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DYING FOR PRIVACY: PITTING PUBLIC ACCESS AGAINST FAMILIAL INTERESTS IN THE ERA OF THE INTERNET

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"*I just killed my two kids. . . . I drowned them. . . . They are 2 and 4. . . . I just shot myself. . . . with a gun. . . . Please hurry*."[1]

That was the dying declaration of 21-year-old Julia Murray on February 16, 2010,[2] preserved for all of posterity on a 911 emergency telephone recording and available to anyone and everyone in Florida—from journalists and police to even voyeurs and perverts—under that state's open records laws.[3] Murray and one of her three children are gone (the second child survived the drowning attempt), but her words remain. Should the public have a right to hear them?

In 2010, multiple events magnified public focus on the escalating tension between family members' privacy rights with respect to the death-scene images and dying words of their loved ones, on the one hand, and the public's right to access those documents, on the other.

Consider the following, all of which transpired within just the first four months of this year:

• Dawn Brancheau, a trainer at SeaWorld in Orlando, died in February 2010 when a whale "grabbed her by [her] ponytail and thrashed her around

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[1] Teresa Stepzinski, *Glynn Mom: I Killed My 2 Kids*, FLA. TIMES-UNION, Feb. 17, 2010, http://findarticles.com/p/news-articles/florida-times-union/mi_8037/is_20100217/glynn-mom-killed-2-kids/ai_n49845269/ (link).

[2] *Id.*

[3] *See* FLA. STAT. § 119.01 (2009) (providing, in relevant part, that it is the policy of Florida "that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.") (link). *See generally* Government in the Sunshine, http://www.myflsunshine.com (providing a website maintained by the Office of the Attorney General of Florida that "is designed to help government agencies, the media and private citizens understand Florida's Open Government and Public Records laws") (link).

after a show."[4] Her family went to court to argue that the public release of a video and photos showing her death "[would] only increase their pain."[5] The court granted the family a temporary restraining order preventing the sheriff's office and medical examiner in Orange County, Florida, from releasing the images.[6] In particular, Judge Lawrence Kirkwood reasoned that release of the images might cause the Brancheau family to "suffer irreparable damage in the form of pain, suffering and mental anguish."[7] Judge Kirkwood added that the images "graphically depict Mrs. Brancheau."[8] The family's attorney argued in court that "there is no constitutional right to voyeurism. There is a constitutional right to privacy."[9] Ultimately, the official investigative report of the incident conducted by the Orange County Sheriff's Office and released in April 2010, struck a balance between the competing interests—it did not include a copy of the videotape taken from a SeaWorld surveillance camera but, instead, contained a second-by-second, written description of the images depicted in that videotape.[10] In brief, written words, rather than video images, were allowed to tell the story.

• Lawmakers in Georgia scrambled to craft legislation[11] to block the release of death-scene photographs after a writer for *Hustler* magazine asked

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[4] Mike Schneider, *Judge to Rule on Death Video of SeaWorld Trainer*, THE LEDGER.COM, Mar. 24, 2010, http://www.theledger.com/article/20100324/NEWS/3245102 (link).

[5] Adrianne Murchison, *The Influence of Viral Videos*, AJC.COM, Mar. 31, 2010, http://www.ajc.com/lifestyle/the-influence-of-viral-418943.html (link). For instance, Scott Brancheau, the deceased trainer's husband, wrote in an affidavit that the release of the images "which graphically depict the circumstances of the death of my wife . . . will cause me untold anguish, grief and pain." Amy L. Edwards & Sarah Lundy, *Images of SeaWorld Trainer's Death Can Remain Private—For Now, Court Says*, PALMBEACHPOST.COM, Mar. 16, 2010, http://www.palmbeachpost.com/news/state/images-of-seaworld-trainers-death-can-remain-private-368054.html (link).

[6] Sarah Lundy, *Images of SeaWorld Death Remain Sealed*, LATIMES.COM, Mar. 25, 2010, http://articles.latimes.com/2010/mar/25/nation/la-na-orca25-2010mar25 (link).

