, still evolving as of 2007, there were vast technological and market changes in society. The central argument of this essay is that those technological and market shifts explain only part of the decline in media standards in the 2000s. The decline is also explained by the inherent flaws of the comprehensive legal solutions and the within-field logics of competition between journalists and self-publishers (who can be seen as the “new journalists”).

This essay draws on a purposive sampling of news reports, blog reports, message board postings, First Amendment cases, and media-on-media analyses,
to trace transformations in the meaning of the *newsworthy public figure*, as a form of reiterative problem-solving taking place over about thirty to forty years. Invoking a historical argument is not a common variant of field theory, which more often looks at the internal workings of field logics (Martin 2003: 12). In this essay, however, contrasts will be drawn between the standards of behavior *within* the fields of law, which operate according to the logic of rulemaking, and the field of journalism (as a field within the cultural production field), which operate according to the logic of storytelling.

The movement across time and fields in this study will not be uniform, although it is roughly chronological. Rather, critical reasoning will be used to analyze a number of historical events where the meanings of key constructs—the *public sphere*, the *public figure*, and *newsworthiness*—are expressed or transformed. First, the field logic of law, *rulemaking*, as of 1974 will be examined. This is when the public figure doctrine was developed as a way of solving the problem of speech-versus-privacy. Then, a glance will be taken at the first “public browser,” which was introduced free of charge by Netscape Communications in 1994—thus enabling the use of the Internet by the general public for the first time. This technological change opened the Internet to use by self-publishers in the one-to-one publication of news and information, which stands in stark contrast to the one-to-many publications by media outlets acting as gatekeepers.
in years past. Briefly also, market changes in the news industry during the 1990s and surrounding decades will be summarized. Then, the field logic of media, storytelling, will be examined in the context of an illuminating case where a private person was drawn involuntarily into the news at a baseball game.

In the design of this study, it is assumed that the fields of media, technology, and law are invasive, meaning that each field purports, or in fact does, reach into many other areas of organized, human striving. For example, the media field, in addition to having an internal logic or its own form of cultural capital, also has meta-capital over the rules of play in the larger society, in a way similar to the overarching power held by the state in governing populations defined by territory or law (Couldry 2003: 672). Technology also reaches into many aspects of social life, including communication realities (Boczkowski 2004; Mejias 2001) and such necessities of everyday life as work, housing, travel, education, and the like (McLuhan [1964] 2002; Cowan 1997; Ellul [1954] 1965).

It also is taken as a premise that the state and media are in a long-range historical dialectic of conflict and resolution as to their relative powers. To understand both the free speech versus privacy problem, and the dialectic of state and media, it is necessary to theorize the public sphere. What is the public sphere and how does it work in relation to state and media powers?
IV.

THE PROBLEM

When examining the meaning of the term *public sphere*, the first step is to understand the meaning of *public*. Even though the terms *public* and *private* are generally understood as opposites, the contour between what is *public* and what is *private* includes overlap and grey areas. Thus, disputes often arise along the edges of the public-private distinction. Of these disputes, one type—the problem at issue here—is the problem of free speech versus privacy.

The interest in freedom of speech, when exercised in the *public sphere*, may infringe on interests in privacy and individual dignity, that is, the right to control one’s reputation, emotions, and related dignity interests. Stated the other way, enforcement by the state of various torts, such as claims for invasion of privacy, intentional infliction of emotional distress, and libel (or defamation), can and do infringe on rights to free expression. How are these competing interests managed by legal actors? It has long been recognized that the conflict between free speech and privacy cannot be entirely resolved, because there will always be cases in which a topic being discussed publicly is a topic that an individual or group considers private, emotionally charged, or injurious to reputation.
Understanding the emergence of the public sphere does much to improve understanding of the problem of free speech versus privacy. The public sphere, as here defined, is a social space for rational-critical discourse on questions of social order, as well as emotional, sensational, and even shock-provoking or action-promoting, discourse on questions of social order or general interest. The public sphere in the U.S. and elsewhere is characterized by free speech. The public sphere has been theorized by many thinkers, but here, emphasis is placed on the historical analysis by Jürgen Habermas in his work, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* ([1962] 1991). There, Habermas outlines changes in social structure in Europe, as it moved from feudalism to capitalism. He argues that, when the bourgeois (those who were not nobility) rose as class separate from the state and the masses, the people in this new category formed a public sphere, or social space, for discourse on social issues. While Habermas emphasized rational-critical discourse by the bourgeois, the public sphere also includes various discourses and other actors.

When the public sphere first emerged, as a social space for discussion not controlled by the state or the media, the meaning of the related term public was transformed. The term had meant the representations of publicness by the state, but now public meant the social space in which people interacted across groups, without regard to state or elite status, in the exercise of their judgment, in critical-
rational discourse, or it meant the social category of the people themselves as a broad, equalitarian class (Habermas [1962] 1991). According to Habermas, this rational-critical discourse about questions of social order transcended the confines of domestic life as previously known in the household economy. Moreover, it made innovative uses of newsletters, salons, and coffee houses as new media for the critique of social order. These practices are contrasted by Habermas, in *The Structural Transformation*, to earlier uses of newsletters and discussion spaces, internally within markets, to communicate about issues of long-distance trade (Habermas [1962] 1991: 5-7, 24-25, and 36). Habermas points out that, with the emergence of the public sphere, the news itself became commodity, to be traded and used to promote cultural change, instead of being used solely as a vehicle for promoting the exchange of other goods.

Although Habermas, in his early work, recognized that there were multiple public spheres, he did not map these various fields of endeavor or communication, but instead held to a dichotomy between public and private (Calhoun 1992: 38). For Habermas, the division of *public* and *private* could be made, but it aligned imperfectly with the division between state and society. He saw the *public sphere* as part of the private realm, because it was not the state, but rather was constituted by private people (Habermas [1962] 1991: 30).
Bourdieu’s work in field theory, as Craig Calhoun points out, is one of the better efforts to map the public sphere or spheres (Calhoun 1992: 48, n. 57). In this essay, field theory will be used as a type of social mapping, in order to understand more precisely how the problem of free speech versus privacy is negotiated within, and between, fields connecting to and across the public spheres. Did the emergence of the public sphere so blur the lines between public and private that it resulted in the emergence (or re-emergence, with new force) of the enduring social problem of free speech and privacy?

During modernity, actors in the legal field and in the media field have attempted various solutions to the problem of free speech versus privacy, in a process of reiterative problem solving over time. How has this social problem been handled in the U.S.? How was it handled during the 1970s by legal actors? Following the technological and market shifts of the 1990s, how was it handled during the 2000s by media actors and members of the general public, some of whom act as “new journalists”? This is the topic at hand.
V.

THE LEGAL SOLUTION

What was supposed to be a comprehensive solution to the problem of free speech versus privacy was formalized by the U.S. courts in 1974, in the case of *Gertz v. Robert Welch*. The *Gertz* case not only presented the *public figure* as legal construct or framework for decision, it also introduced the legal fiction of the involuntary public figure. The public figure doctrine was supposed to divide, strictly and neatly, the public and private spheres, but, in the fiction of the involuntary public figure, it contained the germ for failure, as no comprehensive legal solution could solve the problem. The inherently flawed *public figure* construct breaks down when used out of context by journalists to legitimate their decisions to name private persons and to expand coverage of the personal lives of private people. After comparing the field logics of state and media regarding interpretations of the terms *public figure* and *newsworthiness*, this essay will show that journalists are using an instrumental version of the public figure doctrine to justify invasive storytelling about private persons, thus inverting the original purpose of the construct, which was to divide precisely public from private.
The *Gertz* case presented the public figure doctrine, as an expansion of an earlier test or framework for decision, known as the *public official* standard, that had been stated by the U.S. Supreme Court in *New York Times v. Sullivan* (1964). Although the public figure idea was discussed in earlier legal cases,8 the *public figure*, as a test for legal decision making, arose in the *Sullivan* case, which was actually about *public officials*. In *Sullivan*, the Supreme Court ruled that a *public official* is open to attack, via free speech in the public sphere, because criticizing *the state* is a central purpose of the First Amendment. In other words, speech critical of the state is considered core speech under the First Amendment. Using analogical reasoning, the Court expanded the public official test, in *Gertz*, to express a rule of law not about the *public official*, but about the *public figure*.

Drawing an analogy to the *public official*, the *Gertz* court held that a private person becomes a *public figure* by purposefully stepping into the media spotlight (which is interpreted here to mean the *public sphere*, although the Court did not use that term). Once someone steps into the public sphere, he or she is subject to criticism and other types of public discourse, and so has limited recovery options in lawsuits claiming defamation. This result is equitable because, the *Gertz* Court reasoned, public figures intentionally step into the limelight of public discourse. Moreover, once there, they enjoy greater access to media outlets which enables them to contradict negative publicity.
Over the years, the public figure doctrine has been applied to all of the three primary claims for injury to dignity: not only defamation, but also infliction of emotional distress, and false light invasion of privacy. Under the public figure doctrine, recovery for these dignity torts is not barred: instead, recovery is technically more difficult to obtain because of a high burden of proof. The public figure doctrine is used to enforce the constitutional privilege of free speech, and does so by requiring those plaintiffs who are deemed public figures to show actual malice on the part of the defendant publishers. Actual malice, under Sullivan, is defined as intentional falsehood or reckless disregard for the truth on the part of defendant publishers. The burden of proof is more difficult for plaintiffs who are deemed public figures. They have to show not only the falseness of the defamatory or injurious news report, but also recklessness by the publisher.

