

# A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions

by CLAY CALVERT\*

## Introduction

In May 2012, the United States Court of Appeals for the Ninth Circuit broke new constitutional ground in *Marsh v. County of San Diego*<sup>1</sup> when it became the first court at any level<sup>2</sup> to hold that a federal right to privacy, rooted in the word “liberty” within the Due Process Clause of the Fourteenth Amendment,<sup>3</sup> encompasses “the power to control images of a dead family member.”<sup>4</sup> Writing for a unanimous three-judge panel, Alex Kozinski, the Ninth Circuit’s iconoclastic<sup>5</sup> chief judge, concluded that a mother “has a

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\* Professor & Brechner Eminent Scholar in Mass Communication and director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla.; B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Calli Breil, Ann Manov, Krystal McKay, Cassie Mestre and Linda Riedemann of the University for Florida for their review and comments on early drafts of this article.

1. See *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012).

2. See *id.* at 1154 (“So far as we are aware, then, this is the first case to consider whether the common law right to non-interference with a family’s remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected. We conclude that it is.”). See also *id.* at 1159 (“[T]his is the first case to address the federal privacy interest in death images.”).

3. U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

4. *Marsh*, 680 F.3d at 1153.

5. See Carl Tobias, *A New No. 1 at the 9th Circuit*, L.A. TIMES, Nov. 30, 2007, available at <http://articles.latimes.com/2007/nov/30/opinion/oe-tobias30> (“Kozinski . . . enjoys a well-deserved reputation as an iconoclast or, some would say, eccentric.”). See also *Kozinski Wins Seat on U.S. Appeals Court in S.F.*, S.F. CHRON., Nov. 8, 1985, at 10 (“Senate confirmed a controversial nominee, Alex Kozinski, to the U.S. Court of Appeals

constitutionally protected right to privacy over her child's death images."<sup>6</sup> In *Marsh*, those images were autopsy photos of a toddler<sup>7</sup> who died of severe head trauma<sup>8</sup> that one lower court previously described as "gory"<sup>9</sup> and "gruesome."<sup>10</sup>

That Judge Kozinski was among the initial trio of jurists—the other members of the *Marsh* panel were Kim McLane Wardlaw and Richard Paez<sup>11</sup>—to recognize this right is probably unsurprising. As Judge Kozinski proclaimed one decade before *Marsh*, "I consider myself a fan of all rights. We are here to protect the people from intrusive government in all of the things that people do in all their lives."<sup>12</sup>

His embracement of a new niche of privacy, however, directly conflicts with an earlier decision in *Marsh* by U.S. District Judge Janis Sammartino.<sup>13</sup> In February 2011, Sammartino concluded, upon the same facts, that the federal constitutional right to privacy "does not encompass a relative's interest in a decedent's autopsy photos. As crass as it may seem, Plaintiff's interest in the autopsy photos does not fall within the class of most basic decisions about family, parenthood, or bodily integrity."<sup>14</sup>

Ultimately, the Ninth Circuit's ruling in *Marsh*, which outlines the identical right that Judge Sammartino denied, may constitute a natural, if not inevitable, constitutional culmination of a recent

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in San Francisco yesterday. Kozinski, 35, will become the youngest federal appellate judge in the nation. For the past three years, he has been chief judge of the U.S. Claims Court in Washington, D.C.").

6. *Marsh*, 680 F.3d at 1160.

7. See generally Nancy L. McElwain, *Toddlerhood*, in *ENCYCLOPEDIA OF HUMAN DEVELOPMENT* 1272 (Neil J. Salkind ed., 2005) (describing toddlerhood as typically beginning around a child's first birthday and extending until to the end of the third year, and providing further background on the phase of toddlerhood). As described later, the deceased child in *Marsh* was a two-year-old boy, thus falling within the toddler classification. *Infra* note 34. See also *Marsh*, 680 F.3d at 1152 ("In 1983, Brenda Marsh's two-year-old son, Phillip Buell, died from a severe head injury . . .") (emphasis added).

8. *Marsh*, 680 F.3d at 1152.

9. *People v. Marsh*, 221 Cal. Rptr. 311, 320 (Cal. Ct. App. 1985).

10. *Id.*

11. *Marsh*, 680 F.3d at 1152.

12. Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 *LOY. L.A. ENT. L. REV.* 259, 270 (2003).

13. See *Marsh v. County of San Diego*, 771 F. Supp. 2d 1227 (S.D. Cal. 2011).

14. *Id.* at 1231.

“growth in privacy-of-death jurisprudence.”<sup>15</sup> It is a jurisprudence that, after *Marsh*, now cuts across the domains of constitutional, statutory and common law, while taking into account “concerns for the family’s privacy rights, emotional tranquility, solemn respect, and dignity.”<sup>16</sup>

Using the Ninth Circuit’s ruling in *Marsh* as an analytical springboard, this article concentrates on four facets of this nascent niche of the federal constitutional right to privacy:

1. How both lower-court and legislative recognition of the Internet as a powerful privacy-destroying force, when coupled with Justice Anthony Kennedy’s 2004 opinion for a unanimous Supreme Court in *National Archives and Records Administration v. Favish*,<sup>17</sup> rapidly expedited the transformation of a common law right that had unhurriedly germinated for more than eighty years into a budding constitutional one;

2. How the familial privacy right over death-scene and autopsy images is fundamentally different from—at least, in its protection of the intangible interests of both emotional tranquility and memory preservation—most constitutional privacy interests that affect actions and autonomous decision-making. *Marsh*, in brief, significantly expands the range of interests shielded from government interference and exploitation by the federal constitutional right to privacy;

3. How *Marsh* might be construed as recognizing a specific sliver of a broader constitutional right to informational privacy to which the Supreme Court, back in 1977 in *Whalen v. Roe*,<sup>18</sup> has alluded.<sup>19</sup> The possibility of such a right is tenuous, however, as the Court in 2011 in *NASA v. Nelson*<sup>20</sup> merely assumed it existed without directly deciding its viability,<sup>21</sup> and two justices in *Nelson* completely rejected its existence. In particular, Justice Antonin Scalia bluntly wrote in a

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15. Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 135 (2006).

16. Calvert, *The Privacy of Death*, *supra* note 15, at 135.

17. See Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

18. Whalen v. Roe, 429 U.S. 589 (1977).

19. *Id.* at 599–600.

20. Nat’l Aeronautics & Space Admin. v. Nelson, 131 S. Ct. 746 (2011) [hereinafter *Nelson III*].

21. *Id.* at 751 (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*.”).

concurrence joined by Justice Clarence Thomas that “[a] federal constitutional right to ‘informational privacy’ does not exist;”<sup>22</sup> and,

4. How the newfound constitutional right to familial privacy over death images potentially conflicts with the twin First Amendment<sup>23</sup> interests of free speech and press that may militate in favor of publishing such images, particularly when they are newsworthy or of public concern.<sup>24</sup>

To start to address these issues, Part I of the article provides an overview of *Marsh*, focusing on Judge Kozinski’s reasoning and analysis in finding a new feature of the unenumerated constitutional right to privacy.<sup>25</sup> Part II then demonstrates how Justice Kennedy’s dicta-rich description in *Favish* of the cultural and common law rights of familial privacy over death images tilled the judicial soil in which *Marsh*’s recognition of such a constitutional right took root.<sup>26</sup> Next, Part III explores both judicial and legislative recognition, across multiple cases and controversies during the past fifteen years involving death-scene and/or autopsy images, of the Internet’s power as a game-changing force in the battle to preserve privacy.<sup>27</sup> Part IV then illustrates how these twin forces—*Favish* and the Internet—produced in *Marsh* a constitutional privacy right that protects interests seemingly far different from those involved in using and receiving information about contraception,<sup>28</sup> choosing whether to

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22. *Id.* at 764 (Scalia, J., concurring in judgment).

23. 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. The Free Speech and Free Press Clauses were incorporated nearly ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

24. *See generally* Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles With News Media Complicity*, 19 VILL. SPORTS & ENT. L.J. 39 (2012) (providing an overview of the concepts of public concern and newsworthiness in light of the U.S. Supreme Court’s decision in the Westboro Baptist Church funeral-protest case of *Snyder v. Phelps*, 131 S. Ct. 1207 (2011)).

25. *See infra* notes 36–110 and accompanying text.

26. *See infra* notes 111–144 and accompanying text.

27. *See infra* notes 145–202 and accompanying text.

28. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (“[T]he right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”). *See also* Patrick M. Garry, *A Different Model for the Right to Privacy: The Political Question Doctrine as a Substitute for Substantive Due Process*, 61 U. MIAMI L. REV. 169, 181 (2006) (“The first case in which the Court recognized a constitutional right to privacy—*Griswold v. Connecticut*—involved state regulation of the sale and distribution of contraceptives.”).

have an abortion,<sup>29</sup> and engaging in consensual homosexual acts in private settings<sup>30</sup> recognized in other cases.<sup>31</sup> Part V briefly analyzes what the familial privacy right recognized in *Marsh* over death images might portend for a broader, yet still not explicitly recognized, constitutional right to informational privacy dodged by the Court in 2011 in *Nelson*.<sup>32</sup>

Next, Part VI explores the tension between the constitutional right to privacy over images of death and the First Amendment interest in the free expression of newsworthy information.<sup>33</sup> Finally, Part VII brings these diverse strands together and calls on the U.S. Supreme Court to affirm, if given the opportunity, the familial privacy right to control death images as embraced by the Ninth Circuit in *Marsh*, but to leave an exemption for newsworthy images that reflect on the conduct of government officials and/or operations.<sup>34</sup> A qualified right, rather than an absolute one, would strike a balance between familial interests and potential intangible injury to memories and emotions, and the public's right to know important information.<sup>35</sup>

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29. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

30. In opining against Texas’ anti-sodomy statute in 2003, Justice Anthony Kennedy emphasized privacy concerns, reasoning for the majority that:

[t]he petitioners are entitled to respect for their *private lives*. The State cannot demean their existence or control their destiny by making their *private sexual conduct* a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. . . . The Texas statute furthers no legitimate state interest which can justify its intrusion into the *personal and private life* of the individual.

*Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (emphasis added).

31. See *infra* notes 203–29 and accompanying text.

32. See *infra* notes 230–69 and accompanying text.

33. See *infra* notes 270–98 and accompanying text.

34. See *infra* notes 299–310 and accompanying text.

35. The right to know constitutes an unenumerated or peripheral First Amendment interest. See *Zemel v. Rusk*, 381 U.S. 1, 24 (1965) (Douglas, J., dissenting) (“The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer.”). See generally Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 U. ARK. LITTLE ROCK L. REV. 143, 155–61 (2000) (providing background on the First Amendment right to know).

## I. *Marsh v. County of San Diego*: Facts, Issues and the Ninth Circuit's Analysis

This part features two sections. First, Section A articulates the factual framework in *Marsh*, providing details and context for the case. Section B then provides an overview of the Ninth Circuit's analysis of the crucial substantive due process question raised by plaintiff Brenda Marsh: whether she possessed a federal constitutional privacy right to control dissemination of her son's autopsy photos.

### A. Sparks Igniting a New Constitutional Right: A Boy's Tragic Death and the Release of an Autopsy Photo

When two-year-old Phillip Buell died on April 28, 1983,<sup>36</sup> the Supreme Court's pivotal privacy-grounded abortion decision of *Roe v. Wade*<sup>37</sup> was a mere decade old. Furthermore, the high court's ruling in *Lawrence v. Texas*<sup>38</sup> striking down a Texas anti-sodomy statute and upholding the right of consenting adults, including homosexuals, to engage in the private, noninjurious sexual conduct of their choosing,<sup>39</sup> was still twenty years in the future.<sup>40</sup>

It would therefore have been difficult in 1983 to predict that Phillip's death and the public release decades later of one of his autopsy photos by Jay Coulter<sup>41</sup>—a retired prosecutor apparently peeved that the man he helped to convict of Phillip's murder,

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36. Mark Martin, *\$756,900 for 21 Years Wrongly Held in Prison; Dead Child's Mom Always Said Convict Didn't Kill Her Son*, S.F. CHRON., Jan. 20, 2006, at A1, available at <http://www.sfgate.com/news/article/756-900-for-21-years-wrongly-held-in-prison-2506317.php>.

37. *Roe v. Wade*, 410 U.S. 113 (1973).

38. *Lawrence v. Texas*, 539 U.S. 558 (2003).

39. *See id.* at 578 (emphasizing that the case did not involve minors or individuals "who might be injured or coerced or who are situated in relationships where consent might not easily be refused").

40. *See supra* note 30 (providing a key portion of the majority's ruling in *Lawrence* emphasizing the privacy aspects of its reasoning).

41. Coulter released the photograph to two news media outlets in 2006, six years after he retired. *See* Brief for Appellees at 7, *Marsh v. County of San Diego* (9th Cir. Aug. 1, 2011) (No. 11-55395) (hereinafter Appellees' Brief), available at [http://www.law.uci.edu/calendar/11-55395\\_ans.pdf](http://www.law.uci.edu/calendar/11-55395_ans.pdf) (stating that "[s]ix years after retirement, Coulter copied this photograph into a memorandum he prepared as a private citizen, entitled 'What Really Happened to Phillip Buell,'" and adding that Coulter "prepared the memorandum because he had been contacted by the media to answer questions about Phillip's death").

