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**VICTORIES FOR PRIVACY AND LOSSES
FOR JOURNALISM?
FIVE PRIVACY CONTROVERSIES FROM
2004 AND THEIR POLICY IMPLICATIONS
FOR THE FUTURE OF REPORTAGE**

*Clay Calvert**

INTRODUCTION

A primary role of the press in a democratic society, protected broadly in the United States under the First Amendment,¹ is to fairly, truthfully, and comprehensively report to citizens on matters of public concern.² The ethics code of the Radio-Television News

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¹ The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of *the press*.” U.S. CONST. amend. I (emphasis added). The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

² The code of ethics of one major journalism organization provides:

Members of the Society of Professional Journalists believe that public enlightenment is the forerunner of justice and the foundation of democracy. The duty of the journalist is to further those ends by seeking truth and providing a fair and comprehensive account of events and issues. Conscientious journalists from all media and specialties strive to serve the public with thoroughness and honesty.

Directors Association, for instance, advances a policy that admonishes broadcast journalists to “pursue truth aggressively and present the news accurately, in context, and as completely as possible.”³ In addition to this pivotal role as truth-teller, the press plays a vital function as a watchdog or unofficial Fourth Estate, checking and exposing government abuses of power.⁴

There are, however, social and legal concerns at loggerheads with policies that permit, privilege, and promote an aggressive press. In particular, privacy, which Professor Anita Allen recently described as “a dominant theme in public policy in the United States,”⁵ often conflicts and competes with the jobs of journalists by denying them access to information or images that the public is interested in receiving.⁶ For instance, the common law tort of intrusion into seclusion restricts journalists’ ability to gather information while safeguarding individual privacy of both space and action.⁷ California’s anti-paparazzi law also protects privacy

Society of Professional Journalists’ Code of Ethics, *available at* http://www.spj.org/ethics_code.asp (last visited Jan. 5, 2005).

³ Radio-Television News Directors Association Code of Ethics and Professional Responsibility, *available at* <http://www.rtnda.org/ethics/coe.shtml> (last visited Jan. 5, 2005).

⁴ As Columbia University Professor Herbert Gans recently wrote, the watchdog role represents “the journalists’ finest opportunity to show that they are working to advance democracy.” HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 79 (2003). Whether the press actually plays this role today, however, is up for debate. *See* Marty Kaplan, *The Armstrong Effect*, *DAILY VARIETY*, Jan. 19, 2005, at 60 (contending that “[b]y and large, neither politicians nor entertainment executives regard the press as a check on the abuse of power, or as the representatives of the public. They regard journalists as nuisances—useful idiots”).

⁵ Anita L. Allen, 2003 *Daniel J. Meador Lecture: Privacy Isn’t Everything: Accountability as a Personal and Social Good*, 54 *ALA. L. REV.* 1375, 1375 (2003).

⁶ *See generally* Sandra F. Chance, *The First Amendment in the New Millennium: How a Shifting Paradigm Threatens the First Amendment and Free Speech*, 23 *U. ARK. LITTLE ROCK L. REV.* 169, 174-75 (2000) (describing a number of legislative initiatives and policies designed to protect privacy that negatively affect journalists’ ability to gather information).

⁷ *See, e.g.,* *Marich v. MGM/UA Telecommunications, Inc.*, 7 *Cal. Rptr. 3d* 60 (*Cal. Ct. App.* 2004) (describing the elements of the tort of intrusion into

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against journalists who might engage in either physical or constructive trespasses to obtain images of, as the statute puts it, “personal or familial activities.”⁸ In brief, as the author of this article and a colleague argued elsewhere in 2004, “the First Amendment is not a license to destroy an individual’s privacy.”⁹

On the other hand, journalists often assert and claim privacy interests of their own when gathering news, such as keeping private and confidential the names of sources who have supplied them with important information. As Eugene Volokh, a professor of law at the University of California, Los Angeles (UCLA), recently wrote, “[T]ips from confidential sources often help journalists (print or electronic) uncover crime and misconduct. If journalists had to reveal such sources, many of these sources would stop talking.”¹⁰

This article examines five separate issues and controversies that arose in 2004, each involving privacy, and analyzes their potential impact on the practice and policies of journalism and the free flow of information to the public in 2005 and beyond. In one instance, as this article argues, the odds of a particular privacy concern immediately impacting journalists are minimal. On the other hand, the implications of the other four privacy controversies addressed here may well have a profound and lasting effect on reporters and the press, and on how they perform the democratic duties mentioned at the start of this article.¹¹

seclusion).

⁸ CAL. CIV. CODE § 1708.8 (2004).

⁹ Robert D. Richards & Clay Calvert, *Suing the Media, Supporting the First Amendment: The Paradox of Neville Johnson and the Battle for Privacy*, 67 ALB. L. REV. 1097, 1109 (2004).

¹⁰ Eugene Volokh, *You Can Blog, But You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39.

¹¹ See *supra* notes 2-3 and accompanying text (describing the truth-seeking and truth-telling obligations of journalists imposed by ethics codes).

Drawing from an eclectic mix of both legislative measures and courtroom decisions, the five privacy issues addressed in this article are:

1. The federal Video Voyeurism Prevention Act of 2004,¹² signed into law on December 23, 2004 by President George W. Bush,¹³ and impacting the use of miniature cameras, camera phones, and video recorders in public places;
2. The U.S. Supreme Court's March 2004 decision in *National Archives and Records Administration v. Favish*,¹⁴ which significantly expands a privacy exemption of the federal Freedom of Information Act (FOIA)¹⁵ in order to protect the privacy interests of relatives of the dead;
3. The Supreme Court of Colorado's July 2004 opinion in *Colorado v. Bryant*¹⁶ protecting the privacy interest of a complaining witness in a sexual assault case over the media's right to disseminate truthful and lawfully obtained information about an event of public significance involving basketball superstar Kobe Bryant, and the efforts of California trial court judge Rodney S. Melville to keep private numerous details of the sexual assault case pending against music superstar Michael Jackson;¹⁷

¹² 18 U.S.C. § 1801 (2005); Pub. L. No. 108-495.

¹³ See generally Bruce Alpert, *La. Victim Hails Voyeur Law*, TIMES-PICAYUNE (New Orleans), Dec. 30, 2004, at 1 (describing the new law and some of the reasons for its enactment).

¹⁴ 541 U.S. 157 (2004).

¹⁵ 5 U.S.C. § 552 (2004).

¹⁶ 94 P.3d 624 (Colo. 2004), *stay denied*, 125 S. Ct. 1 (2004).

¹⁷ See generally Adam Liptak, *Privacy Rights, Fair Trials, Celebrities and the Press*, N.Y. TIMES, July 23, 2004, at A20 (writing that "in the Jackson case, Judge Rodney S. Melville of Santa Barbara County Superior Court has issued a series of orders barring the release of essentially all information concerning evidence and potential witnesses' identities").

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4. A federal district court's August 2004 decision in *Turnbull v. American Broadcasting Companies*¹⁸ refusing to grant summary judgment for the media defendants on multiple causes of action based on the surreptitious recording of conversations by a producer for the television newsmagazine *20/20*; and

5. Multiple battles across the United States in 2004 involving the efforts of journalists, such as Matthew Cooper,¹⁹ Judith Miller,²⁰ and James Taricani,²¹ to keep private the names of confidential sources after those journalists and their news agencies were called upon in court to reveal the sources' identities.

When considered collectively, the five subjects analyzed in this article, which cut across the privacy landscape, reveal a startling and disturbing finding for working journalists—that the privacy interests of *others* either prevailed or were expanded in all of the above situations, with the lone exception being when journalists

¹⁸ 32 Media L. Rep. (BNA) 2442 (C.D. Cal. 2004).

¹⁹ *In re* Special Counsel Investigation, 346 F. Supp. 2d 54 (D.D.C. 2004) (denying the request of *Time* magazine reporter Matthew Cooper to quash subpoenas issued by Special Counsel Patrick Fitzgerald as part of an ongoing investigation into the potentially illegal disclosure of the identity of CIA covert operative Valerie Plame).

²⁰ *In re* Special Counsel Investigation, 338 F. Supp. 2d 16 (D.D.C. 2004) (denying the motion of *New York Times* investigative reporter Judith Miller to quash grand jury subpoenas served upon her as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA covert operative Valerie Plame).

²¹ *In re* Special Proceedings, 373 F.3d 37 (1st Cir. 2004) (affirming and upholding a civil contempt order against Taricani for refusing to give up the name of the individual who leaked to him a surveillance videotape). See Pam Belluck, *Reporter Who Shielded Source Will Serve Sentence at Home*, N.Y. TIMES, Dec. 10, 2004, at A28 (describing how James Taricani, an award-winning reporter for a Rhode Island television station, was sentenced “to six months of home confinement for refusing to reveal who gave him an F.B.I. videotape that was evidence in a investigation of government corruption in Providence”).

themselves asserted privacy interests in the name of gathering and disseminating news. Parsed differently and more bluntly, privacy rights grew *except* when journalists needed them to grow. The year 2004, in brief, was not a good one for journalists when confronting legislative and judicial concerns regarding privacy interests. But because the issues discussed here will not disappear in 2005 and beyond, journalists and news agencies must learn from these negative results and adopt new policies and approaches both to newsgathering and the judicial challenges they encounter.

I. PRIVACY IN PUBLIC PLACES?: THE VIDEO VOYEURISM PREVENTION ACT OF 2004

In 2000, the author of this article first identified a growing problem caused by the development of miniaturized technology that had outpaced the current state of privacy law—the deviant and prurient use of tiny, backpack-hidden cameras in public places to take pictures underneath the skirts or dresses of girls and women, and the posting of those photographs, descriptively known as upskirts, on the World Wide Web.²² The problem from a legal perspective was that most of the upskirting occurred in public places—malls and parks—where, under traditional legal policy, people simply do not possess a reasonable expectation of privacy.²³ As I elaborated in a book at that time:

Backpacks and bags are the precise kind of tool employed by many so-called upskirt voyeurs. They drop a backpack near the feet of a woman standing in line and then hope that the covert camera, buried within but with its lens unobstructed and pointing upward, gets a crisp shot of the woman's underwear or lack thereof.²⁴

Today, five years later, the problem of upskirt voyeurism has

²² Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469 (2000).

²³ *Id.* at 489.

²⁴ CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 126 (2000).

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not gone away but, in fact, has been exacerbated by the rapid growth and development of camera phones.²⁵ As a reporter for one newspaper observed in August 2004, “Some people have used camera phones as technological peepholes to take photographs up women’s skirts and post them on a growing list of upskirt and voyeurism Web sites.”²⁶ This statement foreshadowed a typical instance of alleged upskirt voyeurism with regard to which criminal charges were filed in December 2004 in Washington State.²⁷ In that case, a man allegedly used “a cellular telephone camera to attempt to take pictures up a 16-year-old girl’s skirt while she stood in a grocery checkout line.”²⁸ According to police accounts, the suspect, Patrick Donald Armour,

knelt down behind the girl, ostensibly to reach for a candy bar on a bottom shelf, and held a camera-equipped cellular phone under the girl’s skirt. A woman standing in the checkout line ahead of the girl said she looked back and saw Armour place his camera-phone under the girl’s skirt twice.²⁹

Sadly, the incident is not rare. On the other side of the country, in Florida, a man faced criminal charges in July 2004 for allegedly “using his camera phone to snap a picture underneath a 14-year-old girl’s skirt.”³⁰ That incident took place in a mall—a public place where, traditionally, one has no reasonable expectation of privacy—as did an incident in Texas in 2004, in which police

²⁵ See Pui-Wing Tam, *Entreaty to Camera-Phone Photographers: Please Print*, WALL ST. J., Dec. 28, 2004, at B1 (writing that “[s]ales of camera phones outstripped stand-alone digital cameras for the first time in 2003. This year, research firm IDC expects 186.3 million camera phones to be sold, more than double its projected 68.8 million for digital camera sales”).