To move backward in time for a moment, it is important to realize that the public figure doctrine did more than expand on the idea of the public official from the Sullivan case. Use of the construct of the public figure, as the focal point for First Amendment analysis, under the rule in Gertz, also replaced a different, earlier legal solution of the problem of free speech versus privacy. In the case of Rosenbloom v. Metromedia (1971), decided just a few years before Gertz, the U.S. Supreme Court stated a rule that based the level of First Amendment protection
on whether there was public interest in the subject matter (that is, the topic) of a news publication. The Gertz opinion in 1974, in effect, overturned Rosenbloom.

The Gertz Court rejected the Rosenbloom analysis because a topic or subject-matter test was unsatisfactory for resolving conflicts between speech and privacy, according to legal field logics. If a subject-matter test were used, then any topic of interest to the general public would be protected from privacy and dignity claims, and the tort of invasion of privacy would be eliminated for most practical purposes. By changing to the public figure test, the Gertz court moved the point of analysis from the subject matter of the publication, to the subject of the publication—that is, to the person. Any person who became a public figure was deemed responsible for what happened in the media coverage of his or her tenure in the spotlight, regardless of social factors beyond individual control.

Thus, under Gertz, the status of the plaintiff, as either a private person or a public figure, was to be the turning-point, factual question in First Amendment cases, as the high court turned away from analysis of the subject matter of the publications. As between Rosenbloom and Gertz, the Court experimented with two tests for the First Amendment analysis of privacy cases, moving from analyzing interest in the topic of the publication, to attributing responsibility to the person being covered. As it turns out, however, both analyses end up in the same place, once the concept of newsworthiness is brought into play.
Under the newsworthiness exception, if a publication is the subject of general or public interest, then under the First Amendment, plaintiffs who claim to be injured by a particular news publication—regardless of whether the plaintiffs are public figures or private persons—only rarely succeed on their legal claims, because the courts will not limit media outlets from publishing *newsworthy* items. The newsworthiness exception drives a truck through the rule that people can (or ought to be) protected from invasive or injurious publications.

In a casenote written by Michael Shapiro (1962), years before the Supreme Court took up the *Rosenbloom* and *Gertz* cases, it was recognized that this exception to the rule—if *newsworthiness* is interpreted as a descriptive term, rather than a normative term—nearly eliminates claims of invasion of privacy. According to Shapiro (1962), if the newsworthiness exception is determined by reference to the range of popular interest, then the tort of invasion of privacy is without muscle, because publishers are “not in the habit” of reporting occurrences of little interest; and, indeed, it is usually the most scandalous and widely read of these stories that generates privacy and defamation claims in the first place (Shapiro 1962: 734). But, if *newsworthy* is interpreted as a normative standard—meaning that a value judgment is made, then the courts would violate the First Amendment when they attempt to judge the worth of a publication.
(Shapiro 1962: 734). Under legal field logics, however, a comprehensive rule that assigns responsibility to persons before the court is better than a simple rule that turns on social forces. A separately stated exception accomplishing the same result at least appears to be rulemaking, not just casting fates to the wind.

The issue of interpreting *newsworthiness* as read into the First Amendment and privacy cases, took shape in the cases of *Gilbert v. Medical Economics* (1981) and *Shulman v. Group W. Productions* (1998). In those cases, the courts held that judges will not act as the “superior editors” of media decision makers, nor will they engage in “editorial second-guessing” regarding what is *newsworthy*, so long as the information covered in a publication bears any logical connection to a topic of public interest. Under *Shulman* and *Gilbert*, even if there is only a tangential inference connecting the once-private information to a topic of general, public interest, then a claim for invasion of privacy will not succeed because of the *newsworthiness* exception of the First Amendment.

Under the tangential-nexus test of *newsworthiness*, then, the legal solution offered in *Gertz* devolves into the *Rosenbloom* test. Under *Gertz*, the legal solution turned on a public-private dichotomy: the outcome was supposed to be based on the private person intentionally stepping into the spotlight. Yet, under a newsworthiness analysis for invasion of privacy, the outcome turns on whether
there is any tangential relation between the invasive points in the news story and a topic of general, public interest. This, of course, is the subject-matter test.

The inability to devise a legal test that resolves the problem of free speech versus privacy stems not from poor reasoning by jurists, but rather, from the nature of the problem itself: it is not resolvable. The use of a comprehensive solution, based on strict categories, classifications, or dichotomies, is typical of actors in the legal field. Their autonomous power comes from rulemaking; it is unlikely that the courts would throw in the towel and say a problem is irresolvable, even where there is a constitutional limit on rulemaking, as in free speech cases. The public-private dichotomy was a good candidate for resolving the free speech versus privacy problem, under a rulemaking logic. Assigning blame or responsibility to the person standing in front of the court, instead of to broad, social influences, is also typical of legal actors, as a matter of field logic, because the courts operate by looking at one case at time, and determining who is right and who is wrong, instead of analyzing broad social trends that result in outcomes for individuals that are beyond their control. Assigning blame to one party is an autonomous power of courts; rulemaking is their cultural capital.

From the within-field perspective of legal actors, that is, the rulemaking logic of the federal courts, social problems are to be resolved (even if not resolvable) by the promulgation of legal tests that privilege one competing value
over another and assign blame to individual parties. These legal tests, even where complex or worded in technicality, can be broken down into laundry lists of the relevant facts or situational touchpoints that must be shown or reached as matters of law, for certain results (such as liability/no liability) to be obtained. Legal tests are social constructs of the most real variety because of the state-sanctioned consequences that result from ignoring their realness.

Unfortunately, legal frameworks lag behind cultural and technological change. Moreover, legal tests are sometimes based on legal fictions and false dichotomies, such as a dichotomy between public and private and the legal fiction of the involuntary public figure (who does not step intentionally into the public sphere or have access to media, but is nevertheless treated as any other public figure). Using legal fictions and false dichotomies avoids problem solving on the more difficult questions of fact. These more difficult questions of fact of course arise where there is overlap or grey area in the dichotomy. It is at this point that the legal field logic tends to lead judges (and legislators) toward the creation of legal fictions. Is an involuntary public figure, in fact, a public figure? Or in fact a private figure who is forced into the public sphere by rulemaking, and ultimately, due to public interest and media storytelling? The most difficult case is not resolved by comprehensive legal solution, but rather, is assumed away in the process of rulemaking by fiction, dichotomy, and exception.
Returning to Bourdieu, under a field theory analysis, once these legal tests as constructs move across the public sphere into the media field and/or arena of public discourse, and are taken up by actors from other fields, a new field logic applies. Instead of promoting one value over another, as originally intended by the legal actors, the legal tests, and their factual touchpoints, are subject to inversion. In the case of the involuntary public figure, the legal standard is turned into the means for legitimizing various spectacles, specifically violations of the lesser-privileged values. The division between public and private that the rule was supposed to uphold is virtually eliminated. Instead of separating the private from the public, the public figure doctrine, as used in the non-legal context of popular jurisprudence, turns what was private into something public.

Despite the First Amendment prohibition on laws regulating speech, U.S. law does influence media. Even discounting the body of media law, which includes telecommunications regulations and intellectual property laws, the free speech privilege itself is the subject of rulemaking. The autonomous power of judges, under a Bourdieu field theory perspective, is the power to make rules and resolve problems. Accordingly, there is a body of law interpreting the First Amendment, even though the First Amendment is supposed to prohibit state rulemaking. And, as it turns out, First Amendment rules are reflected in the legitimation practices of media decision makers.
In the legal field, judges and others base their decisions and rules on the existing social structures, seen as somewhat permanent or static. For example, the legal solution of the Gertz case is based on a static view that understands media as a separate power, capable of maintaining a firmly closed gate on news coverage, and capable of managing its own spotlight. Further, the legal solution is based on a strict dichotomy of public and private, and places the responsibility for stepping into the public sphere on the individual as sole actor, without regard to social influence. The case law, following Gertz, divides people into four categories: (1) the private person who enjoys the highest level of protection for dignity and privacy; (2) the involuntary public figure who did not intentionally become part of a news story, but is treated as a public figure; (3) the limited purpose public figure who voluntarily stepped into the news as to some issues, and so retains some privacy; and (4) the general purpose public figure who voluntarily stepped into the news for most or all issues.

Private persons (those in the first category) enjoy the highest level of protection for dignity and privacy, under the cases decided in the legacy of Gertz. Public figures (those in the other three categories), however, face the increased burden of proving actual malice. The problem with this solution is that the involuntary public figure is considered in much the same way as the limited purpose and general purpose public figure, even though the involuntary public
figure is accidentally in the media spotlight. The rulemaking logic does not resolve the social problem, despite the elegance of status categories and definitions.

The *Gertz* opinion appeared to move the law forward by focusing on the *status* of the plaintiff, and his or her *voluntary assumption* of the benefits and detriments of life in the public sphere, and access to media outlets; however, because of the involuntary category in the public figure doctrine, the Court did not eliminate the *Rosenbloom* criteria of public interest in the story. The underlying factual test for determining the outcome of lawsuits for some private individuals is still *newsworthiness*, or tangential-nexus to a topic of public interest. To date, the Supreme Court has never revisited the involuntary public figure category of its First Amendment framework.