Kenneth Marsh,<sup>42</sup> was set free<sup>43</sup>—would spawn a new facet of constitutional privacy.<sup>44</sup> Indeed, it was Coulter’s alleged attempt to have news organizations publish an autopsy photo<sup>45</sup> that the Ninth Circuit deemed “sufficiently shocking to violate [plaintiff Brenda] Marsh’s substantive due process right.”<sup>46</sup>

Such are the tortured factual underpinnings and the trio of protagonists at the heart of *Marsh v. County of San Diego*: Plaintiff Brenda Marsh, the grief-stricken mother of Phillip Buell and the woman who now finds her name on a groundbreaking decision, Kenneth Marsh, the man wrongfully convicted of murdering Phillip Buell, and Jay Coulter, a former prosecutor who tried Kenneth Marsh and admitted to both copying and taking home sixteen of Phillip’s

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42. See *Marsh v. County of San Diego*, 771 F. Supp. 2d 1227, 1229 (S.D. Cal. 2011) (describing Coulter as “the San Diego Deputy District Attorney who tried Mr. Marsh’s criminal prosecution”).

43. See generally Maura Dolan, *State Pays Wrongly Convicted Man; Compensation Board Awards Kenneth M. Marsh \$756,900*, L.A. TIMES, Jan. 20, 2006, at B1 (reporting that Jay Coulter, the retired deputy district attorney who prosecuted Kenneth Marsh, “remains unconvinced that Marsh is innocent” and that “Coulter said the evidence did not fit Marsh’s version of what happened”); *Wrongly Jailed, Ex-Inmate Receives a \$757,000 Award*, N.Y. TIMES, Jan. 22, 2006, at A14 (reporting that Kenneth Marsh “spent nearly 21 years in prison” after being convicted of second-degree murder in the death of Phillip Buell).

44. According to a brief filed by Brenda Marsh, mother of the deceased Phillip Buell, with the Ninth Circuit Court of Appeals, Deputy District Attorney Jay S. Coulter: disagreed with the setting aside of the conviction he obtained of Kenneth Marsh in 1983, and objected to the publicity given to Marsh upon his release from prison and subsequent successful Penal Code 4900 proceeding. COULTER began insisting to anyone who would listen that Kenneth Marsh was guilty . . . He contacted news reporters, prosecutors, legislators, attorneys and physicians, attempting to state his opinion that Kenneth Marsh was guilty.

Brief of Appellant at 5–6, *Marsh v. County of San Diego* (9th Cir. June 20, 2011) (No. 11–55395) (hereinafter Brief of Appellant), available at [http://www.law.uci.edu/calendar/11-55395\\_opn.pdf](http://www.law.uci.edu/calendar/11-55395_opn.pdf).

45. Coulter asserted that “he did not want to comment on the murder trial based on ‘30 year old memories’ so he prepared statements to provide to the media, including the 2006 memorandum, and he provided that memorandum to two reporters.” Appellees’ Brief, *supra* note 41, at 8. Rather than seek out the reporters, Coulter contended that he “prepared the memorandum because he had been contacted by the media to answer questions about Phillip’s death” after Kenneth Marsh married Phillip’s mother, Brenda Marsh. *Id.* at 7.

46. *Marsh v. County of San Diego*, 680 F.3d 1148, 1155 n.3 (9th Cir. 2012).

autopsy photos<sup>47</sup> and later releasing one of them—post-retirement—to two news media organizations.<sup>48</sup>

At the time of Phillip’s death, Kenneth Marsh was Brenda’s live-in boyfriend.<sup>49</sup> The two later married despite the government’s accusation that Kenneth killed Brenda’s son.<sup>50</sup> It was during the discovery phase of a lawsuit Kenneth Marsh filed against Coulter and San Diego County after his release from prison<sup>51</sup> that, as the Ninth Circuit wrote:

Coulter disclosed that, while he was Deputy District Attorney, he photocopied sixteen autopsy photographs of Phillip’s corpse. Coulter also mentioned that, after he retired, he kept one of these as a “memento of cases that [he] handled.” Coulter eventually gave a copy of this photograph, along with a memorandum he wrote titled “What Really Happened to Phillip Buell?,” to a newspaper and a television station.<sup>52</sup>

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47. Brief of Appellant, *supra* note 44, at 5 (alleging that “COULTER also admitted in his deposition testimony that after his retirement in 2000, he took home those sixteen (16) copies of Phillip Buell’s autopsy photographs”).

48. According to Brenda Marsh, Coulter admitted that he drafted a memorandum entitled “What Really Happened to Phillip Buell” in which he copied to, and included, one of the autopsy photographs taken of Phillip during his 1983 autopsy . . . . To “prove” Kenneth Marsh’s guilt, COULTER admitted that he provided at least one of the autopsy photographs to Thom Jensen of KGTV television in San Diego, and to Maura Dolan of the *Los Angeles Times*, as part of that memorandum.

*Id.* at 6.

49. *See id.* at 2 (describing Kenneth Marsh as Brenda Marsh’s “then boyfriend”).

50. *Id.* (describing Kenneth Marsh as Brenda Marsh’s “now husband”).

51. *See Marsh v. County of San Diego*, 2007 WL 3023478, at \*1 (S.D. Cal. Oct. 15, 2007) (involving a motion to compel the production of certain medical records in Kenneth Marsh’s lawsuit claiming violation of his Fourth Amendment rights, malicious prosecution, intentional infliction of emotional distress and violation of California state civil rights statutes, and noting that Kenneth Marsh alleged there was “a conspiracy between Defendants to mislead and distort the medical history of Phillip Buell and to perform his autopsy in a false and deliberate manner to convict” Marsh, and that “the Defendants improperly influenced the County of San Diego to allow them to perform autopsies and autopsy related services in cases where children’s deaths were suspected of having been caused by abuse”).

52. *Marsh*, 680 F.3d at 1152.



The news organizations ultimately chose not to publish the photograph<sup>53</sup> and, as Coulter emphasized in a brief filed with the Ninth Circuit, Brenda Marsh “did not see the photograph in any media coverage, or hear about it from family or friends.”<sup>54</sup> Nonetheless, Brenda Marsh sued Coulter and San Diego County, alleging that the copying and dissemination of her late son’s autopsy photographs violated her Fourteenth Amendment Due Process rights<sup>55</sup> and, in particular, “a federal right to control the autopsy photographs of her child.”<sup>56</sup>

Why did she sue? According to a brief filed on her behalf with the Ninth Circuit, Brenda Marsh was horrified when she learned of Coulter’s copying and disclosure of her late son’s autopsy photos and she “suffered severe emotional distress, fearing the day that she would go on the Internet and find her son’s hideous autopsy photos.”<sup>57</sup>

This allegation regarding the speculative harm she might someday sustain due to possible posting of the images on the Internet ultimately proved pivotal for the Ninth Circuit. As Judge Kozinski opined, “Marsh’s fear is not unreasonable given the viral nature of the Internet, where she might easily stumble upon photographs of her dead son on news websites, blogs or social media websites.”<sup>58</sup> As Part II later explores, Judge Kozinski’s reasoning here aligns with other courts, legislative bodies and scholars concerned about the deleterious impact of the Internet on image-based privacy rights. As Professor Danielle Keats Citron encapsulates it:

[t]he searchable, permanent nature of the Internet extends the life and audience of privacy disclosures, and exacerbates individuals’ emotional and reputational injuries. For instance, if pictures and videos of a young girl’s sexual abuse are posted online,

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53. See Bob Egelko, *Family May Keep Autopsy Photos Private, Court Says*, S.F. CHRON., May 30, 2012, at C2 (reporting that “the media outlets did not publish the photos”).

54. Appellees’ Brief, *supra* note 41, at 1.

55. *Marsh*, 680 F.3d at 1152.

56. *Id.* at 1152–53.

57. Brief of Appellant, *supra* note 44, at 6–7.

58. *Marsh*, 680 F.3d at 1155.

they may remain there indefinitely, ensuring that the victim remains haunted by the abuse as an adult.<sup>59</sup>

What was different about Judge Kozinski's reasoning, however, was his analysis of Brenda Marsh's underlying argument—that she possessed a federal right to control autopsy images of her son “as a matter of substantive due process,”<sup>60</sup> rather than as a matter of common law or as a federal statutory right. The next section thus analyzes the Ninth Circuit's analysis of the substantive due process issue.

### **B. Substantive Due Process: Finding a New Facet of a Fundamental Privacy Right**

When examining *Marsh*, it is initially important to note that by focusing on substantive due process, the Ninth Circuit parted ways from the Supreme Court's groundbreaking constitutional privacy rights analysis in *Griswold v. Connecticut*.<sup>61</sup> In *Griswold*, “the Supreme Court for the first time expressly established the right to privacy as a constitutional matter.”<sup>62</sup> But as Dean Erwin Chemerinsky observes, Justice William Douglas's majority opinion in *Griswold* “began by rejecting substantive due process as a basis for finding a right to privacy in the Constitution. Instead, Justice Douglas said that privacy was found in the penumbras of the provisions of the Bill of Rights.”<sup>63</sup> Specifically, Douglas characterized the marital relationship as “lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>64</sup> He then determined that a law forbidding the use of contraception by a marital couple and “allow[ing] the police to search the sacred

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59. Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1808 (2010).

60. *Marsh*, 680 F.3d at 1153.

61. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

62. Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1557 (1994).

63. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2015 (2002). See Timothy Sandefur, *Privileges, Immunities, and Substantive Due Process*, 5 N.Y.U. J.L. & LIBERTY 115, 165 (2010) (observing that in *Griswold*, “the Justices were keen to avoid the specter of ‘substantive due process,’” and thus, they “employed a confusing language of ‘emanations’ and ‘penumbras’ that has invited ridicule ever since”).

64. *Griswold*, 381 U.S. at 485. The right to privacy, according to Justice Douglas, fell within the penumbras and emanations of multiple amendments to the U.S. Constitution, including the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484.

precincts of marital bedrooms for telltale signs of the use of contraceptives”<sup>65</sup> was “repulsive to the notions of privacy surrounding the marriage relationship.”<sup>66</sup>

The fact that the Ninth Circuit would utilize substantive due process to articulate a new niche of constitutional rights renders *Marsh* a decision ripe for immediate critique. As Professor Daniel Conkle writes, “[n]othing in constitutional law is more controversial than substantive due process.”<sup>67</sup> Conkle is not alone in that sentiment.<sup>68</sup> Indeed, as Professor Kermit Roosevelt adds, the “very idea of substantive due process has been derided as oxymoronic, most famously by John Hart Ely, who likened it to ‘green pastel redness.’”<sup>69</sup> Justice Antonin Scalia recently blasted substantive due process in the context of informational privacy, referring to it as an “infinitely plastic concept”<sup>70</sup> that allows the Court “to invent a constitutional right out of whole cloth.”<sup>71</sup>

Compounding the problem inherent with a substantive due process analysis is the very notion of privacy itself, which Professor Jerry Kang calls “a chameleon that shifts meaning depending on context.”<sup>72</sup> Other scholars are in accord. For instance, Professor Daniel Solove observes that “[t]ime and again philosophers, legal theorists, and jurists have lamented the great difficulty in reaching a satisfying conception of privacy.”<sup>73</sup> It is a sentiment seconded by

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65. *Id.* at 485.

66. *Griswold*, 381 U.S. at 486.

67. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006).

68. See, e.g., David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 859 (2009) (describing “the highly controversial area of so-called substantive due process”); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 2 (1994) (contending that “any form of substantive due process has controversial foundations as a matter of text and history”); John C. Toro, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 173–74 (2009) (asserting that “[s]ubstantive due process is the most controversial doctrine in constitutional law. Critics argue that when judges strike down legislation on substantive due process grounds, they improperly impose their own moral-political judgments without license from either the text of the Constitution or its original understanding”).

69. Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 984 (2006) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980)).

70. *Nelson III*, 131 S. Ct. at 764 (Scalia, J., concurring).

71. *Id.*

72. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202 (1998).

73. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088 (2002).

Professor Patricia Sanchez Abril who asserts that “[p]rivacy is a very complex and nuanced concept. Luminaries across academic disciplines have tried to define its precise meaning and importance, yet no singular definition has emerged.”<sup>74</sup>

While Solove writes that two traditional conceptions of privacy involve limiting access to oneself<sup>75</sup> and controlling personal information,<sup>76</sup> the right at issue in *Marsh* arguably differs from these notions because it involves: 1. limiting access to images of *others* (specifically, deceased relatives) rather than images of oneself; and 2. controlling information about others (specifically, deceased relatives) rather than information relating to themselves and their own identity.

Furthermore, the privacy interests at stake in *Marsh* do not involve so-called personally identifiable information (“PII”), which is “one of the most central concepts in privacy regulation”<sup>77</sup> despite being highly contested and poorly defined.<sup>78</sup> No data or facts personal to the identity of any living person, such as a social security number, mailing address, driver’s license number or phone number that

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74. Patricia Sanchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689, 695 (2010).

75. Solove, *supra* note 73, at 1102–05 (addressing privacy conceived as limited access to the self).

76. *Id.* at 1109–15 (addressing privacy conceived as control over personal information).

77. Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1816 (2011). See generally Robert Sprague & Corey Ciocchetti, *Preserving Identities: Protecting Personal Identifying Information Through Enhanced Privacy Policies and Laws*, 19 ALB. L.J. SCI. & TECH. 91, 93 (2009) (providing an overview of personally identifying information (PII), and observing that PII is “essentially, data that identifies a particular individual. Some pieces of PII—such as Social Security numbers—identify by themselves, while other pieces—such as a maiden name or employment address—only identify individuals when aggregated together into a digital profile”).