²⁶ Meena Thiruvengadam, *Privacy Issues; The Popularity of Camera Phones Raises Concerns About Voyeurism and the Right to Take Photos in Public Places*, SAN ANTONIO EXPRESS-NEWS, Aug. 4, 2004, at 1E.

²⁷ John Craig, *Up-Skirt Voyeurism Alleged; Newport Man Faces Charge in Checkout Line Incident*, SPOKESMAN REV. (Spokane, Wash.), Dec. 19, 2004, at B1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Virginian Charged in Florida with Voyeurism Using Camera Phone*, ASSOC. PRESS STATE & LOCAL WIRE, July 10, 2004.

“arrested a 28-year-old Houston electrician using a digital camera to film images under the skirts of girls as young as 10 at a Woodlands Mall department store.”³¹ Such cases are more difficult and troubling from a legal perspective than those that take place in bathrooms and changing rooms, where victims have a reasonable expectation of privacy, and thus, redress is possible.³²

But shortly before Christmas in 2004, President George W. Bush signed into law Senate Bill 1301, a measure designed to punish and deter such upskirt voyeurism on federal property.³³ The Video Voyeurism Prevention Act of 2004 provides in relevant part:

Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.³⁴

More importantly, the new law radically changes the traditional legal tenet that a person does not possess a reasonable expectation of privacy in a public place. In particular, the Act defines the phrase “under circumstances in which that individual has a reasonable expectation of privacy” to include “circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, *regardless of whether that person is in a public or private place.*”³⁵

³¹ Charlie Bier, *Digital Technology a Boon to Criminals*, HOUS. CHRON., July 15, 2004, at This Week 1.

³² While the focus of this part of the article is on voyeurism in public places, violations of privacy through the use of miniature cameras continued in 2004 in more private places such as bathrooms. *See, e.g.*, Michael A. Scarcella, *Detectives Trying to ID Voyeur Victims*, SARASOTA HERALD-TRIB., Dec. 24, 2004, at B1 (describing a case in Florida in which authorities allege that “[f]rom a bathroom ceiling at a local gymnastics studio, the video camera rolled as the teenage girls undressed”).

³³ S. 1301, 108th Cong. (2004) (enacted).

³⁴ 18 U.S.C. § 1801 (2005).

³⁵ *Id.* (emphasis added).

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It is the italicized portion of the Act cited above that breaks with the traditional policy by granting people privacy, at least when it comes to certain areas on their bodies,³⁶ even if they are in public places. The phrase “public privacy” thus is no longer an oxymoron. In adopting a new policy of what might be considered bodily privacy in public places, Congress has essentially borrowed the reasoning of both the drafters of the *Restatement (Second) of Torts* from a quarter-century ago and the Alabama Supreme Court in *Daily Times Democrat v. Graham*³⁷ four decades past. In particular, a comment by the drafters of the *Restatement* provides that “even in a public place . . . there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there still may be an invasion of privacy when there is intrusion upon these matters.”³⁸ Similarly, in *Daily Times Democrat*, the Alabama high court ruled in favor of a woman, Flora Bell Graham, who was photographed in public outside of an amusement fun house as air jets blew up her skirt, exposing her “from the waist down, with the exception of that portion covered by her ‘panties.’”³⁹ In protecting Graham, the court wrote:

Where the status he [the plaintiff] expects to occupy is changed without his volition to a status that is embarrassing to an ordinary person of reasonable sensitivity, then he should not be deemed to have forfeited his right to be protected from an indecent and vulgar intrusion of his right to privacy merely because misfortune overtakes him in a public place.⁴⁰

The Video Voyeurism Prevention Act of 2004 in essence recognizes the “misfortune” that overtakes the victims of high-tech Peeping Toms in public places and the related embarrassment and

³⁶ The Video Voyeurism Prevention Act defines the protected private areas of the body to include “the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual.” *Id.*

³⁷ 162 So. 2d 474 (Ala. 1964).

³⁸ RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (emphasis added).

³⁹ *Daily Times Democrat*, 162 So. 2d at 476.

⁴⁰ *Id.* at 478.

harm that ensues from such intrusions. But how might the new law impact journalists and their use of hidden cameras in investigative reports when they approach people in public places? The journalistic use of hidden cameras in public places, after all, is not an uncommon target of invasion of privacy lawsuits.⁴¹

On its face, the Video Voyeurism Prevention Act of 2004 should have little or no effect on journalists who use hidden cameras in public places. Why? Because the new law does *not* forbid all uses of hidden cameras in public places, but only their use to film or record “a private area of an individual without their consent.”⁴² Broadcast journalists who use hidden cameras would rarely try to capture images of the private area of a person; rather, they would more likely attempt to capture images of deceit, graft, and other wrongdoings by individuals or corporations in line with the roles described in this article’s introduction.⁴³ As Kevin M. Goldberg, an attorney for the American Society of Newspaper Editors, stated, “Theoretically, you never want to see a criminal penalty imposed upon speech, but practically I believe this will have little effect on the mainstream media.”⁴⁴

The real risk for journalism, however, lies in the danger that the new statute’s recognition of a privacy right in a public place will be expanded by future legislation to apply to scenarios and situations beyond those of upskirt voyeurism. If federal law now officially recognizes a right to *bodily* privacy in crowded public

⁴¹ See, e.g., *Deteresa v. ABC*, 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998) (involving several privacy-based causes of action for, among other things, the use of a hidden video camera by an ABC employee to videotape an individual, Beverly Deteresa, without her knowledge from a public street as she stood on the doorstep of her condominium); *Wilkins v. NBC*, 84 Cal. Rptr. 329 (Cal. Ct. App. 1999) (involving an unsuccessful claim for intrusion into seclusion based upon the hidden camera videotaping by producers for NBC’s investigative newsmagazine, *Dateline*, at an outdoor patio table at a crowded public restaurant in Malibu, California).

⁴² 18 U.S.C. § 1801(a) (2005).

⁴³ See *supra* notes 2-4 (describing the aspirational roles and goals of the press).

⁴⁴ Reporters Committee for Freedom of the Press, *Congress Approves Criminal “Video Voyeurism” Law*, available at <http://www.rcfp.org/news/2004/0923s1301b.html> (last visited Oct. 4, 2004).

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places such as malls, then what is to prevent it in the future from recognizing *conversational* privacy in crowded public places? People have intimate conversations in public places, after all, that they may not believe others can hear.

What is more, groups such as the American Civil Liberties Union (ACLU) already claim that the current use in several major cities of security cameras that capture images of people's faces in outdoor public spaces violates individual privacy rights.⁴⁵ In other words, the Video Voyeurism Prevention Act of 2004 may have opened the floodgates for the expansion of *other* privacy interests in public places. In turn, it may affect the use of surveillance cameras outdoors in public places.⁴⁶ Whether this ultimately occurs, however, remains to be seen. In the meantime, the new law and its expansion of privacy rights to public places should have no impact on the work of professional journalists and their camera people.

⁴⁵ See Mark F. Bonner, *Parish Gets Money for Street Cameras; ACLU's Concerns Fail to Dissuade Sheriff*, TIMES-PICAYUNE (New Orleans), July 24, 2004, at 1 (writing that a plan to install surveillance cameras in an area near New Orleans, Louisiana, has "drawn opposition from the American Civil Liberties Union," and quoting Joe Cook, executive director of the ACLU in Louisiana, for the proposition that the cameras constitute a "reckless gamble of privacy rights that wastes tax dollars"); Doug Donovan, *Camera System Expands in City*, BALT. SUN, Dec. 2, 2004, at 1B (describing the objections of the ACLU to a network of 24-hour surveillance cameras in the Inner Harbor district of Baltimore, Maryland, and stating that the "American Civil Liberties Union opposes the Baltimore network, saying the camera system infringes on privacy rights and are [sic] ineffective in fighting crime or terrorism"); Jessica Garrison, *Cameras to Keep Watch in Hollywood*, L.A. TIMES, Oct. 28, 2004, at A1 (citing the objections of the American Civil Liberties Union to the installation of surveillance cameras on public city streets by the Los Angeles Police Department, and quoting Ramona Ripston, executive director of the American Civil Liberties Union of Southern California, for the proposition that "[t]his is creeping Big Brotherism, and it's really disturbing. More and more, we are losing our right to any kind of privacy").

⁴⁶ Surveillance cameras "have come under fire from the American Civil Liberties Union, which in recent years has campaigned against them in several cities. The organization has cited a range of objections, from skepticism about the cameras' ability to produce results to *possible privacy violations*." Frank Donze, *Crime-Time Program*, TIMES-PICAYUNE (New Orleans), Jan. 14, 2005, at 1 (emphasis added).

II. EXTENDING STATUTORY PRIVACY RIGHTS TO RELATIVES OF THE DEAD: THE LASTING LEGACY OF VINCENT FOSTER

While the Video Voyeurism Prevention Act of 2004 created a new federal statutory privacy right and policy with regard to certain images of people captured in public places, the U.S. Supreme Court's 2004 decision in *National Archives and Records Administration v. Favish*⁴⁷ stretched and expanded an existing federal statutory right of "personal privacy"⁴⁸ to apply to a "decendent's family when the family objects to the release of photographs showing the condition of the body at the scene of death."⁴⁹ In brief, the case transformed a right of personal privacy into a familial or relational privacy right, at least in relation to death-scene photographs. As an editorial in the *Plain Dealer* in Cleveland, Ohio, argued, "The high court effectively ripped out of the Freedom of Information Act a great chunk of the public's right to know what its government is doing in its name."⁵⁰ The implications for journalists of the *Favish* opinion, as this part of the article argues, are both serious and far reaching. To understand those implications, it is first necessary to understand the facts and issues of the case.

The case centered on the efforts of Allan Favish, a California attorney, to obtain government-taken, death-scene photographs of Vincent Foster, Jr., former deputy counsel to President Clinton.⁵¹ Although numerous government investigations concluded that the shooting of Foster was a suicide, Favish doubted their findings, and he thus made a request for the photographs under the federal Freedom of Information Act (FOIA) in order to determine for himself what might have really happened.⁵² Under FOIA, any person may request copies of records from a federal government

⁴⁷ 541 U.S. 157 (2004).

⁴⁸ 5 U.S.C. § 552(b)(7)(C) (2005).

⁴⁹ *Favish*, 541 U.S. at 160.

⁵⁰ *A Feel-Bad Ruling; Supreme Court's Emotions Get in the Way of Its Judgment in Vince Foster Case, and the Public's Rights Suffer*, *PLAIN DEALER* (Cleveland, Ohio), Apr. 3, 2004, at B8.

⁵¹ *Favish*, 541 U.S. at 160-61.

⁵² *Id.* at 161.

