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*Court TV*

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## Panel I: Accountability of the Media in Investigations

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Panelists: Gregg Jarrett<sup>c</sup>

Charles E. Rose<sup>d</sup>

Randall J. Turk<sup>e</sup>

L. Lin Wood<sup>f</sup>

MR. SIMS: I would like to thank everyone for coming today, and I certainly want to thank all of our distinguished panelists, both on this panel and on the two upcoming panels. I would also like to thank my co-moderator, Bill Small, whose work on these symposia has been terrific and whose distinguished record speaks for itself.

The topic that we are discussing on this panel, accountability of the media, is a very interesting one, certainly for myself as a professor in this area. We will be focusing principally, although not exclusively, on two high-profile cases: the matter of Richard Jewell, wrongly accused of being the

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Olympic Park bomber, and the *Food Lion* case,<sup>1</sup> recently decided against ABC in Greensboro, North Carolina.<sup>2</sup> We are fortunate today to have parties directly involved in both litigations.

Speaking first is Mr. Lin Wood of the Atlanta law firm of Wood & Grant. With his partner, Wayne Grant, they are the lead civil attorneys for Richard Jewell. As you are probably aware, they have already secured some major settlements from media organizations like CNN and NBC;<sup>3</sup> they also have some other major actions pending and some contemplated. We look forward to hearing Mr. Wood's account of these litigations.

Speaking second is Mr. Randy Turk of the Washington, D.C. law firm of Miller, Cassidy, Larroca & Lewin. Mr. Turk represented defendant ABC in the recently completed *Food Lion* case in Greensboro, where a jury awarded the plaintiffs \$5.5 million in punitive damages on the theory that ABC's employees committed fraud and trespass by not disclosing their media affiliations when they obtained jobs with the

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1. *Food Lion, Inc. v. Capital Cities/ABC*, No. 92-00592, slip op. (M.D.N.C. May 7, 1997). For previously reported decisions in this case, see *Food Lion, Inc. v. Capital Cities/ABC*, 951 F. Supp. 1233 (M.D.N.C. 1996) (denying defendants' renewed motions for dismissal of claims or alternatively, for summary judgment); 887 F. Supp. 811 (M.D.N.C. 1995) (holding that state claims of fraud, trespass, and civil conspiracy did not warrant dismissal, that claims for violations of federal wiretapping statutes warranted dismissal, and claims for negligent supervision, respondeat superior liability, breach of fiduciary duty and constructive fraud, unfair and deceptive trade practices, warranted deferment; that ABC's acts did not constitute pattern of racketeering as required to establish RICO violation; and that plaintiff could not recover damages for injuries to its reputation as result of broadcast).

2. On December 20, 1996 a jury returned a \$5.5 million verdict in favor of Food Lion, finding ABC liable for fraud, trespass, and breach of the duty of loyalty. *Food Lion* (No. 92-00592), slip op. at 1; see generally Barry Meier, *ABC Held Liable for Fraud in Reporting on Store Chain*, N.Y. TIMES, Dec. 21, 1996, at 8 (discussing the \$5.5 million punitive damages verdict against ABC).

3. See *NBC, Lawyers for Jewell Settle Libel Allegations*, WASH. POST, Dec. 10, 1996, at A3 (discussing how Jewell received a monetary settlement on an undisclosed amount); see also Bill Rankin, *In Settlement, CNN Defends Coverage*, ATL. J. & CONST., Jan. 29, 1997, at 1X.

Food Lion supermarket chain.<sup>4</sup> As you are probably aware, ABC employees had gone undercover to ferret out meat processing health violations, and had secretly televised this activity.<sup>5</sup>

We will then hear from Mr. Gregg Jarrett, who is one of the original four anchors of Court TV, and presently serves as the anchor and managing editor of the program *Inside America's Courts*.<sup>6</sup> He is an Emmy Award winner and has covered over 400 cases for the network, including, quite notably, the O.J. Simpson trial.

Our final speaker is Mr. Charles Rose of the law firm of DeFeis, O'Connell & Rose. He has extensive practical experience in the area of criminal law, having worked for fifteen years in the United States Attorney's Office in the Eastern District of New York before entering private practice. He also appears frequently on television as a criminal law expert, and is a three-time recipient of United States Department of Justice awards for superior performance in his work abroad as well.

Each of the panelists will speak for ten minutes, after which we will have a colloquy and questions from the audience.

Thank you so much.

MR. WOOD: Good afternoon. I would like to thank the *Fordham Intellectual Property, Media & Entertainment Law Journal* ("IPLJ") for extending to me the invitation to participate in this afternoon's Symposium.

As I look around, I wonder—because I think it is a thought many of us have at some point in our lives—how many of you have ever dreamed of being a hero? Have you

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4. For a summary of the facts surrounding the *Food Lion* controversy, as well as the jury verdict, see Amy Singer, *Food, Lies, and Videotape*, AM. LAW., Apr. 1997, at 56.

5. *Id.*

6. *Inside America's Courts* broadcast its final episode on February 28, 1997. Mr. Jarrett continues to serve as an anchor for Court TV.

ever had in your life any thoughts of being in a situation where you instantly and without hesitation jumped in to do the right thing to save someone's life, perhaps the life of a loved one? Or maybe, as lawyers, you have dreamed of making the passionate closing argument that saves the life of an innocent person or obtains justice for a victim?

For three days in July of 1996, my client, Richard Jewell, lived the American dream: he was proclaimed by the print and broadcast media in this country and around the world to be a hero.<sup>7</sup> And rightfully so: on the morning of July 27 in Centennial Olympic Park,<sup>8</sup> Richard Jewell did his job as a security officer when he spotted an unattended package, brought it to the attention of the authorities, and, by doing so, was responsible for clearing over 250 people away from the direct vicinity of what turned out to be a bomb.<sup>9</sup> But for Richard Jewell's actions, the legacy of the 1996 Centennial Olympic Games in Atlanta, Georgia would have likely been over one hundred people killed, a tragedy of immense proportion,—not to downplay the loss of the life that did occur.<sup>10</sup>

Tragically, I was not invited to speak to you today about

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7. See, e.g., Kent E. Walker, *Atlanta Games Day 12. Olympic City Heroes at the Park: Guard's Quick Thinking Saved Lives*, ATL. J. & CONST., July 30, 1996, at S29 (proclaiming Richard Jewell a "hero" and describing how he saved hundreds of lives by his quick thinking). On May 15, 1997, the American Police Hall of Fame honored Richard Jewell for saving the lives of countless people by helping to evacuate Centennial Park after spotting the suspicious package which contained the bomb. See *Hero-Turned-Villain-Turned Hero Honored By Cops*, STAR LEDGER, May 17, 1997, at 3.

8. Centennial Olympic Park is the central gathering place in downtown Atlanta that was the scene of nightly entertainment events during the Centennial Olympic Games. See Bill Dwyre, *Blast Rocks Olympic Park*, L.A. TIMES, July 27, 1996, at A1.

9. See, e.g., Max Frankel, *An Olympian Injustice*, N.Y. TIMES, Sept. 22, 1996, at 60; Mike Lopresti, *Guard's Alertness in Park Makes Him an Unexpected Hero*, USA TODAY, July 29, 1996, at 4A; *Jewell Honored for Saving People*, ST. LOUIS POST-DISPATCH, May 18, 1997, at 5A.

10. For details of the victims of the bombing, see Ronald Smothers, *Bomb at the Olympics: The Victims; Woman Who 'Lost Her Life While Celebrating the Human Spirit'*, N.Y. TIMES, July 30, 1996, at B6; Hollis R. Towns, *Turkish Journalist Covering Blast Aftermath When He Died*, ATL. J. & CONST., July 27, 1996, at 4X.

the fact that Richard Jewell lived the American dream—the Fordham *IPLJ* did not ask me to come up here and talk with you about the fact that Richard was a hero. I was asked to speak to you because of Richard Jewell’s nightmare.

Three days after the bombing, on July 30, Richard was subjected to an FBI interrogation, which was itself full of deceit and falsity, and which violated his constitutional rights.<sup>11</sup> I assure the members of the media and the media defense bar that my partner, Wayne Grant, and I have no love lost for the FBI. We do not single out the media in this case. We feel the FBI and the media are equally responsible for what happened to Richard. But, unfortunately, this is not a symposium on FBI accountability. I wish it were; I would like to speak for several hours on that subject.

After this FBI “interview,” and after the *Atlanta Journal* had published an extra edition headlining that the FBI suspected Richard of planting the bomb,<sup>12</sup> a story which was subsequently read verbatim to the world by CNN,<sup>13</sup> Richard Jewell was back at his mother’s apartment—a small, two-bedroom apartment in Atlanta. They were sitting there watching television—actually watching the Olympic cover-

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11. For a discussion of the FBI’s disclosure of Richard Jewell as a suspect, see *The Atlanta Olympic Bombing Case and Possible FBI Leaks to the Media: Hearings Before the Terrorism, Technology & Government Information Subcomm. of the Senate Judiciary Comm.*, 104th Cong., 2d Sess. (1996) (testimony of Louis Freeh, Director, FBI); see also Joel Cohen & Randy L. Shapiro, *Dangers in an Uncounseled Interview by Law Enforcement Officials*, N.Y.L.J., Dec. 16, 1996, at 1 (describing the methods the FBI used to deceive Richard Jewell into waiving his *Miranda* rights).

12. For a look at Richard Jewell’s fall from grace, see Kathy Scruggs & Ron Martz, *FBI Suspects “Hero” Guard May Have Planted Bomb*, ATL. J. & CONST., July 30, 1996, at 1X. In this special extra edition article, the newspaper publicly identified Mr. Jewell as a suspect in the Centennial Olympic Park bombing. *Id.* This information was leaked to the paper by an unidentified FBI agent and was confirmed by unidentified members of the Atlanta Police Department. Complaint for Defamation, Jewell v. Cox Enters., Inc., No. 97-0122804 (State Ct., Fulton Co., Ga. filed Jan. 28, 1997); see also James Collins, *The Strange Saga of Richard Jewell*, TIME, Nov. 11, 1996, at 60 (reviewing the FBI investigation and news coverage of Richard Jewell).

13. *Security Guard Identified as Park Bomb Suspect* (CNN television broadcast, July 30, 1996).

age—and trying in some way to escape the fact that there were hundreds of photographers and several FBI agents outside of their home waiting to pounce upon them.

Bobi Jewell, Richard's mom, is like a lot of us. We all probably have our favorite TV anchor person. Some people like Dan Rather,<sup>14</sup> some people like Peter Jennings,<sup>15</sup> and some prefer Bernard Shaw.<sup>16</sup> Bobi Jewell loved Tom Brokaw.<sup>17</sup> She had watched him almost every night for years. She was watching him that night in her apartment with her son Richard when Tom Brokaw announced to twenty million households<sup>18</sup>—they had a twenty share that night<sup>19</sup>—”They probably have enough to arrest him right now, probably enough to prosecute him as well. They are only using one name tonight, and that is Richard Jewell.”<sup>20</sup>

Bobi Jewell had to make a choice at that time: she had to choose whether to believe Tom Brokaw, a person she had trusted to tell her the truth—the news, factually correct, for so many years, or to believe her own son, Richard. Bobi Jewell made the right choice. Bobi Jewell chose to believe

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14. Mr. Rather is the nightly news anchor at CBS.

15. Mr. Jennings is the nightly news anchor at ABC.

16. Mr. Shaw is a news anchor at CNN.

17. Mr. Brokaw is the nightly news anchor at NBC.

18. *NBC Nightly News with Tom Brokaw* (NBC television broadcast, July 30, 1996).

19. Nielsen Media Research is designed to gather ratings for programs on nationwide broadcast and cable programs. Five thousand households, selected at random, are fitted with a device that records programs being viewed at any given time. *See How Nielsen Measures Ratings*, PEORIA J. STAR, Jan. 5, 1997, at C11. Through information compiled from these “Nielsen” homes, television programs are given “shares” and “ratings.” *See id.* A television program’s “share” is the percentage of televisions tuned into a particular program, out of televisions in use at that time. *See id.* For example, if 20% of the Nielsen households who are watching television at 9:00 p.m. on a Thursday night tune into the NBC television program “Seinfeld,” the show gets a “20 share.” A “rating” is the percentage a television programs tuned into a particular program out all potential viewers. *See id.* Consequently, a twenty share is usually substantially fewer viewers than a twenty rating. *See id.*

20. *NBC Nightly News with Tom Brokaw* (NBC television broadcast, July 30, 1996); *see also* Sam Venable, *Press Jumps Gun with Premature Guilt Assumption*, KNOXVILLE NEWS-SENTINEL, Aug. 2, 1996, at A2.

her son because she knew her son was a decent, polite, gentle person who aspired in life only to be a good public servant. You see, Bobi Jewell knew the truth about Richard Jewell, but the world did not know the truth about him because the media did not bother to tell us.

The media set out, literally, from day one when Richard was identified publicly, to portray him as an aberrant personality; a person with a bizarre history; a person who was most likely responsible for the Centennial Olympic Park bombing.<sup>21</sup> They ridiculed him. They condemned him. They made fun of the fact that he was temporarily living with his mother in her apartment while he worked at the Olympics.<sup>22</sup>

I was reminded of that ridicule when I watched the coverage of the JonBenet Ramsey case.<sup>23</sup> There seemed to be

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21. See, e.g., Kathy Scruggs & Ron Martz, *At the Scene of the Blast 'Hero' Denied Planting Bomb FBI Questions Park Guard in Probe of Blast*, ATL. J. & CONST., July 31, 1996, at A1 (quoting Piedmont College President Ray Cleere, Mr. Jewell's former boss, who called the FBI after Mr. Jewell was interviewed on television); Ron Martz, *Centennial Park Bombing A Motive? Most Seek Glory, Power or Revenge*, ATL. J. & CONST., July 31, 1996, at 10A; Christy Oglesby, *Centennial Park Bombing: Security Guard Had Reputation as Zealot*, ATL. J. & CONST., July 31, 1996, at 10A; Diana White, *Even if Jewell's Not a Bomber, He's Guilty of Fatness*, AUSTIN-AM. STATESMAN, Aug. 12, 1996, at E1; see also *'Hero' Guard is Focus of Probe: He Reported Finding Knapsack Bomb at Atlanta Olympics*, PLAIN DEALER, July 31, 1996, at A1 ("Jewell might fit the profile of the bomber as 'a wanabee' . . . much as a volunteer firefighter might set a blaze, only to put it out."). But see *Jewell Hung Out to Dry*, HERALD, Aug. 8, 1996, at 11A ("The [FBI] must either arrest Jewell or . . . let him start to rebuild his life.").

22. See, e.g., Kathy Scruggs & Ron Martz, *FBI Searches Guard's Home. Man Called Hero After Bombing Under Scrutiny*, ATL. J. & CONST., July 31, 1996, at A1 (noting several times that Mr. Jewell lived with his mother and that she "ordered him to come back inside because he has a phone call").

23. On December 26, 1996, six-year-old JonBenet Ramsey was found murdered in the basement of her family's home in Boulder, Colorado. Frances Melrose, *Ramsey Case Reminiscent of 1930 Denver Murder*, ROCKY MOUNTAIN NEWS, May 18, 1997, at 22D Her mother called police at 5: 52 a.m. on December 26 after finding a ransom note left in the house. *Id.* Since the time of the murder, daily articles in almost every newspaper, magazine, and tabloid have focused on every intimate detail of the Ramsey's life. *Id.* Although no criminal charges have been brought against them, JonBenet's parents have repeatedly been named as the only suspects in this case. See generally *id.* (comparing JonBenet Ramsey's murder to the murder of ten year old Leona O'Loughlin in 1930 by her stepmother). But see *'Possibility of Intruder'/ Jon-*

this implicit condemnation of the Ramsey family because the parents had put their child in beauty contests. I wondered how many people that implicates. How many people at some point return home for a brief period of time to live with their mother? Somehow, that innocent event suddenly became sinister.