78. The Federal Trade Commission observed in a 2012 report that there is “a general acknowledgment that the traditional distinction between PII and non-PII has blurred and that it is appropriate to more comprehensively examine data to determine the data’s privacy implications.” FEDERAL TRADE COMMISSION, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICY MAKERS 19 (2012), available at <http://ftc.gov/os/2012/03/120326privacyreport.pdf>. See Paul Ohm, *Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization*, 57 UCLA L. REV. 1701, 1776 (2010) (calling PII a “hopelessly flawed crutch” for regulators like the Federal Trade Commission to rely upon in protecting privacy); Jane Yakowitz, *Tragedy of the Data Commons*, 25 HARV. J. LAW & TECH. 1, 7 (2011) (asserting that PII “is not limited to information that directly identifies a subject. Included in its ambit are pieces of information that can be used in combination to indirectly link sensitive information to a particular person”).

traditionally were thought of as PII, were at stake in *Marsh*.<sup>79</sup> The case, in other words, was not about behavioral marketing, online tracking or other concerns regarding Internet-based collection of personal data<sup>80</sup> for possible nefarious purposes that animate so much of today's academic discussion about privacy.<sup>81</sup>

What is ultimately at stake in *Marsh* is information about *others*—specifically, information in the form of photographic images of deceased persons, as opposed to information about them in the appearance of words, home addresses, social security numbers or IP addresses. Further resting in the balance with the brand of privacy recognized in *Marsh* are the memories, emotions and tranquility of the living that may be adversely and irreparably affected by the disclosure of images on the Internet. What *Marsh* thus shares in common with the concerns of scholars who devote their efforts to online informational privacy is the driving force of what Professor Jeffrey Rosen calls “the Web [that] never forgets.”<sup>82</sup> In brief, just as the Internet is a transformative technology in the collection and aggregation of facts and figures about individuals that might jeopardize their privacy, so too is it a terrain-shifting variable in judicial and legislative recognition of privacy interests surrounding publication of death images,<sup>83</sup> as Part II explains.

To establish this newfound constitutional privacy right under a substantive due process analysis, Judge Kozinski began by observing that the U.S. Supreme Court has recognized that the word “liberty”

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79. See Steven C. Bennett, *Regulating Online Behavioral Advertising*, 44 J. MARSHALL L. REV. 899, 910 (2011) (noting that information such as “as a name, postal address, Social Security Number, or driver’s license number” falls within traditional conceptions of PII).

80. See, e.g., Woodrow Hartzog, *Information Privacy: Chain-Link Confidentiality*, 46 GA. L. REV. 657 (2012) (serving as a thoughtful example of a law journal article addressing the disclosure of personal information online and proposing a solution for protecting online privacy).

81. See, e.g., Amitai Etzioni, *The Privacy Merchants: What is to be Done?*, 14 U. PA. J. CONST. L. 929 (2012) (analyzing the problems wrought by the so-called privacy merchants—corporations that collect and sell information about Internet users and monitor their online activities); Mark MacCarthy, *New Directions in Privacy: Disclosure, Unfairness and Externalities*, 6 ISJLPI/S: J.L. & Pol’y for Info. Soc’y 425, 426 (2011) (observing that “[p]rivacy policy is back. Policymakers and the public are again concerned about the collection of personal information by businesses and its possible misuse”).

82. Jeffrey Rosen, *Information Privacy: Free Speech, Privacy, and the Web that Never Forgets*, 9 J. TELECOMM. & HIGH TECH. L. 345, 345 (2011).

83. Cf. *Citron*, *supra* note 59, at 1851 (noting the “Internet’s magnifying and distorting impact in assessing” privacy claims based upon public disclosure of private facts).

in the Due Process Clause protects two types of privacy interests: 1. *Informational Control*: avoiding disclosure of information about certain personal matters;<sup>84</sup> and 2. *Familial Integrity and Decisional Autonomy*: making independent choices and decisions related to and affecting certain familial matters.<sup>85</sup>

Rather than rely solely on one of these two “divergent interests”<sup>86</sup> of privacy, Judge Kozinski and his colleagues deployed both aspects to pinpoint the loci of the familial right to control death images.<sup>87</sup> The blending and fusion of an informational-control right with a familial-integrity right produces a familial right to control information in the form of death images.

Regarding informational control and avoiding disclosure of personal matters, Judge Kozinski emphasized that public dissemination of vivid photographic information can disrupt private grieving:

Few things are more personal than the graphic details of a close family member’s tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments—all matters of private grief not generally shared with the world at large.<sup>88</sup>

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84. *Marsh v. County of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012) (citing *Whalen v. Roe*, 429 U.S. 589 (1977)).

85. *See id.* at 1154 (reasoning that “a parent’s right to control a deceased child’s remains and death images flows from the *well-established substantive due process right to family integrity*”) (emphasis added). *See generally* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 798 (3d ed. 2006) (observing that “the Court has expressly held that certain aspects of family autonomy are fundamental rights and that government interference with them will be allowed only if strict scrutiny is met,” and adding that these specific familial liberty rights include “the right to marry, the right to custody of one’s children, the right to keep the family together, and the right to control the upbringing of one’s children”).

86. *See* Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1045 (2009) (observing that subsequent to the U.S. Supreme Court’s groundbreaking privacy decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), “privacy has come to encompass divergent interests in both ‘decisional’ privacy—the right to make certain profoundly personal decisions, such as those concerning contraception, abortion, or marriage, free from government intrusion—and ‘informational’ privacy—the right to control the public disclosure of highly personal information”).

87. *Marsh*, 680 F.3d at 1154 (opining that “[t]he long-standing tradition of respecting family members’ privacy in death images partakes of both types of privacy interests protected by the Fourteenth Amendment”).

88. *Id.*

Unpacking this brief quotation, four key words emerge that pack a powerful rhetorical punch in favor of privacy: *graphic*, *tragic*, *suffering*, and *grief*. Viewed collectively, this quartet of terms captures not only the denotative nature of the cognitive information conveyed by death images like those at stake in *Marsh*, but also their emotive and affective force on the individuals who view them.

Specifically, “graphic” relates directly to the nature of the cognitive information conveyed by the images: vivid, raw, explicit and uncensored information about the manner of death. It is the viewing of such information—the vicarious witnessing, as it were, of a “tragic” death—that produces emotions of “grief”<sup>89</sup> in family members. That sense of familial grief itself possibly emerges from two different sources: 1. imagining the “suffering” felt and sustained by their deceased loved one as he or she perished; and 2. speculating about how an unseen audience of complete strangers on the Internet is feasting on those same images to satiate its voyeuristic appetite.<sup>90</sup>

Judge Kozinski’s recognition of the cognitive and emotive power of images harkens back to the Supreme Court’s analysis of the cognitive and emotive force of words expounded upon in *Cohen v. California*.<sup>91</sup> Writing for the majority in *Cohen* and protecting an adult’s right to wear a jacket emblazoned with the message “Fuck the Draft” in a Los Angeles courthouse corridor, Justice John Marshall Harlan observed “that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.”<sup>92</sup>

In *Marsh*, however, it is precisely the emotive or affective power of the images that requires their censorship rather than mandates their publication. Chief Justice John Roberts recently observed that

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89. See Margaret Stroebe & Henk Schut, *The Dual Process Model of Coping with Bereavement: Rationale and Description*, 23 DEATH STUD. 197, 206 (1999) (observing that “[b]ereavement is a life stressor eliciting grief, an emotion. What needs to be coped with above all is grief”) (emphasis added).

90. See generally Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 279–80 (1999) (asserting that “[a]s a culture, we like to watch others and take pleasure from the watching experience, even though we don’t always like to admit to it,” and noting that “[w]e rely on the media to satisfy our craving for lurid and/or private peeks at others’ lives and intimate moments”).

91. *Cohen v. California*, 403 U.S. 15 (1971).

92. *Id.* at 26.

“[a]s every schoolchild knows, a picture is worth a thousand words.”<sup>93</sup> They are worth the proverbial thousand words because, as Professor Rebecca Tushnet asserts in a recent *Harvard Law Review* article, “[i]mages are more vivid and engaging than mere words”<sup>94</sup> and they “can trigger emotions more reliably than words.”<sup>95</sup> It is these emotions—ones tied to grief, grieving and memory—that represent the intangible injury that a constitutional right of familial privacy over images of death guards against.

Put another way, Professor Tushnet observes that some courts in privacy cases “treat images as more dangerous than words because they provide more information than words could. This greater amount of content becomes a reason to regulate photographs more heavily than words.”<sup>96</sup> Similarly, an article published in the *Journal of Mass Media Ethics* more than two decades ago asserted that “a powerful photograph can tell a story as no words can. Yet, because photographs have greater impact on people than do written words, their capacity to shock exceeds that of language.”<sup>97</sup>

As applied to situations like *Marsh*, this logic about the sheer power of imagery suggests that while lifeless images of Phillip Buell can be shielded from public disclosure by a constitutional right to privacy, words describing Phillip’s death—perhaps in the form of a written autopsy report—cannot be similarly sheltered. Thus, the privacy right recognized by the Ninth Circuit in *Marsh* is one that plays upon an images-versus-words dichotomy with Judge Kozinski specifically using the word “images” when defining it.<sup>98</sup> There was no suggestion by the Ninth Circuit that the written autopsy report was a document subject to Brenda Marsh’s constitutional privacy rights. It should be noted, however, that courts have suppressed from public release written autopsy reports even when they are presumptively open under state freedom of information statutes.<sup>99</sup>

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93. *FCC v. CBS Corp.*, 132 S. Ct. 2677, 2678 (2012).

94. Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 *HARV. L. REV.* 683, 690 (2012).

95. *Id.* at 691.

96. *Id.* at 703.

97. Jennifer E. Brown, *News Photographs and the Pornography of Grief*, 2 *J. MASS MEDIA ETHICS* 75, 75 (1987).

98. *See supra* notes 4 and 6 and accompanying text.

99. *See Bodelson v. Denver Publ’g Co.*, 5 P.3d 373, 378 (Colo. App. 2000) (upholding, under a provision in the Colorado Open Records Act allowing for suppression of presumptively open records such as autopsy reports, a trial court’s order restricting public inspection and disclosure of autopsy reports resulting from the shooting incident at



Turning to the familial integrity-and-autonomy strand of substantive due process and privacy, the Ninth Circuit opined that:

[A] parent's right to choose how to care for a child in life reasonably extends to decisions dealing with death, such as whether to have an autopsy, how to dispose of the remains, whether to have a memorial service and whether to publish an obituary. Therefore, we find that the Constitution protects a parent's right to control the physical remains, *memory and images* of a deceased child against unwarranted public exploitation by the government.<sup>100</sup>

The link between images and memories is rather remarkable. Why? Because *Marsh* creates a constitutional right that thwarts governmental release of disturbing death images in order to preserve happy memories in the living. Put more explicitly, *the power to control negative images facilitates the power to preserve positive memories*. Therefore, the government (Jay Coulter and San Diego County) must suppress negative imagery to allow positive thoughts and recollections held by a private citizen (Brenda Marsh) to prevail.<sup>101</sup>

Judge Kozinski telegraphed this conclusion and the importance of memory preservation in the opening sentence of *Marsh* by asserting that “we try to remember our dearly departed as they were in life, not as they were at the end.”<sup>102</sup> Although never addressed or cited in *Marsh*, there is, in fact, much evidence supporting the connection between photos and memories. As one study notes, “[i]f memory is the way people keep telling themselves their stories, then

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Columbine High School on April 20, 1999, and concluding that there was “substantial evidence” to find “that disclosure of the autopsy reports would do substantial injury to the public interest”).

100. *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (emphasis added).

101. This proposition within the realm of constitutional privacy rights would contradict much of First Amendment free speech jurisprudence were it to be extended to government suppression of negative ideas and beliefs in order to preserve happy thoughts and positive beliefs. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (observing that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

102. *Marsh*, 680 F.3d at 1152.

photographs are one of the ways people keep those stories alive.”<sup>103</sup> Another study suggests this is especially true when it comes to the role that photos of deceased children play for grieving parents. In particular, Gordon Riches and Pamela Dawson assert in the journal *Death Studies* that:

[P]hotographs can provide an important prop both as an object of personal internal conversation *with* the deceased and as a vehicle for conversations between surviving relatives and others *about* the deceased. Whilst the objective presence has gone, photographs can provide continuing support for both public and private dialogues with the character of the deceased.<sup>104</sup>

Riches and Dawson add that photographs of deceased children can become “objects of discourse [that] help anchor parents to the fact of their parenthood and provide continuity in their search for a form of adjustment that makes sense of their loss.”<sup>105</sup>

It seems intuitive that the parental discovery of a graphic death-scene or autopsy image of a deceased child in a public sphere, such as the Internet, intrudes on the bereavement process by placing a very different, disturbing and discomfoting mental visualization in the mind of a parent. Indeed, if it is true that a deceased child’s life can “be carefully catalogued and ordered in photograph albums that enable any point in the family’s history to be open and relived[,]”<sup>106</sup> then reliving a tragic death through a death-scene image never meant for such an album is also not likely desired to be reexperienced on the Internet as part of the family’s public history.

Judge Kozinski, in fact, emphasized how the accidental or unintended<sup>107</sup> discovery of a gruesome death image in the public realm—namely, the Internet—can intrude “into the grief of a mother

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103. Maryanne Garry & Matthew P. Gerrie, *When Photographs Create False Memories*, 14 CURRENT DIRECTIONS PSYCHOL. SCI. 321, 323 (2005).

104. Gordon Riches & Pamela Dawson, *Lost Children, Living Memories: The Role of Photographs in Processes of Grief and Adjustment Among Bereaved Parent*, 22 DEATH STUD. 121, 124 (1998).

105. *Id.* at 139.

106. *Id.* at 136.

107. As Judge Kozinski wrote, Brenda Marsh “might easily stumble upon photographs of her dead son on news websites, blogs or social media websites.” *Marsh*, 680 F.3d at 1155.

over her dead son”<sup>108</sup> and, by implication, the memory of her child as he was in life. Grieving and remembering thus blend together at this stage in the Ninth Circuit’s constitutional analysis.