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agency and the agency must supply it unless the information falls within one of nine statutorily defined exempt areas.⁵³ In this case, the government agencies that held the Foster photographs at one time or another included: 1) the National Park Service, as U.S. Park Police had taken the photographs of Foster; 2) the Office of Independent Counsel (OIC), which, under both Robert Fiske and Kenneth Starr, had investigated Foster's death and concluded it was a suicide; and 3) the National Archives and Records Administration, which took possession of the photographs at the conclusion of the OIC's investigation.⁵⁴

Foster's immediate relatives, however, objected to Favish's request for the death-scene photographs, asserting, as the Supreme Court noted, "their own refuge from a sensation-seeking culture for their own peace of mind and tranquility."⁵⁵ Specifically, Sheila Foster Anthony, sister of Vincent Foster, wrote in an affidavit that the release of the death-scene images of her late brother "would constitute a painful unwarranted invasion of my privacy, my mother's privacy, my sister's privacy, and the privacy of Lisa Foster Moody (Vince's widow), her three children, and other members of the Foster family."⁵⁶

Foster's relatives asserted that Exemption 7(C) of FOIA prevented the release of the photographs. This exemption prevents and shields the disclosure of records or information compiled for a law enforcement purpose that "could reasonably be expected to constitute an unwarranted invasion of personal privacy."⁵⁷ The battle in the U.S. Supreme Court hinged initially on the meaning of the term "personal privacy," with Favish emphasizing the importance of the word "*personal*" and asserting that the term should be narrowly construed to mean "the right to control information about oneself."⁵⁸ The self in this case was Foster, and, so went the argument of Favish, since Foster was dead, he could

⁵³ MARC A. FRANKLIN ET AL., *MASS MEDIA LAW: CASES AND MATERIALS* 670 (6th ed. 2000).

⁵⁴ *Favish*, 541 U.S. at 160-64.

⁵⁵ *Id.* at 166.

⁵⁶ *Id.* at 167.

⁵⁷ 5 U.S.C. § 552(b)(7)(C) (1995).

⁵⁸ *Favish*, 541 U.S. at 165.

not assert his own privacy interest.⁵⁹ Stated differently, Favish contended that “the individual who is the subject of the information is the only one with a privacy interest.”⁶⁰

Foster’s immediate relatives, however, asked the nation’s high court to adopt a much broader construction of the term “personal privacy” that would include the decedent family’s privacy interests.⁶¹ The Supreme Court sided with the Foster family, adopting an expansive interpretation of personal privacy and noting that “the statutory privacy right protected by Exemption 7(C) goes beyond the common law and the Constitution.”⁶² Citing a very odd mix of authorities in support of its conclusion—the *Encyclopaedia Britannica* and a Greek drama by Sophocles, among others—Justice Anthony Kennedy wrote for a unanimous Court that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”⁶³ Kennedy added that the Court had “little difficulty . . . in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member’s remains for public purposes.”⁶⁴ He noted that the “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased has long been recognized at common law.”⁶⁵

In expanding the term “personal privacy” to sweep in family members of the deceased and in refusing to limit the term to individuals who are the subjects of the information or images in question, the Supreme Court also invoked a parade-of-horrors argument. In particular, it attempted to demonstrate the evils that might result if it ruled against Vincent Foster’s family:

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 166-67.

⁶² *Id.* at 170.

⁶³ *Favish*, 541 U.S. at 168.

⁶⁴ *Id.* at 167.

⁶⁵ *Id.* at 168.

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We are advised by the Government that child molesters, rapists, murderers, and other violent criminals often make FOIA requests for autopsies, photographs, and records of their deceased victims. Our holding ensures that the privacy interests of surviving family members would allow the Government to deny these gruesome requests in appropriate cases. We find it inconceivable that Congress could have intended a definition of “personal privacy” so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members’ personal privacy.⁶⁶

If this is correct, then how could the Court’s finding possibly harm the practice of journalism? Because the holding makes it clear that the familial right of privacy outweighs the public’s unenumerated First Amendment right to know, at least when images of the dead are involved.

The Court’s logic has immediate implications for press coverage of the ongoing war in Iraq, particularly with regard to photographs of caskets of dead soldiers as they are flown home and arrive in the United States. Images of dead American soldiers, gruesome though they may be for some, are important for the public to see because they bring home the reality of war; put more bluntly, media images depicting the loss of life, through their power to galvanize public opinion against a war, may save lives in the future. But the reasoning of the Court in *Favish* would suggest that the privacy rights of families would prevent the public from viewing these images. Thus, if the Court’s privacy calculus is extended beyond the reaches of FOIA Exemption 7(C), the *Favish* opinion does not bode well for journalists who seek access to information and images related to the human costs of war; in fact, it is perilous precedent.

These issues and implications are far more than speculative. As journalist Hal Bernton wrote in December 2004, it was the publication of a photograph of flag-draped coffins carrying dead American soldiers, lined up in the fuselage of an airplane, that “rekindled debate about a Pentagon policy—sometimes waived in

⁶⁶ *Id.* at 170.

years past but enforced by the Bush administration—to ban media coverage of transport of military coffins.”⁶⁷ The logic in *Favish*, however, supports and bolsters the U.S. Department of Defense’s thirteen-year-old policy that “has banned photographs and videos that show the flag-draped coffins of American soldiers”⁶⁸ as they arrive at Dover Air Force Base in Delaware. In June 2004, the U.S. Senate defeated by a 54-to-39 vote a bill that would have permitted news photographers access to Dover Air Force Base.⁶⁹ While the ban ostensibly is designed to protect the privacy interests of the families of the deceased soldiers,⁷⁰ it has been described by at least one critic, *The New York Times*’s Maureen Dowd, as “the Pentagon’s self-serving ban.”⁷¹

The immediate implications of *Favish*, which took place within the context of a FOIA case, may well come to bear on a new FOIA-based lawsuit, filed in late 2004, that “seeks to force the Pentagon to release photographs and videotape of coffins of service members killed overseas and brought back to the United States.”⁷² As Meredith Fuchs, one of the attorneys involved in that suit told a reporter, “These are the kind of documents that directly serve the core purpose of FOIA. . . . Everyone says a picture is worth a thousand words. Well, the pictures have an impact and help people understand what war is really about in a way that nothing else does.”⁷³ The question now is whether the privacy interests of the relatives of the deceased will trump the public’s right to know, as served by journalists. Unfortunately, the

⁶⁷ Hal Bernton, *Reflecting on an Image Taken, a Choice Made, a Life Altered*, SEATTLE TIMES, Dec. 26, 2004, at A1.

⁶⁸ Frank Harris III, *America’s War Dead Should Be Shown*, HARTFORD COURANT, Oct. 11, 2004, at A11.

⁶⁹ Sheryl Gay Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES, June 22, 2004, at A17.

⁷⁰ *See id.* (writing that “President Bush has insisted that the policy banning the photography protects the privacy of the families of the dead”).

⁷¹ Maureen Dowd, *Wolfie’s Fuzzy Math*, N.Y. TIMES, May 2, 2004, at Section 4, 11.

⁷² George Edmonson, *Suit Seeks Military Coffin Photos*, ATLANTA J.-CONST., Oct. 5, 2004, at A7.

⁷³ *Id.*

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reasoning adopted by the Supreme Court in *Favish* militates against the latter interest.

The decision in *Favish* also is troubling to journalists for a second reason—a reason beyond its expansive interpretation of the term “personal privacy.” As the *Christian Science Monitor* noted, “The decision makes it more difficult for media organizations, government watchdog groups, and historians to obtain certain types of documents held in government files.”⁷⁴ Specifically, the decision creates evidentiary barriers and hurdles for reporters requesting information under FOIA whenever Exemption 7(C) is raised to block the release of that information. The Court in *Favish* abrogated what it called “the usual rule that the citizen need not offer a reason for requesting the information”⁷⁵ and instead held that

the person requesting the information [must] establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted.⁷⁶

This two-step test, it should be noted, somewhat mirrors two aspects of the Supreme Court’s four-part commercial speech doctrine, created in *Central Hudson Gas & Electric Co. v. Public Service Commission*.⁷⁷ In particular, that doctrine requires the government to prove that it has a “substantial” interest before it can restrict truthful advertising for lawful products and that this interest is directly advanced by the regulation.⁷⁸ What is different, of course, is that the *Central Hudson* test imposes a burden on the *government* before it can *restrict* speech, while the *Favish* test, conversely, imposes a burden on *private individuals*, such as

⁷⁴ Warren Richey, *In Vincent Foster Case, Court Upholds Privacy*, CHRISTIAN SCI. MONITOR, Mar. 31, 2004, at 3.

⁷⁵ 541 U.S. 157, 172 (2004).

⁷⁶ *Id.*

⁷⁷ 447 U.S. 557, 566 (1980).

⁷⁸ *Id.* at 564.

journalists and members of the public at large, before they can *obtain* speech.

Favish, it should be stressed, sought the death-scene photographs *not* because he harbored some prurient interest or deviant desire in them, but rather because he doubted the credibility and accuracy of multiple government investigations into the death of a person, Vincent Foster, who was very closely connected with the highest ranking government official in the country, then-President of the United States Bill Clinton. The Court held that in such instances in which “the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their duties,” the requester of information first “must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”⁷⁹

The problem with this from a requester’s perspective is that the photographs or information being sought might be either the *only* type of physical evidence that exists or the most important piece available. As Lucy Dalglish, head of the Reporters Committee for Freedom of the Press, remarked, “I don’t know how you can expect requesters to prove a negative before they are entitled to a record under the Freedom of Information Act.”⁸⁰ Favish, the high court ultimately concluded, had not met this burden; in fact, he had “not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.”⁸¹

The Supreme Court’s requirement that courts must engage in “a meaningful evidentiary showing”⁸² when FOIA exemption 7(C) privacy concerns are raised, with the burden being placed squarely on the requester of information, clearly elevates privacy interests above free speech interests, including the public’s right to know. The decision thus represents a judicial blow, struck in the name of relational or familial privacy, against journalists’—and, by

⁷⁹ *Favish*, 541 U.S. at 173.

⁸⁰ Linda Greenhouse, *Justices Unanimously Bar Release of Photos From the Suicide of a Top Clinton Aide*, N.Y. TIMES, Mar. 31, 2004, at A16.

⁸¹ *Favish*, 541 U.S. at 175.

⁸² *Id.*

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extension, the public's—access to government records. Although “*Favish* may be a helpful precedent for persons seeking privacy protection from an intrusive media,”⁸³ it is decidedly damaging to a democratic society when applied to journalistic intrusions related to the reporting of alleged misconduct by public officials. Thus, while it may be possible for some simply to dismiss *Favish* as just another conspiracy theorist, one cannot so easily dismiss the speech-related implications of the case and precedent that now bear his name.

This part of the article has demonstrated how one type of privacy concern trumped access to government-held information in 2004. One question raised by this outcome is whether the case reveals the judiciary's implicit assumptions about what constitutes worthy impositions on, in contrast to unworthy prying into, individual privacy. Two additional cases from 2004, involving high-profile celebrities from the worlds of music and sports, implicate this question, similarly placing the concept of privacy squarely in the balance. The next part of this article examines these two cases—one centering on Michael Jackson, and the other, on Kobe Bryant—in which the privacy interests of two high-profile celebrities outweighed, as they did in *Favish*, the First Amendment interest in the right to receive and publish information about matters of public interest.

III. PRIVACY AND SEXUAL ASSAULT CASES: JOURNALISTIC LOSSES IN THE KOBE BRYANT & MICHAEL JACKSON CASES

When jury selection finally began in February 2005 in the sexual molestation case against Michael Jackson, the news and entertainment media were out in full force, with cameras and boom microphones at the ready, to capture and cover every courtroom entrance and exit by the so-called King of Pop. For journalists, the opportunity to witness the trial's daily happenings, even in such a circus-like atmosphere, was a welcome relief from the excessive secrecy that had cloaked the case in 2004.