Nevertheless, in the thirty-plus years since *Gertz* was decided in 1974, the lower courts have managed to develop a more rule-laden definition of the *involuntary public figure*. An involuntary public figure is someone who becomes a public figure, by sheer bad luck, because he or she somehow steps into the path of a “legitimate” news inquiry.¹¹ At least two courts¹² have criticized this definition for not incorporating the two-part rationale from *Gertz*, which first gave the public figure rule its factual basis. The court in *Wells v. Liddy* when considering the plight of the secretary at the Watergate hotel—essentially a bystander who was swept into invasive news coverage—cautioned that the

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11 At least two courts have criticized this definition for not incorporating the two-part rationale from *Gertz*, which first gave the public figure rule its factual basis. The court in *Wells v. Liddy* when considering the plight of the secretary at the Watergate hotel—essentially a bystander who was swept into invasive news coverage—cautioned that the
standard for the involuntary public figure should include the factual rationales for the rule in *Gertz* (assumption of the benefits and risks of public life and access to media channels to rebut charges), because sheer bad luck is all too common.

As it stands, someone who is drawn involuntarily into news stories of public interest will have a small chance of recovery in lawsuits for defamation, invasion of privacy, or infliction of emotional distress. The *Gertz* Court relied on a static view of the media as gatekeepers; yet, nowadays the legal test for whether someone is an involuntary public figure is an automatic gate that any private person can be forced to pass. Only a *Rosenbloom* level of public interest need be shown for the person to be deemed an involuntary public figure, and held to a high legal burden of proof.

This is true first as a matter of law and logic, and also because of the publishing norms now developing in the Internet era. The legal fiction of the involuntary figure leads to illogical and irrational results. If a private individual is drawn involuntarily into a sensational news story, and information about him or her is deemed *newsworthy* under the tangential-nexus test, then that person is likely to be considered a *public figure*, by the general public, the media, and the law. The person is labeled an involuntary public figure, and bears the same burdens as someone who stepped purposefully into the public sphere and (perhaps) enjoys access to media outlets and the ability to sway public opinion.
Analysis of the Gertz framework reveals that it has probably always included a legal fiction. Gertz places the label of public figure on private people, even though the facts of their situations do not support that categorization and even though the underlying factual rationale for calling someone is a public figure is not present. Once a private person is fictionally labeled a public figure, however, he or she is stuck with limited options for loss of dignity. The test for when and how someone becomes an involuntary public figure is outdated. The factual underpinnings on which it was based have changed, or are changing, as a result of the use of Internet-related technology. While the Gertz Court said that the involuntary public figure would occur rarely, in Internet-era, it appears to be rather easy and common to turn private people into involuntary public figures.

The test for when a private person becomes an involuntary public figure does not correspond to current publishing dynamics. The Gertz Court based its rule on then-existing and static definitions of who is in the media, and what defines the public sphere. These social constructs are now in transition, following the advent of the user-friendly Internet. The idea that there is a group of private actors who stand outside the public sphere and can chose to enter public discourse or not, and another group of actors, the mass-media gatekeepers, who manage the contours of the public sphere, may not hold as true today in the 2000s, as it might have in 1974.
VI.

TECHNOLOGY AND MARKET SHIFTS

After Gertz was decided, and after the Gilbert and Shulman decisions, there came period of time when technology and market shifts dramatically realigned the relative powers of the media and the general public. The advent of the public Internet moved the public sphere from a space operating with low economic and cultural capital, somewhere below the fields of state and media, into a higher position wielding both economic and cultural powers (see Benson 1998: 466).

The legal solution to the problem of free speech versus privacy, as expressed in the pre-Internet cases, did not resolve the normative question of when and how it is appropriate for private people to be forced into becoming public figures subject to wide-ranging and invasive public discourse. Moreover, the public discourse is not always of the rational-critical variety, if it ever was cleanly divided between tradition and serious journalism, on the one hand, and tabloid or sensational journalism, on the other.

A lot of journalism coverage in the Internet age is of the emotional variety: witness all of the celebrity-style coverage of regular people caught by scandal or
tragedy. This trend can be explained in large part by technological and market changes. On the market side, not only did widespread media consolidations force journalist-employees to fight for increasingly scare jobs, many newspapers that were once privately held, became publicly held. Thus, Wall Street standards, including a demand for year-over-year profit increases, started to be used in the journalism field, as it moved closer to the economic pole of Bourdieu’s mapping. The journalism field which may have previously had been more comfortably aligned with the cultural capital, started to have to respond to the demands of the economic powers. These market shifts are well-documented in the press and by numerous scholars.

In the same time frame, that is, from 1974 to the 2000s, there have been many technological changes. Most important of these changes is the dramatic technology change in 1994, that shifted power relations between the media gatekeepers and the general public as co-equals of the public sphere. On October 13, 1994, the first public version of the “Mosaic” Web browser was released by Netscape Communications for free downloading by the general public; and the Internet was born. (Weisman 2000; Bloobery.com n.d.).

Of course, computer networking had been in place since at least as early as the 1940s, and the ability to browse through the “information space” known as the World Wide Web had been possible since at least as early as 1990, when
“father of the Internet” Tim Berners-Lee, designed his editor-browser program and named it “WorldWideWeb.” Yet, a sea change occurred when Netscape offered its user-friendly browser to the general public in October 1994, because then ordinary people suddenly had easy access to the Internet.

The browser, later renamed “Navigator,” was the blueprint for public access to mass communications (Lau n.d.). The average person no longer had to climb a technology obstacle to get online (Weisman 2000). Because of Navigator, Microsoft’s rival browser, Internet Explorer, and the corresponding market eruption of low-cost hosting and Web management services that followed the “browser wars,” anybody with a computer can use the Internet to upload news, photos, commentary, or copies of “hot” documents.

Often, these self-publishing efforts are accomplished with a high degree of anonymity (Gillmor 2004). But, the classic example of a self-publisher operating at “Internet speed,” and arguably below traditional-media standards, is Matthew Drudge. (Gillmor 2004). Mr. Drudge publishes the Drudge Report, a portal Internet site that compiles news links and publishes original stories. The Report is a news-and-gossip site that evolved out of Drudge’s habit of publishing news and comments to Usenet sites in the pre-Navigator days of the early 1990s (Pachter 2003). Drudge is credited with breaking the news that then-president Bill Clinton was having an affair with an intern—and the related news that
Newsweek had killed the story, due to lack of courage or lack of verification, depending on one’s perspective (Drudge 1998).

Because of the user-friendly browser, members of the general public can do more than online shopping and informal research projects: they can become anonymous, widely read self-publishers or “new journalists” in a relatively short time; and, in many instances, their publishing efforts operate at a professional standard lower, and a speed much faster, than that of mainstream, professional journalists. These unprecedented methods of Internet publishing irrevocably changed the definition of media. Is the media now anyone with a computer, uploading stories, regardless of professional training or operating standards?

Along the same vein, the use of the Internet has placed the distinction between the private sphere and the public sphere into transition. No longer are there only the three convenient categories, as relied on by the courts in the 1970s, 80s and 90s: (1) private people who do not step in the public sphere, (2) voluntary and involuntary public figures, and (3) the media, cleanly split into mainstream journalist, who follow ethical standards and act as gatekeepers, and tabloid producers who do not. Those social groups, as understood by legal actors and others in the pre-Internet era, are no longer the only guests at the party.

Instead, several new categories or social groups have popped up, including (1) private people who do not use the Internet or other interactive mass
media; (2) members of the general public who post anonymous, widely read comments on Web bulletin boards and the like; (3) Internet self-publishers, such as bloggers, self-appointed journalists, and parody Web site publishers; (4) professional, online infotainment sites; and (5) mainstream media actors, operating simultaneously online and in other media (print and broadcast).

After the advent of the user-friendly Web, readers have many choices in the array of Internet news and commentary being produced by an eclectic mix of mainstream journalists, the general public, and tabloid producers of all kinds hailing from both camps (media and public). Although there are millions of online readers, when any one of them conducts an Internet search for news and information, the search engines will return search results in which the publications from the major news organizations, from the general public, and from perhaps-unscrupulous publishers are intermingled. The Web pages from these various sources, due to similar production quality, appear of like validity.

And there’s the rub. Sometime after October 1994, “Internet competition” started to alter the way publishing decisions are made. Speed-to-publication, self-publishing, anonymous publishing, and increased competition for audience are key benefits of Web-browser technology. By the same token, these factors, particularly side-by-side search results, altered editorial ethics and the meaning of newsworthiness.
VII.

THE INTERNET SCAPEGOAT

It is time to enter the journalism field, leaving to the side for a moment, the law, technology, and market, in order to examine the solution that actors in the journalism field offered for the problem of free speech versus privacy in the Internet era. This solution is embedded in the various codes of ethics and reporter’s handbooks that are readily available to trained journalists. Many of these codes were written before the advent of the public browser and general-use Internet, even though they have been updated since then.

Of these standards, the “Code of Ethics,” published by the Society of Professional Journalists, and last revised in 1996, is representative. The Society of Professional Journalists lists, as its two primary canons of practice: (1) seeking truth and reporting it; and (2) minimizing harm to those persons who become the topics of stories other than by choice (SPJ 1996). These central principles or operating assumptions about how journalism is practiced are not necessarily used by all journalists, particularly those who are new entrants or minimally trained, and so have less cultural capital under Bourdieu’s analysis; moreover,
these standards are not necessarily used by non-journalists or by self-publisher “new journalists” working on the Web. Yet under Internet publishing conditions, anonymous people can create professional-looking Web sites, and so easily act, or appear to act, as journalists.