In the Atlanta paper, they proclaimed, “Richard Jewell, 33, fits the profile of the lone bomber.”<sup>24</sup> It was not attributed to anyone; just a simple statement of fact on the front page of the paper. It was not true. He did not fit the profile of the lone bomber. There was not even a legitimate law enforcement profile of a lone bomber.<sup>25</sup>

The Atlanta paper said in a headline: “Bomb Suspect Had Sought Limelight, Press Interviews.”<sup>26</sup> That simply is not true. It never happened. Richard Jewell never sought one interview. AT&T, his employer, *asked* him to participate in a limited number of interviews wearing an AT&T security shirt.<sup>27</sup>

The Atlanta papers, on August 1, went so far as to liken

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*Benet Prosecutor Wants Records Sealed*, NEWSDAY, May 23, 1997, at A56 (discussing how although last month District Attorney Alex Hunter said the Ramseys were “the focus” of their daughter’s murder, there is now a “real possibility” that JonBenet was killed by an intruder and not her parents).

24. Scruggs & Martz, *supra* note 12, at 1X.

25. According to the July 30, 1996, article by Ron Martz and Kathy Scruggs, published by the *Atlanta Journal/Constitution*, “Richard Jewell, 33, a former law enforcement officer, fits the profile of the lone bomber. This profile generally includes a frustrated white man who is a former police officer, member of the military or police ‘wannabe’ who seeks to become a hero.” *Id.* A “profile” is an “informal compilation of characteristics” believed to be “typical of persons” committing a charged crime. *Reid v. Georgia*, 448 U.S. 438 (1980).

26. Kent Walker, *Bomb Suspect had Sought Limelight, Press Interviews*, ATL. J. & CONST., July 30, 1996, at 3X.

27. See Dave Kindred, *Centennial Park Bombing Strange Turn of Events: A Hero Becomes a Fool*, ATL. J. & CONST., July 31, 1996, at 10A. According to an AT&T spokesman, “[Richard] didn’t even want to do the CNN thing. . . . He went kicking and screaming, and he didn’t enjoy it. My gut feeling is he doesn’t want to talk anymore. . . . You know, the quiet hero kind of guy . . . .” *Id.*; see also Curtis Wilkie, *Jewell Is Still Waiting for a “Thank You”*; *Ex-Olympic Bomb Suspect Ponders Absence of Accolades*, B. GLOBE, Feb. 15, 1997, at A1 (discussing how AT&T encouraged Mr. Jewell to talk with reporters after discovering the knapsack).

Richard Jewell, a man never charged with a crime, to Wayne Williams.<sup>28</sup> Wayne Williams was convicted in 1982 of the murders of the missing children of Atlanta, some twenty-eight children who disappeared and were found dead over the course of three years.<sup>29</sup> It is one of the most heinous crimes and he is one of the most heinous criminals in the history of Atlanta, if not the country—and the Atlanta paper directly likened Richard Jewell to Wayne Williams.

In New York, Richard was described as the village Rambo—a fat, failed, former sheriff's deputy who spent most of his working days as a school crossing guard.<sup>30</sup> This is absolutely false. He was further described in New York as a college security guard who got up in the middle of the night and set up a roadblock around the campus to hunt for people driving under the influence.<sup>31</sup> It never happened. It was false.

CNN spent almost three months with correspondent Art Harris constantly telling the world every time they had a sound bite or a story on Richard that the FBI had a “circumstantial case” against Richard Jewell, that the case was full of “circumstantial evidence.”<sup>32</sup> Absolutely false. There

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28. Dave Kindred, *Park Bombing: The Scene on Buford Highway*, ATL. J. & CONST., Aug. 1, 1996, at 14A.

29. In February of 1982, an Atlanta jury convicted Wayne Williams for the murders of two of the 28 missing and murdered children of Atlanta. Gary Pomerantz, *10 Years After Atlanta's Child Murders*, ATL. J. & CONST., June 16, 1991, at A1; Laura Wisniewski, *Williams Still Claims Innocence in Child Murders*, ATL. J. & CONST., Oct. 9, 1994, at D2. He was sentenced to serve two consecutive life terms in prison for the murders. Pomerantz, *supra*, at A1; Wisniewski, *supra*, at D2. After his conviction, law enforcement officials in Atlanta announced that the conviction had cleared 23 of the 28 murders of Atlanta children. *See generally* Pomerantz, *supra*, at A1 (discussing how ten years after his conviction, Wayne Williams still professes his innocence); Wisniewski, *supra*, at D2 (interviewing Wayne Williams who continued to proclaim innocence).

30. Andrea Peyser, *Who Checked 'Rambo' Crossing Guard's Record?*, N.Y. POST, July 31, 1996, at 2, 18.

31. *Id.*; *see also* Darin Klahr & Helen Kennedy, *Lost Job at College for Grandstanding*, DAILY NEWS, July 31, 1996, at 2.

32. *See, e.g.*, *CNN Talkback Live* (CNN television broadcast, Oct. 28, 1996).

was not one shred of evidence, circumstantial or direct, that ever implicated Richard Jewell in the Centennial Olympic Park Bombing. It simply did not exist; it was fiction.

There were circumstances about Richard to be investigated, but there was, I assure you, not one shred of evidence that linked Richard Jewell to that crime, other than the fact that he did his job and reported the package as being unattended.

That is not even the tip of the iceberg on the mountain of false information about Richard Jewell that was broadcast and published all over the country, even all over the world.<sup>33</sup> After the media had spent these several days tearing this man to shreds and implicating him as the bomber, they set up a media pool stakeout camera up on the hill directly above his mother's apartment, and turned those cameras on Richard Jewell and his mother for twenty-four hours a day.<sup>34</sup> If his mother walked the dog, they filmed it. They paid for a media surveillance car to follow Richard Jewell everywhere he went, and they did it for one reason only: the media wanted to capture on film that one sensational second where they would see this man shackled, handcuffed, and carted off to jail.<sup>35</sup> That is all they wanted. They sat out there for

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33. See generally *Security Guard Fingered as Possible Suspect in Olympics Bombing*, DEUTSCHE PRESSE-AGENTUR (Germany), July 30, 1996 (discussing how the *Atlanta Journal & Constitution*, in a special edition, named Richard Jewell as the focus of the federal investigation); Phil Davison, *Hero or Villain of the Games?*, INDEPENDENT (London), Aug. 3, 1996, at 15.; David Morgan, *FBI Search Home of Olympic Security Guard*, IRISH TIMES, Aug. 1, 1996, at 12; Quentin Letts, *Spotlight Falls on Obsessive Man with a Grudge*, THE TIMES (London), Aug. 1, 1996, at A4; John Duncan, *FBI Scours the Home of Olympics Bomb 'Hero'. Police Confirm Centennial Park Security Guard Who Raised Alarm is the Key Suspect in Atlanta Blast*, GUARDIAN (London), Aug. 1, 1996, at 2; see also Rupert Cornwell, *Olympic Bomb Attack Suspect's '88 Days of Hell'*, INDEPENDENT (London), Oct. 29, 1996, at 11 (detailing Mr. Jewell's 88 day ordeal as a suspect).

34. See Scott Marshall & Bernadine Waller, *Park Bombing: FBI Gathers Evidence; Tired of Media Mania*, ATL. J. & CONST., Aug. 2, 1996, at 7A; Kathy Scruggs & Ron Martz, *At the Scene of the Blast: Guard Denies Role in Blast; Man Called Hero After Bombing Under Scrutiny*, ATL. J. & CONST., July 31, 1996, at 1A.

35. For an account of the media frenzy, see Alicia C. Shepard, *Going to Extremes*, AM. JOURNALISM REV., Oct. 1996, at 38.

thirty days<sup>36</sup> and invaded this man's privacy, and the privacy of his mother, for one sensational photograph that was never going to be taken because Richard Jewell was never going to be arrested. In fact, the media did not have a reasonable belief during that thirty days that there was going to be an arrest.<sup>37</sup>

That tip, as such, of the iceberg brings me to the issue of the need for accountability on the part of the media for its wrongdoing. How many times have we heard, "get it first, but get it right?"<sup>38</sup> I submit to you that that phrase has now somehow been translated into simply "get it first."<sup>39</sup> There seems to be a new role, that the media has to create a story, instead of reporting the facts of that story. The media's desire to rush to a headline invariably creates a rush to judgment by the people who read it.

We live in an era of media giants, media conglomerates.<sup>40</sup> For example, the *Atlanta Journal/Atlanta Constitution* is not locally owned and operated. It is owned by Cox Enterprises, Inc., a worldwide, multi-billion-dollar media corporation.<sup>41</sup>

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36. *Id.*

37. See Patrick A. Tuite, *New Olympic Sport of Tar and Feathering Should Be Banned*, CHI. LAW., Sept. 1996, at 9 (discussing how, as of August 1, 1996, despite media assertions to the contrary, there was no physical evidence linking Mr. Jewell to the bombing or any other criminal activity).

38. See *Editorial*, DENV. POST, Jan. 11, 1997 ("ancient axiom of the journalistic trade—get it first, but first get it right"); see also *TV Went Beyond Need to Know*, POST & COURIER, Aug. 11, 1996, at 22 (explaining "media's rush to get it first [in the Jewell Case] rather than get it right").

39. In an interview published in the *Columbia Journalism Review*, CNN News President Tom Johnson acknowledged that deadlines and competition exert tremendous pressures that influence news judgments. Ellen Alderman & Caroline Kennedy, *The Legacy of Richard Jewell*, COLUM. JOURNALISM REV., Mar. 1997, at 27. He expects the Richard Jewell case to make CNN work harder to avoid getting caught up in the "frenzy." *Id.*

40. See generally H. Peter Nesvold, *Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions*, 6 FORD. INTELL. PROP. MEDIA & ENT. L.J. 781 (1996).

41. See COX COMMUNICATIONS, INC., 1996 ANNUAL REPORT 2 (1997) ("Cox Enterprises, Inc., a privately-held corporation headquartered in Atlanta, Georgia, [is] one of the largest media companies in the United States with consolidated revenues in

There is intense competition between these media giants. I am not optimistic that they have learned from the Richard Jewell story because I believe that someone out there is going to do it again and everybody is going to follow. As Ted Koppel<sup>42</sup> said, “We seem to have a media that is reduced to the lowest common denominator. One does it, and that somehow makes it okay for all the others to follow it.”<sup>43</sup>

I believe that if change does occur, it will only occur as the result of media accountability for its wrongdoings. But if change does not occur, I submit to you that the need for accountability is even greater. The need for accountability is greater because we cannot tolerate sensationalism and falsity from those whom we trust to inform us. If we give members of the media a license to publish and broadcast false statements without accountability, then I submit to you we give them an unfettered license to potentially destroy the reputations, if not the very lives, of innocent individuals.

I wish I could tell you the precise method to follow to achieve accountability. Three possible means exist: self regulation, public opinion and civil litigation. First, the media’s own ethical standards.<sup>44</sup> Perhaps the media could

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1996 of \$4.6 billion.”).

42. Ted Koppel is the anchor for the ABC program, *Nightline*.

43. Shepard, *supra* note 36, at 42.

44. The Society of Professional Journalists adopted a revised code of ethics in late 1996. Its four Guiding Principles state, in relevant part:

[1] Seek truth and report it. Journalists should be honest, fair and courageous in gathering, reporting and interpreting information.

[2] Minimize harm. Ethical journalists treat sources, subjects and colleagues as human beings deserving of respect.

[3] Act independently. Journalists should be free of obligation to any interest other than the public’s right to know.

[4] Be accountable. Journalists are accountable to their readers, listeners, viewers and each other.

*SPJ Code of Ethics; Guiding Principles*, QUILL, Jan. 1997, at 42; see also Steve Geimann, *Journalism Ethics on front burner for coming year; Society of Professional Journalists revised Code of Ethics; SPJ National Convention Special Report*, QUILL, Nov. 1996, at 84 (announcing the adoption of the Society of Professional Journalists’ revised code of ethics); Jay Black, *Now that we have the ethics code, how do we use it? Society of Professional Journalists’ new code of ethics; SPJ National Convention Special Report*, QUILL, Nov. 1996,

regulate itself. This is wishful thinking, in my opinion. I am told that the ethical standards vary from station to station and paper to paper. Effectively, such variation is the equivalent of no standards at all. So, I do not expect that would be the most effective solution.

Second, we can look to public opinion. Unfortunately, I am not very optimistic about public opinion either, because I believe that sensationalism still sells newspapers and still gets people to turn on their television sets. Nonetheless, sometimes it works. It worked in the JonBenet Ramsey case, when a tabloid pulled the autopsy photographs because people would not buy the paper and distributors were not willing to carry it.<sup>45</sup> However, that example is an exception to the rule.

Finally, civil litigation, I submit to you, is the most realistic option in terms of bringing accountability to the media.<sup>46</sup> We need a more realistic approach to the definition of public figure and to the availability of punitive damages awards. Legitimate plaintiffs should not find it so difficult to bring and win a lawsuit for defamation.

To those who cry out in response that change would destroy the First Amendment, I am confident that the First Amendment can withstand a legal assault upon it as long as the assault is based on falsity, not truth. In the final analysis, the First Amendment, without accountability, in my opinion, has little or no meaning itself. The need for accountability did not begin with the Richard Jewell story and the need for

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at 84 (calling for adherence to the four guiding principles in the revised ethics code of the Society of Professional Journalists).

45. See *Boulder in Uproar Over Photos of Slaying*, ATL. J. & CONST., Jan. 13, 1997, at 1A; Valerie Richardson, *Boulder Charges 2 Over Photos; Former Deputy, Lab Worker Booked*, WASH. TIMES, Jan. 16, 1997, at A3; Annie E. Kornblut, *JonBenet Pix Anger Family*, DAILY NEWS (N.Y.), Jan. 12, 1997, at 8; *Tabloid Publishes Photos of Slain Colorado Child*, WASH. POST, Jan. 12, 1997, at A17.

46. For a review of some recent cases in which jurors found against media defendants, see James Boylan, *Punishing the Press: The Public Passes Some Tough Judgments on Libel, Fairness, and "Fraud"*, COLUM. JOURNALISM REV., Mar. 13, 1997, at 24.

accountability on the part of the media will not end with the Richard Jewell story.

I had a writer in my office last week from the *Boston Globe* interviewing Richard and me. He commented at the beginning of the interview: “You know, my editor has a picture of Richard Jewell on his desk.” That picture is not on that editor’s desk because Richard Jewell was a hero. That picture is not on that Editor’s desk at the *Boston Globe* because Richard Jewell is a victim. That picture is there to serve as a reminder of the tragic human consequences that can follow when the media rushes to judgment.

Thank you for letting me speak with you today.

MR. SIMS: Thank you, Lin. We are now going to hear from Randy Turk, who represented ABC in the *Food Lion* case.

MR. TURK: I was listening to some of Lin Wood’s comments just now, and I was thinking about some of the clients that I have represented, in addition to ABC, and how appearances of fairness by the press shift according to your perspective. One of those clients is Craig Livingstone. Some of you may recall the unflattering portrayals in the press last year of Mr. Livingstone.<sup>47</sup> He was the head of the White House Office of Personnel Security,<sup>48</sup> which awkwardly found itself in the possession of about 800 FBI file summaries of prior Administration officials.<sup>49</sup>

From my perspective, this was a purely innocent bureau-

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47. See *Excerpts From Hearing on Handling of F.B.I. Files*, N.Y. TIMES, June 27, 1996, at B10 (statement by Craig Livingstone at the hearing by the House Government and Oversight Committee into the White House’s handling of the F.B.I. files); see also James D. Pinkerton, *Media Find Fall-Guy for Clinton*, CINCINNATI ENQUIRER, July 16, 1996, at A8 (describing how media sources called Livingstone “beefy” and labeled his testimony “a fat boy’s lament”).

48. For a history of Craig Livingstone’s career, see Tim Weiner, *Youthful Enthusiasm and Bitter Experience*, N.Y. TIMES, June 15, 1996, at A8.

49. See Matthew Purdy & Neil A. Lewis, *F.B.I. Files and Personnel Security: A Matter of White House Laxity?*, N.Y. TIMES, July 16, 1996, at A14; see also Julia Malone, *Scandal Over FBI Files*, ATL. J. & CONST., June 27, 1996, at A3.

cratic snafu, by people in Mr. Livingstone's office. Although the independent counsel has yet to conclude its investigation on the matter.<sup>50</sup> But from the outset of the story, the press labeled Mr. Livingstone all kinds of terrible things,<sup>51</sup> assuming the worst. I think what hurt the most was when they called Craig "beefy,"<sup>52</sup> because of his size, and referred to him as "a former bar bouncer,"<sup>53</sup> as if that were somehow a derogatory term. I do not know about you, but, in my view, if you have not been a bar bouncer, bartender, or waiter at some point in your life, you have probably never had an honest job.

