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Favish Decision Increases Risk for Publication of Death Scene Images

By Susan Seager

Media defense lawyers may have overlooked the potential ramifications of *National Archives and Records Administration v. Favish,* 541 U.S. 157, 124 S. Ct. 1570 (2004), the recent United States Supreme Court decision denying a Freedom of Information Act (FOIA) request for death scene photographs of Vincent Foster, Jr., President Clinton's deputy counsel. This would be a mistake.

The Supreme Court's unanimous decision increases the risk for broadcasters and publishers who disseminate graphic death scene images, whether in the form of front-page newspaper photographs of inner city crime scenes, or Internet postings of videotaped beheadings of American hostages in the Middle East. Tort lawyers can be expected to assert that *Favish* resurrected the long-disfavored common law "survivor right of privacy." Under this theory, plaintiff's lawyers would argue that survivors have the right to sue the media for the publication of graphic images of their dead relatives to recover for their emotional distress upon seeing the images. In fact, even before the Supreme Court issued its decision, plaintiff's lawyers were citing the lower court decisions in *Favish* and other FOIA cases to prop up this disfavored tort theory.

Fortunately for the media, there are numerous reasons why such an attempt to revive this disfavored theory of recovery should fail and that *Favish* should not be viewed as creating a private right of action, especially against the media. First and foremost, the *Favish* decision merely interprets a provision of FOIA and, as the Supreme Court explained in a footnote in *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 762 n.13 (1989), "[t]he question of the statutory meaning of privacy under FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question of

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Court TV Challenges the Constitutionality of New York's Ban on Televising Trials

By Steve Chung

In this era of instant information, you can find a live broadcast of a variety of events. In fact, if you have cable or satellite television, you've probably come to expect live broadcasts of a vast spectrum of news and documentary-style programming, including criminal and civil trials in many different state courts. What you will not see, however, is a live or taped broadcast of a trial in New York, no matter how newsworthy the trial. That's because New York Civil Rights Law § 52 prohibits—without exception—televising and broadcasting trials. The New York Court of Appeals, New York state's highest court, soon will have an opportunity to decide whether the media should be permitted, as a presumptive right, to televise public trials. In *Courtroom Television v. State of New York,* Courtroom Television Network ("Court TV") seeks a declaration that New York Civil Rights Law § 52 is unconstitutional under the First Amendment of the U.S. Constitution and/or Article I, § 8 of the New York State Constitution. Thus far, both the trial court and the intermediate appellate court in New York have ruled against Court TV. *Courtroom Television v. New York,* 769 N.Y.S.2d 70 (N.Y. Sup. Ct. 2003); *Courtroom Television v. New York,* 779 N.Y.S.2d 74 (N.Y. App. Div. 2004).

Of course, most of us remember the O.J. Simpson criminal trial, which America watched closely for months. Some commentators argued that the trial's participants "played" to the cameras or were otherwise affected by being foisted onto the national stage, transforming the trial into something other than a fair and objective process.

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whether an individual's interest in privacy is protected by the Constitution." Second, the Supreme Court cannot dictate common law privacy rules to state courts, most of which already have rejected the survivor right of privacy.

The *Favish* decision

Favish was brought by Allan J. Favish, a *pro se* Los Angeles lawyer who believes Foster was murdered, despite five separate government inquiries finding the death to be a suicide. *Favish v. Office of Independent Counsel,* 217 F.3d 1168, 1170 (9th Cir. 2000). *Favish* made a request under FOIA for copies of 150 color photographs compiled for law enforcement purposes related to Foster's death, including one photograph of a gun in Foster's hand that previously was published in *Time* magazine and on ABC-TV, and 10 unpublished photographs of Foster's body, head, arms, shoulders, and eyeglasses. *Id.* The photographs were taken by the United States Park Police in the public park where Foster is believed to have committed suicide by shooting himself with a revolver. *Id.* The Office of Independent Counsel (OIC), which took control of the photographs, released most of the photographs, but refused to release the 11 photographs of Foster's body, including the previously published photograph of his hand. *Id.* Favish sued in the United States District Court for the Central District of California.

U.S. District Court Judge William D. Keller ordered the OIC to release the photograph of Foster's eyeglasses, but sustained the OIC's refusal to release the 10 remaining photographs. *Id.* at 1171.[1] Relying on the law enforcement/privacy exemption in 5 U.S.C. § 552(b)(7)(C), Judge Keller held that the surviving Foster family members had a personal privacy interest in the 10 photographs of Foster's body, and that their privacy interest outweighed any public interest in disclosure. *Id.* at 1170-71. The court relied on a declaration by Foster's sister, who said that she worried that the photographs would be "placed on the Internet for world consumption," and public dissemination of the photographs "would set off another round of intense scrutiny by the media," causing the Foster family to become "the focus of conceivably unsavory and distasteful media coverage." *Id.* at 1182-83. The Foster family members asserting a survivor right of privacy were Foster's sister, mother, children, widow and "other members of the Foster family," who were not otherwise described. *Id.*