Distinctions easily drawn in 1974, regarding who is in the private sphere, and who is in the public sphere, and regarding who is, and is not, acting as a journalist, are now blurred in the Internet era. This blurring of public and private—and of journalist and non-journalist—is due, in part, to the many uses of Internet technology by many types of social actors. It is also attributable to the inherent continuum between public and private, that is often not recognized at law or by social theorists. The use of Internet tech leads to a number of questions about social categories. Are private people who post widely read comments on Internet bulletin boards considered *journalists*, acting as part of the *media*, or are they actors from the private sphere, who happen to be speaking in the electronic public sphere?

Arguably, in the Internet age, members of the general public act both as audience and competitive publishers. Thus, the Internet self-publisher can be understood as the “new journalist,” likely untrained and non-professional. One way to improve understanding of how this “new journalist” operates is to look at some of the many cases of private people being drawn involuntarily into the
news and forced to become public figures. The case of a man who became a public figure while attending a baseball game—called here the case of “the Fan and the Foul”—illuminates the social processes that are now working across fields in the Internet age. He became a public figure culturally, if not legally, through the widespread interest in him and coverage about him, and because of the use of the public figure doctrine by media actors and members of the general public when analyzing his story.14

The date is Tuesday, October 14, 2003. A young man heads out to the ballpark and accidentally gets involved in the workings of a baseball game he came only to watch. After he reaches up to catch a foul ball hit into the stands, his hand tips the ball away from a professional ball player jumping to make an extraordinary catch. This fan did not commit spectator interference, under the rules of Major League Baseball (MLB 2000). Moreover, he was one of many people reflexively reaching up when the ball came flying over head. It just happened that the ball grazed his hand, not someone else’s, on its way down. As a result of this chance occurrence, public interest in him (“the Fan”) is ignited and he is blamed for the Chicago Cubs losing a World Series bid. The Fan is pelted with garbage and threatened with violence, leading to his being escorted from the game by security guards, an exit that is captured on video and uploaded to the Internet.15
In the Internet era, “the medium is the message board,” because, before the game is over, the Fan’s name and other personal information are posted on Web message boards. Due to the Internet factor of an accelerated news cycle, or speed-to-publication, members of the public are uploading comments, while balls are still being thrown at Wrigley Field. Among the first publications are notes from sports fans posted to the MLB’s Fan Forum. According to a MLB executive, Jim Gallagher, within minutes of the foul-ball incident—and before the Fan was escorted out, the Fan’s name, his street address, his e-mail address, the name of his employer, the address of his place of work, and threats of physical violence, were posted on the boards; however, those messages were taken down by MLB as soon as possible.¹⁶

Shortly after the MLB posts, the Fan’s name, picture, and bits and pieces of his life story, were published on an infotainment Web site, The Smoking Gun (TheSmokingGun.com 2003). Over the next days, and following a short apology from the Fan, buried in a short, desperate request to be left alone that was read over the phone to media by a relative of the Fan on the morning after, two Chicago newspapers reversed their earlier decisions to withhold publication of his name. Instead, the papers identify him decide to cover as much of his life story as possible via in-depth personal profile stories.
In accord with Bourdieu’s theory, the newer entrant, that is the less powerful newspaper in town, the *Chicago Sun-Times* (founded 1948) is situated in the media field closer to the economic pole than to the pole of autonomous, journalistic powers or cultural capital. The new entrant is thus motivated by economic factors to publish, wide and deep, about the Fan. In contrast, the more established or “serious” newspaper, the *Chicago Tribune* (founded 1847) is able to rely on autonomy, that is, traditional journalism powers located at the cultural capital pole, and can avoid succumbing to market pressures for broad coverage. Generally following this competitive division of labor, both papers publish stories about the Fan’s personal life that go beyond the initial news event, on the ground that his life story is the story. Over the next few weeks and months, the Fan becomes an “Internet scapegoat,” in an analogy, made from the start of the discourse, to the Curse of the Billy Goat, which is known to plague the Chicago Cubs.17 The reversal of editorial decisions began with naming the Fan, and continued with expanded coverage and a revised opinion on the *newsworthiness* of his entire life story.

Before detailing how decisions on *newsworthiness* were made at the micro-level, it is important to show how this case illuminates a larger trend. There are many signs of an Internet-driven change in standards of *newsworthiness* being expressed across of fields of endeavor, from media to law, and back again. For
example, a decision recently was made by the editors of a second-tier newspaper in Colorado to publish the name of an alleged rape victim in the Kobe Bryant case (supposedly because she stepped in the public sphere when she filed a civil suit), despite death threats against her, following Internet publications of her name, address, and photo of her home, although the more established, older newspaper, in accord with Bourdieu’s field analysis, did not publish her name, citing traditional media standards (Mitchell 2004; Steele 2004; Glaser 2003).

Meanwhile, on the other coast, media critics recently pointed out how journalists are more likely, nowadays, to publish unverified rumors, as the story. Following an Internet rumor—in effect, a smear campaign claiming presidential candidate U.S. Sen. John Kerry had had an affair with an intern—traditional media outlets demonstrated a newfound tendency to publish unsubstantiated rumors, for fear of missing a scoop on the blog of the next Drudge (Eisele 2004; Karr 2004). The Kerry case resulted in widespread publication of an unverified (and false) rumor about a private person, the former intern. This intern, due to no volitional steps on her part, now is the subject of a Wikipedia encyclopedia entry, essentially a permanent place in the electronic public sphere. Those media decisions, made in 2004, can be aptly contrasted with the more traditional approach of Newsweek, just a few years earlier, in the Clinton-intern case. The Bryant accuser and the Kerry intern, who was publicly named and placed in the
public sphere, are a few examples of recent involuntary public figures. In fact, a Florida state court recently decided that the existence of Internet discussion about a woman, who is accused of injuring her husband and is the subject of a criminal investigation, rendered her a limited-purpose public figure (*Thomas v. Patton* 2006). Taken together, these deviations mark an industry-wide decline in journalism norms as to both of the primary values stated in the SPJ code: truth-seeking and respect for people who are drawn involuntarily into the news.

Returning now to the SPJ code, it attempts, with a statement of two core values or principles, to resolve the problem of free speech versus privacy without using a comprehensive solution or a rulemaking logic. Instead of attempting to privilege one value over another, the code simply lists the two values. On analysis of the code, the first value, truth-seeking, corresponds to the free-speech value, and minimizing harm, the second value, captures the ideals of privacy. The problem with this solution, offered by media actors, is that it does not determine what happens in the case of conflict between the two values. There are case studies attached to the code, but they do not reach the point of irresolvable conflict between the two canons.

In the story of the Fan and the Foul, when decisions were made about the level of *newsworthiness* and scope of coverage, the field logic of journalism was, on the first draw, a storytelling logic—not a rulemaking logic. Actors asked
“what is the news?” and answered questions about scope of coverage by defining the story either according to traditional standards or to new-media ethics, depending on their competitive positions in the field. Thus, both cultural capital and economic capital came into play in the storytelling logic of the journalists. Next, the journalists drew, indirectly, on watered-down versions of the legal standard, as a way of legitimizing their ultimate choice, which was to name the Fan, despite the many threats of harm to him, in violation of SPJ’s second canon.

As stated, the mainstream media decision makers in the case of the Fan and the Foul were the Associated Press, and two major newspapers serving the Chicago metropolitan area, the Chicago Sun-Times and the Chicago Tribune. While all three initially withheld publication of the Fan’s name, out of an ethical concern for his well-being, within a half-day or so, they decided to publish his name. The reasons given for their decisions fall into three categories: Internet pressures, interpretations of newsworthiness, and the Fan’s voluntary entrance into public sphere. The third reason draws on legal standards filtered through the media storytelling logic of expressing what’s new. The alleged entrance into the public sphere? The Fan’s decision, after his name and e-mail were released on the Web, threats of violence were made against him, and helicopters were circling his house, to issue a statement apologizing and asking to be left alone.
Here’s what happened: At first, the Associated Press decided to cover the sports story without naming the Fan. According to reports, the AP and other traditional media outlets initially held off on reporting the Fan’s name for his safety (Reichgott 2003). Among the first-filed stories, after the TV broadcast, was the AP wire story—a report that did not include the Fan’s personal name or identifying information (Walker 2003). The Fan did not speak to reporters, and the Cubs did not release his name because, according to Cubs spokesperson Sharon Pannozzo, “he didn’t do anything wrong.” (Lieber 2003).

The two major newspapers in town, the Tribune and the Sun-Times, were busy preparing their stories, which initially did not name the Fan (Walker 2003). The Tuesday and early Wednesday editions of the Chicago Tribune did not identify the Fan by name (Janega 2003; Lieber 2003). According to a Wall Street Journal report, the Tribune did not use his name “out of concern for this well-being,” a feeling expressed in later reports by sports editor Bill Adee, who said the question in the Tribune newsroom was: “Do we really want to point everyone in his direction?” (Lieber 2003).

The Tribune also decided that the Tuesday edition would use an unclear photograph of the Fan (Lieber 2003). The editors at the Tribune were split in their views on the naming question, with Tribune managing editor Jack O’Shea leaning against naming him (Rhodes 2003). O’Shea later said: “I felt like there was the
possibility that by naming him, we would make it easier for someone to harm him. How would we feel if we named and identified him and something happened to him?“ (Rhodes 2003). Yet editors of both papers separately met the next morning, Wednesday, October 15, 2003, to discuss again the question of publishing the Fan’s name and other identifying information (Rhodes 2003; Haysom 2003; Lieber 2003). According to Chicago Magazine reporter Steve Rhodes, many telephone tips were called into the Chicago Tribune and someone at the paper knew someone who worked with the Fan, so the newspaper “knew quite a lot by 10 a.m.” (Rhodes 2003).