I also represented Mike Deaver<sup>54</sup> back during the Reagan Administration. I remember the press used to hang from the trees in his front yard in D.C. just to get that one shot of Mr. Deaver going to work in his Jaguar.<sup>55</sup> There is a lesson there: if you ever get famous or wealthy, do not buy or use a Jaguar or a Rolls Royce because the press, if you

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50. See Pierre Thomas, *Justice Department Criticizes Shapiro for Poor Judgment: FBI Counsel Cited for Role in Files Controversy*, WASH. POST, Mar. 29, 1997, at A6; Pat Griffith, *Specter to Starr: Don't Leave Whitewater Unfinished*, PITTSBURG POST-GAZETTE, Feb. 20, 1997, at A11; Michael Kronish, *Clinton's Legal Woes Seen Heating Up After Election*, B. GLOBE, Oct. 31, 1996, at A1.

51. See Pinkerton, *supra* note 47, at A8 (noting that Livingstone has been referred to as "beefy," "fat boy," "doofus," and "imbecile").

52. *Id.*

53. *Id.*

54. Michael K. Deaver was an intimate friend of President and Mrs. Reagan who became the deputy White House Chief-of-Staff. See Evan Thomas, *Cashing in on Top Connections*, TIME, Mar. 3, 1986, at 28. Mr. Deaver resigned in May 1985 and founded a public affairs consulting firm in Washington, D.C. *Id.* He was accused of using his former position to become a consultant for the Canadian Government in dealing with the White House Administration on acid rain and other issues. Such actions would be a violation of the 1978 Ethics in Government Act. *Id.*; see generally Bernard Weinraub, *U.S. Investigating Lobbying by Ex-Aide to Reagan*, N.Y. TIMES, Apr. 3, 1986, at A21; Ethics in Government Act of 1978, Pub. L. No. 95-521, § 207, 92 Stat. 1864 (1978) (codified at 28 U.S.C.A. §§ 591-599 (West Supp. 1996)).

55. See generally Marjorie Williams, *The Perilous Rise of Michael Deaver; His Devotion Led Him to the White House*, WASH. POST, July 13, 1987, at B1. Concerning the *Time* magazine cover of Mike Deaver in a limousine, one commentator quotes Mr. Deaver's brother as saying, "It wasn't even his car . . . Mike had a Jaguar at the time, and there isn't a wide-angle lens wide enough . . . to shoot a picture in the back seat of a Jaguar." *Id.*

ever get in trouble, will find a way to photograph you in that car, and try to make you look bad.

I am here today, though, speaking from a different perspective about the *Food Lion* case on behalf of ABC News. The background of the case is fairly straightforward.<sup>56</sup> ABC received numerous allegations from current and former Food Lion employees of two categories of potential misconduct by the Food Lion supermarket chain—unsanitary and deceptive food handling practices by the Food Lion supermarket chain, and illegal/unfair labor practices.<sup>57</sup> As a result, ABC News decided to conduct an investigation to see if the allegations were true.

What were these allegations? The labor practice allegations were that Food Lion, pursuant to its “effective scheduling” policy, asked its employees to perform in eight hours work that reasonably ought to take ten to twelve hours.<sup>58</sup>

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56. For the legal background of the case, see *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (M.D.N.C. 1995). The action against ABC arose after ABC and its employees decided to obtain an undercover investigative story for the news-magazine show *PrimeTime Live*. *Id.* After hearing allegations about Food Lion’s food handling practices, two *PrimeTime Live* producers obtained jobs with Food Lion by submitting false employment backgrounds, false references, and other false information. *Id.* Once hired, each producer wore a hidden video camera and recovered events at their workplace. *Id.* Ten minutes of this footage was broadcast on November 5, 1992 in a *PrimeTime Live* episode on ABC. *Id.* This report was critical of both Food Lion’s labor practices as well as the company’s food handling. *Id.* Prior to the broadcast, Food Lion sought an injunction, which was denied, seeking to stop the broadcast. *Id.* After the show aired, Food Lion filed suit against ABC, Capital Cities, and several of the individuals involved in the undercover investigation. *Id.* The only claims which remained at time of trial were those for fraud, trespass, breach of the duty of loyalty, and violation of the North Carolina Unfair Trade Practices Act.

57. See Memorandum in Support of Defendant’s Motion in Limine to Preclude Evidence Regarding Truth, “Fairness” or “Objectivity” of the Broadcast at 4-5, *Food Lion* (No. 92-00592); *Food Lion*, 887 F. Supp. at 814; see also Roone Arledge, *Hidden Cameras Find the Truth*, N.Y. TIMES, Feb. 1, 1997, at A19; Singer, *supra* note 4, at 5.

58. The purpose of Food Lion’s policy was to minimize the overtime hours of department managers and other full-time hourly-paid employees. See generally *In re Food Lion Effective Scheduling Litig.*, 861 F. Supp. 1263, 1266-68 (M.D.N.C. 1994). The policy was set through an “effective scheduling” system which told each department how many hours it had to get the week’s work done. *Id.* If employees could not get the work done in the provided time, they would be subject to disciplinary measures, often leading to termination. See Frand Swoboda, *Food Lion*, U.S.

That requirement not only caused employees to cut corners in sanitation and cleaning, but also required them at the end of eight hours to “punch out” and then go back and work for free to finish their job. If they did not finish their job in eight hours they would be fired.<sup>59</sup> Working “off-the-clock” like this is illegal under the Fair Labor Standards Act. Of course, the employees were also told if they worked off-the-clock they would be fired,<sup>60</sup> but the clear understanding of the employees was that working off-the-clock was what was expected of them by Food Lion management.<sup>61</sup> That, at least, was the allegation that ABC received.

The other category of allegations—the unsanitary and deceptive food handling practices—was much more at the center of the firestorm that was created by this case. Those allegations were that Food Lion had policies and practices—some of them actually in writing, others verbally communicated to employees—requiring that food be retrieved from garbage dumpsters behind the stores and reworked to be sold to customers.<sup>62</sup> In addition, chicken, beef, pork, lamb, and fish were removed from the manufacturers’ packaging,<sup>63</sup> when the manufacturer’s “sell by” date on the package

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*Discuss Allegations; Firm Faces Overtime, Child-Labor Actions*, WASH. POST, Dec. 29, 1992, at D1.

59. *Food Lion*, 861 F. Supp. at 1266-68.

60. *Id.* at 1267.

61. *Id.*

62. See *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992). Bryan Rodgers, produce manager in Columbia, South Carolina, gave the following statement when interviewed for the *PrimeTime* broadcast: “I’ve seen [area supervisors] in the dumpster—not just leaning over into it [but] climbing in it—I mean, be up in it.” *Id.* at 1. Joe Sulton, another Food Lion employee, stated that the “[vice presidents] went into the dumpster and said, ‘You’re throwing away profits’ and the merchandise. I wouldn’t give [the food] to my hogs, to tell you the truth. It wasn’t worth it because the flies [were] in the dumpster and it was during the summertime.” *Id.*

63. In one instance recorded by the hidden cameras, a market manager for Food Lion orders an employee to repackage a Country Pride chicken product with an expired manufacturer date. *Id.* Specifically, the manager tells the employee to “[o]pen them up and put a soaking pad, a couple of them, in the tray. This way, we can put three days date on them.” *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

expired.<sup>64</sup> Food Lion would pull the product from the display case, open it, sniff it, and, if it did not smell too bad, they would rewrap the chicken, give it an extended sell-by date of three or four more days, and send it back out to the display case.<sup>65</sup> Of course, when that three or four more days had passed and the product had not been sold, it would come back, be opened, smelled, and rewrapped with another three or four more days on it.<sup>66</sup>

Basically, the allegation was that a “sell by” date was meaningless at Food Lion if it was not on a manufacturer’s packaging.<sup>67</sup> A customer would have no way of knowing that the manufacturer’s expiration date had passed, much less whether that was the first time the product had been re-packaged, or the second time, or the third time. Was the barbecue sauce on the chicken in the gourmet section really just to make it easier to cook that “gourmet” dinner at night, or was it to conceal off-odors?<sup>68</sup> There were allegations that Food Lion used Clorox, baking soda, or lemon juice solutions to conceal odors and remove slime from meat and fish so that it could be put back out for sale to Food Lion’s customers.<sup>69</sup>

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64. A manufacturer’s “sell by” date is the expiration date it gives to food products. *Id.* Any products sold beyond this date are deemed suspect and most food manufacturers will not guaranty their brand past this code date. *Id.* Several Food Lion employees interviewed for the PrimeTime broadcast stated that it was common practice in their stores to remove or hide manufacturer’s “sell by” dates on products such as eggs, cheese, yogurt and meats by either using fingernail polish remover to take the original date off of the packaging or to completely repackage the expired food product. *Id.*; see generally *Ends, Means, ABC, and Food Lion*, CHI. TRIB., Jan. 30, 1997, at 18.

65. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

66. *Id.*; see generally Singer, *supra* note 4, at 5.

67. *Ends, Means, ABC, and Food Lion*, *supra* note 64, at 18.

68. The Country Pride chicken discussed above, see *supra* note 63, was re-packaged in barbecue sauce and placed in the gourmet food section of Food Lion. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

69. Jean Bull, an ex-employee who worked as a meat wrapper for thirteen years at Food Lion discussed in an interview, how Food Lion would hide the smell of spoiled fish: “The fish smells to high heavens, they take it right out, rinse it, put it in a sink, pour water on it. I have seen them bleach it out to get the smell out. . . . Clo-

ABC News considered these allegations to be important. There were many other allegations, such as slicing off that part of the cheese which had been gnawed by rats and then putting it back out for sale,<sup>70</sup> but I do not intend to list all of them. Suffice it to say, ABC decided to do a hidden camera undercover investigation at Food Lion of these allegations. Now, hidden cameras are obviously unique to television, but undercover investigations are a standard journalistic practice, so this case has implications not just for television reporters, but for radio and print journalists as well.

ABC News had two of its reporters filled out job applications at Food Lion for entry level clerk positions in the deli and meat market.<sup>71</sup> Some of the information, included in the applications was accurate, and some of it was decidedly false.<sup>72</sup> They also did not disclose that they were reporters working for ABC News who were planning to conduct a hidden camera investigation of Food Lion.<sup>73</sup> Included among the false information were false references,<sup>74</sup> people they had lined up—one of whom was actually called by Food Lion—who would vouch for them as having had prior experience in the grocery store industry.<sup>75</sup>

Food Lion hired both reporters, one as a deli clerk waiting on customers at the deli counter, basically slicing meat

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rox will take the smell off the fish.” *Id.*

70. Larry Worley, a former market manager for Food Lion in Charlotte, North Carolina, alleged that while he worked at Food Lion “[w]e had this packed cheese, sliced American cheese, and rats [would] get up on top of that and just eat . . . the whole corner off of it. You know, you [would] have to trim it up and put it back out. You know, you had to because if we didn’t make our gross profit, we were out the door.” *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

71. See *Food Lion*, 951 F. Supp. at 1218. Several *PrimeTime* producers posed as applicants for work in over 20 different Food Lion stores. *Id.* Food Lion hired two of these producers to work in three different stores. *Id.* Food Lion and its employees were unaware that these two new employees were in fact journalists wearing hidden cameras. *Id.*

72. *Id.*

73. *Food Lion*, 951 F. Supp. at 1218.

74. *Id.*

75. See *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

and cheese, selling cakes, etc.,<sup>76</sup> and the other as a meat wrapper in the meat department, which basically involved a lot of unwrapping before she did the wrapping.<sup>77</sup>

One of the reporters worked for seven days and the other worked for eight days.<sup>78</sup> When they were done, they had recorded forty-some hours of videotape documenting what they had seen and heard in confirming many of the allegations ABC News had received.<sup>79</sup> From those forty hours, ABC included ten powerful minutes in a twenty-six minute national broadcast.<sup>80</sup>

Before the network aired that broadcast, Food Lion had learned of ABC's investigation and filed a lawsuit alleging fraud, breach of fiduciary duty, and violation of the North Carolina Unfair Trade Practices Act, and attempted to get a prior restraint. The Court denied the prior restraint and the network broadcast the program on November 17, 1992.<sup>81</sup> Food Lion later amended its complaint to add claims for racketeering, wiretap, and trespass.<sup>82</sup> But never in its original complaint or in its amended complaint did Food Lion bring a libel or a defamation claim contesting the truth of the broadcast.<sup>83</sup> While it claimed in its public relations cam-

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76. *Food Lion*, 951 F. Supp. at 1218.

77. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

78. *Food Lion*, 951 F. Supp. at 1218.

79. *Id.*

80. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992).

81. *Id.*

82. See generally *Food Lion, Inc. v. Capital Cities/ABC*, 887 F. Supp. 811 (M.D.N.C. 1995) (dismissing Food Lion's claims of violations of civil RICO and federal wiretapping statutes).

83. In fact, in a memorandum opinion dated May 9, 1997, District Judge Tilley specifically notes:

For the purposes of this opinion and this case, it is assumed that the content of the *PrimeTime Live* broadcast about Food Lion was true. Food Lion did not challenge the content of the broadcast by bringing a libel suit. Instead, Food Lion attacked the methods used by Defendants to gather the information ultimately aired on *PrimeTime Live*.

*Food Lion, Inc. v. Capital Cities/ABC*, No. 92-00592, slip op. at 4 (M.D.N.C. May 9, 1997).

paign that the broadcast was unfair, it never once did so in the courtroom.<sup>84</sup> Nevertheless, Food Lion sought to obtain \$2.5 billion in broadcast damages, which it then sought to treble under North Carolina's Unfair Trade Practices Act, for a total of \$7.5 billion.<sup>85</sup>

Most of the claims that Food Lion brought to challenge ABC's news novel. Although the Court dismissed the racketeering and wiretap claims, it permitted both the unfair trade practices claim and the breach of an employee's duty of loyalty claims to proceed to trial.<sup>86</sup> The Unfair Trade Practices Act has never been applied to news gathering. And as I read the cases, the duty of loyalty has only been applied in circumstances where there is either a fiduciary relationship<sup>87</sup>—something that springs from a special relationship of trust that has been reposed in someone, not an entry-level five-dollar-an-hour deli clerk or a meat wrapper at a grocery store—or where a fairly high-ranking official steals his employer's confidential trade secrets, which plainly did not occur in this case.

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84. *Id.* The court further notes that Food Lion made no defamation claim, and did not challenge the truthfulness of the broadcast but for contending that ABC "staged" certain incidents. *Id.* Specifically, during the liability phase, evidence was presented to the jury that Ms. Dale and Ms. Barnett (the ABC producers) staged six incidents for broadcast known as: (1) the "stashed" salami; (2) the moldy kielbasa; (3) the deli gloves; (4) the macaroni salad; (5) the "sabotaged" hot water heater; and (6) failure to clean the meat saw. *Id.*

85. Specifically, Food Lion sought to recover compensatory damages for "lost profits, lost sales, diminished stock value or anything of that nature." *Food Lion*, slip op. at 1 (No. 92-00592). The court refused to allow Food Lion to offer any proof of such damages, collectively known as "publication damages." *Id.* at 2.

86. *Food Lion*, 951 F. Supp. at 1224. The *Food Lion* decision is the first time that this tort is recognized by the Supreme Courts of North Carolina and South Carolina. The duty of loyalty recognized in this case requires "an employee to use her efforts, while working, for the service of her employer." *Food Lion*, slip op. at 4 n.2 (No. 92-00592). The jury in this case found that the two reporters, employed by Food Lion, each violated this duty by "failing to make a good faith effort toward performing the job requirements of her employer Food Lion as a result of the time and attention she was devoting to her investigation for ABC" and by "performing specific acts on behalf of ABC which proximately resulted in damage to Food Lion." *Id.*

87. *Food Lion*, 951 F. Supp. at 1218.