⁸³ Ronald J. Riccio, *Subjecting War to the Law*, 177 N.J.L.J. 321 (July 26, 2004).

Laurie Levenson, a professor at Loyola Law School in Los Angeles and frequent media commentator,⁸⁴ summed up the massive sealing of documents in the case against Jackson, remarking, "I've never seen a case with this level of secrecy. You'd think we were dealing with the Pentagon Papers. Everyone is filing papers in code and we're on the eve of trial."⁸⁵ Her sentiment was echoed by Dalglish, who wrote in a *Sacramento Bee*-published commentary that the "Michael Jackson prosecution has been conducted under a cloak of secrecy. Unbelievably, the judge in the Jackson case has refused to even release the indictment against the entertainer."⁸⁶ Beyond that, as another newspaper observed, the "[l]awyers and investigators on all sides of the case are barred from speaking to the media."⁸⁷

In the Michael Jackson case, which centers on ten different felony counts related to the singer's alleged molestation of a 13-year-old leukemia patient in 2003 at his secluded ranch in Southern California,⁸⁸ Judge Rodney Melville justified the need for massive privacy and the denial of the public's right to know by citing the singer's constitutional right to a fair trial.⁸⁹ As Melville remarked in June 2004 in rejecting a motion to lift orders sealing records in the case, "The court is trying to balance the First Amendment right against the right to a fair trial. This defendant is known around the

⁸⁴ Levenson, a former prosecutor, also is the William M. Rains Fellow and Director of Loyola Law School's Center for Ethical Advocacy. Loyola Law School Web site, available at <http://www.lls.edu/academics/faculty/levenson.html> (last visited Jan. 6, 2005).

⁸⁵ Linda Deutsch, *Court Rulings Continue to Shield Evidence in Michael Jackson Case*, ASSOC. PRESS NEWSWIREs, Jan. 4, 2005.

⁸⁶ Lucy Dalglish, *Courts Undermine Freedom of the Press*, SACRAMENTO BEE, Aug. 22, 2004, at E3.

⁸⁷ John M. Broder, *From Grand Jury Leaks Comes a Clash of Rights*, N.Y. TIMES, Jan. 15, 2005, at A8.

⁸⁸ See generally Eric Slater & Steve Chawkins, *Opening Statements in Jackson Trial Today*, L.A. TIMES, Feb. 28, 2005, at B1.

⁸⁹ See generally Martin Kasindorf, *New Set of Charges Awaits Jackson*, USA TODAY, Apr. 30, 2004, at A3 (writing that "Melville, citing the perils to a fair trial that publicity could pose, has sealed document after document in the case").

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world and that makes it very difficult to get a fair trial.”⁹⁰ The right to a fair trial is codified in the Sixth Amendment to the U.S. Constitution, which provides in relevant part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed”⁹¹

The Jackson case was not the only celebrity criminal trial in 2004, however, in which privacy interests trumped the public’s right to know. Even more significantly, in July 2004, the Supreme Court of Colorado upheld a prior restraint on publication against seven media entities that had lawfully obtained accurate information about the sexual conduct and history of the woman who accused Los Angeles Laker Kobe Bryant of sexual assault.⁹² What is critical here is that while the Colorado high court acknowledged that a “[p]rior restraint of publication is an extraordinary remedy attended by a heavy presumption against its constitutional validity,”⁹³ it nonetheless concluded that the privacy interests of the accuser, as protected by a state rape shield statute, were sufficient to overcome this presumption and the First Amendment interests of a free press and the public’s right to know.⁹⁴ The editors of the *Denver Post* opined in an editorial that the Colorado Supreme Court’s decision was “an impermissible encroachment on the First Amendment. It was an effort to balance First Amendment and privacy concerns, a delicate task. But the decision was one of flawed logic that would set a bad precedent.”⁹⁵ In referencing the decision’s impact on the press, University of Colorado Law Professor Paul Campos stated, “We’re not talking

⁹⁰ Michelle Caruso, *Jax Case Secrets to Stay Off-Limits*, DAILY NEWS (N.Y.), June 26, 2004, at 6.

⁹¹ U.S. CONST. amend. VI. The Sixth Amendment is also applicable to the states by incorporation. U.S. CONST. amend. XIV, § 1.

⁹² *People v. Bryant*, 94 P.3d 624 (Colo. 2004), *stay denied*, 125 S. Ct. 1 (2004).

⁹³ *Id.* at 628.

⁹⁴ *Id.* at 628-32.

⁹⁵ Editorial, *State Court Trying to Rewrite Constitution*, DENVER POST, July 21, 2004, at B-06.

about a chilling effect, we're talking about a freezing effect."⁹⁶ While the criminal case against Bryant eventually was dropped,⁹⁷ the prior restraint precedent in Colorado remains on the books. It thus is important to understand what happened in that case and how privacy triumphed over journalists' ability to report truthful news of public interest.

The complex prior restraint issues in the criminal case against Kobe Bryant all began because of simple human errors and the push of a button on a computer. In particular, a court reporter mistakenly emailed to seven news organizations transcripts of an *in camera* pretrial proceeding conducted by the trial court judge to determine the relevancy, if any, of the prior or subsequent sexual conduct of the woman who accused Bryant of rape.⁹⁸ The notation "IN CAMERA PROCEEDINGS" was marked on every page of the transcripts, which were mistakenly sent out over the Internet "because the court reporter maintained an electronic list for media entities subscribing to transcripts of the public proceedings in the case."⁹⁹ The news organizations thus became the fortunate recipients of accurate information that would either confirm or deny rumors about the complaining witness's sexual history that had circulated in the court of public opinion and on the World Wide Web.

When the error was called to the attention of trial court judge Terry Ruckriegle, however, he "ordered the recipients to delete or destroy their copies and prohibited them from reporting the contents."¹⁰⁰ The order was immediately appealed directly to the Colorado Supreme Court by the media outlets on the grounds that it constituted an unconstitutional prior restraint.¹⁰¹ The order at issue before the high court of Colorado provided:

⁹⁶ Jeff Kass, *Case Sparks Debate About Key Principles*, ROCKY MTN. NEWS (Denver), Aug. 26, 2004, at 8K.

⁹⁷ Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N.Y. TIMES, Sept. 2, 2004, at A1.

⁹⁸ *People v. Bryant*, 94 P.3d 624, 626 (Colo. 2004).

⁹⁹ *Id.* at 627.

¹⁰⁰ Charlie Brennan, *Media Appeal Judge's Order*, ROCKY MTN. NEWS (Denver), June 29, 2004, at 17A.

¹⁰¹ *Id.*

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It has come to the Court's attention that the *in camera* portions of the hearings in this matter on the 21st and 22nd were erroneously distributed. These transcripts are not for public dissemination. Anyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of Court.¹⁰²

The Colorado Supreme Court was forced to weigh the privacy interests of Bryant's accuser against the First Amendment interests of a free press. The precedent in support of the news media was clear. The U.S. Supreme Court held a quarter-century ago that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."¹⁰³ It was a rule the Court affirmed and applied as recently as 2001.¹⁰⁴ As applied in the Bryant situation, the news media had lawfully obtained the truthful transcripts about a matter of clear public concern that had attracted massive media attention.

Weighed against this precedent, however, was the interest "in providing a confidential evidentiary proceeding under the rape shield statute, because such hearings protect victims' privacy, encourage victims to report sexual assault, and further the prosecution and deterrence of sexual assault."¹⁰⁵ Under Colorado's rape shield statute, the prior or subsequent sexual conduct of an alleged sexual assault victim is presumed to be irrelevant unless the judge determines that one of several specified exceptions applies.¹⁰⁶ Although the trial court judge in Bryant's case ultimately found that the accuser's sexual conduct during a seventy-two-hour period prior to her medical examination at a hospital after the alleged assault by Bryant was relevant and

¹⁰² *Bryant*, 94 P.3d at 626.

¹⁰³ *Smith v. Daily Mail*, 443 U.S. 97, 103 (1979).

¹⁰⁴ *See Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (noting how the court has "repeatedly held" this rule).

¹⁰⁵ *Bryant*, 94 P.3d at 626.

¹⁰⁶ COLO. REV. STAT. § 13-25-131 (2004).

admissible,¹⁰⁷ the transcript of the *in camera* hearing on the issue remained sealed.

To weigh the competing interests and to determine the constitutionality of the trial judge's prior restraint order, a majority of the Colorado Supreme Court fashioned a three-part test that asked whether:

1. the state of Colorado had an interest of the highest order that would justify a prior restraint;
2. the restraint was the narrowest available remedy to protect the alleged interest of the highest order; and
3. the prior restraint was "necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures."¹⁰⁸

In a 4-3 decision, a majority of the Colorado Supreme Court on July 19, 2004 applied this three-pronged approach and upheld that part of the trial court's order that prevented the media from revealing the contents of the sealed documents, emphasizing that the state's interests of "the highest order in this case not only involve the victim's privacy interest, but also the reporting and prosecution of this and other sexual assault cases."¹⁰⁹ The majority reasoned that "the harms in making these *in camera* judicial proceedings public would be great, certain, and devastating to the victim and to the state. These harms justify the remedy we fashion in this case."¹¹⁰ To assure that the order was as narrow as possible,

¹⁰⁷ See Kirk Johnson, *Judge Limiting Sex-Life Shield at Bryant Trial*, N.Y. TIMES, July 24, 2004, at A1.

[T]he judge ruled that the defense could introduce direct or circumstantial evidence about any sexual conduct on the woman's part in the 72 hours preceding her physical examination by doctors at a hospital in Glenwood Springs, Colo., on July 1, 2003. The incident with Mr. Bryant took place on the evening of June 30, more than 12 hours earlier, at a resort hotel near Vail.

Id.

¹⁰⁸ *Bryant*, 94 P.3d at 628.

¹⁰⁹ *Id.* at 636.

¹¹⁰ *Id.* at 637.

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the majority struck down that portion of Judge Ruckriegl's order requiring the media to delete or destroy the documents it had received, and it noted that "[p]ublication of information the media has obtained or obtains by its own investigative capacities is not limited by the District Court's order or our judgment, even though such information may also be spoken of or referred to in the transcripts."¹¹¹

Three members of Colorado's high court signed off on a vigorous dissent, written by Justice Michael Bender, contending that

two striking facts about this case make it obvious that the prior restraint issued by the district court is an unconstitutional violation of the freedom of the press guaranteed by the First Amendment. First, most of the private details of the alleged victim's sexual conduct around the time of the alleged rape, which is also the subject matter of the confidential hearings in this case, are already available through public court documents and other sources and have been widely reported by the media. Second, the media did nothing wrong in obtaining the transcripts. Under well-established prior restraint doctrine, these two factors alone require this Court to direct the district court to vacate its order immediately.¹¹²

The dissent's passionate argument, however, failed to carry the day in court, and the majority allowed the prior restraint to remain in place. The decision shocked First Amendment scholars such as Erwin Chemerinsky, who remarked, "This is a court order prohibiting publication. Unless the Supreme Court dramatically changes the law of the First Amendment, this decision can't stand."¹¹³

But, unfortunately for free press advocates, it did. Although the media quickly asked the U.S. Supreme Court to step in to prevent the enforcement of the prior restraint, the nation's high court

¹¹¹ *Id.* at 638.

¹¹² *Id.* at 639 (Bender, J., dissenting).