As a Wall Street Journal reporter later put it, due “to the rage of the Chicago Cubs fans and the speed of the Internet,” the Fan’s name was soon released (Lieber 2003); and, as a result, eventually, nearly every available detail of his life from years before the infamous game—what he was like when he was in junior high school, for example—became fodder for journalists in all media.

Why? Because sometime Tuesday night or Wednesday morning, a Web publication called The Smoking Gun published a short item about the Fan, including a photo of the Fan knocking the ball away, as well as the Fan’s name, his age, how far his residence was from Wrigley Field, and where he went to college (TheSmokingGun.com 2003). According to a Wall Street Journal interview with Smoking Gun editor William Bastone, the information came from the
sweatshirt the Fan was wearing, which bore the name of a youth baseball team, and was a “clue” to his identity (Lieber 2003). The information also could have come from the MLB message boards, or from phone tips from the public, however, The Smoking Gun has declined to name all of its sources.19

After The Smoking Gun posted its scandal sheet, the newspapers were quick to follow. At some point Wednesday morning, the Sun-Times editors decided to upload a story including the Fan’s name and other personal details to the paper’s Web site (Lieber 2003). When asked about the decision, Sun-Times Editor-in-Chief Michael Cooke downplayed the risk of harm, saying that he did not “buy” the argument that a Cubs fan would kill the Fan (Rhodes 2003). Cooke also said that the Fan’s name “was all over the Internet” (Haysom 2003). He may have been referring to the single page published online by The Smoking Gun, and perhaps to the MLB Fan Forum messages deleted Tuesday night (Strupp 2003).

In an Editor & Publisher article, Cooke used a storytelling logic that begged the underlying question of newsworthiness, saying: “It [was] the biggest news story in town and this is Chicago” (Strupp 2003). His use of a storytelling logic appears to draw on the cultural capital of journalism and move toward the economic capital pole, because the logic turns on the “sell factor” of the story. According to Cooke, the editors discussed the issue and came down on the side of publishing it, even though the decision was not unanimous (Strupp 2003).
Cooke also defended his decision to go to the Web with the Fan’s name by arguing that anyone who wanted to identify the Fan could have found out as quickly just as the Sun-Times who he was, because the Fan’s picture was being replayed over and over on television (Haysom 2003). This comparison to the practices and publications of other media outlets is an example of within-field competition being a critical force influencing media decisions.

Another of Cooke’s arguments took the form of a question—whether “people believe” that history owes the Fan anonymity (Rhodes 2003). This argument, offered by a less powerful actor in the journalism field competing for the attention of the public, was a rejection of the cultural capital powers held by journalists who avoid the scoop and seek instead long-range credibility. As Bourdieu explains, movement between the poles of the cultural capital and economic capital of journalism is in part motivated by competition between the “new” and the “old” journalists, or between stronger, established actors and the avant garde.

The Fan chose to hide from the public and media: he gave no interviews, made no public appearances, and declined all offers to be on TV or the radio, including an offer to attend the Super Bowl (Greenfield 2004). One reporter wrote that the Fan “seemingly did everything in his power to stay out of the spotlight” (Associated Press 2003). After being publicly blamed for ruining a
World Series bid, the Fan issued a 180-word statement, contradicting the charges made against him and asking that “the negative energy that has been vented towards my family, my friends and myself be redirected elsewhere” (Bartman 2003a). The Fan did not present this brief statement himself: instead, as best can be determined, his brother-in-law read it over the phone to an ABC television reporter (ABC News 2003).

According to that report, the Fan’s parents’ house looked “like the scene of a crime” where there was an ongoing standoff “with a fugitive from the law.” (ABC News 2003). The report includes a short audio of the apology being read by the brother-in-law. The statement says the Fan had his eyes “glued” on the ball and was “so caught up in the moment” that he did not see the player trying to make the catch (Bartman 2003a).

The more powerful actor in the field, the Chicago Tribune, had held off from naming the Fan. But after this apology, buried in request to be left alone, was read on the news, the Tribune decided that because of the Fan’s “public” statement, the initial question of whether to name him had become moot (Rhodes 2003). In this way, the Tribune indirectly evoked the legal standard of the public figure doctrine. The Tribune took the position that the Fan had stepped into the spotlight, even though the “step” taken by the Fan, was about as minimal and forced as can be possibly conceived. The Tribune’s construction of newsworthiness
inverted the original logic of the legal rule, which was meant to divide public
from private. On a micro-level, in the decision-making process of the Tribune
editors, it is possible to discern the operation of competing and transformed
logics, moving across fields of power, from the state to the media.

The Tribune updated its Web version of the news story at 9:53 p.m. on
October 15, 2003—to add the Fan’s name and this note: “The Tribune did not
identify the fan earlier today on this web site or in Tuesday’s print edition. The
newspaper is publishing his name now because [the Fan] issued a statement that
explained his actions and apologized” (Janega 2003, as updated). In a more
revealing statement of their reasoning, Tribune editors told a reporter, who was
writing a media-coverage story, that they thought withholding the Fan’s name
from readers was futile because it was “already out there” (Rhodes 2003).

A newspaper, the thinking goes, shouldn’t withhold from its readers what so many others already know. The problem with that argument, as [Chicago Tribune managing editor James] O’Shea recognizes, is that a newspaper that doesn’t follow its own standards will be governed instead by the lowest standards of someone else—anyone else really. Or no standards at all (Rhodes 2003).

About a week into his ordeal, the Fan issued a “final statement,” asking
that the gifts and money offered to him be donated to the Juvenile Diabetes
Research Foundation (Bartman 2003b). He said he looked forward to returning to
his normal life and would decline requests for interviews and appearances. The
final statement was not widely reported, which means that he did not hold the access to media outlets to rebut stories about him, as are enjoyed by public figures, according to the factual rationales for the legal doctrine. The Tribune and others used a filtered version of the public figure doctrine, constructing the existence of intentional steps into the public sphere by the Fan, but did not later accord the Fan with the full benefit of being a public figure. While the Tribune used a filtered-version of the public figure doctrine to support its storytelling logic, arguing that once the Fan came forward, coverage of his life became newsworthy, the Tribune did not provide access to the Fan to rebut the invasive and scathing statements being made about him in the public sphere. The Fan’s second statement was published on two sites: WGN Radio and CBS News.

The Fan and the Foul story illustrates how the storytelling logic of the media bears on cultural capital, as well as economic capital. According to numerous published reports, journalists generally believe that media-related injuries, in the form of invasive publications that turn someone into a public figure, are best remedied by more storytelling. In other words, the injury caused by free speech is remedied by more speech, and more publicity. Many journalists are not able to clearly see the downside of media coverage.

Indeed, a good many journalists promoted storytelling over privacy, as a general operating logic. This aspect of the storytelling logic does not draw on
economic reasoning, but, instead, is an operating assumption born closer to the autonomous pole of cultural capital. It is a practice that make the media more powerful qua media. If the media tell all of the news fit to print, and then some, the media hold the monopoly on a resource of great human interest and value that extends beyond the economic. Some of the most direct evidence that part of the within-field logic of the media actors is to promote storytelling, as a value in and of itself, without regard to economic gain, is the fact that many media actors believed the Fan should embrace his celebrity for his own economic gain.

The best way for the Fan to recover, several media and sports figures said, would be to take part in a sporting event or a media event. The journalists nearly uniformly believed that invasions to privacy are cured by more publicity. One journalist suggested that the Fan throw out the first pitch in Game 1 of the World Series (Brennan 2003). Another suggested the Fan be given season tickets to baseball (Defede 2003). Still another writer suggested the Fan take part in a public parade. (AP 2003). Another writer said the Fan should have a statute erected in his honor (Steinberg 2003). And, one news reporter invited the reclusive Fan to the Super Bowl (Greenfield 2004).

Likewise, Sun-Times editor Cooke said that the Fan probably would seek get “a book deal and a Visa ad” (Rhodes 2003). A Canadian news reporter said he thought the Fan would “live long and prosper” as an urban folk hero
(Haysom 2003). The idea that more and more storytelling, and more and more publicity, is the best solution to invasions of privacy, indicates the extent to which free speech is privileged by the cultural logic of journalists.

Were the journalists right? Would becoming even more of a public figure have helped the Fan? Entering the public sphere intentionally after being drawn involuntarily into a news story did not seem to help crime victim John Bobbitt (who was mutilated by his wife) or falsely accused security guard Richard Jewell of Olympic bombing fame, both private people who were forced into the spotlight in the pre-Internet era, but their stories are outside of the scope of this study.

While the Fan remained in hiding, his reputation and dignity were shattered in public discourse via the Internet, print, and television. Digitally altered photos were uploaded to the Internet blaming the Fan for Hindenburg disaster and for the Kennedy assassination (Waxy.org). Other photos appeared online showing him being assassinated (Honan.net). His business card, including his e-mail address, was offered for sale on eBay (Lieber 2003); as were t-shirts with pictures of him with Osama Bin Laden. Decals showing his name being urinated on also went on sale on eBay (San Diego Tribune-Union 2004).

