Loyola of Los Angeles Entertainment Law Review

Volume 22
Number 2 *Symposium: Tune in, Turn on, Cop Out? The Media and Social Responsibility*

Article 5

1-1-2002

The Anthrax Investigation: A Newsgathering and Privacy Panel Discussion

THE ANTHRAX INVESTIGATION: A NEWSGATHERING AND PRIVACY PANEL DISCUSSION†

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*Clay Calvert, Panelist***
*Rex S. Heinke, Panelist****
*Neville L. Johnson, Panelist*****
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CLAY CALVERT: There are multiple issues . . . here are a couple of things that I thought arise. Initially, in terms of the procurement of the tape that Geraldo O'Reilly receives, there is an issue from *Bartnicki v. Vopper*:[1] was this lawfully or unlawfully obtained? There were some facts that might suggest that when [KJRN] put out the word on January 10 to their sources that they are actually soliciting this, that they have paid these sources in the past, and maybe it is not so clear-cut that this was unlawfully obtained. You have a chronology of dates given in the hypothetical that on the 10th they put out the word, and on the 21st it comes back, and in between—on the 15th—is when the conversation is recorded, so maybe there is a question of whether it is unlawful or not. And then I think related

† The following is an edited transcript of a panel discussion held in conjunction with the Fourth Annual Entertainment Law Symposium sponsored by Loyola of Los Angeles Law School on February 22, 2002. This panel based its discussion on a hypothetical situation, a summary of which appears in this Issue. *The Anthrax Investigation: A Newsgathering and Privacy Hypothetical*, 22 LOY. L.A. ENT. L. REV. 263 (2002) (hypothetical).

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1. 532 U.S. 514 (2001).

to that on the *Bartnicki* issue is that it has to be, because that case pertains to *Smith v. Daily Mail Publishing Co.*,[2] not only is it lawfully obtained but it must be about an event of public concern, and particularly in that case they talk about threats of physical safety to individuals. And, we can look at the dialogue and ask ourselves whether all [parts of the tape] are matters of public concern or not. . . .

There are also issues of intrusion into seclusion. Is the laboratory behind the door a space where there is an expectation of privacy? If so, whose would have been invaded by it? Does pushing open the door and shooting into it for thirty seconds make a difference? On the other hand, there also some windows to that lab through which [Gibbons] could shoot in and anybody could see in, so maybe there were intrusion issues, and perhaps public disclosure issues as well. Are there public disclosure of public facts issues in this from the audiotape, either from the cellular phone conversation or the hidden microphone worn by Gibbons when he goes into the lab? Are there fraud issues here as well, in terms of procuring the job—which might tie back to *Food Lion Inc. v. Capital Cities/ABC, Inc.*[3] in terms of the resume being forged with some dummy references and the application process? How did [Gibbons] obtain that job in the first place? And then at the end . . . the possible defamation by implication: even though [KJRN doesn't] clearly come out and say he is a terrorist, we have all these different parts running through it. I toss in trespass obviously as well: does Gibbons have a right to be where he is when he goes into the lab or, based upon his job description [which] pretty much limits him to his work station, does he have a right to go beyond that, anywhere in the building? So those are the issues that I see popping up and maybe there are others hidden there. . . .

LAWRENCE SOLUM: Gary, what do you think about this hypothetical? Would you want to represent KJRN?

GARY BOSTWICK: Well, first of all I used to just be a litigator. I would litigate both plaintiffs' cases and defense cases, and it was really easy because people would come to [me] and they would say, "This is where we are, we're stuck in the mud somewhere," and my job was to get them out of it. And now since I've moved to Davis Wright Tremaine, I get called ahead of time. And this is an almost perfect example of what most people call me with . . . this is exactly what happens. People will call and say, "Well, this is what is going on what should we do about this?" The fact is that if I were asked ahead of time—which I think is very much

2. 443 U.S. 97 (1979).

3. 194 F.3d 505 (4th Cir. 1999).

different than what I would do and how I would defend it and what the rules are after it had already happened—but if they asked me ahead of time, "Should we be sending bonus checks to someone, people who are our sources?" I would be telling them almost immediately, "No, do not do that." You have to be very careful about what your relationship is with your source, with any source, because to the extent that the source has any feeling about changing the facts that they are passing on to you based upon the fact that you gave them a big bonus or something else, there is a problem.