It was ABC's position that even if Food Lion could establish each of the claims it had brought, it was not entitled to broadcast damages in the absence of having brought and established libel or defamation. The court ultimately agreed, but not until after the parties had spent four years conducting discovery on the nature and extent of Food Lion's broadcast damages, and until after the liability phase of the trial had concluded.<sup>88</sup> The court rejected, however, ABC's position that Food Lion was not entitled to punitive damages in absence of alleging and proving malice.<sup>89</sup>

After the jury found ABC liable for fraud, trespass and breach of the duty of loyalty, it found that Food Lion had been damaged in the amount of \$1,400. For fraud because the two reporters had lied on their job applications. That amount assertedly reflected the cost to Food Lion of interviewing and training them, and to process their paperwork.<sup>90</sup> There was also a nominal award of a dollar for trespass and a dollar for breach of the duty of loyalty.<sup>91</sup>

Then the trial proceeded to the punitive damages phase. After several days, the jury appeared to be deadlocked, and ABC moved for a mistrial. But the judge denied the motion even though he had already given them an Allen charge,<sup>92</sup> requesting the jury to keep deliberating.<sup>93</sup> According to the accounts of several of the jurors after the trial, the court basically convinced the jury that they were not going home until

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88. See *Food Lion, Inc. v. Capital Cities/ABC*, 165 F.R.D. 454, 455 (M.D.N.C. 1996).

89. *Food Lion, Inc. v. Capital Cities/ABC*, 951 F. Supp. 1211 (M.D.N.C. 1996).

90. *Food Lion*, 951 F. Supp. at 1218.

91. *Jury Awards Food Lion \$1,402 in Actual Damages in ABC Case*, B. GLOBE, Dec. 31, 1996, at D2; *Jury Awards Food Lion \$1,402 in Damages*, DALLAS MORNING NEWS, Dec. 31, 1996, at 4D.

92. In an attempt to break a deadlocked jury, a judge will issue an *Allen*, or "dynamite" charge, intended to encourage jurors, especially those in the minority, to listen to the views and positions of other jurors. See generally *Allen v. United States*, 164 U.S. 492 (1896). The *Allen* charge has been criticized as unduly coercive. See generally *United States v. Webb*, 816 F.2d 1263 (8th Cir. 1987).

93. See *Food Lion Deadlock*, ATL. J. & CONST., Jan. 18, 1997, at 6D.

they came to a verdict.<sup>94</sup> The jury finally compromised at \$5.5 million because one woman on the jury wanted a billion dollars in punitive damages to make Food Lion whole as a result of the broadcast, while a number of other jurors did not want to give Food Lion any punitive damages because they thought that Food Lion had deservedly been caught with its hands in the cookie jar.<sup>95</sup>

Despite the fact that all the media controversy about this case has been about whether or not Food Lion was vindicated or whether or not hidden-camera reporting as we know it is threatened, I think there are really only two critical First Amendment legal issues in the case, both of which go to this question of the media's accountability.

I agree with Lin that the ultimate accountability is a lawsuit. That is the way I believe our legal system functions. If someone feels she has been defamed, she can sue for defamation or libel. If she does not like the way the press has treated her, or the way information has been obtained, she can also bring a false light claim or various invasion of privacy tort claims. Finally, she can also bring a fraud, a trespass, and now, if you are an entry-level grocery clerk, maybe a breach of a duty of loyalty claim if she disagrees with the methods used to obtain a story.

I also believe, though, in terms of accountability, that there are many responsible reporters out there who are trying to be fair and to only publish and broadcast the truth. You are all lawyers, or are going to be, and what the truth is, well, there is a lot of play in that joint. That is why the law affords the press the "breathing room" necessary to sustain robust public debate and a free press.<sup>96</sup>

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94. *Id.*

95. See Barry Meir, *Jury Says ABC Owes Damages of \$5.5 Million*, N.Y. TIMES, Jan. 23, 1997, at A1.

96. See generally *Chapin v. Greve*, 787 F. Supp. 557, 567-68 (E.D. Va. 1992) ("While reporters should not have license to hurl unfounded allegations, it is equally important to preserve the 'breathing room' afforded the press by the First Amend-

Finally, there may be some promise to the media's growing interest in policing itself through peer review panels in lieu of litigation. But let's get back to what the two critical First Amendment issues in the Food Lion case are. The first is, whether a public figure can ever be entitled to broadcast damages, whether they are \$5 or \$2.5 billion, if she does not bring a claim of libel, and prove both falsity and malice. The judge ruled on that issue correctly, albeit on grounds other than the First Amendment, by holding that Food Lion could not recover its alleged broadcast damages, because those damages were caused not by ABC's conduct but by Food Lion's own labor and food handling practices.<sup>97</sup> Whether the issue is ultimately resolved under the First Amendment on appeal remains to be seen.

The second question—on which I just do not think the judge was correct—is, whether the subject of a truthful news story on a topic of substantial public concern can ever be entitled to punitive damages for tortious conduct in the news-gathering process where that conduct does not involve a threat to the public health or safety. Although the Court ruled that punitive damages were available to Food Lion, the issue will be hotly contested in post trial motions and on appeal.

Those are the two issues that I think will dominate the long-term dialogue about this case, both on appeal and after the current media self-examination frenzy cools down. It is true that there may be some chilling effect on undercover hidden-camera stories as a result of this case. What the jury did was tell the press that if it goes in undercover to get a

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ment."); *see also* *Gertz v. Welch*, 418 U.S. 323 (1974) ("Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury.") (citations omitted); *id.* ("[Nevertheless,] we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to that fruitful exercise.") (citations omitted).

97. *See* *Food Lion, Inc. v. Capital Cities/ABC*, 887 F. Supp. 811, 822 (M.D.N.C. 1995) (holding First Amendment bars recovery of publication damages from harm to Food Lion's reputation).

story, even if the story is both truthful and important, it may be sued. Undercover investigations and hidden cameras in particular are by definition deceptive, and therefore subject to a claim of fraud. Ultimately, though, I believe that what this case will chill the most is the press' obtaining jobs at the subject of their investigation, and including false information on job applications to do so, which, as a practical matter, does not happen very often.

MR. SIMS: Thanks, Randy. Gregg Jarrett is next.

MR. JARRETT: Thank you for having me here today. As I look around the room, it is clear to me that I am the only working journalist here, because I am the only one wearing make-up. And, because I had the courage to wear a pink tie for the occasion, I think that ought to command your immediate respect.

We have heard very eloquently from Lin on the subject of Richard Jewell, and from Randy of course on behalf of ABC, and I would like to address both of them.

You can probably guess where I fall on the *Food Lion* case. Whenever I consider the value of hidden cameras or microphones, I am reminded of the old Groucho Marx quip, "Who are you going to believe, me or your own eyes?" That really is the core point in this case. You can prove a story with pictures and sound, but sometimes you cannot get those pictures unless you go undercover to use a hidden camera and microphone. You cannot just simply walk up to the door and knock on it and say, "Hello, I am a reporter. I would like to spend just a few days or a few hours with your operation because I sense there is something wrongful going on inside. By the way, this is my buddy, Mr. Cameraman; he is a swell guy and he is just going to take a few pictures while we are here." Now, we all know the obvious result.

Hidden cameras and other undercover techniques are, in my judgment, necessary tools for exposing vital issues of public policy and public health. Sometimes it is the only

way you can do it.

If we think that is the case, we, as reporters have to begin by asking ourselves a few critical questions. First, is the subject of this story so important that it justifies deceptions and, yes, lies, and maybe even breaking the law in a case of trespass<sup>98</sup> or fraud?<sup>99</sup> Is the story, in other words, a matter of legitimate public interest?

Second, we have to ask ourselves whether there is any other way in which we can get this story without bending or breaking the law. Is there another option? Have we explored that option?

Third, and most important, as we do this story, what can we do to make sure that, as we shoot it, we are being fair, and, as we edit it, we are being balanced?

I believe all reporters should go through that exercise before they ever go to their bosses and say, "We have a story; it is important; we should go undercover and use hidden cameras."

Having said that, here is another important question: have hidden cameras and microphones been overused and abused to create these sort of splashy segments and to boost ratings during the critical sweeps periods? Of course they have, and that is wrong. Should the *Food Lion* case and the jury's decision force us, as journalists, to reexamine whether we should ever, under any circumstances, misrepresent ourselves or lie to get at a higher truth? You bet.

It reminds me of the necessity defense.<sup>100</sup> For those of

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98. Trespass is generally defined as: "An unlawful interference with one's person, property, or rights . . . Any unauthorized intrusion or invasion of private premises or land of another. Trespass comprehends any misfeasance, transgression or offense which damages another person's health, reputation or property." BLACK'S LAW DICTIONARY 1502-03 (6th ed. 1990).

99. Fraud is generally defined as: "An intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right." *Id.* at 660-61.

100. In many jurisdictions, a person is excused from criminal liability if he acts

you who are budding law students, or those who may not be lawyers, here is the typical example of the necessity defense, which is allowed in some jurisdictions<sup>101</sup>—it is not in others (in Randy’s case the judge disallowed it,<sup>102</sup> although ABC, as I understand, tried it): you are walking down the street; there is a big sign on somebody’s private property that says “No Trespass.” You happen to see beyond the fence that a child is drowning in the pool, so you scale the fence and you save the child’s life. Yes, you have committed trespass, but for a higher purpose—to save a human life.

Now, you may think the necessity defense has no application here, but anybody who has ever suffered food poisoning knows how painful an experience that is. It can even be fatal. In fact, the United States Department of Agriculture maintains annual statistics on the number of people who have died in food poisoning cases.<sup>103</sup> This is a very serious health and safety matter.

This is not the first time the media has exposed unsanitary food handling. Near the turn of the century, in the early 1900s, Upton Sinclair went undercover in the Chicago meat-packing industry to expose the abhorrent unsanitary conditions. The stories of what he found are legendary.<sup>104</sup> It dramatically changed the meat-packing industry in that critical

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under duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice. *Id.* at 1030-31.

101. See CHARLES E. TORCIA, *WHARTON’S CRIMINAL LAW* § 90, at 623 (1993) (noting that 24 United States jurisdictions recognize the necessity defense).

102. See generally *Food Lion, Inc. v. Capital Cities/ABC*, 951 F. Supp. 1233 (M.D.N.C. 1996).

103. The United States Department of Agriculture published findings in July of 1996 that estimated food poisoning-related deaths to total 7,000 people annually. See *FY ‘98 Agriculture Appropriations: Testimony Before the Subcomm. on Agriculture, Rural Development, and Related Agencies of the Senate Comm. on Appropriations*, 105th Cong., 2d Sess. (1997) (statement of Michael A. Friedman, M.D.) (testifying that up to 33 million cases of food borne illness occur each year and 9,000 people die according to a United States Department of Agriculture Report); see also Don Oldenburg, *Wash Up, Dirty Hands Can Have Deadly Consequences*, *WASH. POST*, Apr. 30, 1996, at E5.

104. UPTON SINCLAIR, *THE JUNGLE* (reprint 1994) (1906).

period of time in America.<sup>105</sup>

Before Sinclair, Nellie Bly, a reporter for the *New York World* (nobody ever remembers that newspaper; it has been gone a long, long time), went into a New York women's lunatic asylum, and what she found there was hideous.<sup>106</sup> Anybody who has ever studied investigative journalism has read some of her columns. They were entitled, "Ten Days in a Madhouse."<sup>107</sup>

The list goes on and on of the value of undercover work and hidden cameras. But, like Groucho Marx, Food Lion insists that we should not believe our own eyes. The store says, even to this day, "ABC's story was not true. 'Prime Time Live' staged scenes and deceptively edited tapes."<sup>108</sup>

So what did we see on those tapes? We saw old fish re-wrapped as new, old beef reground as new beef, old chicken repackaged with barbecue sauce to disguise the odor, rotten beef trimmed of its decaying sides and the remainder reshelfed as if it were brand-new, and deli products in one instance relabeled twenty-four days after the original sell date.<sup>109</sup> Yet, Food Lion to this day insists that ABC's story is

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105. Sinclair's findings are credited with leading to passage of the Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (June 20, 1906) (repealed by Federal Food, Drug, and Cosmetics Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938)).

106. Nellie Bly feigned insanity in order to investigate a women's insane asylum in New York City. See generally NELLIE BLY, TEN DAYS IN THE MADHOUSE (reprint 1983) (1888). After being declared "insane" by several doctors and the court, she was institutionalized for ten days at Blackwell's Island Insane Asylum. *Id.* While at the asylum, Nellie Bly saw starving patients who received spoiled food and were forced fed by tubes. *Id.* Women were bathed by fellow patients in an open room with the same bath water used over and over again. *Id.* Patients routinely received beatings and were drugged. *Id.* As a result of what she saw, Nellie Bly wrote a series of articles for the *New York World* and a book TEN DAYS IN THE MADHOUSE (reprint 1983) (1888). After her publications, the Blackwell's Island asylum was investigated and the state of New York subsequently appropriated one million dollars more for the benefit of the mentally ill.

107. NELLIE BLY, TEN DAYS IN THE MADHOUSE (reprint 1983) (1888).

108. See Statement of Chris Ahearn, *PrimeTime Live* (ABC television broadcast, Feb. 12, 1997); John Layaette, *ABC's Food Lion Critique Draws Audiences, Promise*, ELECTRONIC MEDIA, Feb. 17, 1997, at 3.

109. *PrimeTime Live* (ABC television broadcast, Nov. 5, 1992); see generally Marc

untrue.<sup>110</sup>

Food Lion's spokesperson, the director of communications,<sup>111</sup> put together, with the help of some pretty skilled editors, their own videotape, which we aired on Court TV in its entirety.<sup>112</sup> I think it runs roughly fifteen minutes. Randy, you have probably seen it. I watched it twice. It is Food Lion's response to try to convince the world that there was staging and deceptive editing practices by ABC. I have to tell you in my judgment, and it is only my opinion, the only deception was Food Lion's videotape. I saw no staging or trick editing by ABC.<sup>113</sup>

Then, there is the comment by that same director of communications, and this one I found really deceptive: "After ABC hid evidence from Food Lion for two years, we did seek to show the falsity of the broadcast in court. But ABC fought us and blocked our libel claim."<sup>114</sup> Now, as Randy pointed out, it is true that Food Lion tried to back-door what are known as publication damages<sup>115</sup> for injury to reputation

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Gunther, *The Lion's Share*, AM. JOURNALISM REV., Mar. 1996, at 18.

110. See Statement of Chris Ahearn, *PrimeTime Live* (ABC television broadcast, Feb. 12, 1997); *Food Lion collects the \$, But Public Pays the Price*, USA TODAY, Jan. 23, 1997, at 14A.

111. Chris Ahearn, Director of Communications of Food Lion, Inc.

112. The Court TV program was aired at 10 p.m. on February 11, 1997. See Peter Johnson, *Court TV Trumps ABC with Food Lion Special*, USA TODAY, Feb. 5, 1997, at 3D.

113. In *Food Lion, Inc. v. Capital Cities/ABC*, No. 92-00592, slip op. at 13-21 (M.D.N.C. May 7, 1997), the court implicitly states that it found no compelling evidence of staging or trick editing by ABC in its broadcast.

114. On February 12, 1997, ABC's *PrimeTime Live*, in conjunction with another ABC show, *Viewpoint*, ran a two and a half hour special to look at the Food Lion verdict. See *PrimeTime Live* (ABC television broadcast, Feb. 12, 1997); *Viewpoint* (ABC television broadcast, Feb. 12, 1997). At the end of *PrimeTime Live*, Food Lion was given two minutes of rebuttal time during which time Chris Ahearn, Food Lion's Director of Communications, insisted that the *PrimeTime Live* show about Food Lion was not true and that it was not good journalism. *PrimeTime Live* (ABC television broadcast, Feb. 12, 1997).

115. For purposes of *Food Lion*, lost profits, lost sales, and other losses were collectively labeled as "publication damages," which allegedly resulted because of fraud, trespass, breach of the duty of loyalty, and violation of the North Carolina Unfair Trade Practices Act by ABC. *Food Lion*, slip op. at 1 (No. 92-00592). As discussed

to get the big money award available in defamation cases. But that statement she made, in a very grand style on television just last week, is misleading. It suggests that Food Lion tried to file a libel claim, and it did not. If anybody was deceptive—and clearly ABC used deception in the employment histories of their two producers—I think there is a far greater deception on Food Lion’s part.