[7] *See* Joe Ruble, *Judge Forbids Video Release in SeaWorld Attack*, WDBO.COM, Mar. 15, 2010, http://wdbo.com/localnews/2010/03/judge-forbids-video-release-in.html (link); *see* Order Setting Deadline for Intervenors and Referring Parties to Mediation at 3, Brancheau v. Demings, No. 2010-CA-6673 (Fla. Cir. Ct. Mar. 25, 2010), *available at* http://www.wesh.com/download/2010/0325/22956336.pdf (noting that "[t]he Orange County Sheriff and District Nine Medical Examiners are reminded that the Temporary Injunction was granted by this Court on March 15, 2010, and is still in full force and videos and pictures are not to be released to 3rd parties as indicated by statements made at the hearing on March 24, 2010.") (link).

[8] *Id.*

[9] Lundy, *supra* note 6. *See generally* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE 133–138 (2000) (discussing the relationship between voyeurism, privacy and the First Amendment).

[10] *See* ORANGE COUNTY SHERIFF'S OFFICE INVESTIGATIVE REPORT, CASE NO. 2010-016715 (2010), http://wdbo.com/common/pdf/orlando/04_28_10_death_investigation.pdf (link).

[11] H.B. 1322, 150th Gen. Assemb. (Ga. 2010), *available at* http://www.legis.state.ga.us/legis/2009_10/versions/hb1322_SCSFA_to_HB1322_11.htm (last visited July 6, 2010) (link). As passed by the Senate in April 2010, the bill generally exempts from disclosure "photographs, videos, or other depictions compiled by law enforcement of any individual in a state of

the Georgia Bureau of Investigation for its complete file on the murder of Meredith Emerson.[12] Among other items, the file included images of Emerson's nude, decapitated body.[13] During her oral argument for obtaining a temporary restraining order (TRO) halting the release of the photos, Lindsay Haigh, an attorney representing the Emerson family, succinctly stated the privacy argument—"Meredith Emerson was a victim. Her family was a victim, and they should not be victimized again with the publication of these photos for all the world to see."[14] DeKalb County Superior Court Judge Dan Coursey agreed, granting the TRO and observing that releasing the photos to *Hustler* and others might cause "irreparable harm" to the Emerson family.[15]

• In January 2010, a California appellate court ruled in favor of the immediate relatives of 18-year-old Nicole Catsouras and against the California Highway Patrol (CHP) and two of its employees for improperly releasing "photographs of her decapitated remains" to the public.[16] The released photographs included an image of Catsouras' lifeless body after a "gruesome" car crash.[17] However, those photos found their way on to numerous blogs and other websites, some of which mockingly referred to Catsouras as "Porsche girl."[18]

Although the case did not deal with California's open records laws—it centered, instead, on civil tort causes of action—the appellate court's stinging rebuke to the CHP officers' actions smacks of the same sentiment that drives lawmakers to erect statutory hurdles to images of death and dying-moment 911 calls. In particular, Associate Justice Eileen C. Moore wrote for a unanimous three-judge panel in *Catsouras v. Department of California Highway Patrol* that "family members have a common law privacy right in

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partial or complete nudity, depicting the dismemberment of a body part, or depicting an injured or deceased individual." *Id.*

[12] *See* Walter C. Jones, *Bill Bars Release of Crime Photos*, FLA. TIMES-UNION, Apr. 14, 2010, http://findarticles.com/p/news-articles/florida-times-union/mi_8037/is_20100414/bill-bars-release-crime-photos/ai_n53169306/?tag=content;col1 (providing details on the records request and the ensuing legislation) (link).

[13] *Id.*

[14] Bill Rankin & Aaron Gould, *Hustler Denied Access to Photos*, AJC.COM, Mar. 11, 2010.

[15] *Id.*

[16] Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856 (Cal. Ct. App. 2010), *modified and reh'g denied*, 2010 Cal. App. LEXIS 253 (Cal. Ct. App. Mar. 1, 2010) (link).