Although never made explicit in *Marsh*, there arguably are two sets of memories of the deceased at stake: 1. *familial memories*, and 2. *public memories*.

In particular, suppressing images of lifeless loved ones represents not simply an effort to preserve *familial memories* of relatives “as they were in life,”<sup>109</sup> but also to prevent the development of *public memories* of relatives as they were in death. Under this logic, a family’s memory of a child as she lived should not be eclipsed by the public’s memory of a child as she died. In other words, a family presumably will always hold and cherish at least some positive memories of a deceased loved one as he or she was in life, even after a horrific death. Preventing an image of death from becoming etched into the collective memory of the general public adds another layer to the familial integrity and autonomy interests at stake under this nascent constitutional right.

With this background in *Marsh* on the fusion of two strands of substantive due process privacy—informational control, and familial integrity and autonomy—in mind, the next part of the article demonstrates how the Supreme Court’s 2004 opinion in *National Archives and Records Administration v. Favish*<sup>110</sup> laid much of the groundwork for the Ninth Circuit in *Marsh* to transform common law and statutory recognition of familial privacy interests over death images into a constitutional right.

## II. More than Just a FOIA Case? *Favish’s* Jurisprudential Jumpstart of a Constitutional Right

In a 2005 law journal article, I asserted that the Supreme Court’s 2004 opinion in *National Archives and Records Administration v. Favish* “gave the green light to judges across the country to recognize family members’ privacy rights over the images of their dead loved ones beyond the narrow confines of FOIA access disputes.”<sup>111</sup> In 2012, the Ninth Circuit in *Marsh* hit the judicial accelerator and used

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108. *Id.*

109. *Id.* at 1152.

110. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

111. Calvert, *The Privacy of Death*, *supra* note 15, at 136.

*Favish* to drive forward a common law and statutory right into newfound constitutional territory.

*Favish* played a particularly important role in *Marsh* not only because the Supreme Court came close to recognizing a constitutional right to control images of a dead family member,<sup>112</sup> but also because the Court provided an extended discussion of a long-standing traditional and common law right in this area.<sup>113</sup> Acknowledging the prior existence of a common law right was pivotal because, as Judge Kozinski wrote, “[a] common law right rises to the level of a constitutional right if it is ‘deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty.’”<sup>114</sup> This history-and-tradition approach for identifying fundamental rights, as Professor Lee Goldman writes, is one generally favored by “[t]he more conservative Justices.”<sup>115</sup> That Judge Kozinski would follow this tack makes intuitive sense; various legal commentators have dubbed him as “a conservative Reagan appointee,”<sup>116</sup> “a rather conservative judge,”<sup>117</sup> and the Ninth Circuit’s “most well-known ‘conservative[.]’”<sup>118</sup>

*Favish* centered on the efforts of California attorney Allan Favish to obtain under the federal Freedom of Information Act<sup>119</sup> death-scene images of Vincent Foster, Jr., the deputy counsel to then-President Bill Clinton. Foster was found shot dead near Washington,

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112. See *Marsh*, 680 F.3d at 1153 (writing that “[n]o court has yet held that this right encompasses the power to control images of a dead family member, but the Supreme Court has come close in a case involving the Freedom of Information Act”).

113. *Id.* at 1153–54.

114. *Id.* at 1154 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

115. Lee Goldman, *The Constitutional Right to Privacy*, 84 DENVER U. L. REV. 601, 602 (2004). Goldman adds that “[t]he Supreme Court Justices have adopted two, often conflicting, approaches to determine whether a case involves a fundamental right. The more liberal Justices, seeking to protect minority interests, ask whether a right is central to personal dignity and autonomy or is at the heart of liberty.” *Id.*

116. Ronald J. Tabak, Commentary, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 548 (1996).

117. Jennifer L. Levi, *Some Modest Proposals for Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL’Y 243, 247 (2007) (referencing DAPHNE SCHOLINSKY *THE LAST TIME I WORE A DRESS* (1997)).

118. Jennifer E. Spreng, *Proposed Ninth Circuit Split: The Icebox Cometh: A Former Clerk’s View of the Proposed Ninth Circuit Split*, 73 WASH. L. REV. 875, 935 n.287 (1998). See Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL’Y & L. 317, 327 (2003) (describing Kozinski as “a conservative judge on the United States Court of Appeals for the Ninth Circuit”).

119. 5 U.S.C. § 552 (2011).

D.C. in 1993.<sup>120</sup> Although multiple investigations ruled the shooting a suicide, Favish was skeptical.<sup>121</sup> As a *New York Times* article reporting on oral argument before the Supreme Court put it, Favish maintained “that the photographs would demonstrate inconsistencies in the official reports of the death and show that the government had been negligent in determining what really happened.”<sup>122</sup> Favish was not alone in holding this viewpoint.<sup>123</sup>

In a unanimous opinion authored by Justice Anthony Kennedy, however, the Supreme Court concluded “that FOIA recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.”<sup>124</sup> The Court determined that the particular FOIA exemption providing such a right was 7(C), which was added in the 1974 amendments to the original FOIA statute in order “to prevent disclosures that could potentially endanger law enforcement personnel, their families, and confidential informants who cooperate with authorities.”<sup>125</sup> Specifically, Exemption 7(C) provides that FOIA does not apply to “records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy.”<sup>126</sup>

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120. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 160–61 (2004). See Jerry Seper, *Foster Death Photos Protected*, WASH. TIMES, Mar. 31, 2004, at A11 (reporting that “Foster’s body was found on a grassy incline at Fort Marcy, a Civil War-era battlefield park overlooking the Potomac River. It was slumped near a cannon. A 1913-vintage revolver, which the report said belonged to the Foster family, was in his hand”).

121. *Favish*, 541 U.S. at 161. See Warren Richey, *A Family’s Privacy vs. Public’s Right to Know*, CHRISTIAN SCI. MONITOR, Dec. 3, 2003, at 2 (reporting that there were “five official investigations, including two by independent counsels. They have generated thousands of pages of evidence, testimony, and analysis, and more than 100 photographs. All five investigations reached the same conclusion: that Foster committed suicide”).

122. Linda Greenhouse, *Justices Hear Case on Using Death Photos of Official*, N.Y. TIMES, Dec. 4, 2003, at A26.

123. See Michael McGough, *Top Court Blocks Release of Photos of Foster’s Corpse—Respect for Dead, Privacy of Clinton Lawyer’s Family Cited*, PITT. POST-GAZETTE, Mar. 31, 2004, at A-5 (reporting that “[t]he 1993 death of Foster, an intimate of the Clinton family from Arkansas who served as deputy White House counsel, long has been a source of speculation in conservative circles, where rumors swirl that he was killed to keep him from revealing supposed crimes committed by then-President Bill Clinton and his wife, now-New York Sen. Hillary Rodham Clinton”).

124. *Favish*, 541 U.S. at 170.

125. Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted Under the FOIA? An Analysis of the Supreme Court’s “Sufficient Reason” and “Presumption of Legitimacy” Standards*, 16 U. FLA. J.L. & PUB. POL’Y 361, 372 (2005).

126. 5 U.S.C. § 552(b)(7)(C) (2012).

The *Favish* case boiled down to a matter of statutory construction rather than the creation of a constitutional right, with Justice Kennedy's opinion addressing whether the phrase "personal privacy" in Exemption 7(C) narrowly encompassed only the right to control information about oneself<sup>127</sup>—in this case, the self being the deceased, Vincent Foster—or whether it extended more broadly to family members of the deceased seeking "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility[.]"<sup>128</sup>

In accepting the latter broader definition, Justice Kennedy dug deep into a rather eclectic mix of sources to find "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."<sup>129</sup> In bridging ancient burial rights with the ability to control modern-day photos of the dead, Justice Kennedy cited the *Encyclopaedia Britannica*, *Encyclopedia of Religion*, Sophocles' tragedy *Antigone* and, much more recently, "outrage at seeing the bodies of American soldiers mutilated and dragged through the streets[.]"<sup>130</sup> Justice Kennedy then deployed multiple cases from across the United States<sup>131</sup> to demonstrate what he called a common law familial privacy right "over the body and death images of the deceased[.]"<sup>132</sup>

Among those cases was a New York appellate court decision dating back more than one century, *Schuyler v. Curtis*.<sup>133</sup> In *Schulyer*, the court held that "a privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased."<sup>134</sup> Importantly, and as addressed later in Part IV, this

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127. See *Favish*, 541 U.S. at 165 (noting that Allan Favish argued "that the individual who is the subject of the information is the only one with a privacy interest" and that "the family has no personal privacy interest covered by Exemption 7(C)").

128. *Id.* at 166.

129. *Id.* at 167.

130. *Id.* at 168.

131. See *id.* (citing *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998), *McCambridge v. Little Rock*, 766 S.W.2d 909 (Ark. 1989), and *Bazemore v. Savannah Hospital*, 155 S.E. 194 (Ga. 1930)).

132. *Id.* at 168.

133. *Schuyler v. Curtis*, 42 N.E. 22 (Ct. App. N.Y. 1895).

134. *Id.* at 25.

language from *Schuyler* cited approvingly by Justice Kennedy makes it evident that the constitutional right later recognized in *Marsh* serves intangible familial interests in memory and emotions. Ultimately, Justice Kennedy wrote that the justices “can assume Congress legislated against this background of law, scholarship, and history when it enacted FOIA and when it amended Exemption 7(C) to extend its terms.”<sup>135</sup>

Judge Kozinski latched onto the Court’s ruling in *Favish* to provide the common law and traditional foundation necessary<sup>136</sup> for the Ninth Circuit’s recognition of a constitutional privacy right tethered to substantive due process. Kozinski wrote that the Supreme Court came “close”<sup>137</sup> in *Favish* to recognizing such a constitutional right but stopped short of doing so simply because it “had no need to determine whether it [a common law right] is also grounded in the Constitution.”<sup>138</sup> Kozinski opined that:

[t]he *Favish* Court considered our history and traditions, and found that “th[e] 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.” For precisely the same reasons, we conclude that this right is also protected by substantive due process.<sup>139</sup>

In hindsight, perhaps *Marsh* was inevitable offshoot of *Favish*. Shortly after the Supreme Court handed down its decision in *Favish*, Ken Paulson, current president and chief executive officer of the First Amendment Center at Vanderbilt University,<sup>140</sup> opined in *USA Today* that the decision stands as:

a reminder that as public, press and media push the envelope with increasingly sensational content, courts

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135. *Favish*, 541 U.S. at 169.

136. See *supra* note 112 and accompanying text (describing the history-and-tradition requirement articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997)).

137. *Marsh v. County of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012).

138. *Id.*

139. *Id.* at 1154 (citation omitted).

140. See Ken Paulson, First Amendment Center, <http://www.firstamendmentcenter.org/author/kenpaulson> (last visited Feb. 18, 2013) (providing biographical information on Paulson).

are going to be inclined to push back. To be fair, it's not the mainstream media that judges truly worry about. It's the uninhibited and unrestrained nature of the Internet that probably gives them pause.<sup>141</sup>

Not only was Paulson correct about the role of the Internet—as noted earlier, it was a pivotal feature in Judge Kozinski's *Marsh* opinion<sup>142</sup>—but he further predicted that *Favish* was merely part of “the first wave of developments signaling broader protection of privacy”<sup>143</sup> that “certainly won't be the last.”<sup>144</sup> Eight years later and in light of *Marsh*, those prognostications proved prescient and, as the next part of this article explores, multiple courts and legislative bodies have recognized the privacy obliterating role played by the Internet when it comes to the sights and sounds of death.

### III. The Sights and Sounds of Death: Rising Judicial, Legislative and Scholarly Concerns About Privacy in the Age of the Internet

The twenty-first century legislative precursor to the Supreme Court's *Favish* opinion arose after requests were filed by news organizations under Florida's open records laws for autopsy photos of Dale Earnhardt, a NASCAR driver killed in a crash at Daytona International Speedway in February 2001.<sup>145</sup> More than thirty photos were taken of Earnhardt's cadaver, and they automatically were considered public documents subject to release under state law.<sup>146</sup> Heeding the pleas of Earnhardt's widow, who was concerned the photographs would be plastered on the Internet if released,<sup>147</sup> Florida

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141. Ken Paulson, *Inside the First Amendment: Supreme Court Places a Premium on Privacy*, USA TODAY, Apr. 5, 2004, available on NewsBank electronic database.

142. *Supra* note 58.

143. Paulson, *supra* note 141.

144. *Id.*

145. See generally Bill Adair, *Privacy, Access at Odds in Foster Autopsy Case*, ST. PETERSBURG TIMES (Fla.), Nov. 30, 2003, at 1A (providing an overview of the disputes involving photographs of both Earnhardt and Foster).

146. See Solove, *supra* note 73, at 1148 n.358 (noting that “[o]ver thirty photographs were taken of Earnhardt's cadaver. Earnhardt's wife sought to keep the autopsy photographs of Earnhardt from the public,” and adding that “[u]nder Florida's public records law, autopsy photographs are public documents, and the owner of a website that specialized in posting gruesome autopsy photographs (along with a number of newspapers and media entities) were interested in obtaining the photographs”).

147. Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10



lawmakers adopted a statute that generally exempts from public disclosure photographs, videos and audio recording held by medical examiners<sup>148</sup> and made it apply retroactively.<sup>149</sup> Balancing concerns about newsworthiness against privacy,<sup>150</sup> lawmakers incorporated into the statute a provision allowing for viewing and copying of such imagery “upon a showing of good cause.”<sup>151</sup> This determination must be made by a judge after considering a trio of factors: “whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family’s right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.”<sup>152</sup>

In 2002, a Florida appellate court upheld the law because it “serve[d] an identifiable public purpose, is no broader than necessary to meet that public purpose and was enacted in accordance with the constitutional and legislative requirements.”<sup>153</sup> As for referencing constitutional requirements, the appellate court found it permissible<sup>154</sup> for the legislature to determine that a provision of the Florida Constitution protecting privacy<sup>155</sup> trumped another section providing

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COMM. L. & POL’Y 313, 314–15 (2005). In making her case for keeping the autopsy photos of her late husband private, Theresa Earnhardt asserted that “this issue is of vital importance, not just to my family but to anyone ever faced with being exploited after losing a loved one.” *Earnhardt’s Widow Pleads for Privacy*, ST. PETERSBURG TIMES (Fla.), Mar. 5, 2001, at 2C. Theresa Earnhardt “said she feared that the pictures would find their way onto the Web.” Editorial, *Newspaper Caved*, ST. PETERSBURG TIMES (Fla.), Mar. 22, 2001, at 14A.

148. FLA. STAT. § 406.135 (2012). See generally Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71, 94 (2003) (observing that “[t]he public-record status of autopsy photos was restricted by the Florida Legislature after the death of race-car driver Dale Earnhardt when a Florida newspaper sought Earnhardt’s autopsy records”).

149. See FLA. STAT. § 406.135 (8) (2012) (providing that “[t]his exemption shall be given retroactive application”).

150. See *supra* Part VI (addressing concerns the tension between privacy and newsworthiness).

151. FLA. STAT. § 406.135 (4) (a) (2012).

152. FLA. STAT. § 406.135 (4) (b) (2012).

153. *Campus Commc’ns, Inc. v. Earnhardt*, 821 So. 2d 388, 395 (Fla. Ct. App. 2002).

154. *Id.* at 402–03.

155. See FLA. CONST., art. I, § 23 (2012) (providing that “[e]very natural person has the right to be let alone and free from governmental intrusion into the person’s private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law”).

for public access to government documents.<sup>156</sup> In 2003, the Supreme Court declined to hear the case.<sup>157</sup>

Other states, such as Louisiana,<sup>158</sup> have carved out exemptions from their open records laws regarding certain images of death.<sup>159</sup> Georgia now generally prevents from public disclosure not only autopsy photographs,<sup>160</sup> but also:

[c]rime scene photographs and video recordings, including photographs and video recordings created or produced by a state or local agency or by a perpetrator or suspect at a crime scene, which depict or describe a deceased person in a state of dismemberment, decapitation, or similar mutilation including, without limitation, where the deceased person's genitalia are exposed.<sup>161</sup>

This aspect of Georgia law “was prompted by the murder of graduate student Meredith Emerson and the subsequent request by a *Hustler* magazine reporter for gruesome crime-scene photos.”<sup>162</sup> As with Florida, Georgia allows for disclosure of both autopsy and crime-scene images when the public interest outweighs privacy concerns.<sup>163</sup> The bottom line is that “[a]lthough autopsy reports

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156. See FLA. CONST., art. I, § 24(a) (2012) (providing, in relevant part, for “the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf”).

157. *Campus Commc'ns, Inc. v. Earnhardt*, 540 U.S. 1049 (2003).

158. See LA. REV. STAT. ANN. § 44:19 (2012) (providing, in relevant part, that “photographs, video, or other visual images, in whatever form, of or relating to an autopsy conducted under the authority of the office of the coroner shall be confidential, are deemed not to be public records”).

159. See N.C. GEN. STAT. § 132-1.8 (2012) (providing that “a photograph or video or audio recording of an official autopsy is not a public record,” but “the text of an official autopsy report . . . is a public record and fully accessible by the public”).

160. GA. CODE ANN. § 45-16-27(d) (2012).

161. GA. CODE ANN. § 45-16-27(e)(1) (2012).

162. Jim Tharpe, *Senate Excludes Some 911 Calls, Crime Photos from Public Record*, ATLANTA J.-CONST., Apr. 14, 2010, at 1A. See Bill Rankin, *Photo Request Sparks an Uproar*, ATLANTA J.-CONST., Mar. 9, 2010, at 1B (reporting that “*Hustler* Magazine’s request for crime-scene photos of the decapitated body of hiker Meredith Emerson was met by outraged lawmakers who vowed on Monday to push legislation exempting such photos from public release”).

163. Specifically, when it comes to autopsy photos, Georgia provides that:

traditionally are public record[s], privacy advocates are gaining traction across the country in seeking confidentiality, in part because of concerns that gruesome photos upsetting to the survivors may be widely distributed online.”<sup>164</sup> In 2009, for instance, the Supreme Court of Pennsylvania concluded that although autopsy reports are public records presumptively subject to disclosure under Pennsylvania statutory law, “graphic photographs” included within them may be suppressed based on privacy concerns where a trial court deems it warranted.<sup>165</sup>

Professor Catherine Cameron explains in a relatively recent article that “a big reason for the media’s difficulty in defending the need for public access to autopsy records and crime-scene photographs is the ever-widening number of outlets that fall under the term ‘media.’ Any person can put up a website and consider it a media outlet.”<sup>166</sup> Likewise, Professors Samuel Terilli and Sigman Splichal assert that “what has truly changed in recent years”<sup>167</sup> in the

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A superior court may, in closed criminal investigations, order the disclosure of such photographs upon findings in writing that disclosure is in the public interest and that it outweighs any privacy interest that may be asserted by the deceased’s next of kin. In any such action, the court shall review the photographs in question in camera and may condition any disclosure on such measures as the court may deem necessary to accommodate the interests of the parties before it.

GA. CODE ANN. § 45-16-27(d) (2012). In terms of disclosing crime-scene photos, the law provides that:

[A] superior court may order the disclosure of such photographs or video recordings upon findings in writing that disclosure is in the public interest and outweighs any privacy interest that may be asserted by the deceased person’s next of kin. In making such determination, the court shall consider whether such disclosure is necessary for public evaluation of governmental performance, the seriousness of the intrusion into the family’s right to privacy, and whether such disclosure is the least intrusive means available considering the availability of similar information in other public records. In any such action, the court shall review the photographs in question in camera with the custodian of crime scene materials present and may condition any disclosure on such condition as the court may deem necessary to accommodate the interests of the parties.

GA. CODE ANN. § 45-16-27(e)(2) (2012).

164. Frank LoMonte, *Transparency Tuesday: Dead Mean Tell No Tales, as States Shut Down Access to Autopsy Reports*, STUDENT PRESS LAW CENTER (July 17, 2012), <http://www.splc.org/wordpress/?p=3915>.

165. Penn Jersey Advance, Inc. v. Grim, 962 A.2d 632, 637 (Pa. 2009).

166. Catherine J. Cameron, *Not Getting to Yes: Why the Media Should Avoid Negotiating Access Rights*, 24 T.M. COOLEY L. REV. 237, 242 (2007).

167. Terilli & Splichal, *supra* note 149, at 346.

battle for access to death images and autopsy photos is “mass reproduction and the Internet.”<sup>168</sup> Another legal commentator labels the Internet:

a virtual graveyard where accident videos can be viewed and corpses can be closely scrutinized under the protection of the First Amendment. This explicit content represents a quantum leap from the standard obituary or the occasional article containing a photograph of the deceased. Often devoid of informative value, these digital images present a challenge to our privacy law that is unlike anything our courts have had to face in coming to prior holdings.<sup>169</sup>

One such specimen demonstrating the Internet-based interest in autopsy reports is a site called AutopsyFiles.org that boasts of its “dedicat[ion] in providing autopsy reports of famous celebrities and other infamous persons.”<sup>170</sup> Another site features crime-scene photos, warning visitors that “[m]any of the photos are extremely graphic and may be considered by some to be disturbing or offensive.”<sup>171</sup> Finally, there is a members-only site called Documenting Reality that features videos and images of death.<sup>172</sup> As all of these sites suggest, the concerns of both Brenda Marsh and Judge Kozinski about the Internet posting of death images are very real.

That such images flourish on the Internet may be partly attributable to the fact that journalists, bound by ethical and professional responsibilities,<sup>173</sup> no longer serve as gatekeepers or intermediates for deciding what images reach the public at large.<sup>174</sup>

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168. *Id.*

169. David Hamill, Note, *The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity*, 25 J. CIV. RTS. & ECON. DEV. 833, 836 (2011).

170. AutopsyFiles.org, <http://www.autopsyfiles.org> (last visited Feb. 18, 2013).

171. Crime Scene Photos, <http://www.members.tripod.com/~VanessaWest/crimescenephotos.html> (last visited Feb. 18, 2013).

172. Documenting Reality, <http://www.documentingreality.com/forum> (last visited Feb. 18, 2013).

173. See generally Society of Professional Journalists Code of Ethics, <http://www.spj.org/ethicscode.asp> (setting forth ethical obligations established by one of the nation's leading journalism organizations).

174. Cf. Kelly McBride, *Questions to Consider Before Publishing Autopsy Reports*, POYNTER, Aug. 24, 2012, <http://www.poynter.org/latest-news/everyday-ethics/186250/questions-to-consider-before-publishing-autopsy-reports> (providing an interesting and

The rise of social media networks and the Internet have dramatically affected the balance between privacy and publicity. As attorney Lauren Gelman succinctly captures it:

Prior to the advent of the Internet era, individuals lacked the technological megaphone to broadcast their story to the world. Instead, their content was filtered through news or other publishing intermediaries. These entities played an important social role in balancing the newsworthiness of information against the privacy interests of third parties who were identified. Now, individuals can no longer rely on intermediaries to filter privacy-invasive content with no “newsworthy” purpose from reaching a mass audience.<sup>175</sup>

In 2011, Florida went beyond shielding autopsy photos from governmental release.<sup>176</sup> In particular, the Sunshine State adopted a statute which generally provides that “[a] photograph or video or audio recording that depicts or records *the killing of a person* is confidential and exempt from” Florida’s open records laws.<sup>177</sup> And when it comes to audio recordings of 911 calls that might capture a caller’s dying words, the National Conference of Legislatures reported in 2012 that “[s]ix states—Alabama, Mississippi, Missouri, Pennsylvania, Rhode Island and Wyoming—keep 911 call recordings confidential. Five other states—Georgia, Maine, Minnesota, North Carolina and South Dakota—place some restrictions on the release of 911 calls or the information contained in them.”<sup>178</sup>

Perhaps the most important pre-*Marsh* decision to grapple with images of death and their posting on the Internet is *Catsouras v. Department of California Highway Patrol*.<sup>179</sup> The case pivoted on

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timely analysis of the ethical concerns that journalists should address when reporting on autopsies).

175. Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1333 (2009).

176. *Infra* notes 197–98 and accompanying text.

177. FLA. STAT. § 406.136(2) (2012) (emphasis added).

178. *State Laws Relating to Confidentiality of 9-1-1 Call Recordings*, NAT’L CONF. STATE LEGISLATURES, Jan. 11, 2012, <http://www.ncsl.org/issues-research/telecom/confidentiality-of-911-call-recordings.aspx> (last visited Feb. 18, 2013).

179. *Catsouras v. Dep’t of Calif. Highway Patrol*, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010), *modified*, 2010 Cal. App. LEXIS 253 (Cal. Ct. App. Mar. 1, 2010), *appeal &*

photos of a decapitated 18-year-old woman, Nicole Catsouras, taken by members of the California Highway Patrol (“CHP”) at the scene of the car accident that took her life.<sup>180</sup> Two CHP officers allegedly “e-mailed the horrific photographs of decedent’s mutilated corpse to members of the public unrelated to the accident investigation.”<sup>181</sup> That unauthorized dissemination began what the California appellate court called “the unthinkable exploitation of the photographs of her decapitated remains. Those photographs were strewn about the Internet and spit back at the family members, accompanied by hateful messages.”<sup>182</sup> Indeed, the graphic photographs were still posted on the Internet in August 2012 on a site fittingly called Best Gore,<sup>183</sup> and at one point “more than 2,500 Internet Web sites in the United States and the United Kingdom posted the photographs.”<sup>184</sup>

The appellate court held in 2010 that “family members have a common law privacy right in the death images of a decedent, subject to certain limitations.”<sup>185</sup> After performing an extensive duty analysis for a negligence cause of action, the appellate court concluded that the CHP defendants “owed a duty of care to plaintiffs not to place decedent’s death images on the Internet for the lurid titillation of persons unrelated to official CHP business.”<sup>186</sup> The case ultimately ended when the CHP settled with the Catsouras family for a whopping \$2.375 million in January 2012 rather than go to trial facing a decidedly bad set of facts.<sup>187</sup>

Nearing the issue that would squarely arise in *Marsh*, the California appellate court in *Catsouras* considered the argument of the deceased’s family members that “they ha[d] a constitutionally

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*depublication request(s) denied*, 2010 Cal. LEXIS 3456 (Cal. Apr. 14, 2010). See generally Clay Calvert, *Salvaging Privacy & Tranquility From the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet*, 2010 MICH. ST. L. REV. 311 (2010) (providing an in-depth analysis of the appellate court’s *Catsouras* ruling).

180. *Catsouras*, 104 Cal. Rptr. 3d at 357–58.

181. *Id.* at 358.

182. *Id.* at 357.

183. Porsche Girl Nicki Catsouras Car Crash Photos, BestGore.com, <http://www.bestgore.com/road-accidents/porsche-girl-nikki-catsouras-carcrash-photos> (last visited Feb. 18, 2013).

184. *Catsouras*, 104 Cal. Rptr. 3d at 359.

185. *Id.* at 358.

186. *Id.* at 376.