What about the jury’s decision? Well, certainly a lot can be said about that. Let me make two very brief points. First, the jurors never saw the broadcast.<sup>116</sup> If they had, they might have felt, very much like the necessity defense, that fraud and trespass are indeed necessary in a case like this. Second, perhaps because they never viewed that broadcast, I have a feeling they *just did not get it*. Eight of the jurors were interviewed afterwards.<sup>117</sup> All eight of them said that they did not oppose undercover investigations or hidden cameras.<sup>118</sup>

But one woman said—and this is my favorite quote, and to me it speaks volumes about what this jury was thinking—”When I go to a grocery store I do not need anybody to tell me how to buy my meat. When I pick up a package of meat I can tell if it is fresh and how long it has been laying out there in the case by the way it looks.”<sup>119</sup> We should all be so clairvoyant.

Now to Richard Jewell. Let me first say that Lin and I have a lot in agreement here. I think that the standards set forth by the United States Supreme Court in the seminal defamation case, *New York Times v. Sullivan*,<sup>120</sup> are miserably

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above, the court refused to allow such recovery. *See supra* note 85.

116. *Food Lion*, slip op. at 16 n.5 (No. 92-00592).

117. *PrimeTime Live* (ABC television broadcast, Feb. 12, 1997).

118. *Id.*

119. *Id.*

120. 376 U.S. 254 (1964). *Sullivan* eroded the prior common law libel standard of strict liability, holding that the “constitutional guarantees require. . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the false or unjustified material

low and, as journalists, it is incumbent upon us to set and follow higher standards. We must, as Lin points out, monitor ourselves; we must discipline ourselves. We did it at one time with an official organization.<sup>121</sup> William Small can probably speak to that subject. But we have largely abandoned it, and that is too bad.

In my judgment, in fact, the *Sullivan* case is all too pervasive in American reporting. It is an invitation to bend, stretch and massage three things: fairness, accuracy, and the truth. Defamation, when you get right down to it, is nearly impossible to prove. I covered one such case very recently in which the ABC station in Houston, Texas,<sup>122</sup> lost.<sup>123</sup> But

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was published with ‘actual malice’” i.e., with actual knowledge of falsity or with reckless disregard of probable falsity. *Id.* at 279-280.

121. See Alicia C. Shepard, *Going Public*, AM. JOURNALISM REV., Apr. 1997, at 25 (reporting on the news media’s renewed interest in reviving news councils as an alternative to lawsuits, in order to evaluate citizen complaints about news coverage and make public their findings). The National News Council (“National Council”) was formed in 1973, with a \$100,000 grant from the Twentieth Century Fund, to fill the gap between letters to the editor and costly libel suits. *Id.* at 26. Persons bringing complaints to the National Council had to waive their rights to sue the accused news organizations. *Id.* The National Council had no punitive powers; its authority derived from its power to embarrass news organizations, thus damaging their credibility and reputations. *Id.* at 26-27. The National Council ceased operating in 1984 because it lacked support from the major national newspapers. *Id.* at 27. Nonetheless, a recent ruling by the Minnesota News Council has aroused interest in creating state news councils in 22 other states. See John J. Oslund, *In Minneapolis: Ruling a Prize-winner Unfair; The State’s News Council Censures a Broadcast as “Untruthful” and “Distorted”*, COLUM. JOURNALISM REV., Mar. 1997, at 34 (detailing the Minnesota News Council’s ruling against CBS affiliate WCCO-TV for broadcasting distorted reports about Northwest Airlines’ safety record and maintenance practices); see also Evan Jenkins, *News Councils: The Case for . . . And Against*, COLUM. JOURNALISM REV., Mar. 1997, at 38 (interviewing CBS News Correspondent Mike Wallace, who favors creation of a news council, and *New York Times* Executive Editor Joseph Lelyveld, who opposes the idea); Steve Geimann, *SPJ Report*, QUILL, Jan. 1997, at 52 (calling upon the major news organizations to commit to a five-year test to determine if revival of a news council would serve a valuable purpose). Steve Geimann is the president of the Society of Professional Journalists. *Id.*

122. KTRK-TV, Channel 13, Houston, Texas.

123. A jury awarded \$5.5 million to State Representative Sylvester Turner, finding that a Houston television station, KTRK-TV, and one of its reporters, Wayne Dolcefino, had libeled him in a 1991 report that linked Mr. Turner to an insurance scam. See *Candidate Wins \$5.5 Million*, NAT’L L.J., Oct. 28, 1996, at A8. In a 10-2 verdict, jurors determined that the broadcast, which aired six days before a 1991 Hous-

that was exceptional and here is why: how do you show that a reporter harbored actual malice—that is, whether he knew the story was false or entertained serious doubts about it? It is almost impossible to prove, and reporters realize that.

Therefore, our standards have to be higher than the Supreme Court. Lin and I might differ on whether or not his client is a public figure,<sup>124</sup> a private citizen,<sup>125</sup> or a public figure for a limited purpose,<sup>126</sup> which may invoke a different legal standard, that of ordinary care. But that will be up to the trial court to decide.

Having said all of that, the question is whether Richard Jewell was defamed by some news organizations. As to a couple of them, NBC and the *Atlanta Journal/Constitution*, in my judgment he was not. But if others went beyond simply calling him a “suspect,” they may have committed some form of libel.<sup>127</sup>

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ton mayoral election in which Mr. Turner was a candidate, was aired to maliciously harm Mr. Turner. *See id.* After the broadcast, Mr. Turner lost the election. *Id.*

124. The Supreme Court has defined public figures as those not holding public office, but who are “nevertheless intimately involved in the resolution of important questions, or by reason of their fame, shape events in areas of concern to society at large.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, *reh’g denied*, 389 U.S. 889 (1967).

125. The Supreme Court, in *Gertz v. Welch, Inc.*, established the test to determine whether an individual is a public or private figure for purposes of a libel action: “Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public figure for all aspects of his life.” 418 U.S. 323, 351 (1974).

126. As the Court of Appeals for the Seventh Circuit has explained: “A person who injects himself into public controversy assumes the risk of negative public comments on his role in the controversy, both contemporaneously and into the future.” *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1270 (7th Cir. 1996).

127. Many news organizations simply reported the incontrovertible fact that Mr. Jewell was the subject of an official investigation by the FBI. This, in and of itself, was truthful speech, protected from libel suits. For a further discussion about whether the media was justified in its coverage of Mr. Jewell, see Jane Kirtley, “*Suspect*” *Reports on Jewell Had Some Merit*, NAT’L L.J., Nov. 18, 1996, at A21. *But see* Tuite, *supra* note 37, at 9 (discussing how, as of August 1, 1996, despite media assertions to the contrary, there was no physical evidence linking Mr. Jewell to the bombing, let alone to any criminal activity at all).

Was Richard Jewell treated unfairly? Probably. But remember, the *essence of the reporting in the case proved to be true*. Richard Jewell *was* the FBI's prime suspect.<sup>128</sup> Only when reporters deviated from that core truth did they run the risk of defaming Jewell, and people like Lin Wood and his partner will hold them accountable, as they should.

Why, by the way, did NBC settle out of court the claim against it and Tom Brokaw?<sup>129</sup> I do not know; I was not involved. But I can tell you this much. I have been a lawyer for seventeen years, five of which I spent defending people in the early 1980s. As a lawyer I would do the same thing; I would settle out of court. Even if the settlement was, as some people have suggested, half-a-million dollars or \$600,000,<sup>130</sup> NBC could easily spend twice that amount defending a libel case and allowing some pretty darn smart lawyers like Lin to tarnish the shining image of its star anchor, the man NBC holds out as most trustworthy and reliable.

I think, in fairness to Tom Brokaw, if you look at his full statement in context,<sup>131</sup> as the law requires—and Lin knows this—you will find that it probably does not violate the *Sullivan* standards.<sup>132</sup> There are some words that are very troubling which Mr. Brokaw uses, words like “speculation”—“the *speculation* is the FBI is close to making the case;” “they *probably* have enough to arrest him right now, *probably* enough to prosecute him.”<sup>133</sup> Those two words, “specula-

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128. See Kirtley, *supra* note 127, at A21.

129. See Amy Stevens, *The Accused: How Richard Jewell and His Lawyers Seek Revenge on the Media. Cleared in Olympics Blast, He Gets Cash From NBC, Tips From Sympathizers*, WALL ST. J., Jan. 3, 1997, at A1 (reporting that NBC paid Richard Jewell approximately \$500,000 to avoid a defamation lawsuit over Tom Brokaw's on-air comments about Jewell).

130. *Id.*

131. See *NBC Nightly News with Tom Brokaw* (NBC television broadcast, July 30, 1996).

132. See *id.*

133. See *id.*

tion” and “probably” disturb me as a journalist. But they do not rise to the level of defamation. In settling the case, NBC did what it thought was best. It did not apologize, by the way.

What about the *Atlanta Journal/Constitution*? Lin Wood’s lawsuit against them, as he points out, really has two aspects to it, two fundamental claims, though there are many. The first is the published statement: “Mr. Jewell fits the lone bomber profile.”<sup>134</sup> Well, pop psychology and hidden analysis may not be defamatory, but, as a journalist, I think they are inflammatory and, therefore, irresponsible. But again, there is no defamation there.

The second claim is based on the statement: “Mr. Jewell approached newspapers seeking publicity for his actions.”<sup>135</sup> Well, as Lin pointed out, under the law of agency or the rule of common sense, Jewell’s bosses sought publicity. It was AT&T, the sponsor of the Centennial Olympic Park, who went to their security firm and asked for these interviews to be done. Richard Jewell agreed reluctantly, but he agreed nonetheless; nobody put a gun to his head. In this case, if it comes down to a defamation lawsuit in front of a jury, that one fact will probably make the difference. He went around for three days, consenting—albeit reluctantly—to interviews in which he agreed to be held out to the public as a hero.<sup>136</sup>

How could the *Atlanta Journal/Constitution* not print that Richard Jewell was a suspect at the very moment he was basking in the glow of celebrity and hero worship? Would it not be disingenuous and withholding vital information to

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134. Scruggs & Martz, *supra* note 12, at 1X (“This profile generally includes a frustrated white man who is a former police officer, member of the military or police ‘wannabe’ who seeks to become a hero.”).

135. According to one pair of commentators: “Jewell has become a celebrity in the wake of the bombing, making an appearance this morning at the reopened park with Katie Couric on the Today Show. He also has approached newspapers, including the *Atlanta Journal/Constitution*, seeking publicity for his actions.” *Id.*

136. Scruggs & Martz, *supra* note 12, at 1X.

readers if the newspaper did not reveal that he was a suspect? While it is true that reporters should guard against invading the privacy of private citizens, Richard Jewell waived that right, in my judgment, when he consented to be an overnight celebrity and a hero.

Finally, since journalists should never be above self-examination and self-criticism, let me leave you with a newspaper headline which I brought along. I think it exemplifies the worst in reporting that I have seen only in recent years. It is my favorite: The *Daily News*, Friday, June 17, 1994. This edition came out just hours before what became known as a “low-speed chase”—nobody had ever heard that term before. Here it is: “Bloody Mask Found at O.J.’s.”<sup>137</sup> There was no bloody mask found at O.J.’s.<sup>138</sup> It is just plain wrong. But being wrong is not what troubles me; it is being irresponsible and lazy that does. If you look at the story, it has no source, and no attribution; they just say it. That is disturbing to me.

The *Daily News*’ reporters did none of their own reporting. The story reveals that “bits of flesh believed to be Simpson’s were found at the crime scene.”<sup>139</sup> The source? Television station KCBS.<sup>140</sup> But what was its source? In that one article, the *Daily News* quoted KCBS,<sup>141</sup> KCAL,<sup>142</sup> KNBC,<sup>143</sup>

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137. *Bloody Mask Found at O.J.’s*, N.Y. DAILY NEWS, June 17, 1994, at 1.

138. See David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?*, L.A. TIMES, Oct. 9, 1995, at S6.

139. *Bloody Mask Found at O.J.’s*, N.Y. DAILY NEWS, June 17, 1994, at 1, 4-5, 30.

140. *Id.* at 4. KCBS-TV reported several erroneous “facts” during its coverage of the Simpson trial. Specific instances include reports that: (1) there was a possible second suspect in the case; (2) that the police discovered potentially damaging evidence in Simpson’s golf bag; (3) Simpson had his hand in a golf bag on the plane trip from Los Angeles to Chicago after the murders; and (4) one of the prosecutors, Marcia Clark, arrived at Mr. Simpson’s estate prior to receiving a search warrant. See Greg Baxton, *KCBS Apologizes for Erroneous Story on Simpson Prosecutor*, L.A. TIMES, July 16, 1994, at A24; David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public*, L.A. TIMES, Oct. 9, 1995, at S6.

141. *Id.*

142. KCAL-TV, Channel 9, Los Angeles, California.

143. KNBC reported that blood on a pair of socks found in Simpson’s home

and Hard Copy.<sup>144</sup> Did that newspaper do any of its own reporting? How do we know the *other* reporters were any good?

What has become of journalists? Do we now report what other journalists report, which they, in turn, have gotten from other reporters? How do we know the original, unnamed, undisclosed sources—and I hope there were two, as the rule requires—were reliable?

The *Los Angeles Times*, to its great credit, was the only news organization I know—and I was out there at “Camp O.J.” for too long—which decided to resist the temptation to print others reports and to print only the work of its reporters.<sup>145</sup> And their stories proved to be the best.<sup>146</sup>

Thanks for listening.

MR. SIMS: Charles Rose?

MR. ROSE: Standing before you today, I feel as though I am in court, and I have the incredible urge to say “good morning, ladies and gentlemen of the jury” and move on. But today, I am the clean-up hitter on this symposium panel, so I have more freedom to tell everybody what I think.

While this discussion is called *Accountability of the Media in Investigations*, the fact of the matter is that, in the day-by-day business of law enforcement and conducting real inves-

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had been linked through a DNA test to the blood of his slain ex-wife. See Howard Kurtz, *TV Station Retreats in Simpson Case; Bloody Sock Report Said to be ‘Incorrect’*, WASH. POST, Sept. 29, 1994, at A12. Even after the presiding judge, Lance Ito, publicly denounced the story calling it false, the television station still insisted that the story was true. See *id.* Six days after the broadcast, KNBC finally retracted the report, acknowledging the story was “factually incorrect.” See *id.*

144. *Hard Copy* is a nationally-syndicated, news-entertainment television program. See John Carmody, *The TV Column*, WASH. POST, May 30, 1997, at B6.

145. At the beginning of the Simpson trial, the *Los Angeles Times* adopted a policy refusing to use any story which their own reporters could not independently confirm. See David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?*, L.A. TIMES, Oct. 9, 1995, at S6. This policy received criticism from many other news organizations, including the *New York Times*. See *id.*

146. See *id.* (reflecting on the number of false stories about the Simpson case reported by members of the media trying to get their stories out first).

tigations, there is no accountability in the media.<sup>147</sup> Having spent seventeen years chasing gangsters, I have learned that the media interferes with the operation of law enforcement for one reason only: because the myth of the media to tell the truth is governed by one thing, and that is the bottom line, profits.<sup>148</sup> It is a business, which is why I think it is very appropriate that sitting on this panel is a former Dean of the Fordham University Graduate Business School, talking about the media. That is what it is—deadlines, time limits, who can get it first.<sup>149</sup>

And you know what? Richard Jewell can sue the networks all he wants because he is going to get \$2 million. But the networks made \$4 million on the story in selling it and in the advertising; and any businessman will tell you four minus two still leaves a profit of two; they are still number one in ratings; and they will still be there forever—especially

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147. See Gunther, *supra* note 109, at 19 (opining that the news media's own shortcomings are to blame for its losses in lawsuits such as *Food Lion*). But see Jane Kirtley, *The Press and the Law: Getting Mauled In Food Lion's Den*, AM. JOURNALISM REV., Mar. 1997, at 48 (opining that the *Food Lion* verdict against ABC's *PrimeTime Live* "could stifle investigative reporting"). Jane Kirtley is the executive director of the Reporters Committee for Freedom of the Press. *Id.*

148. Cf. Fred R. Bleakley, *Corporate Performance 1996 Review: 4th Quarter*, WALL ST. J., Feb. 8, 1997, at C15 (reporting a 61% gain in the net income of 690 large corporations, including media conglomerates, during the fourth quarter of 1996). But cf. Laura Landro, *Back to Reality: Entertainment Giants Face Pressure to Cut Costs, Get Into Focus*, WALL ST. J., Feb. 11, 1997, at A1 (reporting that media conglomerates must cut expenses to compensate for the costs of the 1996 television mega-mergers and to deal with the increased number of television networks competing for viewers); Steven S. Ross, *The media forecast; cost-cutting in 1996 may haunt media in '97 as competition grows*, QUILL, Jan. 1997, at 21 (postulating that cost-cutting in 1996 has left some media organizations vulnerable to new competitors in 1997).