[17] Jessica Bennett, *A Tragedy that Won't Fade Away; When Grisly Images of Their Daughter's Death Went Viral on the Internet, the Catsouras Family Decided to Fight Back*, NEWSWEEK.COM, May 4, 2009, http://www.newsweek.com/id/195073 (link). *Newsweek* described the accident as so gruesome that the coroner would not permit the parents to identify their daughter's body. *Id.*

[18] Amy Saunders, *Web Reputations: Online Insults Hard to Erase*, DISPATCH.COM, May 4, 2008, http://www.dispatch.com/live/content/local_news/stories/2008/05/04/online_eraser.ART_ART_05-04-08_A1_2CA3U8C.html (link). In the interest of not exacerbating the emotional harm already experienced by the Catsouras family, the author of this Essay and the editors of the *Colloquy* have agreed not to provide the links to death-scene images of Nikki Catsouras. For those who wish to see them, however, they are easily found via Google searches.

the death images of a decedent . . . subject to certain limitations."[19] She blasted the CHP's actions that caused "the unthinkable exploitation of the photographs of her decapitated remains."[20] The exploitation, in the author's opinion, was exacerbated because the initial release of the images was committed by law enforcement officers—people who are supposed to serve and protect the public, not to harm and injure them.

While images of death can cause harm, words apparently can too, as many states began exempting 911 recordings from public disclosure requirements. The same piece of Georgia legislation noted above, which the state senate passed in April 2010, also included a provision exempting 911 emergency telephone call recordings that reveal a caller's "personal suffering" from the Georgia's Open Records Act.[21] In particular, the bill prohibits disclosure of "records [that] consist of or contain audio or video recordings of the personal suffering of a person in physical pain or distress" by Georgia law enforcement agencies.[22] Why does it exempt them? According to the legislation itself, it is because the "public dissemination of such records would cause emotional distress to the person whose suffering was so recorded or to the family of such person."[23] Again, Georgia's legislature took steps to protect a family's privacy interest in limiting the dissemination of a loved one's suffering. These calls, of course, could be from panicked persons being attacked and facing life-or-death struggles, thus possibly recording their desperate dying words.

Florida proposed a bill similar to Georgia's in early 2010,[24] but it was beaten back when the Florida House speaker withdrew his support for the measure.[25] Another bill exempting 911 recordings cleared the Wisconsin Assembly in April 2010; the bill stemmed from a 2008 incident in which news media outlets sued to obtain the recording of Jordan Gonnering's 911 call reporting the discovery of the lifeless body of Brittany Zimmermann in

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[19] *Catsouras*, 181 Cal. App. 4th at 864.

[20] *Id.* at 863.

[21] Jim Tharpe, *Senate Excludes Some 911 Calls, Crime Photos from Public Record*, AJC.COM, Apr. 14, 2010.

[22] H.R. 1322, 150th Gen. Assemb. (Ga. 2010), *available at* http://www.legis.state.ga.us/legis/2009_10/versions/hb1322_SCSFA_to_HB1322_11.htm (last visited July 7, 2010) (link).

[23] *Id.*

[24] *See* Brandon Larrabee, *Bill Aims to Keep 911 Calls Private*, FLA. TIMES-UNION, Mar. 11, 2010, http://findarticles.com/p/articles/mi_8037/is_20100311/ai_n52417435/ (describing the Florida bill) (link).

[25] Lloyd Dunkelberger, *Speaker Backs Off Bill to Limit 911 Call Access*, THELEDGER.COM, Mar. 16, 2010, http://www.theledger.com/article/20100316/NEWS/3165007 (link); s*ee* Eric Ernst, *Don't Mourn the Death of the 911 Records Bill*, HAROLDTRIBUNE.COM, Mar. 17, 2010, http://www.heraldtribune.com/article/20100317/COLUMNIST/3171024/2273/NEWS?Title=Eric-Ernst-Don-t-mourn-the-death-of-the-911-records-bill (expressing "good riddance" to the bill's demise, and arguing that it "was bad from the word go, which is probably why, at first, no legislator wanted to own up to its origin") (link).