187. Greg Hardesty, *Family Gets \$2.4 Million Over Grisly Crash Images*, ORANGE COUNTY REGISTER (Cal.), Jan. 30, 2012, <http://www.ocregister.com/articles/family-337967-catsouras-nikki.html>.

protected right of privacy in decedent's photographs."<sup>188</sup> The appellate court, however, noted that the "parties cite no California or Ninth Circuit Court of Appeals case addressing whether a complaint alleging a violation of a family member's privacy right to photographs of a decedent is sufficient to state a cause of action"<sup>189</sup> for a civil rights violation under 42 U.S.C. § 1983.<sup>190</sup> The court held that the CHP officers were entitled to qualified immunity because whether or not such a constitutional right to privacy over death-scene images existed in October 2006 when the photos were taken and transmitted was not clearly established.<sup>191</sup>

In *Marsh*, Kozinski cited *Catsouras* favorably to support the proposition that courts, in addition to the Supreme Court in *Favish*, "have also recognized family members' privacy right in a decedent's death images."<sup>192</sup> He acknowledged, however, that *Catsouras* and an Ohio federal district court opinion called *Melton v. Board of County Commissioners*,<sup>193</sup> both described "the well-established common law right, *not* a constitutional right."<sup>194</sup> As Kozinski wrote, "[a]lthough the *Catsouras* court found a state privacy right over death images, it found no clearly established federal right."<sup>195</sup>

The bottom line is that the ubiquitous presence of the Internet as a cheap and convenient vehicle for posting in perpetuity graphic images of death and the dead is helping to propel decisions like *Marsh* and *Catsouras*. As Jon Mills, Dean emeritus of the University of Florida's Levin College of Law, recently wrote, "[t]oday's toxic mix of easy access to digital photos, easy global distribution via the Internet and the ability to distribute anonymously is a perfect storm for horrible intrusions."<sup>196</sup> Although battles over access to graphic death-scene images certainly captured judicial attention before

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188. *Catsouras*, 104 Cal. Rptr. 3d at 385.

189. *Id.*

190. See 42 U.S.C. § 1983 (2011) (providing for a civil action remedy against state and local government officials, acting under color of state authority, for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws").

191. *Catsouras*, 104 Cal. Rptr. 3d at 385. See *Pearson v. Callahan*, 555 U.S. 223 (2009) (providing a review of the qualified immunity doctrine and the two prongs used in qualified immunity analyses).

192. *Marsh v. County of San Diego*, 680 F.3d 1148, 1153 (9th Cir. 2012).

193. *Melton v. Bd. of Cnty. Comm'rs*, 267 F. Supp. 2d 859 (S.D. Ohio 2003).

194. *Marsh*, 680 F.3d at 1154 (emphasis added).

195. *Id.* at 1159.

196. Jon Mills, *A Privacy Right for Web*, ST. PETERSBURG TIMES (Fla.), Feb. 23, 2010, at 9A.

widespread adoption of the Internet in cases such as *State v. Rolling*,<sup>197</sup> those courts did not need to evaluate the game-changing dissemination force that is the Internet. In fact, in *Rolling*, which centered on public and media access to images of the murder victims of Danny Rolling in Gainesville, Florida while he was standing trial, the local judge presiding over the case wrote:

The potential for substantial injury to innocent third parties presumptively applies to the intimate relatives of murdered victims. The content of the subject matter—the photographs of the nude bodies, the stab wounds and mutilations of the victims—can reasonably be expected to cause extreme emotional distress and trauma if encountered in *supermarket tabloids, newspapers, magazines, television programs or the like*, especially since these involve utilization of the photographs for commercial gain.<sup>198</sup>

This passage is devoid of any reference to the Internet, where today seemingly anyone can post anything to anyone forever. The reasonable expectation for extreme emotional distress described by Judge Stan Morris in *Rolling* is, as the opinions in *Marsh* and *Catsouras* intimate with their references to the Internet,<sup>199</sup> exponentially compounded by this medium. In fact, academics today have a name for the underlying phenomenon about which judges in cases like *Marsh* and *Catsouras* fret—Internet spectatorship.<sup>200</sup> It refers to “the ‘illicit’ looking enabled by new media technologies the looking that takes place outside the mainstream news makers’ control and sanction for public consumption.”<sup>201</sup> Such spectatorship, as noted above, compounds emotional harm suffered by family members.<sup>202</sup>

Justice Kennedy’s recitation in *Favish* of the traditional privacy concerns surrounding death thus melded in *Marsh* with twenty-first century worries about the Internet to produce a nascent

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197. *State v. Rolling*, No. 91-3832 CF A, 1994 WL 722891 (Fla. Cir. Ct. July 27, 1994) (involving the prosecution of Danny Rolling for the murder of several college students in Gainesville, Fla.).

198. *Id.* at \*4 (emphasis added).

199. *Supra* notes 197, 192, and 179.

200. Sue Tait, *Pornographies of Violence? Internet Spectatorship on Body Horror*, 25 CRITICAL STUD. IN MEDIA COMM. 91 (2008).

201. *Id.* at 92.

202. *Supra* notes 197, 192, and 179.



constitutional privacy right. But is this right decidedly different from other privacy interests protected by the federal constitution? The next part of the article explores that issue.

#### **IV. Preserving Memories and Emotional Tranquility: Different Justifications Animating Constitutional Privacy?**

At its core, *Marsh* creates—in the name of privacy and via the prevention of governmental release of death images—a legally protected constitutional interest in memory preservation of the living about the dead. This certainly seems, at first blush, to constitute an important legal interest and it may, when viewed from a much broader perspective, embody a “form of memorial culture.”<sup>203</sup> In a 2001 article, for instance, Professor Jessica Berg writes that “[t]he dead live on in the memories of the living. Harms to the memory of the deceased may entail very real harms to people now living who have an interest in preserving the original memory, such as relatives or close friends of the deceased.”<sup>204</sup>

An examination from outside the realm of law reinforces the nexus between emotional tranquility of the living and preserving their happy memories of the deceased. For instance, the authors of a 2011 study of mothers who faced the sudden loss of a child—the scenario confronted by Brenda Marsh—found that they “expressed the need to engage in activities, *memories*, and people who promote a feeling of peace and well-being,”<sup>205</sup> while simultaneously avoiding “activities that could potentially cause feelings of unhappiness and negativity.”<sup>206</sup> Viewing a gruesome death-scene image or autopsy photograph of one’s child intuitively seems tantamount to an activity that would cause such unhappiness and that a grieving mother would attempt to avoid. The authors of the same study found that for the mothers, “[s]imply *remembering their child* and having the opportunity to talk to others and share pleasant stories helped them cope with the loss they have experienced.”<sup>207</sup> Furthermore, mothers like Brenda Marsh who lose a child seem emotionally vulnerable, with a recent article in

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203. Tim Flohr Sørensen, *Sweet Dreams: Biographical Blanks and the Commemoration of Children*, 16 MORTALITY 161, 166 (2011).

204. Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 99 (2001).

205. Brenda S. Parker & Karen S. Dunn, *The Continued Lived Experience of the Unexpected Death of a Child*, 63 J. DEATH & DYING 221, 223 (2011) (emphasis added).

206. *Id.*

207. *Id.* at 225 (emphasis added).

*Mortality* noting that “the death of a child is widely considered an unquestionable tragedy,”<sup>208</sup> as “the deceased child is circumscribed by narratives of unjust and untimely bereavement.”<sup>209</sup>

By limiting distribution of death images, the Ninth Circuit in *Marsh* is helping relatives with the process of memory management and emotion regulation by reducing the odds of inadvertently stumbling upon a disturbing image that could disrupt an otherwise joyful or pleasant memory narrative. Such an occurrence could trigger what psychologists call an “intrusive memory”<sup>210</sup> of a distressing event. Research suggests that affective disorders such as depression and posttraumatic stress disorder “are often characterized by an exacerbated bias in retrieving and ruminating on negative memories.”<sup>211</sup> All of this paints the Brenda Marshes of the world in a highly sympathetic light that, in turn, strengthens the call for constitutional protection.

By analogy, in their book *Death, Memory & Material Culture*, Professors Elizabeth Hallam and Jenny Hockey write, “there are aspects of material environments that are perceived as ‘uncontrollable.’ Unexpectedly finding an old garment at the back of a wardrobe yields an upsetting reminder that the person who once wore it is gone forever.”<sup>212</sup> The Ninth Circuit’s ruling in *Marsh* provides a certain amount of control to prevent similar inadvertent photographic discoveries that could trigger intrusive, negative memories. Hallam and Hockey add that photographs stand “as a central medium for infusing” memories,<sup>213</sup> and a mother like Brenda Marsh certainly would not want her memory of a deceased toddler to be infused with a grisly photo. Such a horrid photo of death stands counter-posed to the staged postmortem photography of the early twentieth century in which the deceased “were arranged in a posture of restful sleep so that their final image, captured by the camera, was one of a still life-like presence.”<sup>214</sup> Today, even such contrived

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208. Sørensen, *supra* note 203, at 161.

209. *Id.*

210. See generally Marcella L. Woud et al., *Ameliorating Intrusive Memories of Distressing Experiences Using Computerized Reappraisal Training*, 12 *EMOTION* 778, 779 (2012) (discussing intrusive memories).

211. Ekaterina Denkova et al., *Reliving Emotional Personal Memories: Affective Biases Linked to Personality and Sex-Related Differences*, 12 *EMOTION* 515, 515 (2012).

212. ELIZABETH HALLAM & JENNY HOCKEY *DEATH, MEMORY & MATERIAL CULTURE* 105 (2001).

213. *Id.* at 143.

214. *Id.* at 144.

pleasant imagery of the dead has fallen out of favor, as it is “images of the living body that come into focus as a site for the generation of socially acceptable memories.”<sup>215</sup>

But even if all of this is true—even if one reflexively feels vast empathy and sympathy for individuals like Brenda Marsh—there is still something very different about the ultimate outcome (happy memory preservation and emotional tranquility) served by the privacy right fashioned in *Marsh* when it is compared to the outcomes facilitated by other niches of constitutional privacy. In brief, both interests—memory and emotions—are intangible mental states or mindsets.

*Marsh* embodies a bit of judicial jujitsu because it amounts to an effort to block a truthful reality—in this case, the gory and grisly truth depicting a deceased toddler—from interfering with the constructed postmortem narratives people would prefer to embrace. Viewed cynically, *Marsh* creates a constitutional right premised on concealing the truth and hiding it from familial and public view. The truth hurts, as the cliché goes, and the law steps in here to lessen its sting.

Certainly, the interests in happy memory preservation and emotional tranquility are distinct from the ones that animated the high court’s decision in *Roe v. Wade*<sup>216</sup> in which, as Professor David Flaherty notes, it “was a woman’s right to choose an abortion that became the vehicle for enunciating a right to privacy.”<sup>217</sup> The outcome or consequence preserved and protected by the *Roe* niche of privacy (having a child or aborting one) is far more tangible than preserving how one thinks about or remembers a child that has died. *Roe* affects a child’s entire future; *Marsh* affects the memories of a deceased child. Put differently and perhaps more provocatively, autonomy over one’s body and of one’s choices regarding it<sup>218</sup> are distinct from some ethereal kind of autonomy over memory that must not be violated by governmental release of a photograph.

A liberty interest in happy memory preservation and freedom from any emotional interference that the release of an image of one’s deceased child may cause is far different from other liberty interests

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215. *Id.* at 146.

216. *Roe v. Wade*, 410 U.S. 113 (1973).

217. David H. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831, 839 (1991).

218. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992) (observing that *Roe* may be viewed as embracing “a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection”).

such as the right to have children or how a child should be raised and educated.<sup>219</sup> How one chooses to raise and educate a child after deciding whether or not to have a child is far removed from how one recalls a child that has passed away. The former involve parental decisions that directly affect the wellbeing and future of a living being, while the latter does not.

Furthermore, while the constitutional right to privacy, as Professor Radhika Rao writes, is “typically invoked in support of the individual’s right to marry, to form a family, to procreate or not procreate, to rear children, and to engage in sexual activity,”<sup>220</sup> each and every one of those rights has possible consequences for a living child. For instance, some people may believe that children should only be conceived and raised by a married couple, while others may believe that sexual activity serves the primary purpose of bearing children. In *Marsh*, a child already is dead; no parental choice regarding whether to have a child, how to raise a child, or how to educate a child is affected. While it certainly is true, as the Supreme Court observed in the forced sterilization case of *Skinner v. Oklahoma*<sup>221</sup> that “[m]arriage and procreation are fundamental to the very existence and survival of the race,”<sup>222</sup> preserving happy memories—or preventing painful realities of gruesome deaths from encroaching on them—are not.

Ultimately, if the judiciary is going to continue to hold that the U.S. Constitution protects happy memories by thwarting the release of truthful imagery, as the Ninth Circuit did in *Marsh*,<sup>223</sup> then perhaps jurists should better understand the meaning of memory, as well as how memory functions and operates. Entire academic journals—one called *Memory* and another entitled *Memory Studies*—are devoted to the subject. Memory, like the issue of when life begins that clouds *Roe* and its progeny, is far from a simple subject. As John Lucas of

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219. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (observing that “the ‘liberty’ specially protected by the Due Process Clause includes,” among other liberties, the right “to have children” and “to direct the education and upbringing of one’s children”) (citations omitted).

220. Radhika Rao, *Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1078 (1998).

221. *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

222. *Id.* at 541.