I was involved in a case with Joseph McGinniss, and I represented Dr. MacDonald. One of the problems in that case relating to *Fatal Vision* was that McGinniss had made a contract with MacDonald that they were going to share the money that came out of that case. And people were very concerned with the fact that it is not independent journalism when you are paying your sources. So I would always be worried about taking anything from a source that was being paid. Now, the problem is of course that many sources will not talk unless they are paid. And the *National Enquirer* has broken some very good stories, stories that were important to be broken, only by being able to pay the sources. I am glad to say that my client, Kato Kaelin [made famous in the O.J. Simpson trials], turned down $350,000 and wouldn't sell his story, but that was because he had a lawyer who was upright and didn't believe that Kato needed to be in a different tax bracket.

That is one problem I look at right in the beginning when I go down this. I say, "Oh my god, no, please don't do that." I get to the tape and if someone had called me and said, "Look, we've got this tape, it came in over the transom." . . . But the fact is, you have to look at this with the *Bartnicki* case in mind. Obviously the *Bartnicki* case is very, very narrow and also very scary. For those who want to look at it with more care, there is an implication that there is a right of privacy that no one has ever said existed before. Whenever we have talked about a constitutional right of privacy before, we have talked about *Roe v. Wade*,[4] *Griswold v. Connecticut*,[5] the right to be left alone from the government's interference. *Bartnicki* begins to suggest that maybe there is an individual right of privacy, which there is in California because of the California constitution. But [*Bartnicki* suggests] there is a federal right of privacy that individuals have. So I would start being more and more careful about this stuff that's coming in over the transom.

4. 410 U.S. 113 (1973).

5. 381 U.S. 479 (1965).

There is not enough time to go through all this, I know that. So one more thing I will say that I think is extremely important is that here in California, the audiotape snippet is automatically a problem because of [California Penal Code section 632] that makes the audio recording of anyone's words actionable, both criminally and civilly. And, therefore, the only requirement is that it be a confidential communication, and certainly when Mr. Da said, "This stuff rocks. If the authorities knew about it they'd have our collective asses in a secret military tribunal," we know that he meant for that to be confidential. So here in California, if I were asked ahead of time, I would say, "No, no, no, you cannot do that, you don't do that, it is just way too risky, I don't know whether you will win or lose in the long run but it is way too risky." So a lot of people are going in with hidden cameras in California but no mikes, which is a really interesting distinction. I cannot tell you what I think about that, I don't know how that's going to play out in the long run. . . .

LAWRENCE SOLUM: Neville.

NEVILLE JOHNSON: Well, when I started suing large media organizations, I was sort of a lone wolf at the time and the law was unsettled. I remember being at one conference and I basically said to the people there, who were mostly media lawyers, "I am going to wipe that smirk off your faces." And I did. And the law has changed big time: the media don't do these hidden camera elaborate stories anymore, where they go in and they set up these stings. Because the next time they do, it's bet-your-company time. I have already socked ABC for $1,000,000, and I've got two lawsuits against ABC right now in the court of appeal which I intend to win. And when I was initially doing these cases, I was saying, forget libel, libel is hard—I have to overcome malice. Now I have changed. Now I am saying, "I am going to sue you for the tort *and* I am going to sue you for malice at the same time."

And, I have a new theory which I am going to be publishing in a [Loyola of Los Angeles Entertainment Law Review] article,[6] that if you commit a crime or a tort to gather the news, there is going to be a presumption of malice. Why should I believe your story at all if you lied to get it? It is antithetical to the notion of journalism and being a truth-seeking activity, and I am not the only one who thinks that way: judges are starting to buy it now and the public is beginning to buy it. And what you have seen is a dumbing-down of the media as they compete for the dollar.

6. David A. Elder, Brian A. Rishwain, & Neville L. Johnson, *Establishing Constitutional Malice for Defamation and Privacy/False Light Claims When Hidden Cameras and Deception Are Used by the Newsgatherer*, 22 LOY. ENT. L. REV 327 (2002).