149. See Phil Record, *Name them, guilty or not; In Jewell, Irvin cases, the news media took libel protection too far*, BALT. SUN, Feb. 2, 1997, at F6 (opining that the Richard Jewell case and the recanted rape accusations against Dallas Cowboys football players Michael Irvin and Erik Williams demonstrate that the libel protection afforded by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, have made the news media reckless about prematurely naming suspects); see also Andrew Fegelman, *Long After Crime Suspects Are Freed, Notorious Media Images Can Linger*, CHI. TRIB., Jan. 10, 1997, at 1 (analogizing the Richard Jewell case to the reporting about Martin Blake, who, like Jewell, was widely publicized as a suspect but was never charged in a notorious crime—a 1993 mass murder in Palatine, Illinois).

during “sweeps,” those all-important rating periods in November, February, and May.

A very dear friend of mine is a reporter. It is strange how we met. He tried to meet me for a year, but I had no reason or rhyme to meet this guy. I have spent all my life putting mob guys in jail, and he was a reporter, so all he could do was cause me trouble. Yet it happened; some other friend set up the meet, and we sat down and we met. It turned out that the reporter became my best friend. Why? Because he is one of the few people I actually trust.

But, as I predicted, he also became my worst enemy because, as a prosecutor and an investigator, I know my role; I know my ethical conduct; I know that I cannot tell a reporter what is going on.<sup>150</sup> By the way, what I will say is, “Hey, tomorrow at six in the morning you might want to be up; you might want to have a camera crew ready; and you might want to turn on your police radio scanner and listen,” because I know that in television five minutes is the difference between being the first station and the last station to arrive at the scene of a news event and broadcast the story.

I kidded my friend about being first with the news. He liked to walk proudly into his haunts, saying, “I am John Miller, NBC News. I tell you what the news is today.” I would laugh and say, “Yeah, but I can tell you what the news is going to be tomorrow. Wouldn’t you like that?” But I would not tell him, and it was not a problem because, even

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150. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994) (limiting public disclosures by lawyers regarding litigation or investigations in which they are, or have been, participating). Rule 3.6 of the Model Rules of Professional Conduct was amended in 1994 to conform to *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), in which the Supreme Court invalidated for unconstitutional vagueness Nevada Supreme Court Rule 177, an ethics canon that paralleled the pre-1994 version of Rule 3.6. As amended, Rule 3.6 prohibits attorney statements that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1994). Rule 3.6 also contains guidelines to determine those attorney statements that are permissible and those that are not. *Id.* Rule 3.6(b)-(c).

though he tried to turn me into a news source, we each knew our ethical responsibilities.<sup>151</sup> That is why we were able to become such good friends.

There is a perverse relationship between news and law enforcement.<sup>152</sup> Do news people want to take you to dinner because they love you? No, they do it because they want to buy you; because they want to get that call; because they want to know the information. That is what happens. Let me tell you how it interferes with investigations.

We can debate all day long whether the FBI was accountable for what happened to Richard Jewell.<sup>153</sup> Maybe one FBI agent did the wrong thing; maybe he is to blame. But, you know, it could also be a Georgia Bureau of Investigation agent who did it, or an Atlanta police agent. Whoever leaked that investigation is at fault, not the FBI, because Richard Jewell was a good suspect. If Jewell had been in New York, I would be looking at him myself as a suspect, and, as a federal prosecutor, I *should* investigate someone in Jewell's position.

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151. Lawyers are accorded less protection than the press for speech regarding pending litigation or investigations. *Gentile*, 501 U.S. at 1074 (“[O]ur opinions in *In re Sawyer*, 360 U.S. 622 (1959), and *Sheppard v. Maxwell*, [384 U.S. 333 (1966)] rather plainly indicate that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Ass’n v. Stuart*, 477 U.S. 539 (1976) . . . .”); compare *Gentile*, 501 U.S. at 1037-38 (allowing restrictions on lawyers’ speech regarding pending cases if the speech creates “a substantial likelihood of material prejudice”) with *Nebraska Press Ass’n*, 427 U.S. at 561 (imposing a strict prior-restraint test for judicial orders limiting speech by the press regarding pending litigation); see MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6.

152. In *Sheppard*, the Court recognized the adversarial relationship between the press and government by declaring that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” 384 U.S. at 350. In reversing the murder conviction of Dr. Sam Sheppard, the Court ruled that the trial court had adequate means at its disposal to prevent the “carnival atmosphere” that existed inside the courtroom, without placing undue restrictions on the press outside the courthouse. *Id.* at 357-63.

153. See *Collins*, *supra* note 12, at 60 (reviewing the FBI investigation and the news coverage of Richard Jewell).

Although an investigation should be conducted in secret, it is not always so conducted. Everybody has a political agenda; you have to go on television; people want to know who blows it. So, someone leaks Richard Jewell's name to a reporter—and again, I do not know if it was done intentionally. That is, I cannot fathom any reason why the FBI, as an institution, would leak Jewell's name intentionally. I know the FBI director too well, and I do not think he is that kind of guy. And look at what the leak did; it interfered with this entire investigation.<sup>154</sup>

What the media does not understand are the problems they create by setting artificial deadlines.<sup>155</sup> For instance, in my discussions with media representatives, I have asked, "Hey, what are you reporting tonight at eleven o'clock?" And the answer would be, "Well, the news is this." Then, at 10:30 p.m., something major happens, a plane crashes, and the story that was originally planned is never reported. My question is, "Well, does that mean the original story is not news anymore? It was news a half-an-hour ago. Why is it not news now?" The answer is that the plane crash is now the lead story, and they only have a half-an-hour to tell you all the news, and the result is that the original story is canceled. So, as it turns out, it was not really so all-important to broadcast that original story by the 11:00 p.m. deadline. The same can be said for most television stories, so most of my comments will concern television news.

Now turning to the Food Lion case. As I sat here and lis-

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154. See Henry Bailey, *FBI chief wants to fire official who named Jewell*, COMM. APPEAL, Dec. 20, 1996, at A2 (reporting on FBI Director Louis Freeh's testimony to a Senate subcommittee, including his vow to fire the leaker and his admission that the FBI rarely catches officials who leak information to the press).

155. In an interview published in the *Columbia Journalism Review*, CNN News President Tom Johnson acknowledged that deadlines and competition exert tremendous pressures that influence news judgments. Ellen Alderman & Caroline Kennedy, *The Legacy of Richard Jewell*, COLUM. JOURNALISM REV., Mar. 1997, at 27. He expects the Richard Jewell case to make CNN work harder to avoid getting caught up in the "frenzy." *Id.*

tened to my fellow panelists, I thought, from what I learned, ABC should be out there, they should do this investigation, this is great. But I have heard from some other sources, “ABC only told half the truth; they left out a part.” I am now confused.

I want to give you an example of why it is important for the media to have their own ethical standards, which is not going to be gained by suing them because they are a business—if they have to pay less than they make, lawsuits will not work.<sup>156</sup>

It has been said that Richard Jewell’s mother, Bobi Jewell, loves Tom Brokaw. I do not know if that is true, but I do know that Tom Brokaw is terrific at delivering the news on television. So are Peter Jennings and a lot of others. But they should not use their credibility as a license.<sup>157</sup> When they do, I have the same problem as Mrs. Jewell; I become a victim of television news.

One of my fellow panel members today is a man whom I met an hour ago. Yet, even though I do not know him, I believe what he says. When he sat here and told me that “ABC was wronged” in the *Food Lion* case,<sup>158</sup> I thought, “That’s

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156. See Shepard, *supra* note 121, at 25 (reporting on the news media’s renewed interest in reviving news councils as an alternative to lawsuits, to evaluate citizen complaints about news coverage and make public their findings). The National Council ceased operating in 1984 because it lacked support from the major national newspapers. *Id.* at 27. Nonetheless, a recent ruling by the Minnesota News Council has aroused interest in creating state news councils in 22 other states. See John J. Oslund, *In Minneapolis: Ruling a Prizewinner Unfair; The State’s News Council Censures a Broadcast as “Untruthful” and “Distorted”*, COLUM. JOURNALISM REV., Mar. 1997, at 34 (detailing the Minnesota News Council’s ruling against CBS affiliate WCCO-TV for broadcasting distorted reports about Northwest Airlines’ safety record and maintenance practices).

157. Stevens, *supra* note 129, at A1 (reporting that NBC paid Richard Jewell approximately \$500,000 to avoid a defamation lawsuit over Tom Brokaw’s on-air comments about Jewell); see also *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 126 S.E.2d 873 (Ga. Ct. App. 1962) (coining the term, and setting forth the law of, “defamacast”).

158. See *Desnick v. ABC*, 44 F.3d 1345, 1355 (7th Cir. 1995). In *Desnick*, Judge Posner ruled that:

Gregg Jarrett; I watch him on television; and he is a man I should believe.” So, he has a responsibility to me; and he has to uphold that responsibility; otherwise I will be victimized again by television news.

Let me give you some examples you have never heard of, just quick ones, of the media’s non-accountability in investigations.

In New York City a few years ago, a drug suspect named Larry Davis attempted to murder nine cops in a shootout.<sup>159</sup> He wounded six of them, and the police went to look for him.<sup>160</sup> I know—all the law students are going to say, “Oh, you cannot say ‘attempted murder’ because he was acquitted on grounds of self defense,” and I guess, as an attorney, that I should agree.<sup>161</sup> Nonetheless, Larry Davis did, in fact, shoot six cops; and the New York City Police Department (“NYPD”) asked the FBI to help find him; so the FBI also went out to look for Larry Davis.<sup>162</sup> When the FBI got involved, so did I, by virtue of my work with the Terrorist Task Force. So, one night I got a phone call, and the caller said, “We’ve got an informer, and he’s going to meet with Larry Davis; but we have to notify the Public Information

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Today’s tabloid-style investigative reportage . . .—although it is often shrill, one-sided and offensive, and defamatory—. . . is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them . . . regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast.

*Id.*

159. See Robert D. McFadden, *New York Police In Citywide Hunt For Gunman Who Shot Six Officers*, N.Y. TIMES, Nov. 21, 1986, at A1.

160. See *id.* (reporting that a heavily-armed task force was searching for Larry Davis, while the press and the public wondered how Davis was able to shoot his way out of an apartment and slip through a cordon of 27 police officers).

161. William G. Blair, *Jury in Bronx Acquits Larry Davis In Shooting of Six Police Officers*, N.Y. TIMES, Nov. 21, 1988, at A1 (reporting that Larry Davis was acquitted of attempting to murder nine police officers, and wounding six of them, in a shootout in 1986).

162. Robert D. McFadden, *Hunt For Police-Shooting Suspect Widens To At Least 5 Other Cities*, N.Y. TIMES, Nov. 23, 1986, at 1 (reporting that heavily-armed police in several cities posted stakeouts for Larry Davis).

Officer of the NYPD, who has to call the Chief of the Department, who has to call the Police Commissioner, because we are not allowed to arrest him.”

I said, “Why can’t you? Wait a minute. You are going to see Larry Davis on the street? Are you going to follow him?”

“We can’t because it is not good that the FBI arrests an NYPD suspect,” the caller responded. “You know, the media goes crazy, and the local police will be embarrassed.”

“Okay,” I said.

So they called the NYPD, and the NYPD put it out on the police radio, which is monitored by everyone.<sup>163</sup> The FBI uses privacy band radios; you cannot monitor it. I used to drive my reporter friend, John Miller, nuts by listening to my FBI radio and taunting him—saying, “Ha, ha, I know what is happening.”

But John Miller and his colleagues could monitor every police radio in town, and, sure enough, once the FBI notified the local police about the Larry Davis meeting, out came the news vans. While we sat and watched, the news vans jockeyed to become first in line. The NBC truck showed up first, and they knew where the meeting was going to be. Well, the ABC crew came second, saw the NBC truck, and decided they had to be closer; so they moved in front. CBS came last—that is not a comment about their ratings—and they said, “We have to get closer.” It finally got to the point where the informant called up and said, “Excuse me, there are, like, six news camera crews across the street. I am supposed to meet Larry Davis. He may not show up.”

“Good point,” I responded. “Let’s move the location.”

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163. Cf. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104, 106 (1979) (refusing to allow West Virginia to punish a newspaper for publishing information it had obtained lawfully by monitoring a police radio). The Court called the police radio monitoring a “routine newspaper reporting technique[.]” *Id.* at 103.

So, we moved the location of the meet, but all of a sudden the trucks started to move too. Finally, I went over to the news vans and said, “Okay, look, do not move this truck. Miller, you are my friend. I am personally telling you to stop.”<sup>164</sup>

Well, everything worked out until ABC, or one of the other stations, decided, “We are going to get ahead. We are going to get maybe just a little bit closer.” So they did.<sup>165</sup>

The FBI called me on its privacy band radio and said, “What are we going to do? They’re moving out.”

I said, “Slash the tires.”

They were astonished. “What? Wait a minute,” said the voice on the radio, “I didn’t hear you.”

I repeated, “Slash the tires of the news truck.”

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164. See *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . .”). *But cf.* *CBS, Inc. v. Smith*, 681 F. Supp. 794 (S.D. Fla. 1988) (refusing to let Florida prohibit the news media from conducting election day “exit poll” interviews with voters within 150 feet of polling places). In *Branzburg*, the Court stated that “[i]t generally has been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.” 408 U.S. at 684. Notwithstanding such language, *Branzburg* did recognize a limited newsgathering privilege, saying “[n]or is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press would be eviscerated.” *Id.* at 681.

In *CBS, Inc.*, the court enjoined Florida from enforcing a law that prohibited solicitation of opinions from voters within a 150-foot prohibited zone surrounding any polling place. 681 F. Supp. at 803. In issuing a preliminary injunction, the court found that the statute was likely to be held invalid because it restricted only activity protected by the First Amendment and did not prevent entry into the prohibited zone for other purposes. *Id.*

165. *Cf.* Lou Prado, *Choppers Soar at Local News Operations*, AM. JOURNALISM REV., Apr. 1997, at 52 (reporting on television’s increasing use of helicopters, equipped with a new generation of high-technology cameras, to provide closeup coverage while hovering long distances away from news events); Judy Farah, *Gizmos: Whopper of a Chopper*, COLUM. JOURNALISM REV., Jan. 1997, at 11 (reporting that KXTV in Sacramento, California, employs sky-cameras that zoom in so close to news events that the Secret Service, the FBI, and the Air Force have mistakenly concluded that the news helicopter violated airspace restrictions).

They were still astounded, “You are giving us authorization to slash the tires on a news truck?”