¹¹³ Steve Henson & Henry Weinstein, *Court Bars Disclosure by Media*, L.A. TIMES, July 20, 2004, at D1.

refused to stay the order, in part because of timing issues.¹¹⁴ Justice Stephen Breyer wrote that

the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application [for a stay of the prior restraint]. As a result of that determination, the trial court may decide to release the transcripts at issue here in their entirety, or to release some portions while redacting others. Their release . . . is imminent.¹¹⁵

In essence, the Supreme Court passed on the issue, but strongly suggested that the trial court judge quickly review and release as much of the transcripts, redacted if necessary, as possible. Justice Breyer also wrote that the news organizations could re-file in two days' time for a stay with the U.S. Supreme Court if the trial court judge had not, by that time, made his findings regarding which portions of the transcripts could be released.¹¹⁶ In response to Breyer's rather forceful encouragement, Judge Ruckriegle ordered the prosecution and defense "to work together to produce an edited version of disputed transcripts that can be released to the public."¹¹⁷

The media entities involved ultimately dropped a second appeal to the U.S. Supreme Court in August 2004 after the trial judge unsealed large portions of the transcripts of the closed-door hearings about the sexual history of Bryant's accuser.¹¹⁸ One reason the appeal was dropped, however, was to avoid "the possibility that the U.S. Supreme Court might uphold Colorado's high court, setting a national precedent in favor of do-not-publish orders."¹¹⁹ Thus, while the transcripts were made public in the Bryant case, "the greater battle over prior restraints remains."¹²⁰

¹¹⁴ *Associated Press v. District Court*, 125 S. Ct. 1 (2004).

¹¹⁵ *Id.* at 2.

¹¹⁶ *Id.*

¹¹⁷ Steve Henson, *Judge Seeks Edits of Transcripts*, L.A. TIMES, July 28, 2004, at D3.

¹¹⁸ Karen Abbott, *Media Groups Drop Plans to Appeal Publishing Ban*, ROCKY MTN. NEWS (Denver), Aug. 4, 2004, at 5A.

¹¹⁹ *Id.*

¹²⁰ Steve Lipsher & Felisa Cardona, *Media Drop Bryant Lawsuit*, DENVER

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In summary, in 2004, when it came to sexual assault cases involving high-profile public figures such as Kobe Bryant and Michael Jackson, privacy and secrecy trumped the public's right to know and the First Amendment interest in a free press. This does not bode well for the press in 2005 and beyond. As media reporter Tim Ruten observed in the *Los Angeles Times*, "[T]he precedent established in the Bryant case ominously stands in Colorado."¹²¹

Why are trial court judges such as Terry Ruckriegle and Rodney Melville now coming down squarely on the side of privacy and against the First Amendment interests of the public and journalists? Could there be factors at play here besides legal rules and principles (such as the right to a fair trial and rape shield statutes) that might be influencing their opinions?¹²² One extrajudicial, contextual variable that might be playing an unseen role is a possible growing sentiment that the prying and peering behavior of the news media that has, in part, given rise to our voyeuristic culture has simply gone too far.¹²³ In fact, Michael Jackson's attorneys, in arguing for certain information to be kept sealed, wrote that media coverage of the case was "voyeuristic and entertainment-related"¹²⁴ and that the press was simply seeking

POST, Aug. 4, 2004, at B-02.

¹²¹ Tim Ruten, *Regarding Media; Secrecy Proves Costly*, L.A. TIMES, Sept. 3, 2004, at E1.

¹²² The law often is influenced by variables that may have nothing to do with legal rules. Benjamin N. Cardozo, the late U.S. Supreme Court Justice, wrote more than eighty years ago that the forces that influence judges in their opinions

are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. . . . Deep below consciousness are other forces, the likes and dislikes, the predilections and prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 178 (M.E. Hall ed., 1947).

¹²³ See generally CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 133-37 (2000) (detailing the media's voyeuristic news practices and the public's appetite for such content).

¹²⁴ Liptak, *supra* note 17, at A20.

“material that might sell magazines or provide higher ratings during sweeps week on television.”¹²⁵ What the author of this article has elsewhere identified as the voyeurism value in First Amendment jurisprudence¹²⁶ may finally have met its match in the form of celebrity cases involving sexual assault.

Parsed differently, what occurred in 2004 may well represent the start of an unfortunate wave of judicial backlash in response to prior journalistic indiscretions or out of fear of future foibles. A recent article in the *ABA Journal* on celebrity cases and the sealing of records, including those involving Kobe Bryant and Michael Jackson, noted how some people “say increasing numbers of competing news organizations and the rise of tabloid journalism have overwhelmed courts and forced judges’ hands.”¹²⁷

Or could it be that the judges’ decisions against the news media reflect a much broader and pervasive lack of public trust in the news media?¹²⁸ Put differently, if the public does not trust the news media, then why should Judge Melville—a member of that same public—trust news organizations with the sensitive sexual information at issue in the Michael Jackson case? After all, a survey conducted in 2004 on behalf of the Project for Excellence in Journalism found that the “public believes that news organizations are operating largely to make money, and that the journalists who work for these organizations are primarily motivated by professional ambition and self-interest.”¹²⁹ It would be distressing for journalists, of course, to believe that they in part brought this situation on themselves, but that may be the case.

Ultimately, regardless of the actual reasons, the Michael Jackson and Kobe Bryant cases in 2004 represent triumphs of privacy over a free press and the public’s right to know. The next

¹²⁵ Steve Chawkins, *Jackson Lawyers Scold Media for Seeking Records*, L.A. TIMES, July 20, 2004, at B6.

¹²⁶ Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999).

¹²⁷ John Gibeaut, *Celebrity Justice*, ABA J., Jan. 2005, at 42, 47.

¹²⁸ Cf. Mark Jurkowitz, *Public’s Cynicism About Media Has Become A Pressing Concern*, BOSTON GLOBE, Apr. 14, 2004, at C1 (writing that “public distrust of the news media appears to be at a dangerously high level”).

¹²⁹ *Id.*

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part of this article illustrates, using the opinion of another court in 2004 in a decidedly *non-celebrity* setting, some of the specific, privacy-intrusive journalistic practices that may result in legal liability. Despite the different setting and players in this next case, privacy again prevailed in court. In contrast to the Jackson and Bryant cases, in which cameras were a pervasive presence *outside* of the *public* courthouses, the case discussed in the next part of the article poses ramifications for the covert use of cameras and microphones by journalists *inside* of *private* places.

IV. UNDERCOVER JOURNALISM AND PRIVACY: SOME LESSONS FROM *20/20* IN 2004

Los Angeles-based attorney Neville Johnson has made a name for himself as a litigator by suing news media organizations on behalf of people who claim that their privacy interests were invaded by duplicitous and invasive newsgathering techniques.¹³⁰ He successfully posited such an argument before the Supreme Court of California in *Sanders v. American Broadcasting Companies, Inc.*¹³¹ In that case, which examined the use of hidden cameras and microphones, Johnson coaxed from the court a decision holding that a plaintiff need not prove a complete expectation of privacy to recover under the tort of intrusion into seclusion.¹³²

In 2004, Johnson was at it once again, this time in federal court, in a case called *Turnbull v. American Broadcasting Companies, Inc.*¹³³ The case pivoted on the surreptitious recording of both images and voices by an undercover ABC producer for a *20/20* newsmagazine segment called “Pay to Play” that aired in November 2002. The lawsuit focused “on the alleged intrusion of

¹³⁰ See generally Richards & Calvert, *supra* note 9 (profiling Johnson and providing the transcript of an in-depth, first-person interview with him).

¹³¹ 20 Cal. 4th 907 (1999).

¹³² *Id.* at 916 (holding that “[t]here are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law”).

¹³³ 32 Media L. Rep. (BNA) 2442 (C.D. Cal. 2004).

privacy rather than the broadcast of the program,¹³⁴ as the plaintiffs did not assert a cause of action for defamation.¹³⁵

In August 2004, U.S. District Court Judge S. James Otero issued an order rejecting ABC's motion for summary judgment on a number of privacy-based causes of action filed by Johnson and his partner, Brian Rishwain, thus allowing much of the case to proceed to a jury trial.¹³⁶ Although the plaintiffs ultimately lost at trial on October 28, 2004,¹³⁷ there are several significant aspects of Judge Otero's summary judgment ruling that bode well for privacy advocates and that may impact and limit future hidden-camera and hidden-microphone investigations by journalists. In particular, Judge Otero's decision permitting causes of action based on eavesdropping,¹³⁸ intrusion into seclusion,¹³⁹ trespass,¹⁴⁰ and

¹³⁴ *Id.* at 2446.

¹³⁵ See CAL. CIV. CODE § 44 (Deering 2004) (defining defamation in California to include both libel and slander).

¹³⁶ *Turnbull*, 32 Media L. Rep. 2442 (C.D. Cal. 2004).

¹³⁷ See E-mail from Jim Ryan, associate attorney for Johnson & Rishwain, LLP, to Clay Calvert, Associate Professor of Communications and Law at The Pennsylvania State University (Jan. 18, 2005, 14:39:59 PST) (on file with author) (setting forth the date of the jury verdict, and noting that a motion for a new trial had been filed and was, at that time, under consideration).

¹³⁸ CAL. PENAL CODE § 632 (Deering 2004). This section, which applies to the secretive recording of confidential communications, provides in relevant part:

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars (\$ 2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

Id.

¹³⁹ See generally Reporters Committee for Freedom of the Press, *Invasion of Privacy: Intrusion*, First Amendment Handbook, available at <http://www.rcfp.org/handbook/c02p02.html> (last visited Jan. 18, 2005) (describing the intrusion tort).

¹⁴⁰ See *Miller v. NBC*, 187 Cal. App. 3d 1463, 1480 (Cal. Ct. App. 2004)

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physical and constructive invasion of privacy under California's anti-paparazzi statute¹⁴¹ is significant because it:

- identifies a number of specific, objective indicators or signals that a reasonable expectation of privacy exists in certain scenarios when hidden recording devices are used;
- reflects an expansive interpretation of both the California Supreme Court's decision in *Sanders* regarding privacy expectations¹⁴² and the state's anti-paparazzi law; and

(defining the tort of trespass under California law).

¹⁴¹ CAL. CIV. CODE § 1708.8 (Deering 2004). The law was enacted after the death of Princess Diana and amid a public furor about the actions of so-called paparazzi. See generally Clay Calvert & Robert D. Richards, *The Irony of News Coverage: How the Media Harm Their Own First Amendment Rights*, 24 HASTINGS COMM. & ENT. L.J. 215 (2002) (discussing the evolution of anti-paparazzi legislation). California's anti-paparazzi statute has two key components—one for physical invasions of privacy, the other for constructive invasions of privacy, with the former providing:

A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or otherwise committed a trespass, in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.

CAL. CIV. CODE § 1708.8 (a) (Deering 2004).

In addition to targeting physical invasions of privacy on personal or familial activities, the statute also restricts constructive invasions of privacy by providing:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

CAL. CIV. CODE § 1708.8 (b) (Deering 2004).

¹⁴² See *supra* notes 131-32 and accompanying text.

- contains dicta suggesting that First Amendment protection for the use of hidden cameras is limited, especially when journalist-defendants freely admit during discovery that such surveillance techniques were not necessary to report the story in question.