And over the last three or four years, we saw four nights of "Prime Time Live" and three nights of "Dateline" because market share has diminished to forty-four percent or below for the networks, and they are competing with all of the other cable operators out there, A&E and everybody else, so it is cheaper to get that kind of programming.

Anyway, some of the issues that struck me as being here was preordained result, impersonation, trespass, ill will, and those are all indicia of malice as far as I am concerned. Possibly, I don't know Clay, we are not sure whether it is defamatory or not, but I would be very concerned about those particular kinds of issues. And there was a trespass here. The issue really comes down to the journalist saying, "The truth-seeking activity I am [undertaking] warrants the conduct that I am going to commit which is going to be anti-social." And that is a devil's bargain for the journalist to make, particularly when he has to explain it at the end of the day. And, I remember once having a deposition with a producer from CBS, in which he said, "Well, I think it's okay to break certain laws to get the news." And I said, "Do you distinguish between felonies and misdemeanors? And exactly which crimes can you commit in the name of journalism?" Our country has gotten along just fine without dishonest newsgathering. The impersonation obviously would fail today, I think, in most jurisdictions under *Sanders v. ABC, Inc.*[7] and *Food Lion*. The "outside-looking-in" issue may constitute an invasion of privacy; however, those of you who have studied it know that corporations or entities can't claim a right of privacy ordinarily, but the individuals therein may be able to do so.

The tape-recorded phone conversation, as Gary points out, is problematic. I am going to go after the guy who taped that conversation: if I can't get the news media guy, I'll go after the person who taped that conversation. He'd better be warned about that, and the news media—and this has never really been talked about—might have an obligation to say, "Hey, you know if we use this and we publish this, somebody may go after you." That's one of the issues I have talked about before. These poor sources sometimes don't know what they are getting into. They're dupes, and we sue these people and then I believe they have rights of indemnification or claims that they can bring against the news organization for getting them in the middle of this mess in the first place. Fraud is certainly viable. I have many sources in the news media, many people who agree with my position. I had a conversation with a confidential source last week who told me that the game at the tabloids is they want to solve the crime now, so that is what they try and do. If it's an O.J. Simpson case or

7. 978 P.2d 67 (Cal. 1999).

something else like that, they go and they want to participate. Do you remember all the hoopla about the Bruno Magli shoes and O.J. that *The Enquirer* found? You know, more power to them, but my issue is that the news media are not the police. If you are witnessing, as here, what you believe is criminal conduct, you need immediately to go to the police and stop something bad from happening. You know I will say, because I have thought about this issue before, that if it's a matter of life or death, it's a World Trade Center, if it's a concentration camp, then you know I certainly wouldn't defend somebody who was the victim of trespass in a situation like that. But the journalist must be mindful of his obligation to society over all. That was one of the issues that came up in my cases and in the *Food Lion* case: why did you wait six months to warn the public about this supposed disaster? Was it any coincidence that it was [aired] during sweeps week?

Editing, that is another issue here. What we are seeing also in the cases that we have is just false editing, and I think there are going to be more and more cases like that. And I think more and more judges and juries are going to be sympathetic and understanding of the fact that it's the false-light context as well, and people need to be very mindful of that.

LAWRENCE SOLUM: Rex, I assume you don't agree with everything that Neville had to say.

REX HEINKE: Almost everything Neville said. I guess I am kind of like Gary. There is a big distinction between what you tell people before they go and do it, and what you do when they have done it and all you've got is the complaint to deal with. And this probably highlights that pretty well. These are great clients for people like Gary and me if they don't call you beforehand; I mean, they are going to make me wealthy. They might make Neville wealthy, I don't know. But they are certainly going to make me wealthy because, boy, this is not the way you do these things. It is just rife with mistakes and things that we would strongly recommend they not do, but in the end, hey, they make those decisions. But, in terms of the advice you would give to people in this kind of situation, I won't touch on the same things Gary did, or at least I'll try to avoid that, but let's take the audiotape. You can tell your clients until you are blue in the face, "Don't listen to it." Well, they are going to listen to it, so get over it. When it comes in over the proverbial transom, they are going to listen to it, I guarantee it. I'd listen to it if I were [in their shoes], because how the hell do you know what's there unless you listen to it? So they are going to listen to it, you've just got to get over that. But there is no indication in the hypothetical how they have a clue that the thing is authentic, except that somebody handwrote a note on it saying who this is and when it happened.