their Madison, Wisconsin apartment.[26] In April 2010, the Alabama legislature approved a bill prohibiting the release of the audio tapes of 911 calls "except pursuant to a court order finding that the right of the public to the release of the recording outweighs the privacy interests of the individual who made the 911 call or any persons involved in the facts or circumstances relating to the 911 call."[27] Such a balancing-of-the-interests approach mirrors an open-records law already on the books in Pennsylvania that exempts a 911 recording or a transcript from disclosure unless a government "agency or a court determines that the public interest in disclosure outweighs the interest in nondisclosure."[28]

This recent flurry of cases and legislative activity raises an important question about whether and when the public should have either a statutory or a First Amendment[29] right of access—a right sufficient to trump familial concerns for privacy, grief and grieving—to horrific death-scene images and the terrified words of 911 callers confronting death. This Essay traces the origins of the growing right of surviving-heir privacy, as it has emerged from a series of judicial battles. It then explores some of the pro-and-con arguments regarding access and privacy within this niche. Importantly, the Essay argues that journalists must carefully pick and choose the access battles they want to fight. When they do decide to fight for access, they must do a better job of articulating to the public—not only to judges and lawmakers—the necessity of access and how the public will benefit from the press gaining access. Ultimately, if journalists are to invoke what philosopher Sissela Bok calls "the language of rights"[30]—in these situations, the public's *right* to know—then they need to carefully craft explanations, rather than rationalizations, to defeat privacy concerns in this dialectical dance.

I. A DECADE OF DEVELOPMENT OF DEATH-RELATED PRIVACY RIGHTS

Without a doubt, the key decision in the area of familial privacy rights over death-scene images is the United States Supreme Court's 2004 ruling

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[26] *Wis. Assembly Votes to Restrict 911 Access*, WASW.COM, Apr. 15, 2010, http://www.wsaw.com/news/headlines/90996674.html (link).

[27] H.B. 159, Reg. Sess. (Ala. 2010), *available at* http://alisondb.legislature.state.al.us/acas/searchableinstruments/2010rs/bills/hb159.htm (link).

[28] 65 PA. CONS. STAT. ANN. § 67.708(b)(18)(ii) (2009).

[29] The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I (link). The Free Speech and Free Press clauses were incorporated eighty-five years ago 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) (link).

[30] SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 256 (Vintage Books ed. 1989).

in *National Archives and Records Administration v. Favish*.[31] In a Freedom of Information Act dispute over death-scene images of Vincent Foster, former counsel to President Bill Clinton, a unanimous high court wrote that it 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."[32] In ruling against Allan Favish's efforts to obtain the photographs, Justice Anthony Kennedy wrote for the Court that, "family 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."[33] In 2010, the California appellate court in *Catsouras* cited *Favish* favorably on these points, arguing that *Favish* did not limit family members' privacy rights to the Freedom of Information Act context.[34]

Interestingly, the familial privacy rights recognized in *Favish* soon may spill over into the First Amendment context when the Supreme Court hears oral arguments later this year in the funeral protest case of *Snyder v. Phelps*.[35] Will the high court voice an identical concern for family members honoring and mourning their dead, allowing restrictions on unwarranted public exploitation? Alternatively, will the First Amendment right of free speech protect the ability of the followers of the Westboro Baptist Church to hold signs with messages such as "Semper fi fags" and "Thank God for dead soldiers" outside of the funeral of a Marine killed in Iraq?[36] If the father of the late Marine Lance Corporal Matthew A. Snyder prevails, then the privacy-of-death jurisprudence will expand beyond questions of access to images and words, and begin to stanch free speech when it impacts a family's mourning.

Before *Favish*, Florida carved out a statutory exception to its generally favorable open records laws for photographs or a video or audio recording of an autopsy.[37] The legislature quickly adopted the exception in 2001 after some members of the news media requested autopsy photographs of NASCAR driver Dale Earnhardt, who died in a crash at the Daytona 500 in February that year.[38] The statute withstood legal challenge over the course of the next two years.[39]

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[31] 541 U.S. 157 (2004) (link).