To better understand the potential implications of the *Turnbull* decision, however, it is first important to briefly review the underlying facts of the case. The *20/20* segment at issue focused on the activities of certain “casting workshops” in the Los Angeles area.¹⁴³ The gist of the story was that these workshops for aspiring actors had very little educational or learning component to them, but instead, were merely paid opportunities for actors to meet and appear before casting directors. As such, the plaintiffs, most of whom were aspiring actors, contended that the *20/20* segment “made them look like ‘whores,’ or desperate losers on the fringe of the acting community in Los Angeles.”¹⁴⁴ But because the causes of action focused on how the information for the segment was gathered rather than on the segment itself, the gravamen of the complaint was that the “[p]laintiffs object[ed] to the very fact that their presence at the workshop was recorded”¹⁴⁵ and that private and embarrassing conversations were recorded.

To obtain footage and audio at these workshops, ABC producer Yoruba Richen went undercover and attended several workshops, paying an admission fee to enter as if she too were an aspiring actress.¹⁴⁶ It is undisputed that “Richen’s primary purpose in attending the workshops was to do a story on the workshops, not to practice her acting.”¹⁴⁷ It also was undisputed that “Richen did not tell anyone at the workshops that she was wearing a hidden camera or planned to wear a hidden camera.”¹⁴⁸

While at the workshops, Richen recorded performances by the actors doing scenes for the casting directors and, more importantly,

¹⁴³ *Turnbull v. ABC*, 32 Media L. Rep. (BNA) 2442, 2445 (C.D. Cal. 2004).

¹⁴⁴ *Id.* at 2445-46.

¹⁴⁵ *Id.* at 2447.

¹⁴⁶ *Id.* at 2446.

¹⁴⁷ *Turnbull*, 32 Media L. Rep. at 2447.

¹⁴⁸ *Id.*

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secretly recorded “conversations between actors while they were waiting for performances to begin,”¹⁴⁹ including “personal conversations between workshop participants to which Richen was not a party.”¹⁵⁰ In one instance, she recorded a plaintiff-actor “making an offensive and overtly sexual comment to”¹⁵¹ another plaintiff-actor, while in another situation she captured one plaintiff-actor expressing something that she did not want the casting directors to know. Beyond this, Richen “even filmed a journey into the womens’ [sic] lavatory.”¹⁵² The tape also captured conversations “overheard from across the room as two people talk[ed] in a corner, or while their backs [were] turned to Ms. Richen, apparently unaware that an ABC News reporter [was] recording their every word.”¹⁵³

With these undisputed facts in mind, one can better understand the three significant aspects of Judge Otero’s opinion identified earlier in this section of the article. First, in holding that the plaintiffs had reasonable expectations of confidentiality and privacy in their communications at the workshops, the judge articulated a number of objective indicators of privacy that were manifested in the setting, the situation, and the behavior of the plaintiffs. This was all part of what Judge Otero called “a common sense approach”¹⁵⁴ to privacy. These factors, which, if heeded, should help journalists avoid future lawsuits for privacy invasions, include:

- *Plaintiffs’ Body Language*: In particular, in finding a conversational privacy expectation, Judge Otero noted that two of the plaintiffs “had their back[s] turned to”¹⁵⁵ ABC’s producer, Richen, while the plaintiffs were talking among themselves.
- *Plaintiffs’ Distance and Location from Defendant*: Judge

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Turnbull, 32 Media L. Rep. at 2447.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2453 n.8.

¹⁵⁵ *Id.* at 2451.

Otero specifically observed that defendant “Richen was standing across the room”¹⁵⁶ from the plaintiffs at the time she recorded one of their conversations. It also appeared to make a difference to the judge that the plaintiffs, during some conversations, were “in a corner”¹⁵⁷ of a room.

• *Content of the Communications*: Judge Otero’s opinion suggests that if the plaintiffs are engaged in a conversation that includes potentially embarrassing or offensive remarks, it may signal that they did not expect their conversation to be recorded. In particular, he emphasized that, in one instance, a plaintiff made an overtly sexual comment that “probably was not for Ms. Richen’s benefit.”¹⁵⁸

In addition, in another conversation recorded by Richen, a different plaintiff, Sharon Johnston, specifically said, “*But they don’t have to know that.*”¹⁵⁹ For Judge Otero, this statement made it “clear”¹⁶⁰ that the plaintiff “did not want her conversation disseminated outside of the intended audience.”¹⁶¹ As the judge wrote, “By stating ‘they don’t have to know that,’ Johnston was signaling her expectation of privacy.”¹⁶²

• *Number of People in the Setting*: In finding a privacy expectation, Judge Otero observed that the workshops “were small, consisting of 10 to 20 people,” and in many instances when conversations were recorded, “there were only two or three people in a room.”¹⁶³

• *Custom of the Activities in the Setting*: The very nature of the educational workshop at issue in the case also appeared to play an important role in the judge’s privacy calculus. In particular, Judge Otero wrote that “[i]t is not difficult to

¹⁵⁶ *Id.*

¹⁵⁷ Turnbull, 32 Media L. Rep. at 2451.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (emphasis in original).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Turnbull, 32 Media L. Rep. at 2451.

¹⁶³ *Id.*

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imagine a litany of classroom or workshop settings where the students might reasonably expect privacy.”¹⁶⁴ In important dicta, Otero observed:

Customarily, in law school and undergraduate university lectures, students must ask for the instructor’s permission prior to recording university lectures. Closer to the point, if a group of aspiring authors decided to attend a seminar with a writer in residence at a local university in order to obtain feedback and criticism regarding unfinished work, it would probably be reasonable for them to assume their activities, readings, and the instructor’s comments, were not being overheard by a person who was not similarly situated; let alone being recorded by a journalist.¹⁶⁵

What is interesting here is the suggestion that, in certain learning environments in which people voluntarily expose themselves to the risk of criticism from others (instructors or classmates) for the ultimate purpose of improving themselves based on feedback, they do *not* voluntarily expose themselves to a risk of recordation of their activities and conversations.

• *Admission and Entrance to the Setting*: Judge Otero pointed out in his analysis of privacy expectations on the tort of intrusion that “the workshops were closed to the general public. To gain entry, a prospective participant had to audition, pay an entry fee and check-in.”¹⁶⁶ He added that “[t]he workshops took place in a private room of a private building few actors know about.”¹⁶⁷ In the judge’s view, the restrictions on the program’s accessibility seemingly added to the degree of privacy expected by workshop participants.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 2453 n.9.

¹⁶⁷ *Id.*

Viewed collectively, the abovementioned laundry list of privacy factors that can be distilled from Judge Otero's opinion should prove useful for journalists considering whether and when to use hidden cameras and microphones. Indeed, journalists should seriously consider incorporating these variables into their newsgathering policies and practices.

In addition to these privacy variables, Judge Otero's opinion is significant in its expansive reading of the Supreme Court of California's holding in *Sanders v. American Broadcasting Companies, Inc.*¹⁶⁸ In *Sanders*, the California high court held that "[a] person who lacks a reasonable expectation of complete privacy in a conversation because it could be seen and overheard by coworkers (but not the general public) may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation."¹⁶⁹

Judge Otero extended this logic from the workplace setting of *Sanders*, which involved the tele-psychic industry, to the educational and classroom setting of *Turnbull*. This extension allowed Otero to conclude, in part, that the plaintiffs "could not have expected, as they talked amongst themselves in the corners or against the wall of the classroom, in their chairs awaiting class to begin, much less the ladies [sic] room, that a reporter was covertly recording their conversations."¹⁷⁰

Judge Otero adopted a similarly expansive construction of California's anti-paparazzi law and, in particular, its requirement that the alleged privacy invasion must relate to "the plaintiff engaging in a *personal or familial activity*."¹⁷¹ Clearly the factual situation at issue in *Turnbull* did not involve "familial activity"; indeed, the workshops were all about acting and meeting casting directors. Thus, to receive the protection of California's anti-paparazzi law, the plaintiffs' conduct at the casting workshops would have to be characterized as "personal activity." The defendants contended in their summary judgment motion that ABC

¹⁶⁸ 20 Cal. 4th 907 (1999).

¹⁶⁹ *Id.* at 923.

¹⁷⁰ *Turnbull*, 32 Media L. Rep. at 2454.

¹⁷¹ CAL. CIV. CODE § 1708.8(a) (Deering 2004) (emphasis added).

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producer Richen “did not record personal activity.”¹⁷² The judge, however, rejected this contention. In allowing the plaintiffs to proceed to trial on this statutory cause of action, Judge Otero ruled that the defendants “recorded *personal conversations* and other matters without permission.”¹⁷³ This expansive reading of the anti-paparazzi statute stretches the term “*activity*”¹⁷⁴ to include *conversations*. The judge’s view thus rejects the existence of a conduct-versus-speech dichotomy that separates and distinguishes an activity from a conversation. Under this interpretation, personal conversations, not just personal activities, fall within the ambit of California Civil Code Section 1708.8. This interpretation represents an important victory for privacy advocates.

Finally, the third significant aspect of Judge Otero’s summary judgment ruling in *Turnbull* is the following statement made by the judge: “[T]here is no point in according First Amendment protection in the instant case because Defendants freely admit that they would have gone ahead with the same story even if secret camera footage was unavailable.”¹⁷⁵

If this proposition really is true, as Judge Otero believes it is, then *Turnbull*’s implications for hidden-camera journalists and producers are profound: if the same story can be told *regardless* of whether hidden cameras are used, then journalists should not expect the First Amendment to come to their rescue if they are sued for invasions of privacy based on the use of hidden cameras. Likewise, journalists and producers should never admit in depositions or affidavits that they could have told the same story or would have done the same story *without* the hidden surveillance devices. Indeed, Judge Otero cited the deposition testimony of Brian Ross, the chief investigative correspondent at ABC and “one of the individuals who decided to do the story and decided to use hidden cameras for the program,”¹⁷⁶ as proof that “Ross would not have scrapped the story if he could not have used hidden

¹⁷² *Turnbull*, 32 Media L. Rep. at 2456.

¹⁷³ *Id.* (emphasis added).

¹⁷⁴ CAL. CIV. CODE § 1708.8 (Deering 2004) (emphasis added).

¹⁷⁵ *Turnbull*, 32 Media L. Rep. at 2458 (emphasis added).

¹⁷⁶ *Id.* at 2448.

cameras.”¹⁷⁷ To some extent, then, ABC was done in by its own words.

Judge Otero’s statement further suggests that the First Amendment will come to journalists’ defense in such situations if hidden cameras were the *only* way to tell the story. This forces news producers and in-house media counsel to make very tough choices about how to cover stories and whether to risk the use of hidden cameras. *Turnbull* advises that a true journalistic and legal cost-benefit analysis is in order for those in the newsrooms and executive suites of the broadcast networks.

In summary, Judge Otero’s summary judgment ruling in *Turnbull*, although of precedential value today in only one federal district court, contains reasoning, logic, and analysis that, if adopted by other courts, may have significant ramifications for journalism policies and practices in the future. In the interim, the laundry list of privacy-expectation signals identified by the judge should prove useful for journalists in guiding their own conduct in future investigative-report scenarios.

V. PRIVACY IN SOURCE-REPORTER RELATIONSHIPS: THE DIFFICULTY OF KEEPING CONFIDENCES IN 2004

This article so far has illustrated how privacy concerns often prevailed in 2004 against the interests of both journalists and the public’s right to know. It thus is more than a little bit ironic that, when journalists in 2004 asserted their own privacy interests—in particular, the right to keep private and secret the names of their confidential sources—they were thoroughly rebuffed and rebuked by the judiciary. In fact, as the author of this article and a colleague wrote in a newspaper commentary in November 2004, “[t]he list of reporters now facing jail time for refusing to disclose a source’s identity grows longer each day.”¹⁷⁸

Chief among those journalists was Jim Taricani, an investigative television journalist for NBC-affiliate WJAR,

¹⁷⁷ *Id.* at 2458.