One parody site posted a story saying that the Fan killed three ball players in a car accident (Krupto 2004), while another posted a story saying the Fan was
murdered twenty-seven times by being shot, stabbed, poisoned, drowned, and suffocated (The Splitter n.d.). There was a movie optioned about what happened at the ballpark that night, and about the Fan’s life, probably without his consent (CNN/Money 2003). His personal name was registered as a domain name (Network Solutions.com). The Web site *Am I Annoying or Not* published an entry page for him, where Web surfers can vote on whether he is, in fact, annoying, and post reasons explaining their votes. More than 1,600 people voted on the Fan at that site (AmIannoyingornot.com n.d.).

More than 47,000 people answered an online survey on *USA Today.com* asking whether the Fan changed the outcome of the Cubs game (see Howell 2003). An imposter working for shock jock Howard Stern posed as the Fan, and fooled on-air ESPN reporters into a live TV interview (Washington Post 2003). The Fan’s name was used generically to represent the idea of a downturn in the stock market (Hanley 2003); and a pseudonymous message writer, known as “Miss November,” suggested, on the Major League Baseball Fan Forum, that the Fan’s personal name might become a household word: a shorthand term for “dumb move.” Before long, a Web publication started to use the Fan’s personal name as its slogan, apparently to indicate the site is ill-fated (Sportsdrivel.com n.d.).

A play was performed at Chicago’s Second City in which a caricatured version of the Fan causes a number of mishaps and gets blamed for several social
problems: for example, the play showed the Fan interfering with a fireman’s attempt to catch a baby thrown out of a window (Zeff 2003). It also showed the Fan stealing the weapons of mass destruction, before the Bush administration could find them. The play also presented a scene in which the Fan comes home from the baseball park and his parents ask him to move out of the house, referring to him in scatological terms (Young 2004).

The Chicago Sun-Times editor argued that the Fan’s entire life became the story once the public started debating whether he was the personification of the Curse of the Billy Goat. That argument is based on the storytelling logic of the journalism field. Under the rulemaking logic of the legal field, however, if the Fan had sued for invasion of privacy, his claim likely would have failed because of the newsworthiness exception (which incorporates into law the storytelling logic of journalists). The Fan also likely would have lost a defamation case, on the ground that most of the publications about him were either true, parodies, or merely opinion—that is, not false or published in reckless disregard of falseness.

In sum, the story of the Fan and the Foul illustrates how legal ideas enter the cultural realm and become bits of folk wisdom or “commonsense,” even if not understood in their legal technicalities. Members of the public when considering the plight of the Fan were not entirely dismissive of his dignity claims. Yet when they loosely applied the public figure doctrine in a form of popular jurisprudence
they stated that they believed that the Fan had no privacy rights, once he became a *public figure*. This was a folk translation of the technicality, because, at law, being a public figure does not bar claims, it makes bringing a successful claim nearly impossible on either invasion of privacy or defamation because of the higher burden of proof, that is, the requirement of showing actual malice.

Several members of the public expressed the idea that once someone is deemed a *public figure*, then publishing that person’s name and looking into his or her personal life is entirely lawful. For example, known as “Fred,” drew an analogy to state laws that shield the names of victims of sex crimes—posting the comment that the Fan’s name should not have been republished just because others published it: “Publicity (which makes a private person a public person) is not an on-off switch, but is a continuum of information” (Dead Parrot Society n.d)

In the months following the controversial naming of the Fan, a number of media outlets and pundits weighed on the question of whether naming the Fan in the newspapers was the right thing to do. What additional reasons did the editors give for the decisions they made? What did the media analysts, both the professional and the untrained members of public, believe about the case?

At least one critic thought that the decision by *Sun-Times* to upload the Fan’s name on its Web site, instead of waiting for the next print edition of the
paper, had more to do with the “blood” of a scoop (i.e., the logic of a media actor who is moving closer to the economic pole) than it did with a judgment about news values, and made reference to two of the Internet pressure factors identified above: speed to publication and competition for audience (Rhodes 2003).

When interviewed a week after the story broke, Sun-Times editor Cooke insisted that his newspaper was “not in the business of suppressing news.” (Kurtz 2003). Cooke also said he told those Sun-Times reporters who thought the paper’s decision to publish stories about the Fan would ruin his life that the Fan “became the center of an incredible news story. He’s now part of the Cubs curse lore” (Kurtz 2003).

Howard Kurtz of The Washington Post, in his 2003 critique of the Sun-Times decision to publish the Fan’s name, said that news organizations traditionally withhold the names of whistleblowers and sex crime victims; and so he questioned why a hapless spectator, against whom physical threats were made, should not get the same media deference. In a similar analysis, cutting-edge media reporter Seth Mnookin, said that by printing the Fan’s name, the Sun-Times “helped further the notion that somehow this one person had ruined the Cubs season” (Mnookin 2003).

On the other side of the fence, Poynter ethics writer, Bob Steele, took the Chicago Tribune position, which selected those parts of the public figure standard
that work to attribute responsibility to the involuntary public figure for invasive publications about him. Steele said that when the Fan stepped forward and made a public statement about the foul-ball incident, the issue of whether to name him became moot—and it became appropriate for journalists to identify the Fan and “reflect on the tenor of his remarks” (Steele 2003). On the point of legitimatizing coverage of the Fan and use of his personal name, because he came forward (or stepped into the public sphere), *Sun-Times* editor Cooke told Kurtz he thought the purported rationale for the Tribune’s decision to name the Fan, only after he “went public,” was posturing (Kurtz 2003). Cooke said: “The Tribune is now dabbing its perfumed hanky at its mouth and saying, ‘We can name him now because he’s put out a public statement’” (Kurtz 2003).

Of course, given the public anger over the lost of a World Series bid, many people in the general public did not object to the release of the Fan’s identity in the newspapers, but instead wanted to know as much as possible about him. That seems clear from the gist of the Internet postings and news coverage. The Fan’s personal identity was the sensational angle of the story of general public interest. Even so, there were members of the public who criticized the decisions of the papers to name the Fan, citing media ethics. One person, posted this comment, which he lifted from Mnookin’s (2003) *Newsweek* article without attribution:
“A journalist’s job is to educate and inform the public. Sometimes, however, there is a compelling reason for leaving some information off—that’s why most mainstream media outlets don’t identify victims of alleged sex crimes. The name of the Cubs fan shouldn’t have been printed in a mainstream newspaper. It puts him at risk, and it furthers the notion that reporters will do anything for the tiniest amount of buzz, regardless of the possible consequences” (Memefacture.com n.d.).

While media decision makers and reporters focused on the ethics of the naming issue, many Internet bloggers and message writers were debating these legal questions: whether the Fan would be considered a private person;26 or become a public figure involuntarily, which would make publishing his name “defensible,” even if in “poor taste.”27 Thus, the cultural understanding of the Fan’s story turned in part on interpreting the social construct of the public figure. Although the public’s understanding was not legally precise, it establishes the cross-field influence of legal standards on media behavior (that is, media behavior, in the form of the “new journalist” or member of general public who is acting as a self-publisher in the mediated public sphere).

The framework of First Amendment analysis under Gertz, was meant to reflect the contours between the private and public spheres, or at least neatly divide them. Under the First Amendment, truthfully identifying by name someone who is involved in the news (i.e., a topic of public interest) is lawful under most any circumstance. Looking into his or her personal life is also a fairly
wide open door under the *newssworthiness* standard that protects free speech and generally bars privacy claims. The legal test for when someone becomes a *public figure*, as it was originally created, relates—more precisely and narrowly than is believed by the public—to the requirement of *actual malice*, which becomes part of a plaintiff’s case, if the plaintiff is deemed a public figure at law.

If someone is deemed a *public figure* by a court, then he or she has a more difficult task in establishing defamation, invasion of privacy, and infliction of emotional distress, because proof of actual malice is required under *Sullivan*. As stated above, in the *Sullivan case*, *actual malice* was defined, not as bad intentions, but as actual knowledge of the falsity of the defamatory statements or reckless disregard for their truth or falsity. This higher burden means a public-figure plaintiff must show *more than mere carelessness* on the defendant’s part.

So, does the public-figure standard make any difference in the Fan’s case? Based on the known facts, the Fan probably would not have a good case for recovery under the dignity torts, for several reasons other than the public-figure test. Thus, whether he would have difficulty showing actual malice or recklessness—because he is supposedly an involuntary public figure—is not the point. As it stands, the public figure doctrine probably would not control whether he could establish a case. Yet the members of the general public who brought up the public figure construct were not focusing on legal nuance in their online
comments. They appeared to believe that the public-figure rule was important to the editorial decisions made by journalists. In sum, the general public expressed the cultural belief that private people, when drawn involuntarily into the news, can become public figures, unable to protect their identity, privacy, and dignity, perhaps forever.

Likewise, mainstream journalism actors, in particular the Chicago Tribune, relied on a argument that the Fan stepped into the public sphere and so was subject to legitimate news coverage, using a media-filtered version of the involuntary public figure standard to justify media-competitive behavior. Because of that general understanding of the public, and the use of watered-down legal standards by powerful media actors to justify a decline in media standards, it is vital that the involuntary public figure concept be critically examined and more generally understood. Whether the Fan is considered an involuntary public figure by the general public, the media, or the law is still pertinent, even if not legally relevant, because, for one thing, publications about him (and others like him) have not yet ceased. Moreover, labeling him a public figure, either legally or culturally, leaves open the possibility of more attacks on his dignity. The Fan’s story, because of the way it played out, uniquely illustrates the field dynamics of state, media, and public, as well as the sociolegal problems with the concept of the involuntary public figure.
VII.