But I don't see anything here that tells me that it is authentic. So one of the first things I'd be saying to them is, "Hey, how do we know?" Somebody here scribbled this note. I don't know these people. How do we know this is true, that these people are the ones who are recorded and so on, because this is key to everything. If that thing isn't authentic, boy, you are going to go down really big time.

[As for] the distribution of the reference to the wife, the editor who let that through should be taken out, and drawn-and-quartered on the nearest plaza. It doesn't have anything to do with the story. There is no need to take that risk. It doesn't do anything to help the story. There is nothing really of public concern in referring to the wife. Somebody should have taken out his heavy pen, got rid of that part of it and eliminated that problem. Then they decide that, oh boy, we need to hire someone and send him into the lab. To what end are we going to take those kinds of risks? This is an area that is fraught with problems. I think there are situations where you can make a pretty good case that you need to do that, but there aren't a whole lot of those situations, and this one sure doesn't appear to be one of those. It's just hey, let's send somebody in with a camera, audio and video, and hope we get something and have them wander around, open doors, and see what's going on without any real showing or real reason to believe they are going to come up with anything. And then when they came up with nothing as far as the videotape, they decide to use it for reasons that just mystify me, because I can't see it adds anything to the story. As the hypothetical is written, it doesn't prove anything. So again, why are you taking that kind of risk and putting it on the air when it adds nothing to the story?

Now the snippet of audiotape they got in the public lobby is pretty great stuff because it certainly implicates this guy Da. Then you go over to the story, it's not clear exactly what the story says because we don't have a tape, but there seems to be a real attempt to put together a whole bunch of things that are fairly tangential, and then end up with the most ridiculous thing I could imagine. Morphing [Da's image] into Osama bin Laden? I mean there is another one, were there no adults there that day? Were they all out? What was going on here? If I were the editor or the lawyer advising the editor, if I could authenticate the first tape that came in over the transom, got rid of the reference to the wife, and used the other piece of audiotape if I was also sure that was authentic, that would be the story. And, I would tell them, go with that story, and we'll defend that case and we'll win that case. But the way they did this is going to get them into very big time trouble.

LAWRENCE SOLUM: Why don't we focus in on *Bartnicki v.*

Vopper and the cell phone conversation as a place to begin. And, I am sure many members of this audience are very familiar with the *Bartnicki* case but for those who aren't: this was a May 21, 2001 decision of the U.S. Supreme Court, so it is less than a year old. A cell phone conversation was taped involving a chief union negotiator and the union president in a collective bargaining situation involving a Pennsylvania high school and a school board, and that tape made its way to Vopper, a radio commentator. He played the tape on his show and one of the gentlemen who was taped filed the damage suit under wiretapping laws, and the Supreme Court decided in Vopper's favor that the First Amendment protected his right to play this tape. There were several factors that were very important to the court I think, one of which was that there was no indication that Vopper had been in any way involved in the surreptitious taping. So one question that I think is very important to us is, what do we think of *Bartnicki*? Does this case really make any sense? It is a very interesting opinion written by Justice Stevens that involves an *ad hoc* balance between the First Amendment interests on one hand and the privacy interests on the other. Two of the justices who joined Stevens wrote separately to say this [decision] is very, very narrow. Clay, maybe you can get us started again. What do you think of *Bartnicki*, does this decision make sense? And then maybe you can say a word or two about its application to our hypothetical.

CLAY CALVERT: Sure. I think it's really about actually competing First Amendment interests—a First Amendment right to engage in private conversations, which the court seemed to find perhaps for the first time in that decision, versus the First Amendment right to disclose public information or information of public concern. So you have dual, or competing, First Amendment interests: private speech versus public speech or public discourse in that part of it. And to the extent then that we are dealing with this constitutional right of private speech, you do have an important issue.