¹⁷⁸ Robert D. Richards & Clay Calvert, *Keeping Public Confidences: It’s Time for a Federal Shield Law Protecting Journalists from Source Revelation*, PITTSBURGH POST-GAZETTE, Nov. 30, 2004, at A-21.

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Channel 10, in Providence, Rhode Island, who was held in both civil and criminal contempt in November 2004.¹⁷⁹ In particular, Taricani was convicted of criminal contempt for refusing to reveal the identity of the person who leaked to him a copy of an FBI surveillance videotape showing a bribe being accepted by a Providence city official.¹⁸⁰ The tape, which Taricani's station aired on February 1, 2001,¹⁸¹ had been under seal by a court, and thus, the person who leaked it to the reporter violated a court order.¹⁸² U.S. District Court Judge Ernest C. Torres appointed Marc DeSisto as a special prosecutor to try "to find out who gave Taricani the secret videotape."¹⁸³

Taricani's November criminal conviction followed a decision earlier that same year by the U.S. Court of Appeals for the First Circuit affirming a civil contempt ruling and holding that Taricani did not have a First Amendment privilege or right to refuse to reveal his source to DeSisto.¹⁸⁴ The decision was not surprising. Although thirty-one states now have shield laws that grant journalists varying degrees of protection against testifying about certain confidential information in their possession,¹⁸⁵ there is no

¹⁷⁹ See generally Lynne Tuohy, *Reporter Convicted; Shielded Source*, HARTFORD COURANT, Nov. 19, 2004, at A1 (providing an excellent overview of the battles Taricani faced for protecting his source).

¹⁸⁰ Pam Belluck, *Reporter Is Found Guilty for Refusal to Name Source*, N.Y. TIMES, Nov. 19, 2004, at A24.

¹⁸¹ Tuohy, *supra* note 179, at A1.

¹⁸² See Eileen McNamara, *Journalists Under Attack*, BOSTON GLOBE, Nov. 21, 2004, at B1 (writing that "[w]hoever leaked the videotape to Taricani, though, did so in violation of a court order that all such materials were to be sealed").

¹⁸³ Tracy Breton, *Taricani Told to Reveal Source or Risk Prison*, PROVIDENCE J., Nov. 5, 2004, at A-01.

¹⁸⁴ *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

¹⁸⁵ See, e.g., CAL. EVID. CODE § 1070 (setting forth California's shield law); see generally DON R. PEMBER & CLAY CALVERT, 2005-2006 EDITION MASS MEDIA LAW 390-93 (2005) (discussing state shield laws); Reporters Committee for Freedom of the Press, *The Reporter's Privilege Compendium: An Introduction*, available at <http://www.rcfp.org/cgi-local/privilege/item.cgi?i=intro> (last visited Jan. 16, 2005).

[Thirty-one] states and the District of Columbia have enacted statutes—

federal shield law to protect source privacy; in fact, in the only instance in which the U.S. Supreme Court has considered a possible constitutional privilege, the Court rejected a First Amendment privilege for journalists to refuse to testify before grand juries.¹⁸⁶

After the appellate court's ruling, Judge Torres began fining Taricani \$1,000 per day, hoping that the civil contempt remedy would persuade Taricani to give up his source.¹⁸⁷ Some \$85,000 in paid fines later, Torres switched tactics from civil to criminal contempt.¹⁸⁸

Why did Taricani refuse to reveal his source to the special prosecutor? As the Emmy Award-winning journalist explained outside the courthouse after his conviction,

I wish all my sources could be on the record, but when people are afraid, a promise of confidentiality may be the only way to get the information to the public, and in some cases, to protect the well-being of the source. I made a

shield laws—that give journalists some form of privilege against compelled production of confidential or unpublished information. The laws vary in detail and scope from state to state, but generally give greater protection to journalists than the state or federal constitution, according to many courts.

Id.

¹⁸⁶ *Branzburg v. Hayes*, 408 U.S. 665 (1972). See *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (writing that “[i]n *Branzburg*, the Supreme Court flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege”).

¹⁸⁷ See Tracy Breton, *Taricani Could Face Harsher Sanctions*, PROVIDENCE J., Sept. 30, 2004, at A-01 (describing the court-imposed, \$1,000-per-day fine on Taricani, and how it was being paid everyday by a check “delivered to the clerk of the U.S. District Court—written from a bank account of Channel 10 investigative reporter Jim Taricani”).

¹⁸⁸ See Belluck, *supra* note 180, at A24 (writing that “Taricani was fined \$1,000 for each day he continued to refuse to name his source” and, when he refused to relent “after he had paid \$85,000—for which he was reimbursed by his employer—Judge Torres changed the civil contempt case into a criminal contempt case”).

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promise to my source, which I intend to keep.¹⁸⁹

Taricani's promise of privacy to his source, however, ultimately resulted in six months of home confinement—the sentence Judge Torres meted out in December 2004 for the criminal contempt conviction.¹⁹⁰

Taricani was not the only journalist under a determined judicial assault in 2004 aimed at compelling the revelation of his sources. In fact, as a reporter for the *Boston Globe* summarized the situation in late 2004:

This past summer, five reporters were found in contempt for refusing to disclose sources used in reporting on Wen Ho Lee, the former nuclear scientist who was the suspect in an espionage case.¹⁹¹ And leaked information from the BALCO steroid grand jury investigation could leave some Bay Area reporters facing penalties for not revealing their sources.¹⁹²

In the BALCO situation, which centered on alleged steroid use by individuals such as baseball superstars Barry Bonds and Jason Giambi, U.S. Attorney Kevin V. Ryan asked journalists from the *San Francisco Chronicle* to reveal their sources for leaked grand jury testimony.¹⁹³ By early 2005, the *Chronicle's* editor, Phil Bronstein, maintained that the newspaper would not give up its confidential sources, stating that “[t]he press has certain responsibilities in society, but one of them is not to enforce the provisions of the federal grand jury system. Obviously, there are people who disagree with that, including the Justice Department.

¹⁸⁹ *Id.*

¹⁹⁰ W. Zachary Malinowski, *Taricani Won't Appeal Punishment*, PROVIDENCE J., Dec. 22, 2004, at B-03.

¹⁹¹ *Lee v. U.S. Dept. of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004). The five journalists in that case were Bob Drogin of the *Los Angeles Times*, H. Josef Hebert of the Associated Press, Jeff Gerth and James Risen of *The New York Times*, and Pierre Thomas, a former CNN reporter who now works for ABC News. *Id.* at 27 n.1.

¹⁹² Mark Jurkowitz, *Journalists Push for a State Shield Law*, BOSTON GLOBE, Dec. 21, 2004, at D1.

¹⁹³ John M. Broder, *From Grand Jury Leaks Comes a Clash of Rights*, N.Y. TIMES, Jan. 15, 2005, at A8.

But that's not the view from here."¹⁹⁴

Two other major cases from 2004 involving the journalistic desire to keep private the identities of sources both pivot on the question of who leaked and disclosed the name of covert CIA operative Valerie Plame in July 2003 to several members of the media, including Robert Novak.¹⁹⁵ Novak later blew Plame's cover by printing her name in his syndicated column that same month. Novak cited his sources for the scoop on Plame's employment as "two senior administration officials,"¹⁹⁶ neither of whom he identified. It is a violation of federal law to reveal the names of covert CIA agents, and the Justice Department named a special prosecutor, U.S. Attorney Patrick J. Fitzgerald, to conduct a grand jury investigation into who leaked Plame's name to Novak. With Novak refusing to tell anyone whether he had even spoken with the special prosecutor or was cooperating with the government investigation,¹⁹⁷ Fitzgerald soon began "aggressively taking on other journalists who reported on the story."¹⁹⁸ Among those journalists was *Time* magazine's Matthew Cooper and, although she never wrote a story on the matter, *The New York Times*'s Judith Miller.¹⁹⁹ In November 2004, U.S. District Court Judge Thomas F. Hogan refused to quash a subpoena served on Cooper

¹⁹⁴ *Id.*

¹⁹⁵ See generally Lorne Manly & Adam Liptak, *At Leak Inquiry's Center, a Circumspect Columnist*, N.Y. TIMES, Dec. 31, 2004, at A18 (providing a thorough overview of the facts and legal issues in the dispute).

¹⁹⁶ See Adam Liptak, *Judges Skeptical of First Amendment Protection for Reporters in C.I.A. Leak Inquiry*, N.Y. TIMES, Dec. 9, 2004, at A28 ("Robert Novak, the syndicated columnist, was the first to disclose Ms. Plame's identity publicly, in a column published on July 14, 2003. He had been told, he wrote, by 'two senior administration officials' seeking to cast doubt on an opinion column by Ms. Plame's husband, Joseph C. Wilson IV, a former diplomat.").

¹⁹⁷ See Charles Duhigg, *Media Law; Robert Novak: How Does He Stay Out of Jail*, L.A. TIMES, Dec. 12, 2004, at Opinion M6 (describing how Novak has managed to escape the same wrath that has faced Matthew Cooper and Judith Miller).

¹⁹⁸ Richard B. Schmitt, *The Nation; Prosecutor's Lips Still Sealed in Probe of Leaked Information*, L.A. TIMES, Oct. 23, 2004, at A10.

¹⁹⁹ See *Punishing the Press*, N.Y. TIMES, Dec. 20, 2004, at A28 (writing that Miller "never wrote a single article about the Plame controversy").

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and *Time*, writing:

Mr. Cooper and *Time* have no privilege based in the First Amendment or common law, qualified or otherwise, excusing them from providing documents to or testifying before the grand jury in this matter. Therefore, Mr. Cooper and *Time* must fulfill their obligations to answer valid subpoenas issued to them by a grand jury acting in good faith.²⁰⁰

This decision followed an earlier August 2004 order holding Cooper in civil contempt and fining *Time* \$1,000 per day until it handed over the subpoenaed documents.²⁰¹ Judith Miller's motion to quash the subpoena of Fitzgerald also was rejected by Judge Hogan.²⁰² Similar to his finding with Matthew Cooper, Judge Hogan opined that Miller "has no privilege, based in the First Amendment or common law, qualified or otherwise, excusing her from testifying before the grand jury in this matter. . . . Ms. Miller must fulfill her obligation, shared by all citizens, to answer a valid subpoena issued to her by a grand jury acting in good faith."²⁰³ With both Cooper and Miller facing up to eighteen months in jail for refusing to disclose their sources, the reporters and their news organizations took their case to a federal appellate court in December 2004.²⁰⁴ The three-judge panel seemed skeptical during oral argument of granting a privilege to Cooper and Miller,²⁰⁵ and in February of 2005, it ruled against the journalistic duo.²⁰⁶ The

²⁰⁰ *In re* Special Counsel Investigation, 346 F. Supp. 2d 54, 56 (D.D.C. 2004).

²⁰¹ *In re* Special Counsel Investigation, 332 F. Supp. 2d 33 (D.D.C. 2004).

²⁰² *In re* Special Counsel Investigation, 338 F. Supp. 2d 16 (D.D.C. 2004).

²⁰³ *Id.* at 19.