I said, “Absolutely!” And all I heard on the other end was “hee, hee, hee.”<sup>166</sup>

The bottom line is that our suspect, Larry Davis, never showed up that day. We later learned that he had seen everything from three blocks away. The good news is they got Davis several months later.<sup>167</sup>

Oklahoma City is an example of a different problem. They had a suspect, Timothy McVeigh, and they had 1,700 witnesses. So what did officials do? They held a “perp-

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166. The inherent tension between the press and law enforcement is evidenced by arrests of reporters at public events and crime scenes, by the ensuing allegations of police harassment, and by news media lawsuits charging police with misconduct. See Leonard Levitt, *One Police Plaza; Confidential; Police vs. Press: Tension Grows*, NEWSDAY, Mar. 20, 1997, Queens Ed., at A8 (quoting Eva Burton, attorney for the *Daily News* (New York), as saying that at least five reporters and news photographers were arrested or summarily deprived of their press credentials in 1996 while covering news events in New York City); see, e.g., Alice McQuillan et al., *Cop Probe Begun on Reporter Arrest*, DAILY NEWS (N.Y.), Mar. 20, 1997, at 4 (reporting that the New York City Police Department Internal Affairs Bureau was investigating the arrest of *New York Times* reporter Julia Campbell as she covered a melee that broke out among mourners at the funeral procession for rap star Biggie Smalls); David Kocieniewski, *Safir Lauds Police Work at Rap Star's Funeral*, N.Y. TIMES, Mar. 20, 1997, at B5 (reporting that police forced WINS Radio reporter Ben Mevorach away from a telephone and seized the receiver from his hand, cutting off his live, on-air report during the melee at the Biggie Smalls funeral procession in New York City); Jim Upshaw, *Oregon forest fire sparks media-government blaze*, QUILL, Oct. 1996, at 8 (detailing the (Eugene, Oregon) *Register-Guard's* sweeping lawsuit against the federal government for the arrest of two reporters, whose notes were photocopied, cameras were seized, and film was developed, after the journalists attempted to cover a U.S. Forest Service raid on an anti-logging encampment near Eugene); Jose Lambiet, *Post Spy Bugs Kin*, DAILY NEWS (N.Y.), July 23, 1996, at 6 (reporting the arrest of *New York Post* reporter Tonic Sgrignoli for allegedly masquerading as a grieving relative to gain access to the families of the 230 people killed in the midair explosion of TWA Flight 800 off the coast of Long Island, New York); Susan Heller Anderson, *Chronicle*, N.Y. TIMES, June 11, 1991, at B20 (reporting the arrest of John Miller, then a police reporter for WNBC-TV in New York City, while he attempted to cover an anti-war protest during the Persian Gulf War victory parade).

167. Robert D. McFadden, *Cornered in Manhunt, Davis Surrenders In Bronx*, N.Y. TIMES, Dec. 7, 1986, at 1 (reporting that Larry Davis surrendered peacefully at a New York City housing project after a seventeen-day manhunt, culminating in an all-night siege in which Davis held hostage a mother and two children).

walk.”<sup>168</sup> They paraded their suspect in front of the news cameras. Right, wrong, or indifferent—because I have never done this—the “perp walk” is an institution in law enforcement because you want to be proud, for example, that you have arrested the man who has killed half of Brooklyn. So suspects are walked out to where the press can see them.

Sometimes, if they are smart, the police will put a coat or some other thing over the suspect’s head. But no, not in Oklahoma City. The police had to parade that man, McVeigh, right out in front so everybody could take his picture.

That perp-walk triggered eight months of hearings to suppress eyewitness identification on the grounds that the ID’s are tainted by the suspect’s exposure in the media. Will the defense win? I have gone through those a hundred times, so experience tells me probably not.<sup>169</sup> But the defense gets a preview of the witnesses, and they get information they would not otherwise receive.

Once again, who is at fault? The cops who are parading him in front of the media? The media for showing him? We want the media to act responsibly, but the police must be held accountable for protecting the integrity of their own investigations.

Just a short time ago, while discussing the *Food Lion* case, Gregg Jarrett said “there’s a higher calling” by the news media to conduct investigations. Before today, I disagreed. I would have told the news media, “Mind your own business.

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168. Journalists coined the term “perp-walk” as a shorthand for the police practice of parading arrestees before news cameras and as a caricature of common police parlance, in which suspects are labeled as “perpetrators.” See Howard Pankratz, *Defense Hits “Perp Walk;” First Time McVeigh Seen*, DENVER POST, Apr. 20, 1997, at A12.

169. See *United States v. McVeigh*, 1997 WL 123263 (D. Colo. Mar. 17, 1997) (refusing to dismiss the indictment, delay the trial for a year, or change the venue, despite massive pretrial publicity that included several reports by news organizations that had obtained privileged defense documents containing confessions by McVeigh).

Let law enforcement decide. Do we really need investigations by ABC? How about reporting Food Lion to the Food and Drug Administration (“FDA”), because you know the FDA could pose as anyone they want and no one is going to sue them.” But today’s discussion has changed my mind; maybe there is a reason for investigations by reporters.<sup>170</sup> And in response to Gregg Jarrett’s question, “What did the press do wrong in *Food Lion*?” I say I am absolutely convinced that Food Lion should go out of business tomorrow.<sup>171</sup>

Let me go through other problems we have. I have already mentioned the perp-walk. There is also the JonBenet Ramsey case. An Assistant District Attorney, or the District Attorney himself, out in Colorado, announced to the world, before any arrests were made, “I am having a press conference every week. Tune in next week. I am going to tell you how the investigation is going.” As a prosecutor, I want to call him up and say, “Would you mind? Why don’t you just tell everyone ‘it’s none of your business, we’ll get back to you when we arrest someone?’” But now, they use the press conference as a psych game; you know, they look at that camera, talking directly to the perpetrator.<sup>172</sup> The prosecu-

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170. See *Daily Mail Publishing Co.*, 443 U.S. at 104 (“A free press cannot be made to rely solely upon the sufferance of government to supply it with information.”); see also John Seigenthaler & David L. Hudson Jr., *Going Undercover; The public’s feed to know should be more important*, *QUILL*, Mar. 1997, at 17 (recounting journalism’s long tradition of undercover reporting, starting with Upton Sinclair’s 1904 investigative reports about unsanitary conditions in the Chicago meatpacking industry).

171. By a two-to-one margin, Americans sided with ABC in the *Food Lion* lawsuit, according to a survey conducted by the Freedom Forum Media Studies Center and the Roper Center. *F.Y.I., AM. JOURNALISM REV.*, Apr. 1997, at 15.

172. See Burt Hubbard, *Ramsey case latest trial in DA’s 25-year tenure; Alex Hunter has not shied from challenges, but can he redeem the justice system*, *ROCKY MOUNTAIN NEWS*, Mar. 16, 1997, at A5 (reporting that Boulder County District Attorney Alex Hunter stared into the news cameras at a press conference and threatened JonBenet Ramsey’s unidentified killer, saying, “You will not get away with what you’ve done”); *JonBenet Prosecutor Lashes Out*, *AUSTIN-AM. STATESMAN*, Feb. 14, 1997, at A9 (reporting that Boulder County District Attorney Alex Hunter stared into the news cameras at a press conference and said to JonBenet Ramsey’s unknown killer, “You have stripped us of any mercy”). The prosecutor went on to tell the unknown sus-

tors are playing media. Who is accountable for that? The prosecutor is as much at fault as the media.

Los Angeles Deputy District Attorney Marcia Clark is another example of what happens when a prosecutor succumbs to the relentless media pressure.<sup>173</sup> Marcia Clark became a media star, even though she is, in my not-so-humble opinion, probably one of the most inept prosecutors I have ever seen. She made \$4 million on a book about the O.J. Simpson trial—a case that she lost.<sup>174</sup> It shows how justice can get trampled in the shuffle between press and prosecution. Maybe I should have lost some of my cases so I could sell a book.

An interesting tidbit: reputed mob boss John Gotti is alive today because of the media, and I am sure he thanks the press. Why? Because there was a contract out to kill John Gotti by the Genovese and Luchese crime families. One day a man named Anthony “Gaspipes” Casso, the underboss of the Luchese crime family, was standing by a car while Gotti walked toward him. Gaspipes reached into the car, pulled out a gun, and was about to shoot Gotti, but he stopped when he looked up and saw what he mistook to be an FBI surveillance van.<sup>175</sup> But the FBI van was not there that day. Instead, the FBI surveillance teams were hidden.

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pect, “The list of suspects narrows. Soon there will be no one on the list but you. . . . We will see that justice is served in this case and that you pay. We have no doubt that will happen.” *Id.*

173. See *Simpson Civil [sic] Case; Where Are They Now*, L.A. TIMES, Feb. 11, 1997, at A16 (reporting that Marcia Clark stated that the massive publicity surrounding the O.J. Simpson case and her role in the trial has ruined her effectiveness as a prosecutor).

174. See *id.* (reporting that one month after the O.J. Simpson trial ended, lead prosecutor Marcia Clark signed a \$4.2 million deal to produce a book, *Without a Doubt*). In January 1997, Clark announced her departure from the Los Angeles County District Attorney’s Office to host a television program called *LadyLaw*, about women in law enforcement. *Id.*

175. Anthony “Gaspipes” Casso later became a high-level Mafia defector, who provided the United States Attorney for the Eastern District of New York with information about a 1986 bombing attempt on John Gotti’s life. Selwyn Raab, *Defector Says Bomb That Killed Underboss Was Meant For Gotti*, N.Y. TIMES, Jan. 24, 1995, at B1. The explosion killed Gotti’s lieutenant instead of Gotti. *Id.*

The van that Gaspipe saw happened to be an NBC surveillance vehicle camouflaged to look like an FBI van. So, here again, we have an investigation; you are on the set; you have reporters showing up; you have everyone. People are incredible!

The Department of Justice insures professional integrity through investigations by the Office of Professional Responsibility (“OPR”). I have gone through nine OPR investigations. It happens when we are involved in trying to put bosses of crime families in jail, and some reporter puts out a story. The next thing you know, we have to shut down shop so all the people from Washington can come up and ask us, “Who leaked this information?”<sup>176</sup>

I invariably protest, “Excuse me, I have to go to trial. We have an underboss of a crime family. I have got a witness to call. Do you mind if I do that?”

“No, no,” they insist, “you have to answer our questions first.”

Of those nine OPR investigations, I was cleared in every one because I was not guilty. But you know what? It disrupted the whole investigation every time. Somebody leaked it and somebody reported it. Someone was out there. I cannot tell you how many times I have had conversations with news reporters and told them, “If you report that he is an informant, you will kill that man.” When I said that to Jerry Capeci, the reporter who covers the underworld for the *Daily News* in New York, do you know how he responded? He said, “Gee, well, I have to think about it.” I said, “What do you mean? You do not have to think about it; a man’s life is at stake.” But the bottom line is that the media *does*

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176. Cf. *United States v. McVeigh*, 931 F. Supp. 756, 757 (D. Colo. 1996) (banning extrajudicial statements by anyone connected with the Oklahoma City federal building bombing trial, after the United States Attorney General reported that the government was unable to uncover the source of leaked information from discovery documents).

have to think about it before deciding to save a life.

So, I have to come up with an alternative—sort of a Hobson's choice. I have to sit there and say, "Okay, look, I do not want you to get this particular guy killed, but there is some other guy that I do not really care about. Let me give you something about the other guy. And if you print that information about the other guy, will you give up printing the information about the guy I am trying to protect?" Law enforcement people find themselves in just such untenable positions of changing the course of investigations all day long because of the media. The press wants to be involved in it. They want to dictate to you when the investigation goes down.<sup>177</sup>

Finally, there comes a time when I, as a prosecutor, decide that "I have had enough; that is it." What happens then? There was a man named Edward Byrne, who was a rookie cop. He was sitting out in front of a witness's home in Queens many years ago when four guys came up and shot him dead.<sup>178</sup> He had nothing to do with anything; he was just a guard—an uniformed police officer in a police car—yet he was shot to death.

We took the case federally. Within three months, we knew who did it. We had everything; we had wiretaps up; the arrest went down; and a person named Viola Nichols, sister of a major drug czar, sat in my office and gave me a five-page typewritten statement concerning the murder of Eddie Byrne.<sup>179</sup> I had three copies of that statement: one I

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177. Cf. Bob Minzesheimer, *Mistakes Compound Tragedy of Flight 800*, USA TODAY, July 25, 1996, at A3 (detailing the confusion that ensued when public officials responded to pressure from reporters for news about the TWA Flight 800 crash investigation in the early hours after the disaster).

178. See Bob Drury et al., *Cop Assassinated; City Declares War; Targets Drugs In Queens*, NEWSDAY, Feb. 27, 1988, at 5 (reporting on the predawn killing of 22-year-old rookie police officer Edward Byrne, as he guarded a home that was twice fire-bombed after its owner identified a local drug dealer).

179. Bob Drury & Richard Esposito, *Drug Czar's Sister Talks to Feds*, NEWSDAY, Aug. 26, 1988, at 3 (reporting that Viola Nichols, sister of drug czar Lorenzo Nichols,

kept; one I gave to the Queens County District Attorney; one I gave to the lead investigator.

The next Monday, NBC News Correspondent John Miller called me and said, “Oh, I guess Viola cooperated. I hear she testified. I hear you have a five-page written statement.”<sup>180</sup> I was stunned. “Miller,” I responded, “let me tell you right now that in two days, on Wednesday, I am going to put a wire on her in jail and send her in to talk to drug kingpin Howard ‘Pappy’ Mason, the guy who ordered Byrne shot, and we are going to make the case. Do not report this. You will interfere with it.” To John’s credit, I never heard from him again on that matter.

But I did hear from other reporters, including Richard Esposito of *Newsday*. He called me an hour after Miller, saying, “Hey, I hear Viola gave a five-page written statement.” I was dumfounded. I looked in my safe to make sure the statement was still there. I told Esposito, “Richard, do not do this. Wednesday I am putting this in. We are going to solve this murder.” To his credit, I never heard from Esposito again on that matter.

But another reporter found out about Viola Nichols’ statement and did not bother to call me, did not bother to tell me. I learned just hours in advance of publication, and the very night we were supposed to wire her up, that he would

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had implicated her brother’s drug ring lieutenant, Howard “Pappy” Mason, in the murder of police officer Edward Byrne).

180. *Cf. Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (refusing to allow Georgia to punish a television journalist for reporting a rape victim’s name obtained from official court records); *cf. also Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (invalidating a Florida statute that made newspapers civilly liable for publishing the names of rape victims). In *Cox*, the Court held that states may not forbid the publication of information contained in official records generally available to the public. 420 U.S. at 496. The holding was limited to information contained in documents open for public inspection. *Id.* The Court did not address whether the state could have punished the journalist for reporting information legally derived from his own investigation. *Id.* at 496 n.27. In *Florida Star*, the newspaper published information contained in a publicly-released police report. 491 U.S. at 526.

report that Viola Nichols was cooperating.<sup>181</sup> I called the reporter to tell him my problem with his report, but he did not want to hear about it.<sup>182</sup> So what happened? Because Viola Nichols was in prison at the time, her life was now in jeopardy. It was one o'clock in the morning. What was I supposed to do? I had to awaken people to get Viola into protective custody—shuttling back and forth; one thing after another. It cost us the taped evidence we had hoped to obtain, and I was outraged.

I decided, “I am going to stop this,” so I served subpoenas on the phones of all the cops and anyone else who could have touched that information—looking for any connection between that leak, that source, and that reporter.<sup>183</sup> I felt, “Just give me a phone; just give me anything, because now we are finally going to get to it. This is the murder of a police officer.” We never found the leaker, but I paid the price for trying. From the time I served those subpoenas, almost

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181. See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the “Pentagon Papers Case”) (refusing to enjoin publication during the Vietnam War of “The Pentagon Papers,” a classified study, leaked to the press, on United States policy-making in Vietnam); cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (refusing to allow criminal sanctions against the *Virginia Pilot* for publishing information about a confidential judicial disciplinary proceeding). Although the *Pentagon Papers Case* established the doctrine that even serious impact from publication disclosures cannot justify prior restraint of the press, it did not address the issue of post-publication sanctions. See *New York Times*, 403 U.S. at 733 (White, Stewart JJ., concurring) (suggesting that publication of the Pentagon Papers could expose the newspapers to criminal prosecution for allegedly publishing stolen information). In *Landmark Communications*, the Court did not reach the issue of whether the state’s confidentiality statute could be applied to a news organization that obtained information illegally and subsequently divulged it. 435 U.S. at 837. Nor did the Court consider Virginia’s authority to keep the judicial proceedings secret or punish participants for breaching confidentiality. *Id.*

182. In all likelihood, Mr. Rose would have had little legal recourse against the reporter. Cf. Pete Bowles & Richard Esposito, *New Evidence In Cop’s Slaying*, *NEWSDAY*, Aug. 12, 1988, at 4 (quoting from wiretap transcripts attached to the federal criminal Complaint filed against Viola Nichols).

183. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(e) (1994) (imposing upon prosecutors a special responsibility to “prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6”).

every column that the irresponsible reporter wrote had my name in it, regardless of whether I was involved. The columns would read like, “the situation in Bosnia is really getting tenuous and, by the way, did I mention that Charles Rose is a complete, low-life scum?” The reporter even wrote a book in which he called me “the most disliked prosecutor in the history of New York.”<sup>184</sup> I treasure that quote because I always like to be the best at whatever it is I do.