One of the things the court does and specifically says in that case is that it's not going to definitely rule on, and it has kept on avoiding the issue of, whether or not the press could ever be punished, or drawing a bright line for, publishing truthful information. And that's something because if they finally said, you can never be held accountable for publishing truthful information, then that basically swallows the whole public disclosure of private facts tort, because truth is not a defense in that. What the court did in that case was it adopted the rule from the *Florida Star v. B.J.F.*[8] or *Smith v. Daily Mail* series of cases, that essentially says that if you lawfully

8. 491 U.S. 524 (1989).

obtain truthful information about an event of public concern and you publish that information, then the state or the government cannot punish you absent an interest of the highest order. And so, [in *Bartnicki*] what the court decided was that this was information of public concern, that this dealt with a threat of physical safety. The actual tape in that case said something like, "If they don't move from three percent, we're going to blow off their front porches. We've got to move them." And that obviously was important in that the court seemed to suggest that public concern [did not involve] just threat of physical safety.

They were also to some extent public officials, they were heads of the labor union, and one was the chief negotiator in that case. They are ostensibly public individuals engaged in that situation. In contrast, in this case, you might [ask], are these individuals in the same circumstances—are they public figures or not? Obviously, part of the issue [is, in] the second half of that tape I don't believe was anything of public concern, or of physical threat of safety or violence to anyone. That's purely private. Why do they run it? The only excuse that we are given in here is O'Reilly knows something, he's got something good. He and the station eventually do run it in its entirety, leaving in the part about the affair because O'Reilly believes it reveals Da's true character and shows how morally depraved he is. Now that sounds kind of odd, but that's the same argument we had in the Clinton/Lewinsky situation. Why was President Clinton's affair relevant? It "goes to show his true character," right?

And so if we go back in the *Bartnicki* case . . . Breyer's concurring opinion is very important too because he really suggests it has to be this issue of ultimate public concern, very high in other words, [like] physical safety. The court also contrasts in *Bartnicki*, and it specifically says that it is not dealing with domestic gossip: that's one of the terms it uses. It is not dealing with a trade secret case and it's not dealing with "domestic gossip" [and this is] pretty much domestic gossip, so we don't have that here. I think the lawfully obtained part is going to be a big issue that will keep popping up. What do we mean by whether something is lawfully obtained? We don't ultimately know, in this case, who sent it in. The authenticity part that Rex mentioned is very important here. But we do have a chain of events and a series of times when we might say that, indeed, maybe [KJRN] did procure this, or maybe they at least whet the appetite of the potential sources to bring it in. And maybe it's too close of a call on that, so the key issues with regards to the *Smith v. Daily Mail* case then, I would say, are [was the tape] lawfully obtained, and is it all of public concern? Can we justify that? So the bottom line from *Bartnicki* is that we are balancing the interests of private speech versus public speech right. And in

that particular case, it happened that the public speech rights won out. In the future, will that be the case? It probably depends upon how we define public concern, I think.

LAWRENCE SOLUM: Neville, what do you think?

NEVILLE JOHNSON: I think it's the logical extension of the *Florida Star* case. There is also a case involving Drew Pearson that was a court of appeals case from D.C.[9] that held along the same lines. I don't have a problem with it as a citizen or as a plaintiffs' lawyer. I echo Clay that, to the extent it was talking about private matters and it got published, whoever published it has some big problems there.

LAWRENCE SOLUM: Rex.

REX HEINKE: In a way, I think this is easy once you get rid of the stuff about the wife. That is, if you put this in front of any jury in America and ask, "Is it a matter of public interest whether these people are manufacturing anthrax, you get to decide." Okay that one I want. What's the next issue in this lawsuit? I mean, that's not an issue as far as I'm concerned. I think you win that with any jury in America. Maybe the U.S. Supreme Court is going to say these guys aren't public figures, and they are not public officials, and therefore it's punishable, okay, well we'll go back and try it and they'll get one dollar. I mean, that's the real world. This is not a serious claim in terms of figuring out what you are going to do out there in the real world day to day, as far as I'm concerned, as long as you get rid of the thing about the wife. The thing about the affair and the wife is just extraneous and really indefensible, as I said at the start.