²⁰⁴ See Richard B. Schmitt, *A Sign of Hope for Reporters in CIA Leak Case*, L.A. TIMES, Dec. 9, 2004, at A22 (describing the arguments before the U.S. Court of Appeals for the District of Columbia).

²⁰⁵ See Carol D. Leonnig, *Judges Weigh Press Freedoms*, WASH. POST, Dec. 9, 2004, at A11 (describing how "Judge David B. Sentelle grew visibly irritated as he repeatedly asked longtime First Amendment lawyer Floyd Abrams to explain how Cooper and Miller's circumstances differed from those of the Kentucky reporter").

²⁰⁶ *In re* Grand Jury Subpoena, No. 04-3138, 2005 U.S. App. LEXIS 2494

appellate court wrote that “there is no First Amendment privilege protecting the evidence sought, but no decision had been reached by the end of the year,”²⁰⁷ and it added that “if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court.”²⁰⁸

In situations such as those involving Taricani, Cooper, and Miller, the First Amendment interest in privacy of information—privacy of source identity, in particular—is clear. As veteran media defense attorney James C. Goodale observed, what journalists such as “Taricani are fighting for is the right to do their job. They cannot do it without confidential sources.”²⁰⁹ And what is that job? *New York Times* columnist William Safire summed it up well in a recent commentary calling for a privilege for journalistic source confidentiality when he wrote that “it is the publication’s obligation to the public to publish what it considers newsworthy—and not to assist the government in punishing the provider of that news.”²¹⁰

Indeed, a promise of privacy to a source is sometimes the only way that a journalist such as Taricani can obtain what Safire terms “newsworthy” information. A journalist who burns such a source by breaching that promise harms not only himself and the source, but all journalists and, more importantly, the public in general.²¹¹ As Eileen McNamara of the *Boston Globe* wrote in 2004, breaching a promise of confidentiality “undermine[s] the work of

(D.C. Cir. Feb. 15, 2005).

²⁰⁷ *Id.* at *2.

²⁰⁸ *Id.*

²⁰⁹ James C. Goodale, *Communications and Media Law; Why Reporters Go to Jail*, N.Y. L.J., Dec. 3, 2004, at 3.

²¹⁰ William Safire, *Judges as Plumbers*, N.Y. TIMES, Dec. 13, 2004, at A27.

²¹¹ Cf. Maggie Mulvihill, *As You Were Saying . . . This Journalist Stands Tall Rather Than Give Up a Source*, BOSTON HERALD, July 3, 2004, at 16 (writing that “no governmental whistleblower would confide in a reporter if he thought the reporter were in cahoots with prosecutors or would blow his cover” and pointing out that “so much that the public should know would remain secret if reporters didn’t keep their promises and refrain from ratting out their confidential sources to the government”).

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all journalists by discouraging people in sensitive situations from sharing information about wrongdoing with reporters. Journalists would always prefer to put their sources on the record, but there are instances in which such candor could cost a source his job or his physical safety.”²¹²

The situation was so bad that, in November 2004, U.S. Senator Christopher Dodd (D-Conn.) introduced a bill titled “The Free Speech Protection Act of 2004,” which was designed to create a federal shield law to protect individuals and organizations involved in gathering and disseminating news from being hauled into federal court and forced to disclose their sources or other unpublished information.²¹³ In proposing the measure, Dodd contended that “[w]hen the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered.”²¹⁴ In a January 2005 opinion piece published in the *Atlanta Journal-Constitution*, Dodd elaborated on this argument, writing:

If reporters are unable to promise confidentiality to their sources, many conscientious citizens will choose not to come forward with information out of fear for their jobs, their reputations, even their lives. The public’s ability to hold those in power accountable—whether in the government or in the private sector—will be severely compromised. In a real sense, when the public’s right to know is threatened, so are all of the other liberties we hold dear.²¹⁵

There was good reason to think that the public would support the measure; a national survey of more than 650 adults conducted in October 2004 on behalf the First Amendment Center in Nashville, Tennessee, found that seventy-two percent of respondents either strongly or mildly agreed with the statement

²¹² McNamara, *supra* note 182, at B1.

²¹³ S. 3020, 108th Cong. (2004).

²¹⁴ Andy Thibault, *Good Time to be Enemy of the State*, CONN. L. TRIB., Jan. 10, 2005, at 20.

²¹⁵ Christopher J. Dodd, *Public’s Right to Know on Endangered List*, ATLANTA J.-CONST., Jan. 15, 2005, at 11A.

that “journalists should be allowed to keep a news source confidential.”²¹⁶

Dodd’s proposal for congressional action clearly had the support of the mainstream news media. In an editorial in November 2004, the *Washington Post* opined:

Mr. Taricani’s case unfortunately is not unusual at all. It is part of a rash of recent cases in which judges are seeking to force journalists to renege on promises of confidentiality, using the threat of jail as leverage. Without such promises, much good journalism wouldn’t happen. If the federal courts will not recognize a privilege for reporters such as Mr. Taricani, as most states do, Congress needs to step in and do it for them.²¹⁷

If Congress does indeed act in 2005, it will represent a battle between the legislative and judicial branches of government, with the latter coming down squarely against the privilege in 2004 in the cases of Jim Taricani, Matthew Cooper, and Judith Miller. This clear preference for disclosure over source protection raises the question: Why is there such reluctance on the part of judges to extend a privacy privilege to journalists to protect their sources? Why was there in 2004, as William Safire puts it, a “sudden wave of judicial repression”²¹⁸ of reporters? Mark Jurkowitz of the *Boston Globe* observes that while “First Amendment advocates say that privilege is vital to the free flow of information . . . some of the public seems more skeptical, viewing journalists as putting themselves above the law.”²¹⁹ Might such skepticism be present among judges who might see journalists as too often intruding on others’ privacy in order to get information to sell newspapers? In other words, if there is a perception among judges that journalists push the boundaries of other people’s privacy rights in the name of

²¹⁶ First Amendment Center, 2004 Confidential-Sources Survey, available at http://www.firstamendmentcenter.org/about.aspx?item=2004_confidential_sources (last visited Jan. 16, 2004). See Richards & Calvert, *supra* note 178, at A-21 (citing the survey finding).

²¹⁷ *Jailing Reporters*, WASH. POST, Nov. 28, 2004, at B06.

²¹⁸ Safire, *supra* note 210, at A27.

²¹⁹ Mark Jurkowitz, *Departures Anchored the Year’s Top Media Stories*, BOSTON GLOBE, Dec. 26, 2004, at N10.

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newsgathering and reporting, then why should judges not show them how it feels to have their private information revealed?

CONCLUSION

If the judicial opinions and statutes described and analyzed in this article were tallied up on a mythical legal scoreboard in a contest pitting privacy advocates against working journalists, it would show a decisive victory for privacy in 2004 and an overwhelming defeat for the press. As discussed in this article:

- A right to personal privacy was extended by Congress, albeit in limited circumstances, to people in *public* places under the Video Voyeurism Prevention Act of 2004;
- A right to personal privacy also was extended, in certain federal FOIA actions, by the U.S. Supreme Court to the family members and close relatives of the dead who, for obvious reasons, could not assert their own privacy claims;
- The press was not allowed to print, because of privacy concerns, the contents of truthful documents that it had lawfully obtained in the Kobe Bryant sexual assault case;
- The press was prohibited from obtaining access, also because of privacy concerns accompanied by right-to-fair-trial issues, to basic and fundamental information about a criminal case pending against one of the world's most well-known celebrities, Michael Jackson;
- The use of journalistic hidden cameras and microphones that intrude on personal privacy was rebuked by a federal court judge who took, as was noted earlier, what he called a "common sense"²²⁰ approach to privacy that rejected a media summary judgment motion and allowed numerous privacy-based causes of action to proceed to trial.

When journalists, however, asserted their own privacy rights—in particular, the right to keep private the identity of their confidential sources—they lost in several high-profile cases, such as those involving Jim Taricani, Matthew Cooper, and Judith

²²⁰ See *supra* note 154 and accompanying text.

Miller.

What does all of this mean? For the news media, the preponderance of judicial opinions and legislation against it in 2004 may reflect the findings of an independent survey conducted that same year revealing a growing belief among the public that, as compared to their counterparts from years past, modern “journalists are sloppier, less professional, less moral, less caring, more biased, less honest about their mistakes, and generally more harmful to democracy.”²²¹ Judges and legislators may harbor these very same beliefs about the press—legislators, of course, often pander to public sentiment to win elections, whether or not they agree with those sentiments—and this may be influencing their actions. There just might be then a disturbing correlation here for journalists: less trust in the press may lead to fewer favorable judicial rulings and less favorable legislation. The less-trust side of the equation is clear,²²² and the negative legal side has been illustrated amply with multiple examples in this article.

While the news media devote a great amount of time to hand-wringing about whether there is a liberal news media bias,²²³ as do others involved in the media,²²⁴ perhaps the media’s time would be

²²¹ Mark Jurkowitz, *Media Distrust May Be Libel-Case Key*, BOSTON GLOBE, Jan. 9, 2005, at B1 (quoting from a “major study released in March 2004 by the Project for Excellence in Journalism”).

²²² See David Weddle, *Swagland*, L.A. TIMES MAG., Jan. 16, 2005, at 14 (writing that “[a] recent Gallup poll found that only 21% of those surveyed rated newspaper reporters’ ethical standards as high or very high. Journalists ranked lower than bankers, auto mechanics, elected officials and nursing home operators”).

²²³ See, e.g., Joe Strupp et al., *The Liberal Media: Myth or Reality?*, EDITOR & PUBLISHER, Aug. 1, 2004 (providing a comprehensive analysis of both data and opinions regarding a potential liberal bias in the news media).

²²⁴ See, e.g., ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS AND THE NEWS* (2003) (attempting to refute allegations that there is a liberal bias in the media); BERNARD GOLDBERG, *ARROGANCE: RESCUING AMERICA FROM THE MEDIA ELITE* (2003) (setting forth multiple instances of what the former reporter for CBS News believes is a liberal bias in the mainstream news media, including, most notably, *The New York Times*); BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (2002) (providing examples that the author contends illustrate a liberal bias in the media).

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better spent now focusing on the specific conduct and actions that tend to erode respect for the news media while simultaneously elevating judicial and legislative respect for privacy rights. Journalists, in other words, cannot sit back and simply blame pandering politicians and judges for their current state of woe. Instead, a self-examination of their own actions may point them out of this mess and toward a reasonable solution. If journalists expect a right of privacy in their own relationships with sources (think Jim Taricani and Matthew Cooper), then they may need to be more careful about intruding on the privacy interests of others.

The solution, of course, must strike a balance that respects privacy rights, but that allows journalists to perform their roles in a democratic society. To achieve this balance, journalists must educate the public (judges and legislators included) through their actions, and not simply their pontifications in self-serving editorials and commentaries, about the importance of their roles as both watchdogs of government abuses of power²²⁵ and conveyors of truthful and accurate news.²²⁶ The proper location of the fulcrum in this delicate privacy-versus-reporter balance is, of course, difficult to precisely pinpoint; however, it is clear that in 2004 more judicial and legislative weight was placed on the side of personal privacy than on the side of journalists and reporters. The press must now convince judges and legislators that the policy interest in protecting a free press in a democratic society requires shifting that balance back to a point that affords journalists greater access to information and greater freedom to report the material that they lawfully obtain.

²²⁵ See *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (observing that “[t]he press plays a unique role as a check on government abuse” and “as a watchdog of government activity”).

²²⁶ See *supra* notes 2-3 and accompanying text (describing this role).