The Ninth Circuit, in a 2-1 decision by Justice Noonan, agreed that Section 7(C)'s law enforcement/privacy exemption to FOIA extended to Foster's survivors, even though the photographs contained absolutely no information about them. Using broad, flowery language, the Ninth Circuit concluded that Section 7(C) implicitly included a survivor-right-of-privacy protection that "extends to the memory of the deceased held by those tied closely to the deceased by *blood or love.*" *Id.* at 1173 (emphasis added). The Ninth Circuit, however, remanded the case to the trial court for an in camera review of the actual photographs, noting that "no court has ever seen them" and that the trial court improperly relied solely on the OIC's description of the photographs as "graphic, explicit, and extremely upsetting." *Id.* at 1174. On remand, the district court ordered five photographs released, concluding that disclosing those photographs of Foster's body, shoulder, hand holding the gun, right side and arm, and top of his head seen through heavy foliage would not "unnecessarily impact the privacy interests of the family," apparently because they were not overly graphic. 124 S. Ct. at 1575. On a second appeal to the Ninth Circuit, the same panel affirmed the release of four of the photographs and overruled the release of the fifth photograph of Foster's body, without explanation in an unpublished opinion. 37 Fed. Appx. 863 (9th Cir. 2002). The government sought review, and the Supreme Court granted *certiorari.*

Favish, supported by several media *amici* groups such as Reporters Committee for Freedom of the Press and the American Society of Newspaper Editors, but lacking support from any large media corporations, contended that Foster's survivors had no privacy interest under Section 7(C). Favish relied on well-established common law and previous FOIA decisions to argue that the right of personal privacy allows individuals to control information about *themselves,* not about their dead relatives. 124 S. Ct. at 1576. Quoting from the Supreme Court's decision in *Reporters Committee for Freedom of the Press,* 489 U.S. at 763, Favish asserted that "the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person."124 S. Ct. at 1576 (holding that a person has a privacy interest sufficient to prevent disclosure of his own rap sheet).

But Justice William M. Kennedy, writing for a unanimous Supreme Court, rejected this well-established rule, at least in the context of FOIA. "We disagree. The right to

privacy is not confined ... to the 'right to control information about oneself.'" *Id.* The Court held that "FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images" and allows "family members ... [to] object to the disclosure of graphic details surrounding their relative's death[.]" *Id.* at 1579, 1580. "We have little difficulty ... in finding in our case law and traditions the right of family members to direct and control the disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes." *Id.* at 1578. Based on this "tradition," the Court concluded that the "personal privacy" exemption to FOIA was intended by Congress "to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and our cultural traditions." *Id.* at 1578. The Court restricted the class of survivors to "close family members," although it did not define that term. *Id.* at 1579. It did not endorse or discuss the broad "blood or love" language of the Ninth Circuit.

The Court based its decision on three grounds: (1) a "well-established cultural tradition acknowledging a family's control over the body and death scene images of the deceased"; (2) a handful of obscure common law decisions dating back to the 1800s; and (3) several FOIA decisions from the D.C. Circuit. *Id.* at 1578-80. For its "cultural tradition" ground, the Court cited a passage in the 1985 edition of *Encyclopedia Britannica,* stating that "the ritual burial of the dead has been practiced from the very dawn of human culture and in most parts of the world," and it declared that *Antigone,* the ancient Greek tragedy by Sophocles, "maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother." *Id.* at 1578 (brackets, internal quotation marks, and ellipses omitted).

For its common law ground, the Court relied on four obscure common law decisions—two of which date back to 1895 and 1930—calling them "typical." The Court cited a lengthy passage from the 1895 decision:

> It is the right of privacy of the living which it is sought to enforce here. That right may be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognized. 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.

Favish, 124 S. Ct. at 1578, quoting *Schuyler v. Curtis,* 42 N.E. 22, 25 (N.Y. 1895). The Court cited three similar cases without discussion: *Reid v. Pierce County,* 961 P.2d 333, 342 (Wash. 1998); *McCambridge v. City of Little Rock,* 766 S.W.2d 909, 915 (Ark. 1989); and *Bazemore v. Savannah Hospital,* 155 S.E. 194 (Ga. 1930). As discussed below, however, these cases are not, in fact, "typical," and most state courts have rejected a survivor or relational right of privacy.

The Supreme Court also cited the RESTATEMENT (SECOND) OF TORTS § 652D, p. 387 (1977), which relies on the *Bazemore* decision to assert that publication of a photograph of a deformed infant could invade the mother's privacy. *Favish,* 124 S. Ct. at 1579. But the Supreme Court failed to mention that the Restatement added a "Special Note" to Section 652D cautioning that "[i]t has not been established with certainty that liability of this nature is consistent with the free-speech and free-press provisions of the First Amendment to the Constitution, as applied to state law through the Fourteenth Amendment."

For its third ground, the Supreme Court relied on several FOIA decisions from the D.C. Circuit. One of those is *New York Times Co. v. NASA,* 782 F. Supp. 628, 631 (D.D.C. 1991), which sustained a privacy exemption under FOIA and blocked disclosure of the audiotape of the last words of the astronauts of the doomed Space Shuttle Challenger because "[e]xposure to the voice of a beloved family member immediately prior to that family member's death would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within hearing." The Court also relied on *Katz v. National Archives and Records Administration,* 862 F. Supp. 476, 485 (D.D.C. 1994) (exempting from FOIA disclosure autopsy X-rays and photographs of President Kennedy because their release would cause "additional anguish" to the surviving family), *aff'd on other grounds unrelated to survivor right of privacy,* 68 F.3d 1438 (D.C. Cir. 1995) and *Lesar v. Department of Justice,* 636 F.2d 472, 488 (D.C. Cir. 1980) (recognizing survivor privacy rights in FBI investigation

of Dr. Martin Luther King, Jr., but only as to "information concerning Dr. King's family and associates").