By the way, that reporter wrote about things that simply never happened, relying on false information. He never called me; he never asked me to confirm or verify anything. I never spoke to him about the content of his columns, neither before or after. But that is what happened when I asked that reporter to act responsibly.

I do not know what the answer is to holding the news media accountable. We all seem to agree that one method is to take their money away through lawsuits; let the media’s business guys do the accounting, and then you may have some accountability. But that would have a chilling effect,<sup>185</sup> and it would not work if you take away less than they earn from the offending news stories. Another answer is for the media to hold themselves accountable. For that, we must rely on the personal integrity of people like my fellow panelist Gregg Jarrett—one of the best journalists on television. We have to rely on Tom Brokaw and “Jerry Nachman’s guys”<sup>186</sup> not to meddle with investigations—to let law en-

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184. MIKE MCALARY, *BUDDY BOYS: WHEN GOOD COPS TURN BAD* (1989).

185. Cf. James Boylan, *Punishing the Press; The Public Passes Some Tough Judgments on Libel, Fairness, and “Fraud”*, COLUM. JOURNALISM REV., Mar. 1997, at 24 (noting that the current generation of journalists mistakenly assumes sweeping First Amendment protection for all of its activities and is startled to find that its news-gathering practices are vulnerable to legal attack).

186. While serving as vice president for news at WNBC-TV in New York City, Jerry Nachman allowed free reign to a group of investigative and police reporters, one of whom was John Miller. Verne Gay, *I-Witness News; The City’s First All-News Channel Features a Controversial, Cost-Effective Concept: The Reporter and Camera Operator Are the Same Person*, NEWSDAY, Sept. 3, 1992, at 68. Nachman also served as the editor of the *New York Post* and as news director of WCBS-TV in New York City. *Id.*

forcement chase bad guys without interference.

Thank you.

MR. SMALL: You will notice I am the only one here who does not have a law degree, and the lawyers have managed to use up all the time. I am going to impose on you so I can ask a few questions and make a few comments, and I will do it in order—and, Gregg, I promise not to suck up to you, as certain prosecutors have.

First of all, there have been references to the JonBenet Ramsey case. Mr. Wood, I would like to begin with you. In that regard, you said that the press treated the family badly because this little girl was put in beauty contests. Indeed, there have been a number of feature stories about whether or not children of that age ought to be exposed to beauty contests, or performances, whatever.<sup>187</sup>

The fact of the matter is that when a child is murdered, the press undoubtedly is sympathetic to the family. But they were not in this case. Why not? Not because they put their child through these performances, but because: (1) the family refused to talk, not just to the press, but to law enforcement people; and (2) the family hired a criminal lawyer to defend them. These are matters that are sort of suspicious if you are in the news business.

And by the way, Mr. Prosecutor, while indeed I have been Dean of the Fordham Graduate Business School, I came to Fordham to teach MBA candidates and occasionally coming to this side to teach law students a little bit about the impact that media has on their lives, because I spent over thirty-five years at networks and in other news organiza-

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187. See, e.g., *Letters to the Editor*, DAYTON NEWSPAPERS, may 9, 1997, at 11A (“The parents of little JonBenet Ramsey may not have killed her, [but they] are certainly guilty of making her pedophile bait, as are all the other parents and promoters of so-called child beauty contests.”); Paul McAfee, *Strangely, JonBenet Case Can Teach Business Hints*, BUS. PRESS, Mar. 31, 1997, at 9 (commenting, in the context of the JonBenet Ramsey case, “isn’t it disgusting what parents put their children through?”).

tions, and did so proudly.

Let me begin by asking you, Mr. Wood, the status of your case. You settled with NBC, right?

MR. WOOD: Right.

MR. SMALL: For how much?

MR. WOOD: Confidentiality agreement.

MR. SMALL: Really? Why?

MR. WOOD: Insisted upon by NBC.

MR. SMALL: Settled with CNN for how much?<sup>188</sup>

MR. WOOD: I cannot tell you. Same problem, insisted upon by CNN. I would like to be able to tell you all.

MR. SMALL: Why is it that the *Atlanta Journal* has not settled?<sup>189</sup>

MR. WOOD: We have not asked them to.

MR. SMALL: Why not?

MR. WOOD: Because we said early on that first on our list was the *Atlanta Journal*. I think they realized that we were not going to discuss with them an out-of-court settlement.

MR. SMALL: They have more money than NBC?

MR. WOOD: No, I do not think so.

MR. SMALL: I do not think so, either.

MR. WOOD: But let me say this—the fact is that the newspaper historically takes a very hard position on First Amendment cases.<sup>190</sup> While they may have millions of dol-

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188. Kevin Sack, *Atlanta Papers are Sued in Olympic Bombing Case*, N.Y. TIMES, Jan. 29, 1997, at A12 (discussing numerous lawsuits Richard Jewell has settled or is contemplating).

189. See generally *Jewell Sues Papers, College Over Olympic Blast Stories*, L.A. TIMES, Jan. 29, 1997, at A5; Sack, *supra* note 188, at A12.

190. See, e.g., P. Cameron DeVore, *Summary of Major 1996 Commercial Speech Developments*, in COMMUNICATIONS LAW 1996, at 341, 360-61 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 462, 1996); P. Cameron

lars to spend on other things, they do not hesitate to spend a lot of money defending Ann Cox Chambers' view of the First Amendment.<sup>191</sup> But, candidly, I feel—and I do not mind saying this on the record—if we had approached the *Atlanta Journal* as we did NBC and CNN, I believe they would have discussed a settlement with us because, while I only pointed out a couple of problems with their coverage, I could show you the newspapers and you would see that for three days this newspaper literally indicted, tried, and convicted Richard Jewell.<sup>192</sup>

I think they know what they did; they have internal problems. We have information that would indicate that the company itself was very divided about the question of whether certain articles were libelous. Obviously, until we give them a chance to settle the case with us, I do not think we are going to be talking settlement.

MR. SMALL: I am pleased that Mrs. Cox feels the way she does. My lawyer friends here in town—I do have lawyer friends, but I do not tell my wife about it—say they hate the *New York Times* because, going back to Adolph Ochs, the *Times* has always taken the position that “if we have defamed someone, let them take us to court; and if they prove we have, then let us pay in full, let us not settle.” So the *New York Times*, to my knowledge, has never settled a case out of court.

What about the contention of my colleague, Mr. Jarrett, that it is much cheaper, even at half a million dollars, for

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Devore & Robert D. Sack, *Advertising and Commercial Speech*, in COMMUNICATIONS LAW 1996, at 371, 668-69 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 462, 1996); Floyd Adams, *Recent Developments in Prior Restraints Law*, in COMMUNICATIONS LAW 1996, at 539, 888 (PLI Pats., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. 462, 1996).

191. Anne Cox Chambers and her family own the *Atlanta Journal* and *Atlanta Constitution*. See generally *Over \$3,500,000,000*, FORBES, Oct. 14, 1996, at 114.

192. Kathy Scruggs & Ron Martz, *At the Scene of the Blast: Guard Denies Role in Blast; Man Called Hero After Bombing Under Scrutiny*, ATL. CONST. & ATL. J., July 31, 1996, at 1A.

NBC to settle—that is his number, not yours—rather than go through the whole process?

MR. WOOD: Well, I am sure NBC has its reasons for settling. I know some of them. I really do not believe that NBC settled the case with us because they felt it would be cheaper. I think NBC realized that, again, there were problems in the coverage and the statements of Tom Brokaw. I do not think they wanted us to go in and try to find out the alleged sources who were telling him—if anyone told him—that there was enough information to arrest Richard Jewell, enough evidence to prosecute him.

I think NBC made a decision that was not related to the cost of defense. I think they made a business decision which considered the fact that they had problems and that they did not want to spend the next two or three years very publicly exposing those problems with Brokaw and his comments, as well as potentially the comments of other people with NBC.

MR. SMALL: ABC was not afraid to spend several years debating *Food Lion*.<sup>193</sup> Are NBC and ABC different? Mr. Rose tells us “at the bottom, it’s all money.” They saved a hell of a lot of money by whatever they gave you.

MR. WOOD: Well, it is a matter of perspective. Over the course of several years, with their star Tom Brokaw under attack in terms of his credibility, that has to take some financial toll on the company, especially if ultimately the verdict is against them, as we believe it would have been.

MR. SMALL: In my opinion, the credibility of Diane Sawyer at ABC, who was the anchor on the broadcast involved in *Food Lion*,<sup>194</sup> has not been hurt one bit. In fact, if I were giving Food Lion public relations advice, I would have told them long ago to give up the case, because just last

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193. See Meir, *supra* note 95, at A1.

194. Plaintiff’s Memorandum in Opposition to Defendant’s Motion in Limine to Preclude Evidence Regarding “Truth,” “Fairness,” or “Objectivity” of the Broadcast, *Food Lion, Inc. v. Capital Cities/ABC*, No. 92-00592 (M.D.N.C. Nov. 8, 1996).

week ABC ran one hour courageously and boldly repeating its position, re-showing the very material they could not show in court, which was described ably here. In terms of the cost to Food Lion, it was much more than it was to the network ABC. But your client, of course, is not a giant conglomerate.

Lin, I want to ask you one last question, because, when you said at the start you wished this audience were FBI men and women, I suspect if that were the audience, you would have gone on at greater length about the abuses, the lack of discretion, and the restraint on the part of the FBI.<sup>195</sup> True?

MR. WOOD: Absolutely.

MR. SMALL: Is this not exactly what the media is basing its reports on? The *Atlanta Journal* did not invent that material.

MR. WOOD: You are wrong. The *Atlanta Journal* invented a number of stories about Richard Jewell. The only thing the *Atlanta Journal* relied upon from the FBI was the fact that Richard Jewell was a suspect.<sup>196</sup> We are not suing anybody for that.<sup>197</sup> We may question the ethics of revealing his identity, but we are not questioning the legality of it.

But I can show you a list of articles that contained false statements about Richard Jewell, and none of them came from the FBI.<sup>198</sup> There is a joke down at the *Atlanta Journal* that sometimes they speak with what they call the “voice of God” because it is unattributed. There are a number of unattributed statements about Richard Jewell that are false, and a number of stories that portrayed him as the bomber.<sup>199</sup> It

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195. See generally Henry Bailey, *FBI Chief Wants to Fire Officials Who Named Jewell*, COMM. APPEAL MEMPLUS, Dec. 20, 1996, at A2; Ken Foskett, *No Clues to Leak in Olympic Park Bombing*, ATL. CONST. & ATL. J., Dec. 20, 1996, at A23.

196. Scruggs & Martz, *supra* note 12, at X1.

197. See Complaint for Defamation, *Jewell v. Cox Enters., Inc.*, No. 97-0122804 (State Ct., Fulton Co., Ga. filed Jan. 28, 1997).

198. Kindred, *supra* note 27, at A10.

199. *Id.*

had nothing to do with the FBI. It was media-created.

MR. SMALL: Mr. Turk, would you like to represent them in a case like this or would you turn them down?

MR. TURK: Would I mind representing the *Atlanta Constitution*? I think I would be delighted in that representation.

MR. SMALL: You would not have a problem because the basic source was the FBI?

MR. TURK: Assuming that is true, and I just do not know one way or the other.

MR. SMALL: Well, it is acknowledged the FBI called him a suspect.<sup>200</sup> I object to your client's, Craig Livingstone, not liking being called "beefy."<sup>201</sup> That is sort of a compliment when you are my size, right? But the Livingstone and Deaver stakeouts concerned public figures. The Jewell stakeout did not. So the *Sullivan* matter takes on different aspects. If you are in the news business, what do you do? Do you say, "Well, I do not care what anyone else does. We will pass on a picture of him getting into his Jaguar or coming out of his house," or, in the case of the Jewells, the Jewell family? It becomes the key story.

This might be different with a client who generates less sympathy: O.J. Simpson, for example—I am not talking about his lawyers, but people who feel that he may well have been guilty of that crime—no one objects to pictures of him on the golf course. In fact, it reaffirms their prejudices.

I do not want to pick on Jarrett, because he is on the side of God here.

MR. JARRETT: Imagine what that freeway chase scene with the white Bronco would have been like if he was in a

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200. *Jewell Sues Papers, College Over Olympic Blast Stories*, L.A. TIMES, Jan. 29, 1997, at A5.

201. See Jane Crawford, *From Bearer County to White House: He Keeps Official Activities on Track*, PITTSBURG POST GAZETTE, May 22, 1994, at H1.

Rolls Royce, though.<sup>202</sup> It would have had a very different tinge.

MR. SMALL: I personally thought it was insanity driven by competition that everyone preempted an entire evening to show an automobile slowly driving down this freeway.<sup>203</sup> But what if the worst had happened and he had killed himself? The networks would have been faced with quite a problem.

In any case, I am going to let Jarrett off easy, except for one thing, because he is on the “right” side. That is, I could not disagree with you more when you say that the *Sullivan* standards are too low. They have been eroded by some subsequent cases, but *Sullivan* is the single most important case in libel law in my lifetime—probably in history. Prior to that, we had virtually nothing out of the Supreme Court. I think it is exceedingly important.

Anyway, I am going on almost as long as they did. I just want to end with Mr. Rose. We have had the case of *Food Lion*, in which people lied about their applications for low-level jobs, and before the jury got to punitive damages they measured that as worth \$1,400. Think about it yourself. How many people do you know in this life who have applied for low-level jobs—any jobs—in which they have lied, and how many companies have failed to follow up on references? In academia, how many universities have not followed up to ask prior colleges and universities about the history of that professor. It happens all the time. Was it an illegal act? Yes. My question of you, Mr. Rose, is was it an illegal act any more than ordering someone to slash the tires of a privately owned vehicle?

MR. ROSE: Gregg, can we get that greater good?

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202. See Ben Stein, *O.J. Triggers a Racist Quake That's Off the Richter Scale*, *NEWSDAY*, June 26, 1994, at A30.

203. See Christa Worthington, *Rushing Back to See Court TV*, *INDEPENDENT*, Mar. 5, 1995, at 12.

MR. JARRETT: You are on your own, pal.

MR. ROSE: It is actually something I thought about several times. When I sat there I had three seconds to make a decision, and the decision was “do we let a person like Larry Davis walk away or do we buy a few tires?” Of course, I should add that, I knew I would probably have immunity from any prosecution or any lawsuit, or that the FBI would pay for the tires. So, the worst that could have happened was that really nothing would happen. I still do not think it would be considered a crime, simply because we were stopping an interference with an ongoing investigation, called obstruction of justice, which was a crime in progress.

Now, I can tell you that the FBI, the DEA, and every federal agency permits their agents to commit crimes, called “extraordinary acts,” with the authority of the Department of Justice.

You laugh. A man named Joe Pistone, better known as Donnie Brasco, an agent about whom a movie was just released, committed crime for seven years under specific stringent standards. Another agent, whose name I shall not reveal, who just did a three-year undercover with the Gambino crime family, committed crime for three years—no violent crime.<sup>204</sup> That was for the greater good.

If I had it to do over again, you know I would do it over again.

MR. SMALL: Charlie, over a beer I could listen to your mob stories all evening long. However, for now I will close by pointing out that much of the material critical of the press here stems from leaks to the press, many of them from law enforcement people. If you are sitting on the side that I sat on for so long, you ask yourself “how do you cover a news story?” You do not say to yourself, “that guy who works for

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204. See Selwyn Raab, *F.B.I. Agent Runs a Brooklyn Club to Snare a Mafia Outfit*, N.Y. TIMES, Jan. 24, 1997, at B2.

Rose, or for the FBI, or whoever, has no business leaking this.” The nature of government in this society, including law enforcement, is that leaks take place all the time, and the leakers do it because they have their own agenda, very often because they think that, as good as Rose is or others are, the law will not fall into place unless it gets public attention.

The role of the journalist is not to condemn leakers, to try to confirm what they have leaked, but the object of the leakee in this case, and in almost every other, is not to make more money, but rather to do his best to see that the rest of us, the consumers of the news product, get information that we will not get from anyone else on this panel.

I would like to thank all of our panelists.