[32] *Id.* at 167.

[33] *Id.* at 168.

[34] Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 872 (Cal. Ct. App. 2010).

[35] 580 F.3d 206 (4th Cir. 2009) (link), *cert. granted*, 2010 U.S. LEXIS 2280 (Mar. 8, 2010).

[36] *See id.* at 212 (describing signs held by the protestors at Matthew Phelps' funeral).

[37] FLA. STAT. § 406.135 (2009) (link).

[38] *See generally* Patrick N. Bailey, Note & Comment, *In the Wake of a Tragedy: The Earnhardt Family Protection Act Brings Florida's Public Records Law under the Hot Lights*, 26 NOVA L. REV. 305

The *New York Times* also fought a battle over the dying words and sounds of the victims of the September 11, 2001 attacks on the World Trade Center in the New York state court system this past decade.[40] In *New York Times Co. v. City of New York Fire Department*, the New York Court of Appeals held that, "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private."[41] In a rather interesting attempt to balance the competing interests of the privacy rights of relatives and the public's interest in ascertaining the quality and effectiveness of the 911 and emergency response system on that terrible day, the court allowed only the words of the 911 operators to be released.[42] In 2007, as the battle continued, a New York appellate court applied the lower court's balancing approach of weighing competing privacy and public interests, holding, "the survivors' compelling interest in preserving the privacy of their loved ones' final moments outweighs any countervailing public interest in disclosure."[43]

Even when courts have rejected privacy claims in disputes centering on images of the dead, they have recognized that some images are perhaps so horrific as to justify familial privacy claims. In *Showler v. Harper's Magazine Foundation*,[44] the U.S. Court of Appeals for the Tenth Circuit rejected a father's tort claims against a magazine and a photographer for publishing an image of his late son, dressed in military garb in a half-open, flag-draped casket at a funeral attended by more than 1,200 people.[45] The court nonetheless suggested that the publication of some images of the dead may be subject to civil liability, depending upon their context:

> Courts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs. The photographs here are not death-scene photographs, but images of Sgt. [Kyle] Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects. Coupled with the public nature of this funeral, the

(2001) (discussing the Earnhardt Family Protection Act and its effect on the public's right of access to records in Florida).

[39] *See* Campus Commc'ns, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. Dist. Ct. App. 2002), *rev. denied*, 848 So. 2d 1153 (Fla. 2003), *cert. denied*, 540 U.S. 1049 (2003) (link).

[40] N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266 (N.Y. 2005) (link).

[41] *Id.* at 271.

[42] *Id.*

[43] N.Y. Times Co. v. City of N.Y. Fire Dep't, 39 A.D.3d 414, 415, 94 (N.Y. App. Div. 2007) (link).

[44] 2007 U.S. App. LEXIS 7025 (10th Cir. Mar. 23, 2007), *cert. denied*, 552 U.S. 825 (2007).

[45] The photo in question is available online at http://www.harpers.org/archive/2007/10/hbc-90001320 (last visited June 30, 2010) (link).

> photographs are distinguishable from those at issue in *Favish*.[46]

In a nutshell, judicial and legislative concern for images and words of death grew in the first decade of the twenty-first century. The new decade now brings with it the battles noted at the start of this Essay and surely will render more in the years to come. The next section thus examines the arguments for and against public access to such images and words.

II. SOME ARGUMENTS FOR AND AGAINST ACCESS AND PRIVACY

The starting point for evaluating the pros and cons of public access to images and words of death must be acknowledgment of the game-changing, intervening factor in all of the situations described above—namely, the Internet. It injects two critical variables—permanence and accessibility—into the access versus privacy equation.