The Court, however, did acknowledge that the survivor right of privacy exemption to FOIA can be overcome if the requestor can show that disclosure is in the "public interest."*Favish,* 124 S. Ct. at 1580. Creating an entirely new burden not found in the language of FOIA, the Supreme Court held that where a requestor asserts the public interest in learning whether there was government negligence or malfeasance, the requestor "must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." *Id.* at 1581. Not surprisingly, the Supreme Court held that *Favish* failed to meet that burden, and ordered all of the photographs of Foster withheld from public view. *Id.* at 1582.

Even before *Favish* reached the Supreme Court, plaintiff's lawyers had sporadically relied on the underlying Ninth Circuit opinion and similar FOIA cases to assert that family members could maintain a survivor-right-of-privacy tort claim against the media arising from mental distress caused by the media's public dissemination of the images of their dead relatives. Now that the Supreme Court has endorsed the Ninth Circuit's recognition of a survivor right of privacy in the context of a FOIA case, one can expect that plaintiffs' lawyers will be emboldened in their efforts to gain recognition for a survivor-right-of-privacy claim.

Most states have rejected a common law survivor right of privacy

The Supreme Court acknowledged in *Favish* that it was merely interpreting the privacy protections that Congress provided in FOIA, and that this "statutory privacy right" found in FOIA *"goes beyond the common law and the Constitution."* 124 S. Ct. at 1579 (emphasis added). The Supreme Court also provided some comfort to American media defense lawyers by not basing its decision on a federal constitutional right of privacy. Whether a survivor-right-of-privacy claim is viable, therefore, should continue to depend on whether individual states have adopted such a right. With few exceptions, the majority of states have rejected a common law survivor or relational right of privacy.

For example, in *Cordell v. Detective Publications, Inc.,* 419 F.2d 989 (6th Cir. 1969), the Sixth Circuit, applying Tennessee law, held that a parent could not maintain an invasion of privacy claim based on her emotional distress caused by reading a pulp magazine article containing "an unauthorized and sensational account of her daughter's murder." *Id*. at 989. Although the court stated that it was "offended by defendant's tasteless exploitation of this tragedy," and had "no difficulty understanding the distress that this article inflicted upon" the mother, the court held that the mother had not made out a viable invasion of privacy because the cause of action is "purely personal" and may not be asserted by a survivor. *Id.* at 989-990. "[O]ne cannot recover for this kind of invasion of the privacy of a relative, no matter how close the relationship." *Id.* at 991. The Sixth Circuit explained that the "policy underlying these limitations is not hard to discern." Where such a claimed injury is "purely emotional, ... it would be difficult to fix [the] boundaries of such a claim." *Id.* "How distant a relative could sue? At what relational distance does the danger of feigned claims overcome the likelihood of real emotional distress?" *Id.* at 991-92. Because there are "no neutral principles which a court can apply to answer these questions," and because the court found "no suggestion" that Tennessee courts would depart from the majority of jurisdictions that have "declined to recognize a relational tort" of invasion of privacy, the Sixth Circuit held that Tennessee courts would not recognize a relational right of privacy. *Id.* at 991-92. The court cited dozens of federal and state court decisions in support of its holding that "the right [to privacy] lapses with the death of the person who enjoyed it ...." *Id.* at 990-91 & nn.2-4.

Similarly, in *Smith v. City of Artesia,* 772 P.2d 373 (N.M. Ct. App. 1989), the New Mexico Court of Appeals held that the parents of a murder victim had no right to privacy in the photographs of their daughter's dead body, and affirmed the dismissal of their common law invasion of privacy claim based on some police officers' allegedly improper circulation of photographs of her nude body. *Id.* at 374. "[N]o special rule provides relatives a right of privacy in the body of a deceased person." *Id.* at 375. *Accord Andren v. Knight-Ridder Newspapers,* 10 Med. L. Rep. 2109, 2111 (E.D. Mich. 1984) (holding that a mother could not maintain a cause of action for invasion of privacy for a news article detailing the murder of her daughter; "It is axiomatic that an action for invasion of privacy can be maintained only by a living individual whose privacy has been invaded") (quotations omitted); *Metter v. Los Angeles Examiner,* 95 P.2d 491, 494 (Cal. Ct. App.

1939) (same for widower's privacy claim based on article and photograph of wife who had committed suicide because the right of privacy "is purely a personal action, and does not survive, but dies with the person"); *Waters v. Fleetwood,* 91 S.E.2d 344, 348 (Ga. 1956) (same for parents' privacy claim arising from newspaper's public display and sale of photographs of the mutilated body of the plaintiffs' murdered daughter taken in course of police investigation); *Bremmer v. Journal-Tribune Pub. Co.,* 76 N.W.2d 762, 763-67 (Iowa 1956) (same for parents' privacy claim arising from publication of a photograph of decomposed body of their son); *Kelley v. Post Publ'g Co.,* 98 N.E.2d 286, 287-88 (Mass. 1951) (same for parents' privacy claim arising from newspaper publication of a photograph of their daughter's body taken at the scene of a fatal automobile accident; noting that without such a bar, "[a] newspaper could not safely publish the picture of a train wreck or of an airplane crash if any of the bodies of the victims were recognizable"); *Costlow v. Cusimano,* 311 N.Y.S.2d 92, 94-95 (4th Dep't 1970) (same for parents' privacy claim arising from the publication of photographs of the dead bodies of their two young children who had suffocated inside a refrigerator, even though the photographs were taken inside the plaintiffs' home and without their consent); *but see Loft v. Fuller,* 408 So.2d 619, 624-625 (Fla. Dist. Ct. App. 1982) (observing that the "majority view, as represented by the Restatement of Torts, is that the deceased relatives may not maintain an action for invasion of privacy ... based on their own privacy interests," but surmising in *dicta* that Florida *might* recognize a survivor right of privacy based on the publication of "grotesque pictures of the deceased's body" where "defendant's conduct towards a decedent [is] sufficiently egregious"). As this weight of authority demonstrates, the Supreme Court's assertion that it was relying on "typical" common law cases was simply wrong.