CONCLUSION

The case of the Fan and the Foul illustrates the point that the concept of the involuntary public figure is outdated because the underlying social-analytic framework on which it was based has changed significantly. When the Supreme Court created the public-figure test in the 1974, it based the test on a number of assumptions about social interactions and media coverage—assumptions that were probably true at the time; however, social interaction in the private, public, and media spheres is in an ongoing process of evolution.

Following the Web explosion in October 1994, at least two features of the social condition have changed or are changing: (1) the number and nature of the social actors and groups involved in “media” transactions; and (2) the ethical standards employed by “mainstream media” actors. Thus, the public figure doctrine—at least that piece of it which provides for involuntary public figures—is outdated. The definition of media has changed significantly since the time period in which the test for an involuntary public figure was first devised; and the definition of media is still in transition. In addition, distinctions that might
have been clear in 1974 between what is in the *private sphere* and what is in the *public sphere* are blurring, because of the use of Internet technology by many different types of social actors.

Those two, interrelated and ongoing social changes mean that the socio-analytic perspective that the U.S. Supreme Court had in mind when it looked at interactions between social groups identifiable during in the 1970s may no longer apply. As of 1974, the U.S. Supreme Court recognized five types of social actors: (1) private persons, (2) limited public figures, (3) general public figures, (4) public officials, and (5) the media (split cleanly into mainstream and tabloid actors). Those ideal-type definitions no longer appear to hold true.

Another key finding here, regarding the *between-field* logics of the state and the media, is that there is a fundamental disconnect between the social norms regarding *newsworthiness* in Internet-era publishing decisions, and the social construct of media gatekeeping of the public sphere used as the touchstone for legal analysis in First Amendment cases decided in the pre-Internet era.

This disconnect between the sociolegal framework and the social realities of Internet publishing needs to be brought into some type of resolution. At the same time, it is not possible to design a framework for legal analysis that protects both free speech *and* personal dignity. Under the First Amendment to the U.S. Constitution, it was determined long ago decided to value free speech over
dignity in nearly every instance, because expression free of government control is one of the tenets of a democratic society. For that reason, the legal field is not a likely protector of a dignity right that infringes on free speech.

Can the right to be “left alone” hold any quiet ground? The case of the Fan and the Foul shows that newspapers now must compete, side-by-side, with similar-looking publishing vehicles created by anonymous amateurs and infotainment publishers. To justify the decline in media standards, some newspaper editors and media critics are pointing to First Amendment concepts, like the *newsworthiness* test, and elements of the public figure doctrine, as an evolving social construct, even though those tests set a *minimum* standard of what can be published, not a higher standard of what is worthy of publication.

Renewed sociological thinking on the public sphere in the Internet era could help legal scholars rethink their static and outdated conceptions of the public; and conversely, revised, and sociologically informed, legal ideas about the newsworthy, public figure could help individuals, citizens, and other media decision makers do a better job of managing the mediated, public sphere.

This enhanced social process might arise from a more-nuanced understanding of the sociolegal dynamics. Interactions between legal and mass media institutions have resulted in the present pattern of turning private people involuntarily into public figures for public consumption while at the same time
legitimating the commodification of the individual through the filtered use of legal frameworks and standards that were designed in another era.

Legal institutions rely on static concepts of media dynamics to avoid abridging free speech, in order to present comprehensive legal solutions to problems that are irresolvable, and to render decisions based on existing social structures and norms, because transformations of those structures and norms cannot be anticipated. Publishers in the public sphere, both traditional journalists, and the “new journalists” of the general public, are able to choose between informative, democratic discourse that address important, public issues—or market exploitations that invade privacy. In a free society, it is the responsibility of the society, not legal institutions or the state, to develop a theory of the public and to manage competing values of free speech and privacy.

It is not argued in this essay that if legal scholars developed a better theory of the public (using sociology), then media decisions-makers and members of the general public who use the media (including the “new journalist” as consumer and citizen) could use the new legal ideas to reestablish a better boundary between private and public. Instead, it is argued that it is the social collective that must establish norms and ethics promoting worthwhile public discourse, while at the same time recognizing freedom of expression in all instances, and the potential value of widespread freedom in storytelling for the resolution of conflict. It is an
obligation of *society* to understand the scope and purposes of public discourse, while still protecting the right to investigate topics of public interest, including public figures and those people who are drawn involuntarily into the news.

Although it is right and proper that journalists and others are free to communicate truth, parody, and opinion, reaching down to the legal minimum, doing so marks not only a decline in media ethics, but also a loss of mainstream-media power. This loss of media power is not recognized when the decline in media ethics is explained only by Internet competition (technology and market shifts), while ignoring the influence of legal constructs on the media decisions.

Is it *legitimate* to examine private lives in mass-media publications, when the person was not already a public figure in the first place and the person’s privacy, dignity, reputation, or physical body is at risk? What if there have been threats of violence? It is certainly *lawful* to examine private lives under the First Amendment, but making a private person into a public figure for all topics—in a process of commodifying the private person as an object, despite possible harm, and sometimes without verification or objectivity—does not comport with journalism tradition or preserve the cultural capital of journalists.

Commodifying the private person is predictable, given the legal, technological, and market forces, but it is not in the best interests of journalism as a power field. Autonomous power in journalism comes from emphasizing what
makes journalism different from other fields: it may be in the best interests of journalists and private people if the normative (not descriptive) determination of newsworthiness is emphasized, in accord with standards of professional reporting.

Naming and expanding the scope of coverage of involuntary public figures to the point of commodification of personal lives achieves the opposite of the intended result of the public figure doctrine, which was meant to divide the public and private spheres. Yet, the dichotomy is itself a legal fiction based on a static view of media structures. The doctrine was created in accord with the state’s core logic, rulemaking, which produces comprehensive solutions to enduring problems through the use of categories and classifications that do not cleanly translate to real-world situations. Moreover, naming and expanding coverage of the involuntary public figure moves journalism toward the economic power, where it has less inherent power.

The current pattern of placing the public figure in the public sphere is accomplished without regard to the intentions or actions of the person placed there, or, in some instances, without regard for truth and objectivity. Moreover, the Internet is not entirely to blame, even though it accounts for the increasing strength of the general public to act as self-publishers or new journalists.

The absolute freedom of speech, the tendency of lawmakers to propose comprehensive solutions based on legal fictions and false dichotomies, and the
tendency of journalists to scan other media sources so that they may publish competitively within their own field of endeavor, and the psychological tendency to blame the person for his or her social downfalls, all exert strong influences on recent trends. Although the instrumental use of the First Amendment construct of the public figure supports an economic logic, that is, the commodification events and persons as “what’s new” for audience consumption and circulation increases, the instrumental use of the First Amendment construct of the public figure contradicts with the autonomous power and traditions of journalism, which center on objectivity, fairness, credibility, independence, respect for sources and subjects, and accountability (SPJ 1996).

The decline in media ethics is usually seen as caused by technological and market forces, but many private people became involuntary public figures before the Internet era. In two words—Internet competition — downward changes in the practice of journalism are explained. While the explanation has merit, it lacks historical perspective and avoids critical analysis of journalistic behaviors and outcomes.

Hasn’t the media always covered the sensational? Stevens (1985: 78) establishes that complaints about media sensationalism date back to the times of ancient Rome, and are as universal as the attractive nature of stories about death, accidents, and riots. Likewise, isn’t it true that private people have been forced
into being the topic of public discourse, through the history of group life, even before the 1994 advent of the public Internet?

How is the change in newsworthiness standards best explained? Some critics point to “technology.” They argue, in short, that the Internet has changed everything. That view removes agency from the equation. Others point to “the market.” They argue that the commodification of news, combined with economic pressure from shareholders—who demand staff cuts and profits increases year over year, has lead to an environment that causes editors to use the standards of the legal minimum and disregard the higher standards of ethical codes and elite, institutional practices. Certainly, social forces coming from the fields of tech and market have influenced the criteria for determining newsworthiness, as well as the process of gathering and disseminating news. Yet tech and market do not entirely explain recent trends.

Technology and market effects are necessary, but insufficient explanations for current media directions. To explain journalism practices, this study examined the other forces influencing U.S. media decisions: the limited power of the state to regulate the public sphere, and, correspondingly, the use of First Amendment tests by media and the public, to legitimate the opposite of the intended result: invading privacy. The recent decline in journalism standards reduces privacy. Moreover, it reduces the autonomous power that can be wielded by journalists.
ENDNOTES

1 Newsworthiness is the nature of the game (or operating logic) of the journalism endeavor, wherever practiced. The physical locations of the journalism field include the editorial boardroom, conversations with other journalists, both in and outside of budget conferences (Sumpter 2000), the government, police station or other beats, and, of course, the telecommuter’s bedroom.

2 But see, Benson (1998) which catalogs the field study research that has been conducted connecting journalism to other fields: journalism and philosophy (Pinto 1994); journalism and law (Lenoir 1994); and journalism and medicine (Champagne and Marchetti 1994).