Ken Paulson, former editor of *USA Today*, recently wrote in the pages of that newspaper that "[n]ew technology and the Web have spurred understandable anxiety from people concerned about having the details of their lives shared with strangers."[47] The gruesome images of Nicole Catsouras, for instance, will seemingly circulate in perpetuity on the Internet, as there are several sites that prominently feature them today.[48] Those images are but one example of what happens when, as columnist Joseph Rose of the *Oregonian* puts it, "the public's right to know and the dark side of the digital age collide."[49]

The potential for such prurient and morbid gawking over these images casts a pall over their need for disclosure. Professors Samuel Terilli and Sigman Splichal observed after the Dale Earnhardt autopsy photo dispute that there are "deep societal concerns regarding the privacy rights and feelings of family members—concerns heightened by technology (the Internet and digital reproduction, for example)."[50] In a February 2010 op-ed commentary, Jon Mills, dean emeritus of the University of Florida's Levin College of Law and the attorney for family of the late SeaWorld trainer Dawn Brancheau,[51] opined that "today's toxic mix of easy access to digital photos,

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[46] *Showler*, 2007 U.S. App. LEXIS 7025, at *15.

[47] Ken Paulson, *Privacy vs. Public Right to Know*, USATODAY.COM, Mar. 18, 2010, http://www.usatoday.com/news/opinion/forum/2010-03-18-column18_ST_N.htm (link).

[48] *See supra* note 18 (explaining the decision of the author and editors not to provide the links to these websites).

[49] Joseph Rose, *Sadly, Crash Photos Can Live on Online*, OREGONLIVE.COM, June 29, 2009, http://blog.oregonlive.com/commuting/2009/06/sadly_crash_photos_can_live_on.html (link).

[50] Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 341 (2005).

[51] *See supra* notes 4–7 and accompanying text (describing the controversy involving Dawn Brancheau).

easy global distribution via the Internet and the ability to distribute anonymously is a perfect storm for horrible intrusions."[52]

With this technological transformation in mind, what are, in brief, some of the arguments for allowing access to death-scene images under public records laws? In the case of the Georgia bill targeting the release of crime-scene photographs, Professor Jessica Gabel of Georgia State University argued against the measure in the pages of the *Atlanta-Journal Constitution*.[53] Succinctly and effectively articulating the case for access, Gabel wrote:

> When a brutal crime occurs, it does not discriminate. It always destroys. But uncomfortable as the notion of the study of death is, it informs us, educates us and maybe even makes us safer. Yes, the state Legislature has legitimate reasons for concern. Yes, [Meredith] Emerson's family has the right to be protective. But haphazard laws won't serve the public. If compelled to act, the Legislature should consider passing a stand-alone law that prevents the malicious, gratuitous or unethical use of such photos. Darkening Georgia's sunshine laws is a sacrifice, not the solution.[54]

But don't just take it from an ivory-tower academic. Consider the argument of Fred Rosen, the freelance writer working on the story for *Hustler* that spawned the Georgia legislation.[55] As he explains it, albeit in perhaps self-serving terms:

> I was reporting a true-crime story for Hustler magazine on Gary Michael Hilton, who killed Emerson and is the suspect in murders in Florida and North Carolina.
>
> For a reporter doing his job, the crime scene photos are essential to the reporting. The idea is not only to understand what happened, but to piece together how it happened.
>
> I use them to double-check if what the killer told police is true; to see if his M.O. fits in with the other crimes

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[52] Jon Mills, *On Web, Families of Victims Entitled to Privacy*, TAMPABAY.COM, Feb. 23, 2010, http://www.tampabay.com/opinion/columns/on-web-families-of-victims-entitled-to-privacy/1075049 (link).

[53] Jessica D. Gabel, *Hustler Law Will Damage Access*, AJC.COM, Mar. 15, 2010, http://www.ajc.com/opinion/hustler-law-will-damage-373165.html (link).

[54] *Id.*

[55] Fred Rosen, *Why I Requested Slain Hiker's Crime Scene Photos*, AJC.COM, Mar. 18, 2010, http://www.ajc.com/opinion/why-i-requested-slain-382763.html (link).