The minority cases can be distinguished

The four survivor right of privacy cases cited by the Supreme Court in *Favish* are likely to be cited by plaintiff's counsel. But they are readily distinguishable from any claim that might be made against a media defendant. *Schuyler* is an odd case brought more than a century ago. The plaintiff sued to halt the public exhibition of his stepmother's statue because he believed *she* would have been very distressed to learn of the public display—she had been shy when alive—and this idea caused *him* mental distress. 42 N.E. at 24-26. The New York high court rejected the stepson's convoluted claim as "incredible." However, the court stated that under some circumstances, survivors could bring a survivor-right-of-privacy claim if a public display of an image of their deceased ancestor violated their "rights in the character and memory of the deceased," and the display would foreseeably "cause mental distress and injury to any one possessed of ordinary feelings." *Id.* at 25-26. Not surprisingly, no modern court has endorsed the notion that a survivor could enjoin the display of an unflattering statue of a deceased relative because it would cause them mental distress. The Supreme Court's reliance on *Schuyler* is particularly puzzling because the case was decided decades before the Court's modern line of cases granting First Amendment protection for news reports about matters of public concern. As one court has observed, *Schuyler* is among the "few cases ... occasionally cited as recognizing a so-called 'relational' right-of-privacy," which, "[f]or the most part ... are not recent cases and their authority, even in the states which decided them, is questionable." *Young v. That Was The Week That Was,* 312 F. Supp. 1337, 1341 n.2 (N.D. Ohio 1969), *aff'd,* 423 F.2d 265 (6th Cir. 1970).

Bazemore, another common law case cited by the Supreme Court in *Favish,* is equally obscure and disfavored. In *Bazemore,* the Georgia Supreme Court held in 1930 that the parents of a malformed dead baby could maintain a survivor-right-of-privacy claim against a hospital and newspaper to enjoin the publication of a photograph of their dead child, who had been photographed inside the hospital without the parents' knowledge or consent. 155 S.E. at 194-96. Although the U.S. Supreme Court erroneously described the *Bazemore* decision as a *"per curiam"* unanimous decision, *Favish,* 124 S. Ct. at 1578-79, two Georgia justices strongly dissented, saying that the child would have been able to maintain a claim for invasion of privacy had he survived, but "the cause of action would not be in [his] parents." 155 S.E. at 197-199.

In 1956, the Georgia Supreme Court severely restricted *Bazemore,* dismissing a survivor-right-of-privacy claim brought by the mother of a 14-year-old murder victim arising from the publication of a photograph of the child's decomposed body after it had been pulled from a river. *Waters,* 91 S.E.2d at 348. The *Waters* court held that there was no invasion of privacy because the child's murder investigation was a matter of "public" concern. *Id.* at 348. "There

are many instances of grief and human suffering which the law can not redress. The present case is one of those circumstances." *Id.* The court repudiated its earlier *Bazemore* decision, saying that it would "not pass on the question of whether or not there might be a 'relational' right of privacy in this State," noting that "there is a wide divergence of views in different jurisdictions on this question," and that the decision in *Bazemore* "was not a unanimous decision." *Id.*

The other two cases cited in *Favish* also can be distinguished. *Reid* allowed the plaintiffs to maintain survivor-right-of-privacy claims against medical examiner employees who displayed autopsy photographs to friends and others outside of work, but because there were no media defendants involved, the court did not consider any First Amendment defenses. *Reid,* 961 P.2d at 335. *McCambridge* is merely an interpretation of the Arkansas public records statute. The Arkansas Supreme Court found that the plaintiff had a privacy interest in the photographs from a triple murder-suicide involving her son, but ordered disclosure of the photographs because the crime investigation was a matter of public concern, even though the photographs were "horrible and sickening." *McCambridge,* 766 S.W.2d at 914-15.

Although in *Favish* the Supreme Court did not cite D*ouglas v. Stokes,* 149 S.W. 849 (Ky. Ct. App. 1912), plaintiff's lawyers previously have cited the nearly century-old case to support survivor-right-of-privacy claims. But the Sixth Circuit has described *Douglas* as "one of the few cases standing against the weight of authority" and "clearly distinguishable" because it was based on "breach of contract." *Cordell,* 419 F.2d at 991. In *Douglas,* a couple hired a photographer to take confidential photographs of their deceased infants who were joined at birth. The parents sued after the photographer arranged to have the photographs published without their permission. The Kentucky appellate court found that the photographer "obtain[ed] the information in the course of confidential employment," and "had no authority to make the photographs, except by their authority, and when he exceeded his authority, he invaded their right." *Douglas,* 149 S.W.2d at 849-850. To the extent that *Douglas* can be interpreted as "recognizing a relational right to privacy because it discusses the severe emotional injury that the plaintiff-parents suffered from the publication of pictures of their deceased infant Siamese twins," the Sixth Circuit later declared that this "interpretation appears to rest on an assumption that for every emotional injury there must be a remedy—an assumption not generally accepted in the law of torts." *Cordell, 419 F.2d at 991 n.4.* These four obscure cases were not only weak authority for the Supreme Court's new survivor right of privacy under FOIA, but they also do not support a publication-based tort claim.