223. See *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012) (concluding that the “Constitution protects a parent’s right to control the physical remains, *memory and images* of a deceased child against unwarranted public exploitation by the government”) (emphasis added).

the Mayo Clinic writes, “[m]emory is not a unitary construct but instead reflects a number of distinct cognitive abilities that can be categorized along a number of different dimensions,”<sup>224</sup> such as short-term (primary) memory and long-term (secondary) memory,<sup>225</sup> as well as explicit memory and implicit memory.<sup>226</sup> Furthermore, others view memory as a social construction and assert that “the past is constructed and reconstructed on the basis of present needs.”<sup>227</sup> Thus, it has been written that “it is not unusual for the very term ‘memory’ to mean many things to many people.”<sup>228</sup>

The Ninth Circuit has fashioned a new niche of constitutional privacy that thwarts the public release of truthful imagery in the interest of memory preservation and emotional tranquility. It is now left to other courts to better explicate precisely what memory means in this context. If an interest is truly to rise to the rarified level of a constitutional concern, then it must be understood and dissected with the same analytical rigor given to other interests such as the nature of abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>229</sup>

### V. Expanding *Marsh* Beyond Death Images: Constitutional Incrementalism Toward a Broader Right of Informational Privacy?

Photographs convey information. As articulated previously, “[a] powerful photograph can tell a story as no words can.”<sup>230</sup> First Amendment protection for expression thus applies equally to photographs and words.<sup>231</sup> Both Chief Justice John Roberts and

224. John A. Lucas, *Memory, Overview*, in ENCYCLOPEDIA OF THE HUMAN BRAIN, VOL. II 817, 817 (V. S. Ramachandran ed., 2002).

225. *Id.* at 817–18.

226. Kathleen B. McDermott, *Memory, Explicit and Implicit*, in ENCYCLOPEDIA OF THE HUMAN BRAIN, VOL. II 773 (V. S. Ramachandran ed., 2002).

227. Tara L. Tober, *Memory*, in ENCYCLOPEDIA OF IDENTITY 444 (Ronald L. Jackson II & Michael A. Hogg eds., 2010).

228. José María Ruiz-Vargas, *Memory*, in ENCYCLOPEDIA OF PSYCHOLOGICAL ASSESSMENT 570, 573 (Rocío Fernández-Ballesteros ed., 2003).

229. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

230. Brown, *supra* note 97, at 75.

231. See *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (observing that “[a]s with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution”).

Professor Rebecca Tushnet have recently expounded on the power of images.<sup>232</sup>

It thus seems fair, given the informational and emotional power of images, to consider how *Marsh* might influence or otherwise affect the development of a still inchoate constitutional right to informational privacy. This is especially true given the acknowledgement in *Marsh* of the informational impact of photographs when Judge Kozinski wrote, “[i]mages of the body usually reveal a great deal about the manner of death and the decedent’s suffering during his final moments.”<sup>233</sup>

As framed by Justice John Paul Stevens back in 1977, the Supreme Court in *Whalen v. Roe*<sup>234</sup> considered the issue of “whether the State of New York may record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor’s prescription, certain drugs for which there is both a lawful and an unlawful market.”<sup>235</sup> The law sought to prevent the misuse and abuse of the drugs, both in the prescription process and in their consumption.<sup>236</sup> A group of patients receiving some of the drugs, as well doctors who prescribed them and two physicians’ associations, challenged the law,<sup>237</sup> claiming it “invade[d] a constitutionally protected ‘zone of privacy.’”<sup>238</sup>

In the opinion, Justice Stevens noted that constitutional privacy features two branches—“the individual interest in avoiding disclosure of personal matters,”<sup>239</sup> and “the interest in independence in making certain kinds of important decisions.”<sup>240</sup> Both were implicated in the case, Stevens wrote, since the law “threatens to impair both their [patients’ and doctors’] interest in the nondisclosure of private information and also their interest in making important decisions independently.”<sup>241</sup> Ultimately, however, the Court ruled that the

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232. *Supra* notes 94–96 and accompanying text. See Lawrence M. Friedman, *The One-Way Mirror: Law, Privacy, and the Media*, 82 WASH. U. L. REV. 319, 324 (2004) (observing that “as the old saying goes, a picture is worth a thousand words”).

233. *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012).

234. *Whalen v. Roe*, 429 U.S. 589 (1977).

235. *Id.* at 591.

236. *Id.* at 591–92 (where the Court found that existing laws failed to prevent the public from illicitly obtaining prescription drugs).

237. *Id.* at 595.

238. *Id.* at 598.

239. *Id.* at 599.

240. *Id.* at 599–600.

241. *Id.* at 600.

record before it did “not establish an invasion of any right or liberty protected by the Fourteenth Amendment.”<sup>242</sup>

In dicta, Justice Stevens wrote that the Court was aware “of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files,”<sup>243</sup> and suggested that a statutory and regulatory duty imposed on government entities and officials not to reveal some of that information “*arguably* has its roots in the Constitution.”<sup>244</sup>

Fast-forward more than three decades and the “arguably” aspect of that dicta was still very much in play in *National Aeronautics and Space Administration v. Nelson*.<sup>245</sup> The case centered on a challenge to background investigations conducted on government contract employees working at the Jet Propulsion Laboratory (“JPL”) in southern California.<sup>246</sup> The employees objected to questions relating to treatment or counseling for recent illegal drug use, as well as queries regarding their designated references.<sup>247</sup> They alleged “that the background-check process violates a constitutional right to informational privacy.”<sup>248</sup>

Writing the opinion of the Court, Justice Samuel Alito began *Nelson* by stating that “[w]e assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen*,”<sup>249</sup> namely “a constitutional privacy ‘interest in avoiding disclosure of personal matters.’”<sup>250</sup> As noted in the Introduction,<sup>251</sup> however, two justices—Scalia and Thomas—bluntly wrote that “[a] federal constitutional right to ‘informational privacy’ does not exist.”<sup>252</sup>

Despite the unsettled status at the level of the nation’s highest judicial authority, Professor Mary D. Fan observed in 2012 that “the majority of the federal courts of appeals and a number of state courts have . . . accorded the idea of informational privacy constitutional

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242. *Id.* at 606.

243. *Id.* at 605.

244. *Id.* (emphasis added).

245. *Nelson III*, 131 S. Ct. 746 (2011).

246. *Id.* at 751–52.

247. *Id.* at 751.

248. *Id.* at 754.

249. *Nelson III*, 131 S. Ct. at 754. *Id.* (emphasis added).

250. *Id.*

251. *Supra* note 22 and accompanying text.

252. *Id.* at 764 (Scalia, J., concurring).

stature.”<sup>253</sup> Indeed, she writes that among lower courts, the “right has flourished by assumption over the decades.”<sup>254</sup> Yet the cases in which it has been invoked have not involved information in the form of images of dead humans, but rather in cases involving facts about living individuals such as their HIV status, sexual orientation, health records and financial information.<sup>255</sup>

Photographs certainly do provide information, but the ones at issue in *Marsh* provided no personal information that could negatively jeopardize job, physical health or finances. In fact, the information at stake in *Marsh* really is only *relational*—it is about a relative—rather than *personal* to those who assert a right of privacy, like Brenda Marsh. Put differently, the only information revealed is about a relative, namely that the relative is dead and visual clues relating to the possible cause of death.

In *Marsh*, however, Judge Kozinski made the argument that the information at stake was personal, quoting *Whalen* while opining that “the publication of death images interferes with ‘the individual interest in avoiding disclosure of personal matters’ . . . Few things are more personal than the graphic details of a close family member’s tragic death.”<sup>256</sup> But this may be confusing the effect or impact of the information—a personal effect on a living individual—with the nature of the information itself.

What is particularly intriguing here, at least in terms of searching for clues about what *Marsh* may portend for a constitutional right to informational privacy, is that *Nelson* came up to the Supreme Court through the Ninth Circuit and involved written opinions by two of the judges in *Marsh*—Judge Kozinski and Judge Wardlaw.<sup>257</sup> In June 2008, a three-judge panel of the Ninth Circuit ordered that a preliminary injunction be issued against certain aspects of the background checks because the JPL employees “raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor.”<sup>258</sup> That opinion was written by Judge Wardlaw, although neither Judge Kozinski nor

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253. Mary J. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 974–75 (2012).

254. *Id.* at 956.

255. *Id.* at 975 n.121.

256. *Marsh*, 680 F.3d at 1154.

257. *Nelson v. Nat’l Aeronautics and Space Admin.*, 568 F.3d 1028 (9th Cir. 2009) (hereinafter *Nelson II*).

258. *Nelson v. Nat’l Aeronautics and Space Admin.*, 530 F.3d 865, 883 (9th Cir. 2008), rev’d, 131 S. Ct. 746 (2011) (hereinafter *Nelson I*).



Judge Paez—the other two judges on the Ninth Circuit’s *Marsh* opinion—were on that 2008 *Nelson* panel. But the key opinions in *Nelson* by Judge Wardlaw and Judge Kozinski arguably came in 2009 when the Ninth Circuit denied a petition for rehearing *en banc*.<sup>259</sup>

In his dissent from the denial of that petition, Judge Kozinski characterized informational privacy as a “free-floating privacy guarantee,”<sup>260</sup> adding that “[w]e have a grab bag of cases on specific issues, but no theory as to what this right (if it exists) is all about. The result in each case seems to turn more on instinct than on any overarching principle.”<sup>261</sup> He characterized the law in this area as “so subjective and amorphous.”<sup>262</sup>

This may suggest that for Judge Kozinski, the narrow and concise familial right of preventing governmental disclosure of death images in *Marsh* is different from some larger, amorphous and “free-floating”<sup>263</sup> general right of informational privacy that might thwart disclosure of other types of information. In *Nelson*, Judge Kozinski pointed out an important distinction in the realm of informational privacy that, for him, must be addressed before it can be embraced as a constitutional right: the *collection* of information versus the *dissemination* of information.<sup>264</sup> The right in *Marsh* focuses only on the latter aspect of informational privacy, as it guards against public disclosure by governmental employees of death images, not their collection or taking. There was never an issue in *Marsh* about whether the government could take or collect autopsy photos in its investigation of potential criminal activity; it was only their public release by Jay Coulter that sparked the case. Judge Kozinski intimated that there may be no need to create an informational privacy right when it comes to the collection of information (as contrasted with its dissemination), opining that:

Government acquisition of information is already regulated by express constitutional provisions, particularly those in the Fourth, Fifth and Sixth Amendments. How can the creation of new constitutional constraints be squared with the

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259. *Nelson II*, 568 F.3d 1028 (9th Cir. 2009).

260. *Id.* at 1052 (Kozinski, J., dissenting).

261. *Id.*

262. *Id.* at 1054.

263. *Id.* at 1052.

264. *Id.*

teachings of *Medina v. California*, which cautioned against discovering protections in the Due Process Clause in areas where the “Bill of Rights speaks in explicit terms”?<sup>265</sup>

Thus, to the extent that Judge Kozinski is at all inclined to recognize a general constitutional right to informational privacy, it would seem that *Marsh* would fit within his apparent view of confining it to the disclosure side of the equation. At most, then, the right in *Marsh* amounts to a possible move of constitutional incrementalism toward a broader right that would shield other specific types of information from governmental release and dissemination.<sup>266</sup> If governmental disclosure of personal information is what might be called the big-picture problem, then incrementalism may make sense because it “has the virtue of breaking down an enormous problem into manageable parts.”<sup>267</sup>

In setting forth her views on informational privacy in *Nelson*, Judge Wardlaw suggested the right applied to sexual orientation, personal financial information, medical information and sexual activities.<sup>268</sup> She did not suggest or otherwise intimate that the right would sweep up images like those at issue in *Marsh*. Rather, Judge Wardlaw’s concern was that the questions asked in *Nelson* touched on “the most private aspects”<sup>269</sup> of plaintiffs’ lives. Ultimately, the information at issue in *Marsh* seems decidedly different from that at issue in most informational privacy cases, and *Marsh*, thus, may either represent one tiny sliver of (or step toward) a larger informational privacy right or it may be distinct from it altogether.

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265. *Nelson II*, 568 F.3d at 1052–53 (quoting *Medina v. California*, 505 U.S. 437, 443 (1992)).

266. See generally Suzanna Sherry, Cal Turner Professor of Law and Leadership, Vanderbilt University Law School, Keynote Address, *Politics and Judgment*, 70 MO. L. REV. 973, 982 (2005) (observing that “[i]n both common law and constitutional adjudication, incrementalism and adherence to precedent work hand-in-hand to ensure that the law will change slowly, through accretion and subtle revision rather than through sudden or fundamental shifts in policy,” and asserting that the “most famous example of constitutional incrementalism is the story of *Brown v. Board of Education*, the case that held racially segregated schools unconstitutional. The Court acted gradually—some would say too gradually—both in declaring segregation unconstitutional and in implementing its decision”).

267. Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 516 (2008).

268. *Nelson II*, 568 F.3d at 1037–38 (Wardlaw, J., concurring).

269. *Id.* at 1032.

## VI. A Constitutional Conflict on the Legal Horizon? Privacy's Tension With First Amendment Freedoms

While *Marsh* posits the existence of a constitutional right of familial privacy to control images of death possessed by government officials and agencies, this newfound entitlement potentially runs headfirst into a longstanding First Amendment privilege to publish newsworthy information. For instance, a plaintiff suing under the tort theory of public disclosure of private facts<sup>270</sup> based upon the publication of a death-scene image typically would lose if the image were deemed newsworthy.<sup>271</sup> As the Supreme Court of California has observed, “the analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution.”<sup>272</sup> Put slightly differently by the Supreme Court of Colorado, a plaintiff suing under the theory of public disclosure of private facts will only prevail if “the facts disclosed are not of legitimate concern to the public.”<sup>273</sup> The “requirement that the facts disclosed must not be of legitimate concern to the public protects the rights of free speech and free press guaranteed by the United States.”<sup>274</sup> In brief, the law of privacy “often bends in the interest of promoting free speech,”<sup>275</sup> with newsworthiness standing as “an essential balance point between privacy and the rights of the press.”<sup>276</sup>

Layered on top of the immunity from privacy tort liability for publishing newsworthy information is the fact that contemporary First Amendment doctrine provides the press with what was recently described as “almost absolute protection to publish truthful

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270. As encapsulated by the Supreme Court of Texas:

the invasion of privacy tort for public disclosure of embarrassing private facts . . . has three elements: (1) publicity was given to matters concerning one's personal life, (2) publication would be highly offensive to a reasonable person of ordinary sensibilities, and (3) the matter publicized is not of legitimate public concern.

*Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473–74 (Tex. 1995).

271. See *Shulman v. Group W Prods.*, 955 P.2d 469, 478 (Cal. 1998) (finding that the “lack of newsworthiness is an element of the ‘private facts’ tort, making newsworthiness a complete bar to common law liability”).

272. *Id.*

273. *Ozer v. Borquez*, 940 P.2d 371, 378 (Colo. 1997).

274. *Id.* at 379.

275. Lauren Gelman, *Privacy, Free Speech, and “Blurry-Edged” Social Networks*, 50 B.C. L. REV. 1315, 1318 (2009).

276. Gajda, *supra* note 86, at 1061.

information that is lawfully acquired.”<sup>277</sup> Indeed, in *Bartnicki v. Vopper*,<sup>278</sup> the Supreme Court reinforced the notion in 2001 that publication by the press of truthful information about a matter of public significance that it has lawfully obtained cannot be punished unless the government can prove an interest of the highest order.<sup>279</sup>

How does this implicate cases like *Marsh*? It will be recalled that prosecutor Jay Coulter gave an autopsy image of Phillip Buell to two news organizations, both of which ultimately chose not to publish it.<sup>280</sup> But what if those media outlets had published the image to accompany a news story addressing disagreements on the cause of Phillip Buell’s death? And what, in turn, if Brenda Marsh had sued those two news organizations under the tort theory of public disclosure of private facts?

Initially, it is important to note that the two news organizations lawfully obtained the photograph—the photo was sent to them, without any apparent solicitation or request, by Jay Coulter.<sup>281</sup> The cause of Phillip Buell’s death, in turn, would seem to be a newsworthy issue, particularly in light of the judiciary tossing out Kenneth Marsh’s conviction.<sup>282</sup> The photograph arguably would provide ocular information to members of the public about the extent of the trauma to Phillip Buell’s head that would, in turn, allow them to draw their own conclusions regarding his death. In other words, it would reflect the same argument made by Alan Favish regarding why it was important for the public to see the death-scene images of Vincent Foster.<sup>283</sup>

But just as privacy is a maddening concept,<sup>284</sup> so too is newsworthiness an “elusive concept.”<sup>285</sup> The Supreme Court, in 2011 in *Snyder v. Phelps*,<sup>286</sup> attempted to flesh out the meaning of the

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277. William E. Lee, *Probing Secrets: The Press and Inchoate Liability for Newsgathering Crimes*, 36 AM. J. CRIM. L. 129, 134 (2009).

278. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

279. *Id.* at 528 (citing *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

280. *Supra* notes 52–53 and accompanying text.

281. *Supra* note 52 and accompanying text.

282. *Supra* note 43 and accompanying text.

283. *Supra* notes 121–123 and accompanying text.

284. *See supra* notes 72–74 and accompanying text (addressing the difficulties in pinning down a definition of privacy).

285. David F. Partlett & Russell L. Weaver, *Remedies, Neutral Rules and Free Speech*, 39 AKRON L. REV. 1183, 1187 (2006).

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

interchangeable concept of public concern.<sup>287</sup> After noting that speech about matters of public concern lies at the core of the First Amendment and must be given special protection,<sup>288</sup> Chief Justice John Roberts wrote for the majority that speech addresses a matter of public concern when it either: 1. “can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’”<sup>289</sup> or 2. “‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”<sup>290</sup> The chief justice added that this determination involves consideration of the context, content and form of the speech.<sup>291</sup> Although this test arguably is “riddled with ambiguities that lower courts must now sort through,”<sup>292</sup> its existence nonetheless suggests that future courts—perhaps even the U.S. Supreme Court—who visit the familial right to privacy over images of death might attempt to carve out a specific exemption from it when the images in question are highly probative of a matter of public concern.

Imagine that a government employee releases to a newspaper several autopsy photos because he believes they demonstrate what he considers to be the indefensibly sloppy and shoddy nature of the autopsy procedures performed by the government’s medical examiner. In other words, the photos could serve as visual proof of governmental malfeasance and, in turn, might prompt an investigation into the medical examiner’s autopsy procedures.

Such an exception, in fact, is built into Florida Statute Section 406.136, which took effect on July 1, 2011, and generally mandates that “[a] photograph or video or audio recording that depicts or records the killing of a person is confidential and exempt from”<sup>293</sup> Florida’s open records laws. The statute provides, however, that such recordings of killings may be viewed or copied “upon a showing of

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287. Courts often use “newsworthiness” and “public concern” interchangeably. *See, e.g., Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) (observing that it “is in the determination of *newsworthiness*—in deciding whether published or broadcast material is of legitimate *public concern*—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom”) (emphasis added); Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 LOY. U. CHI. L.J. 781, 824 (2009) (writing that “whether something is of a legitimate public concern turns on a determination of newsworthiness”).

288. *Snyder*, 131 S. Ct. at 1215.

289. *Id.* at 1216 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

290. *Id.* (quoting *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

291. *Id.*

292. Calvert, *Defining “Public Concern”*, *supra* note 24, at 70.

293. FLA. STAT. § 406.136 (2) (2012).

good cause.”<sup>294</sup> One of three factors that courts must consider in a good-cause determination is “[w]hether such disclosure is *necessary for the public evaluation of governmental performance*.”<sup>295</sup> Shoddy performance by the medical examiner’s office would appear to fall within the ambit of this factor. Similarly, the hypothetical release of death-scene photos involving victims of police shootings could be relevant in a determination of whether officers exercised excessive force or engaged in a particular pattern of response.

Requiring courts to balance a constitutional right to familial privacy over images of death against the newsworthiness or public value of the images comports with many other aspects of substantive due process-based constitutional rights. For instance, a woman’s right to choose to have an abortion is not absolute. As Justice Sandra Day O’Connor wrote in 1992:

The woman’s liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State’s interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.<sup>296</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court fashioned an “undue burden” test for determining whether state-imposed restrictions violate a woman’s right to choose to have an abortion.<sup>297</sup> Courts evaluating the scope of a familial right to privacy to control death images might similarly consider whether, based upon the specific facts at issue in any given case, this right unduly burdens the public’s right to know newsworthy information affecting governmental affairs.

The bottom line here is, as Professor Anita Allen points out, that the Supreme Court has held that “fundamental constitutional privacy

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294. FLA. STAT. § 406.136 (4) (a) (2012).

295. FLA. STAT. § 406.136 (4) (b) (2012) (emphasis added). The other factors include “[t]he seriousness of the intrusion into the family’s right to privacy and whether such disclosure is the least intrusive means available” and “[t]he availability of similar information in other public records, regardless of form.” *Id.*

296. *Planned Parenthood Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869 (1992).

297. *See id.* at 878 (observing that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability”).

rights may yield to compelling state interests.”<sup>298</sup> Future courts applying *Marsh*’s new privacy right should recognize that it must yield, under certain circumstances, to an unenumerated First Amendment right of the public to receive newsworthy information.

## VII. Conclusion

In February 2012—just three months before he authored *Marsh*—Alex Kozinski made the following observation during a keynote symposium address at Stanford Law School:

No matter how private, dangerous, hurtful, sensitive, or secret a piece of information may be, any fool with a computer and an Internet connection—which means just about everybody—can post it online, never again to be private or secret. They say that removing something from the Internet is about as easy as removing urine from a swimming pool, and that’s pretty much the story.<sup>299</sup>

In *Marsh*, Judge Kozinski and his Ninth Circuit colleagues took a constitutional step forward that may prevent at least some of those fools from gaining access to and later posting on the Internet one particular form of hurtful information—images of death held in the possession of government entities. But in doing so, as this article has suggested, the Ninth Circuit has embraced two intangible interests—memory preservation and emotional tranquility—that seem different from those at stake in cases like *Roe v. Wade* and *Lawrence v. Texas*.

More than twenty-five years ago, the Supreme Court of Oregon cogently observed that although the term privacy “denotes a personal or cultural value placed on seclusion or personal control over access to places or things, thoughts or acts,”<sup>300</sup> it also is “a difficult legal concept to delimit,”<sup>301</sup> with “[l]awyers and theorists debat[ing] the

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298. Anita L. Allen, *Privacy, Surrogacy, and the Baby M Case*, 76 GEO. L.J. 1759, 1765 (1988).

299. Alex Kozinski, Chief Judge, United States Court of Appeals for the Ninth Circuit, Symposium Keynote, *The Dead Past*, 64 STAN. L. REV. ONLINE 117, 124 (Apr. 2012), available at <http://www.stanfordlawreview.org/sites/default/files/online/topics/64-SLRO-117.pdf>.

300. *Anderson v. Fisher Broad. Cos., Inc.*, 712 P.2d 803, 808 (Or. 1986).

301. *Id.*

nature of the interests that privacy law means to protect.”<sup>302</sup> The Ninth Circuit’s 2012 ruling in *Marsh* ultimately throws a new wrinkle into the morass of privacy law by privileging, in constitutional fashion, a cultural recognition of familial sanctity surrounding death and the ability of the living to carve out a zone of privacy for grieving, memorializing and remembering the deceased. And while it may have been true back in 2004 that “the topic of access to images of death ha[d] developed into a fertile new battleground,”<sup>303</sup> *Marsh* shifts the fight to a constitutional battlefield that ultimately should be contested at the Supreme Court.

Beyond representing a possible incremental step toward a broader right of informational privacy, *Marsh*, if extended, might buttress future judicial recognition of what Professor Njeri Mathis Rutledge calls a constitutional right to mourn—a right she readily acknowledges “has not yet been established.”<sup>304</sup> Such a right might prove pivotal, she points out, in supporting laws targeting the funeral-protest expression of groups like the Westboro Baptist Church.<sup>305</sup>

Although perhaps no more than a constitutional coincidence, it is worth noting that the bridge between *Favish* and *Marsh* is paved by a connection between the authors of those opinions, Anthony Kennedy and Alex Kozinski, respectively. Kozinski clerked for Kennedy when Kennedy was on the Ninth Circuit.<sup>306</sup> Kennedy, in turn, has selected multiple law clerks over his years on the Supreme Court from Judge Kozinski.<sup>307</sup> In *Marsh*, Kozinski channeled Kennedy’s concerns in *Favish* but to a constitutional result.

Finally, it is one thing to compensate relatives of the dead for emotional distress under principles of tort law when they are

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302. *Id.*

303. Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 735 (2004).

304. Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 305 (2008).

305. Rutledge, *supra* note 307, at 304 (writing that “[a]n important issue in determining whether a statute is constitutional is the governmental interest involved. The governmental interest involved in the funeral picketing statutes is protection of what I characterize as ‘the right to mourn’”).

306. See Biographical Directory of Federal Judges, Federal Judicial Center, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx>, using this link, one can find Judge Kozinski’s official biography, which notes that he clerked for Justice Anthony Kennedy from 1975–76).

307. David J. Garrow, *Acolytes in Arms*, 9 GREEN BAG 2D 411, 417 (2006) (asserting that “Justice Anthony M. Kennedy selected fifteen clerks from Ninth Circuit Judge Alex Kozinski, an outspoken conservative, up through 2004”).



intentionally or recklessly exposed to gruesome images of their deceased loved ones.<sup>308</sup> It is quite another thing, however, to transform tort-based freedom from such emotional distress into a constitutional right when the images are disclosed by a government entity or official. Furthermore, the U.S. Supreme Court has made it clear, in both *Hustler Magazine v. Falwell*<sup>309</sup> and *Snyder v. Phelps*,<sup>310</sup> that tort liability for emotional distress stemming from highly offensive messages must be balanced against the same type of First Amendment concerns described earlier in Part VI. This buttresses the argument that the right articulated in *Marsh* should not be absolute, but rather a qualified right bounded by competing interests. Thus, while *Favish* and the Internet combined to lay the groundwork for the Ninth Circuit's recognition of a new constitutional privacy right, it is a right that is not as simple as it initially may seem.

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308. See *Armstrong v. H & C Commc'ns, Inc.*, 575 So. 2d 280, 281 (Fla. Dist. Ct. App. 1991) (allowing a claim for emotional distress damages under the tort of outrage to proceed after a television station aired during a news story a close-up image a six-year-old girl's skull that was "intentionally included to create sensationalism for the report. The close-up was gruesome and macabre, and was broadcast to thousands of viewers, including" the immediate surviving family members of the deceased girl).

In Florida, where the *Armstrong* case described above occurred, the tort of outrage is identical to the tort of intentional infliction of emotional distress. See *Foster v. Jackson County*, 1994 U.S. Dist. LEXIS 20437 (N.D. Fla. Dec. 9, 1994) (providing that "[u]nder Florida law, outrageous conduct and intentional infliction of emotional distress are alternate names for the same tort").

309. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). *Falwell* involved a public figure's efforts to recover under the tort theory of intentional infliction of emotional distress for the publication of an ad parody mocking the plaintiff and that was "doubtless gross and repugnant in the eyes of most." *Id.* at 50. The Court held that "public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice.'" *Id.* at 56.

310. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). The Court in *Snyder* observed that "[t]he Free Speech Clause of the First Amendment—'Congress shall make no law . . . abridging the freedom of speech'—can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." *Id.* at 1215. The Court added that whether members of the Westboro Baptist Church should be held liable in tort for emotional distress caused by their offensive messages "turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case." *Id.*

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