> he's charged with; and to see if there are similarities and/or differences compared to unsolved murders.
>
> Hilton, for example, took off Emerson's clothes because he is a serial killer who understands how forensic evidence can prove guilt. He didn't want any evidence that could tie him to the crime. He hid everything. That's what makes him particularly dangerous.[56]

Rosen's assertion here that he needed the photographs to "double-check"[57] the police work can be viewed both positively and negatively. Viewed positively, Rosen is simply playing the long-embraced role of the reporter as a watchdog,[58] checking up on government officials—the Georgia Bureau of Investigation—to make sure they did their job correctly. It is a vital role acknowledged by both the United States Supreme Court and academics alike.[59] Viewed negatively, however, Rosen can be seen as actually playing the role of law enforcement himself, rather than reporting on its activities. This is a line that courts may be reticent to see journalists traverse. For instance, in a recent civil lawsuit for wrongful death against NBC Universal, based on an episode of *Dateline NBC* involving its "To Catch a Predator" journalistic operation,[60] United States District Judge Denny Chin admonished the show for crossing "the line from responsible journalism to irresponsible and reckless intrusion into law enforcement."[61]

In the *Favish* situation, attorney Allan Favish explained that he needed to see the death-scene photos of Vincent Foster because "the only investigation that will matter in this case is the one where the public themselves can see the evidence."[62] The argument here amounts to this: ocular proof is essential for public verification of a government investigation into the death of an individual, at least when that individual holds close connections to public officials (in Foster's case, to the highest public official in the country, the President of the United States). Without such visual evidence, the words in a government report are merely that—words, selectively and care-

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[56] *Id.*

[57] *Id.*

[58] *See* W. Lance Bennett & William Serrin, *The Watchdog Role*, *in* THE PRESS 169, 169 (Geneva Overholser & Kathleen Hall Jameson eds., 2005) (defining watchdog journalism "as: (1) independent scrutiny by the press of the activities of government, business and other public institutions, with an aim toward (2) documenting, questioning, and investigating those activities, in order to (3) provide publics and officials with timely information on issues of public concern").

[59] *See* Leathers v. Medlock, 499 U.S. 439, 447 (1991) (observing that "the press plays a unique role as a check on government abuse" and "as a watchdog of government activity") (link); HERBERT J. GANS, DEMOCRACY AND THE NEWS 79 (2003) (writing that the watchdog role represents "the journalists' finest opportunity to show that they are working to advance democracy").

[60] *To Catch a Predator* (NBC television broadcast 1997–2008).

[61] Conradt v. NBC Universal, Inc., 536 F. Supp. 2d 380, 383 (S.D.N.Y. 2008) (link).

[62] Lisa Friedman, *Photo Finish in High Court*, L.A. DAILY NEWS, Dec. 4, 2003.

fully chosen by a public official who cannot, at least in Allan Favish's view, be trusted. Photographs of death, in contrast, tell an unvarnished story of truth that words cannot capture. In clichéd terms, seeing—not reading—is believing.

Cutting against these calls for access are familial claims of privacy and preservation of dignity of the dead. As noted above, it is better for purposes of this Essay to hear it from the family members themselves and their attorneys, not academics.

"In a perfect world, I would push a button and delete every one of the images," Lesli Catsouras, mother of Nicole Catsouras, told a reporter for *Newsweek* magazine last year.[63] "It's evil, and this was done maliciously, as a joke, and it has devastated our lives completely. People should know that this can happen to them," she told the *New York Post*.[64]

James Hamilton, an attorney for Vincent Foster's family, explained their feelings, telling the *Washington Post* that "the Foster family seeks to be free from seeing these photos on television and the front pages of grocery store tabloids or on ghoulish Web sites."[65]

III. WHERE DO WE GO FROM HERE

Courts have long recognized an unenumerated First Amendment right to know.[66] Journalists, in turn, can argue that this right to know protects them when they publish photographs of tragedy and death that ostensibly serve what Professor Louis Day calls "some greater public good."[67] But as Day points out, there is a line that must be maintained between the public interest and a prurient interest.[68] Or as Professors Anthony Fargo and Laurence Alexander recently observed, "although most of the content that the news media produce may be interesting to most of the public, there is a difference between *being interesting* and *being of public interest*."[69]

Perhaps, in our reality TV world, we believe everyone else's life—and, more importantly for purposes of this Essay, their death—is of the public

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[63] Bennett, *supra* note 17.