First Amendment protections can be asserted by media defendants

Favish decided a narrow issue of relational privacy rights under FOIA, not whether the First Amendment protects the media's right to publish accurate information. It can and should be argued that *Favish* and similar FOIA cases are not binding authority in publication-based claims where First Amendment defenses apply.

For more than 25 years, the United States Supreme Court has recognized that the First Amendment shields the press from liability for publishing lawfully-obtained information about a matter of public concern, even where the information is excruciatingly sensitive or the government has attempted to withhold the information from the public. In so holding, the Supreme Court emphasized that "[g]reat responsibility is ... placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975). In *Cox Broadcasting,* a local television station learned the identity of a 17-year-old rape and murder victim from a public criminal indictment, and published her name in a news broadcast. *Id.* at 472-73. The victim's father sued a television station for common law invasion of privacy by disclosure of private facts, pointing out that a Georgia statute specifically forbade publishing a rape victim's identity. *Id.* at 471-72. The Court acknowledged that "powerful arguments ... have been made ... that ... there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity." *Id.* at 487. But the Court held that these common law privacy interests had to yield to the First Amendment privilege to publish information from public court records, underscoring the importance of coverage of official conduct: "Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Id.* at 491-92.

The First Amendment also protects lawfully obtained truthful reports about non-government matters. In *Bartnicki v. Vopper,* 532 U.S. 514 (2001), the Court extended First Amendment protection to the broadcast of an illegally intercepted cell phone conversation. In *Bartnicki,* the media defendants broadcast a cell phone conversation between two teachers' union leaders that had been illegally recorded by a third party who later gave it to the media. The Court found that the broadcasts were protected because the media defendants, unlike the interceptor, did not do anything unlawful, and the phone conversation about the union's labor negotiations was a matter of public concern. "We think it clear ... that a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Id.* at 535. The Court also rejected the argument that the union leaders' right to privacy outweighed the media defendants' First Amendment protection, emphasizing that "privacy concerns [often] give way when balanced against the interest in publishing matters of public importance." *Id.* at 534.

Beginning with its *Cox Broadcasting* decision and extending without exception to *Bartnicki,* the Court has never found a privacy interest to be a "state interest of the highest order" sufficient to permit liability for truthful publication about matters of public concern. *E.g., The Florida Star v. B.J.F.,* 491 U.S. 524, 533, 536-37 (1989) (holding that the First Amendment shielded a newspaper from a common law privacy claim brought by a rape victim whose name was published in violation of state statute because report disclosed "truthful information about a matter of public significance"); *Smith v. Daily Mail Publ'g Co.,* 443 U.S. 97, 103-104 (1979) (holding that the First Amendment shielded two newspapers from criminal liability for publishing the names of juvenile criminal defendants in violation of a state statute because the report was truthfully obtained and reported about a matter of "public significance," even though information was not taken from any official court records; "A free press cannot be made to rely solely upon the sufferance of government to supply it with information"). The California Supreme Court recently extended this First Amendment protection even further, holding that the media is absolutely protected from liability when reporting about public court records that are not about contemporary events or are "not newsworthy" cases. *Gates v. Discovery Communications, Inc.,* 101 P.3d 552 (Cal. 2004). As the California high court explained, "the [Supreme] [C]ourt has never suggested, in *Cox* or in any subsequent case, that the fact the public record of a criminal proceeding may have come into existence years previously affects the absolute right of the press to report its contents." *Id.* at 560. The California court inserted a caveat in a footnote, however, saying it was not deciding whether the First Amendment protects news reports based on "*non* record facts" or "*non* public records." *Id.* at 562 n.8.

It is difficult to predict how courts will reconcile the *Cox Broadcasting* line of cases with *Favish* when dealing with publication-based claims arising from graphic death scene photographs. The *Favish* Court disfavored the publication of death scene images, even where they were arguably a matter of public concern, and found that survivors could object to the disclosure of death scene images to "be shielded ... from a sensation-seeking culture for their own peace of mind and tranquility[.]" 124 S. Ct. at 1577. The decision suggests that courts might require a specific and compelling showing of a public interest for death-scene images. Indeed, the Court stated in *Favish* that "[n]either the deceased's former status as a public official, nor the fact that other pictures have been made public, detracts from the weighty privacy interests involved" in images of the dead. *Id.* at 1580. Courts also are likely to scrutinize whether the images were lawfully obtained. Any degree of misrepresentation, concealment or encouragement of unlawful activity by the source will be viewed skeptically.

Pre-publication strategies should be considered to reduce risk

Until the impact of *Favish* has been sifted by courts, media lawyers should consider the following possible steps to minimize risks of litigation.