3 To disentangle the variations of field theory, see Martin (2003). He identifies three principal types: (1) a field theory of the social-psychological, such as group dynamics, a la Kurt Lewin, who linked behavior to both personality and environment; (2) a field theory of power relations and domination, which operate in spheres of organized striving, as defined in Pierre Bourdieu’s work, which, in turn, built on the advances of Victor Turner (1974), Max Weber ([1915] 1946), Heinrich Rickert (1913), and others; and (3) a field theory of interorganizational relations, as in the work Paul J. DiMaggio and Walter W. Powell. (Martin 2003: 14, citing Bourdieu [1985] and DiMaggio and Powell [1983]).

4 The reference “thirty years ago” is meant to point to the year 1974 when the public-figure doctrine was first presented by the United States Supreme Court in Gertz v. Robert Welch. The decision made in that case relied, in part, on the idea that journalists are powerful gatekeepers able to manage the media spotlight. Now, in the Internet age, technological abilities of the general public as self-publishers and interactive audience has diminished the journalist’s role as gatekeeper. Mass communication is now arguably more democratic than elite, with an emphasis on speech by all persons as equals, without regard to status on a member of the state or the elite in “representing publicness,” which, in a way, is in accord with Habermas’s vision in the opening chapters of his work, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society ([1962] 1991). For more research on media gatekeeping and the changing role of journalists, from powerful gatekeepers to the managers of interactivity on the World Wide Web, see Kline, Tichenor, and Olien (1972); DiMaggio, Hargittai, Neuman, and Robinson (2001); Boczkowski (2004a, 2004b); Lowrey and Anderson (2005); Croteau (2006); Lowrey (2006); Robinson (2006); and Singer (2006). There is also an article, titled “Net Gain,” about gatekeeping and interactivity at JDLasica.com, http://www.jdlasica.com/articles/netgain.html, which originally appeared in the American Journalism Review (November 1996).

5 Benson (2006) argues that an association can be made between the field-theory research being conducted on journalistic practices, and the research being conducted under the name of “new institutionalism”—a line of inquiry that similarly calls for viewing news outlets as units operating within a larger field, or mezzo-level, professional environment (see also Martin 2003: 2003).
26-28). Benson (2004) further suggests that research into the institutional routines of the journalism field may ground cultural analysis and improve theories of news production.

6 It would be difficult to describe the terrain of all possible such analyses — and, a priori, impossible to start digging everywhere. So, the plan is to map out a few scattered points on the map — to connect a few glens to their peaks, and perhaps to trace the path of a stream or two. Taking this journey will be a partial application of field theory to media, which will fill in some gaps in the knowledge base about media decision-making, in the particular, and clarify some points of field theory and critical media studies, on a more general level.

7 For a breakdown of the various types of “historical sociology,” itself a hybrid field located between two fields within academia, see Haydu (1998), Deflem (2001), and Sztompka (1996). In addition to evoking reiterated problem solving in this study, the historical approach taken here is interpretative or verstehen, and specifically not of the comparative-historical variety—meaning the testing of a theory across different events to see if it still holds water.

8 See, Hazlitt v. Fawcett Publications, 116 F. Supp. 538, 544 (D. Conn. 1953), which is discussed, along with other cases, in note 16 of an student’s anonymous casenote (Shapiro 1962) which was authored by now-professor Michael Shapiro (University of Southern California law school), when he was studying law at the University of Chicago.

9 Shulman v. Group W. Productions, 944 P.2d 469 (Calif. 1998) (plaintiff suing for invasion of privacy after being involuntarily drawn into the news as an accident victim whose rescue was covered by the media). In Shulman, the Supreme Court of California reiterated once again that the right to privacy cannot prevent the dissemination of news. The Shulman court held that the First Amendment protects not only the simple account of public proceedings and abstract commentaries, but also publication of newsworthy, albeit private facts, so long as those facts bear some logical relationship to the newsworthy topic and reasonable members of the public could entertain a legitimate interest in the topic area.

10 Gilbert v. Medical Economics, 665 F.2d 305 (10th Cir. 1981) (summary judgment to defendant publisher on newsworthiness privilege affirmed). In Gilbert, a magazine article had detailed marital and psychiatric problems of anesthesiologist and the inference was drawn that her personal problems of the doctor were related to her alleged malpractice. The court held that there was a sufficient nexus between the private facts and the news story for the newsworthiness privilege to bar an invasion of privacy claim.

11 Dameron v. Washington Magazine, 779 F.2d 736 (D.D.C. 1985), cert. denied, 476 U.S. 1141 (1980) (air traffic controller duty at time of a plane crash became involuntary public figure by “sheer bad luck” for limited purpose of discussing the crash; court declines to consider whether the passage of time would ever change that status); Jones v. Taibbi, 400 Mass. 786, 799 (Mass. 1987) (person wrongly accused of being the Hillside strangler did not become an involuntary public figure, distinguishing Dameron as a case where the plaintiff was in public sector employment); Wagstaff v. The Morning Call, 41 Pa. D & C 4th 431, 443 (Lehigh County 1999) (plaintiff who leased garage to persons who used it as the base of operations for bank robbery became involuntary
public figure because he was “in the path of legitimate inquiry”); Wiegel v. Capital Times, 145 Wis. 2d 71 (Wisc. 1988) (plaintiff, whether voluntarily or not, became limited purpose public figure for purpose of discussing pollution of lake in which he was a central or “vortex” figure); Wells v. Liddy, 186 F.3d 505, 539 (4th Cir. 1999) (secretary at the Democratic National Committee was not an involuntary public figure because she was not a central figure in the Watergate break-in); and Wilson v. Daily Gazette, 588 S.E.2d 197 (W.V. 2003) (high school athlete accused of exposing himself to cheerleaders after basketball game was not an involuntary public figure because nothing suggested that he was took part in a pre-existing controversy).


13 This short list of “new media” actors assumes (erroneously) that the various social groups can be cleanly split apart and divided into neat piles; however, cataloging their multiple crossovers is beyond the scope of this essay.

14 No litigation was ever filed in the case of the Fan and the Foul, and so no legal determination was made as to the Fan’s status.

15 The videotape of the Fan’s exit shows what cannot be describe in words: people rushing through the tunnels of Wrigley Field; a shouting security guard pushing the Fan, then asking him to stand still; an angry man in a shoving match with another security guard; a man pointing a finger at the Fan asking, “Are you the one?”; people taking pictures of the Fan as he is pushed along in front of them; people shouting profanities; and the Fan himself, with his shirt over his head, trying to hide from the cameras and the frightening mob. The video also shows the use of a security-guard decoy, dressed in clothes similar to those of the Fan, being escorted in another direction—to confuse the angry spectators and allow the Fan to escape their fury. See, RealVideo clip, formerly available on Waxy.org, http://www.waxy.org/archive/2003/10/15/cubs_fan.shtml, for which the broken hyperlink remains, titled “Fan escorted by security, harassed by fans.”

16 Interview, Jim Gallagher, Senior Vice President, Corporate Communications, MLB Advanced Media, March 15, 2004, on file with author. See also Lieber (2003); and message board postings, MLB Fan Forum, http://mlb.mlb.com/NASApp/mlb/mlb/fan_forum/index.jsp, at Message No. 29316.5 (“God knows what would happen! Especially now that nobody leaves him alone and everyone knows his name”) and Message No. 29316.6 (“what would happen? Hmm, I dunno. I’ve got a gallon of gasoline and a few spare matches, not to mention [the Fan’s] addy and phone number, but I don’t know what good those things would do”) (free access; registration required).

17 Message board postings, MLB Fan Forum, http://mlb.mlb.com/NASApp/mlb/mlb/fan _forum/index.jsp, at Message No. 29287.9 (“Baseball is such a game of inches. Think of the odds of a ball landing right where that foul fly landed in that situation. Mere coincidence or the ‘goat curse? One has to wonder.’); Message No. 29250.1 (“goat curse seems alive in 8th at Wrigley”); Message No. 2925.10 (“Wrigley management should make every fan spray on ‘Goat Off’ before
they enter”); and Message No. 29316.29 (“he kept the curse alive and curses bring character to an organization”).

18 Eisele (2004) and Karr (2004) ask when covering the existence of a smear campaign is acceptable journalism, which touches on the first principle of journalism: to seek truth and report it (Society of Professional Journalists 1996). When are false allegations in themselves straight news? Karr suggests that the Internet is causing mainstream news organizations to cross traditional, ethical lines to compete with less-scrupulous Internet sources.

19 E-mail and letter inquiries, regarding the source of the fan’s personal information, sent to William Bastone, Editor of The Smoking Gun, and to the legal department at that online publication, went unanswered.

20 The URLs for photographs found on the Internet are listed at the end of the references. (URLs for message board postings, however, are provided in endnotes at each relevant point.)


22 Zeff (2003) (“Poor Steve. If you make a Second City satire, you know your negative immortality is ensured”).

23 Jones (2003) (“bold enough to theorize that … the advent of all our current problems can be traced to one dumb move by one dumb guy”). The Tribune review also claims that it is fun to attack the Fan and that the play makes “the bigger social point” that “his scapegoating” has much to do with the “insecure and dysfunctional” American psyche.

24 Rhodes (2003) (taking the position that the Sun-Times was not compelled to publish the Fan’s name because of the importance of the news, but rather because the Sun-Times was looking to “scoop” its competitors by being the first newspaper to publish on the Web).


26 Waxy.org 2003 (one person entered the question: “Is he considered a limited public figure by appearing in a public place and trying to catch a foul ball?”; and there were also questions posted asking whether the Sun-Times article presented “a privacy issue”).

27 The Dead Parrot Society (n.d).
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