[64] Maureen Callahan, *Untangling a Web of Lies*, NYPOST.COM, Feb. 16, 2007, http://www.nypost.com/p/entertainment/item_k6T4zNOT1FFDdWjmWVOz8L;jsessionid=19600AB20E546288E9A69DA84AEFF550 (link).

[65] Charles Lane, *Privacy Case Goes Before Justices*, WASHINGTONPOST.COM, Dec. 4, 2003, http://www.washingtonpost.com/ac2/wp-dyn/A33174-2003Dec3?language=printer (link).

[66] *See* Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577, 583 (6th Cir. 1976) (observing that "First Amendment protection of the right to know has frequently been recognized in the past") (citations omitted) (link).

[67] LOUIS ALVIN DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 151 (5th ed. 2006).

[68] *See id.* (drawing a distinction between the public interest and a prurient interest).

[69] Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media from Newsgathering Torts*, 32 HARV. J.L. & PUB. POL'Y 1093, 1106 (2009) (emphasis added) (citation omitted) (link).

interest, as fodder and fair game for our voyeuristic media consumption. Could it be that reality TV undermines the longstanding journalistic claim to a public's right to know by trivializing death? It may just be one of several social forces, along with the technological changes wrought by the Internet, which have brought us to this point.

Regardless of the causal forces, so that news media claims of access to images and words of death and dying are not denigrated and devalued by the public and judges to the point of being rendered piously—perhaps, vacuously—hollow cries of professional self-importance, I contend that the news media must pick, choose and, most importantly, explain their battles wisely when they seek access to such content. Even if a journalist obtains a death-scene photograph or videotape as part of the research process for an investigative report that could serve the public good, she must remember that once made public, the image of death she has gathered often will take on a life of its own, including going viral on the Internet. What was once obtained in the name of serving the public's right to know is later disseminated to serve the virulent voyeur's morbid and sensational self-interests.

It is no longer enough for journalists simply to say: "Well, we wanted the photograph for a legitimate purpose. We can't control what others do with it later. That's their business, not ours." Such assertions and self-serving absolutions allow journalists to wash their hands of the down-the-road, voyeuristic rubbernecking that transpires on the Internet. The "too bad, so sad" line of reasoning only paints journalists as callous, self-centered individuals with little compassion for others.

But it does not need to be this way. Journalists are professional communicators. They must now communicate to a trio of interest groups, in a professional and even-handed fashion, why both visual and auditory documentation of death and dying must remain open for public consumption. In particular, they must thoroughly explain:

• **To the public:** the larger societal value that supposedly is served by the opportunity to see such images or hear such words;

• **To the surviving members of the family**: in an in-person, face-to-face meeting, why they believe publishing such images and words serves the public interest; and

• **To lawmakers:** why further exceptions to state open records laws should not be carved out when they would close off access to records containing such images and words when they are in the possession of government agencies.

I suspect that communicating with surviving family members will be the most difficult for journalists, because they are accustomed to writing about people from behind the safety of their computer screens and keyboards, or broadcasting as they stare into a camera. Seeing the familial victims up close would give journalists a better framework for helping to contextualize and understand the potential negative consequences of their

actions. In sum, it is far too easy for journalists to trot out the First Amendment and then parade around crying "the public has a right to know." Requiring journalists to listen to those whose lives they are greatly impacting may avert some of the problems we now face in 2010. If the public has a right to know, then the families should possess a correlative right to let journalists know how they feel. Opening up the lines of direct communication between journalists and members of the public who may be adversely affected by images and words of death thus may mitigate legal and ethical problems for both groups in the future.