- **Pixilation**
  The risk of liability might be reduced if pixilation obscures the faces of the dead, as well as graphic wounds, genitals, and identifying features, such as tattoos, even if the body is in a public place. Simply deleting the names of the dead, without blurring the graphic images of their wounds or faces, might not reduce the risk of a claim where the details about the deceased and their manner of death would be recognizable to the survivors. Conversely, if the graphic details are deleted, the names of the dead could be used with less risk.
- **Use of previously published images or images taken in public places**
  The risk of liability might be reduced by using death scene images from public

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places or that already have been disseminated to the public. As the Supreme Court stated in *Cox Broadcasting,* under the common law, "[t]here is no liability when the defendant merely gives publicity to information about the plaintiff which is already public." 420 U.S. at 491. See also *Faloona v. Hustler Magazine, Inc.,* 799 F.2d 1000 (5th Cir. 1986) (no privacy claim can arise from the publication of photographs of plaintiff and her children in the nude where the pictures had been previously widely disseminated); *but see Katz,* 862 F. Supp. at 485 (affirming nondisclosure under FOIA of Kennedy autopsy photographs because release would "cause additional anguish" to survivors, even though similar photographs previously were published).

- **Government records generally are privileged**
  Videotapes, photographs, and documents that have been placed in the public government record, such as a court proceeding, inquest, or other public government proceeding, should be privileged under the First Amendment or statutory privileges for fair reports of government proceedings, and should not create grounds for liability.
- **Reenactments carry less risk**
  Reenactments of deaths or killings probably carry less risk if the scene is clearly labeled as a reenactment and is not extraordinarily graphic. In *Favish*, the Court seemed most concerned about an actual dead body being put on public display. This should not be a concern where actors and props are used. *Cf. Ruffin-Steinback v. dePasse,* 267 F.3d 457, 465 (6th Cir. 2001) (affirming summary judgment rejecting intentional infliction of emotional distress claim; television docudrama reenacting famous singer's death, including scene of singer's beaten body being thrown from moving car, was not "so extreme to the degree as to go beyond the bounds of decency").

Comment

Images of tragic and graphic deaths have long been part of U.S. public discourse, from the scenes of the American Civil War dead photographed by Mathew B. Brady to the Pulitzer Prize-winning photograph of the lifeless body of one-year-old Oklahoma City bombing victim Baylee Almon in a fireman's arms. These images help inform and influence the public debate about terrorism, war, domestic crime, and even random or accidental deaths. Graphic crime scene and morgue photographs are widely available on the Internet and in books, and have been the staple of tabloid newspapers. *See, e.g.,* Gail Buckland, *Shots in the Dark: True Crime Pictures* (Little Brown & Co. 1st ed. 2001) (photographs of dead bodies at crime scenes, autopsy photographs of John F. Kennedy, Lee Harvey Oswald, decomposed body of infant Charles Lindbergh, Jr., pp. 43, 92 & 150); William Hannigan, *New York Noir: Crime Scene Photos From the Daily News Archive* (Rizzoli Int'l Publications, Inc. 1999) (tabloid newspaper photographs of dead bodies at crime scenes, morgue, and in electric chair); Angus Hall, *The Crime Busters* (Verdict Press 1976) (nude autopsy photograph taken by New York coroner, p. 125); http://www.johngilmore.com/Crime%20and%20Morgue/crime_scene1.html (crime scene and morgue photographs of murder victim Elizabeth "Black Dahlia" Short); http://spot.acorn.net/jfkplace/02/JilM.html (morgue photographs of Lee Harvey Oswald); http://weirdpicturearchive.com/humans.html (morgue photographs of Uday and Qusai Hussein, Marilyn Monroe, John F. Kennedy, Jesse James, Benito Mussolini and others); http://www.celebritymorgue.com (same).

Risks must be weighed in the wake of *Favish.* But self-censorship of all images of death should not be the goal, especially where those images inform the public debate about important issues. As the California Supreme Court explained in *Shulman v. Group W Prods. Inc.,* 955 P.2d 469, 474 (Cal. 1998), "[t]he sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time."

FOOTNOTE

[1] Favish has posted the photographs he obtained on www.alanfavish.com

Court TV challenges the constitutionality of New York's ban on televising trials

(continued from page one)

Others contended that the dispassionate broadcasting of actual trial testimony provided the only educational and objective source of information in a trial that would have been sensationalized regardless of whether television cameras were placed inside or outside of the courtroom. Perhaps not coincidentally, it was shortly after the Simpson trial that New York reenacted New York Civil Rights Law § 52's complete ban on television coverage in New York's courtrooms, and ended its 10 year experiment (1987-1997) with permitting television cameras in the courtroom.

Background to New York Civil Rights Law § 52

As Court TV documented in its complaint, New York's restrictions on media coverage of trials began with the 1935 trial of Bruno Hauptmann, in which Hauptmann was accused of kidnapping and murdering Charles A. Lindbergh's 18 month-old son. 769 N.Y.S.2d at 74. A popular commentator during the time called the trial a "Roman Holiday"—scads of photographers aimed their bulky cameras in the faces of witnesses and uncontrollably spilled themselves over counsels' tables. The judge imposed access restrictions barring any further photographic coverage during the trial and demanded that the newsreel companies "withdraw the trial footage from exhibition," but the trial footage played in over 70 percent of the nation's movie theaters at the time. *Id.* at 73-74.

In 1937, the American Bar Association responded to the Hauptmann trial by adopting Judicial Canon 35, which stated that "The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." *Id.; Validity, Propriety, and Effect of Allowing or Prohibiting Media's Broadcasting,Recording, or Photographing Court Proceedings,* 14 A.L.R.4th 121 (2004). New York's Civil Rights Law § 52, enacted in 1952, emerged from a similar reaction to the nationally-televised anticommunist "witch hunts" conducted by the United States Senate Crime Investigating Committee in New York. Trial brief for plaintiff at 6; Association of the Bar of the City of New York, "Report on Radio and Television Broadcasting of Hearings of Congressional Investigating Committees" (1951).

New York's Civil Rights Law § 52 states that:

> No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state ....

The purpose of Section 52 was clearly identified at the signing of the bill when Governor Thomas E. Dewey pronounced that:

> It is basic to our concept of justice that a witness compelled to testify have fair opportunity to present his testimony. The use of television, motion pictures and radio at such proceedings impairs this basic right. Batteries of cameras, microphones and glaring lights carry with them attendant excitement, distractions and the potential for improper exploitation and intolerable subversion of the rights of the witness. Official proceedings should not be converted into indecorous spectacles. 769 N.Y.S.2d at 73 (quoting *Public Papers of Governor Dewey,* 324-25 (1952)).

This ban on courtroom cameras remained intact for over 30 years.

New York experiments with television cameras in the courtroom from 1987-1997

The Legislature reconsidered the wisdom of New York Civil Rights Law § 52 decades later, as technology advanced and cameras no longer required blinding flashbulbs or resulted in pandemonium in the courtroom. Motivated to educate the public and inspire public confidence in the judiciary and recognizing that improvements in technology would minimize disruption in the courtroom, in 1987 the Legislature approved Judiciary Law § 218, which, on a two-year trial basis, permitted audio-visual coverage subject to the trial judge's continuing discretion. In connection with this experiment, the chief administrator of the courts conducted surveys of participants in televised trials and submitted a report in 1989, which concluded that physical disruptions were minimal and that most of the trial participants favored the media coverage. *Id.* at 77-80. The methodology of the report was disputed by some groups (*e.g.,* the New York State Defender's Association's *Cameras in NY Courtrooms White Paper* (1999)) and also by some legislators.

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In response to these challenges, the Legislature authorized a second (1989) and later a third (1992) experimental period. Adopting improvements in the survey methodology, the second and third reports corresponding with the second and third experiments still recorded results consistent with the first report and concluded with a recommendation to make Judiciary Law § 218 permanent. 769 N.Y.S.2d at 80-82.

Instead of accepting these recommendations, the Legislature decided to extend the experiment for a fourth trial period (1995). An advisory committee submitted a report following the fourth experiment, noting the potential drawbacks of televising trials, some of these fears stemming from its perception of the O.J. Simpson trial. Nevertheless, the committee concluded that these fears had not been realized in New York during the experimental periods and that a wholesale ban on television cameras in the courtroom could not be justified. *Id.* at 86-94. In contrast, a Minority Report, delivered by one of the committee's dissenters, argued that too many concerns had been raised—in particular, the fear that televised trials would deter witnesses from testifying—to justify the committee's recommendation. The Legislature subsequently failed to extend or reenact Judiciary Law § 218, and since then, New York Civil Rights Law § 52's ban on cameras in the courtroom has remained intact. *Id.* at 94-96.

The Supreme Court of New York and the Appellate Division uphold New York Civil Rights Law § 52

In 2003, Court TV sought in New York State Supreme Court (New York's trial court) a declaratory judgment holding Civil Rights Law § 52's outright ban on cameras in the courtroom unconstitutional. Without asserting that televising judicial proceedings is a constitutional requirement in every case, Court TV argued that under the First Amendment of the U.S. Constitution and Article I, § 8 of New York's Constitution, there is a presumptive right to observe public trial court proceedings, as noted in the U.S. Supreme Court's landmark decision, *Richmond Newspapers, Inc. v. Virginia.* 448 U.S. 555, 572 (1980). Trial brief for plaintiff at 12-18; 769 N.Y.S.2d 70 (N.Y. S. Ct. 2003). That presumptive right, argued Court TV, should include the observational rights of citizens who wish to observe those same proceedings on a television screen. This wide protection accords with the U.S. Supreme Court's broad definition of First Amendment protections in *First National Bank of Boston v. Bellotti,* which "prohibit[s] government from limiting the stock of information from which members of the public may draw." 435 U.S. 765, 783 (1978); trial brief for plaintiff at 13. Furthermore, Article I, § 8 of New York's Constitution, which prohibits the use of official authority to "restrain or abridge the liberty of speech or of the press," affords even broader protection than the U.S. Constitution. Brief for plaintiff at 19.

The New York State Supreme Court held that both *Richmond* and *Bellotti* stand for the limited proposition that there is a First Amendment right to attend and report on trials, not to televise them, and emphasized that no appellate court has ever applied strict scrutiny to restrictions on audio-visual coverage of a trial. 769 N.Y.S.2d at 98-99. It cited a number of federal appellate courts, including the Second Circuit, that have sustained prohibitions on audio-visual coverage of trials. *E.g., Combined Communications Corp. v. Finesilver,* 672 F.2d 818, 821 (10th Cir. 1982); *Conway v. United States,* 852 F.2d 187, 188-89 (6th Cir. 1988); *United States v. Edwards,* 785 F.2d 1293, 1295 (5th Cir. 1986); *United States v. Kerley,* 753 F.2d 617, 620-22 (7th Cir. 1985); *United States v. Hastings,* 695 F.2d 1278, 1280 (11th Cir. 1983); *Westmoreland v. Columbia Broad. Sys., Inc.,* 752 F.2d 16, 23 (2nd Cir. 1984). Thus, the court concluded that Section 52 constitutes a limitation on the time, place and manner of press coverage, which must be upheld if the record demonstrates that these restrictions bear a reasonable relationship to the attainment of a legitimate governmental interest. 769 N.Y.S.2d at 99-101. The court opined that the concerns that emerged from New York's 10-year experiment—particularly the suggestion that witnesses would be deterred from testifying—supported the state's claim that Civil Rights Law § 52 reasonably advances the state's interest in conducting fair trials. And while the court agreed that Article I, § 8 of New York's Constitution provides broader speech protection than the First Amendment in some instances, it held that "the record raises a reasonable doubt that the needs and expectations of New York citizens demand a constitutional right to televised court proceedings." 769 N.Y.S.2d at 100-103.

The Supreme Court's Appellate Division (New York's intermediate appellate court) similarly held that there is no federal or state constitutional right to televise court proceedings. 779 N.Y.S.2d 74 (N.Y. App. Div. 2004). Unlike the lower court, however, the Appellate Division entertained the assumption that Section 52 restricts some

speech, but nevertheless posited that Section 52 would survive the intermediate level of judicial scrutiny that applies to content-neutral statutes. *Id.* at 76. The Appellate Division held that "Section 52 is sufficiently tailored to further an important state interest, namely, the preservation of the value and integrity of live witness testimony in state tribunals." *Id.* Thus, the court held that even if less-restrictive measures could have been adopted to achieve the purpose of the legislation (the test under strict scrutiny), Section 52 should still be upheld as constitutional. *Id.*

Court TV's forthcoming argument before the New York Court of Appeals

Court TV's argument before the Court of Appeals will focus on the lower courts' failure to recognize that the U.S. Supreme Court and appellate court decisions from decades ago invited courts in the future to reconsider whether there is a First Amendment right to televise trials. Quoting from the Second Circuit *Westmoreland* opinion, the New York Supreme Court stated that "[t]here is a long leap ... between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised." 769 N.Y.S.2d at 98 *(quoting Westmoreland,* 752 F.2d at 23). However, *Westmoreland* was decided 20 years ago, yet the court still acknowledged that:

> There may indeed come a time when 'experimentation' ... with television coverage establishes that the concerns ... are considered secondary or basically irrelevant as impediments to the search for truth when a given case is televised. At such a time the presumption may well be that all trials should be televised, or televisable ....

752 F.2d at 23; Court of Appeals brief for plaintiff at 18.

Likewise, 40 years ago in *Estes v. Texas,* the U.S. Supreme Court rejected a First Amendment right of camera access, describing the hectic conditions brought upon by the televised trial that deprived the defendant of a fair trial: 12 cameramen scurrying about the courtroom throughout the proceedings with cables and wires snaked across the courtroom floor. 381 U.S. 532, 536 (1965); Court of Appeals brief for plaintiff at 17. Still, in his concurrence, Justice Harlan had the foresight to anticipate future reconsideration of the right to televise trials:

> Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.

381 U.S. at 595; Court of Appeals brief for plaintiff at 17.

Court TV will argue that the day for reexamination has arrived. Televising and broadcasting newsworthy events is now not only commonplace, but it is expected, and technology has advanced to the point that filming is much less a physical imposition than it was 40—or even 20—years ago. In contrast to the *Estes* Court's "most telling" evidence that in 1965, 48 states had deemed televised coverage of trials improper, 381 U.S. at 544, now 43 states permit it. Even in the period following the Simpson trial, when apprehension grew to a peak, six states have joined the majority by permitting coverage. Court of Appeals brief for plaintiff at 18-19.

Indeed, ten years of experimentation with cameras in the courtroom in New York resulted in a finding that the dangers of televising trials have dissipated to the point that a wholesale ban no longer can be justified. In light of these conclusions, almost a decade ago, Judge Sweet, federal district court judge in the Southern District of New York, stated that a First Amendment right to televise public court proceedings should be presumed:

> Twelve years after the *Westmoreland* decision and 22 years after the Estes holding, the advances in technology and the above-described experiments have demonstrated that the stated objections can readily be addressed and should no longer stand as a bar to a presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television.

Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580, 589 (S.D.N.Y. 1996).

Court TV will argue that the lower courts failed to read *Richmond Newspapers* and its progeny broadly enough. The right of access in *Richmond Newspapers* encompasses more than just physical entrance—it incorporates the right to collect and disseminate information that is fundamental to our values of openness and self-sovereignty. The *per se* ban

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Court TV Challenge

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on the modern tools of trade used for gathering and distributing information in public court proceedings is just the type of wholesale restriction to which *Richmond Newspapers* applied heightened scrutiny. Court of Appeals brief for plaintiff at 21-30. New York Civil Rights Law § 52 is not a reasonable limitation on access to a trial—it is a ban on an entire category of information. To the vast majority of the public who could only view a public trial by watching it on television, it constitutes nothing short of an outright denial of access.

Conclusion

The lower courts attempted to justify a narrow reading of past U.S. Supreme Court and appellate court cases by pointing out that no appellate court in any state or federal jurisdiction has applied strict scrutiny to restrictions on audio-visual coverage of trials. This may very well be because the vast majority of states do not impose an outright ban on televising public trials. It is ironic that New York, which expressly protects First Amendment rights more broadly and vigorously than almost any other state, is one of the few remaining states that supports an outright ban of televising trials. The New York Court of Appeals now has a chance to be the first appellate court to proclaim that there is a presumptive right to televise trials, which, Court TV will argue, is an opportunity to bring First Amendment jurisprudence up to speed with our modern era.