LAWRENCE SOLUM: Gary, would it make any difference to you that on the facts of the hypothetical it obviously would have been tremendously irresponsible to go on the air with this story as the first thing you do? Anyone who had even a smidgen of public spirit would go to the FBI with this and allow them to investigate before they went on the air. . . .

GARY BOSTWICK: One of the things that occurred to me right away was that if this tape came in, there are ways to try to determine whether this is an authentic tape. You don't just have to take the tape and say, "Well, look at this label, huh, it says it's between Lumbergh and Da, must be right." Of course not, no responsible journalist really is going to do that. An editor or the producer of a broadcast is going to be trying to figure out how to determine it. Now I'm the lawyer, so it is not my job to be imaginative in those ways. But, in fact, I could think of several ways myself, and I'm not trained as a journalist. I'm not a good reporter. I am in awe of the good reporters that I see. They could call up several of

9. McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985).

Lumbergh's friends and they can call up Da's friends or Da's enemies or Lumbergh's enemies. They can [find] anybody who knew their voices [to] try to figure out if that is really a tape-recorded conversation between those two people. At the very least, you would want to do that, it seems to me, so that you would be able to defend yourself that you weren't just putting it out there based upon what it says on the label. That's one thing.

The second thing, I think, is the fact that it is of public interest. I would want an editor to be developing that in a broader context than just suddenly reacting to the fact that this has to do with anthrax and this has to do with production of anthrax. I don't think I would say, "Well, that automatically makes it something immediately that is of public interest." I would say to the editor, "Wait a second, what's the thrust of this story going to be?" That is what tells us all to keep out anything that doesn't have to do with the manufacture of anthrax, that is a deadly threat. So anything such as this attitude that we want to show Da's true character in any form whatsoever—whether it was the statement about the wife or anything else in a broadcast that was a sort of self-righteous self-justifying comment on the part of the producer that didn't stick right within the four corners of the issue that is of public concern—I would be worried about, and I would want them to be very careful about staying within those corners.

CLAY CALVERT: One of the other things . . . is the need for the videotape. Was there even a need really, as Rex points out, to get videotape? But because broadcast journalism is so video-driven, trying to get interesting footage and that's what sells really, rather than just reading text, that seems to be why they did it. "Well, we need some videotape, we need to show Food Lion, we need to show spoiled meats, we need to show them doing this. We need to see the videotape, without the videotape we don't have the story." And maybe that's where they go and they get in trouble because they go to do that.

NEVILLE JOHNSON: I am concerned about the nexus between the unlawfully obtained [tape], and the getting to the news organization. I think the presumption in *Bartnicki* that the court and everybody understood, is that when the news organization got it, it was unlawfully obtained. I mean, it was a secret tape of a telephone conversation—that violates federal and state laws everywhere. So, if it was *The New York Times* that published it, as opposed to, say, a tabloid, I might give more credence to *The New York Times*' protestations of innocence. But I am deeply concerned about the pseudo-sourcing of various tabloid-type entities and I don't limit it just to the print media as well. And, I would certainly want to take a look at that to see if it really did come in anonymously in the

first place.

Secondly, with respect to *Bartnicki*, it's two judges concurring, Breyer and O'Connor, and three dissenting. And Breyer and O'Connor are saying, "We're just kind of poking our head over the fence here and privacy is really important to us." And if anything, it is a harbinger and watershed type of case indicating that you'd better not push your luck on a privacy level if you're in the news media.

CLAY CALVERT: And they talk a lot about that idea of a chilling effect, a self-censorship on private speech: that seems to be the one interest in *Bartnicki* that comes through. That they examine the government's two asserted interests, and one is punishing the wrongdoer basically, but the other one is the chilling effect that this might have on the ability of individuals to engage in private conversation via cell phone. And yet that raises other issues, because people would know that their conversations can be easily overheard on a cell phone, or at least more easily than other things would be. So it all goes to the expectation of privacy. But again, the idea that there is a constitutional right to engage in private speech that might sometime, upon different facts, outweigh public speech is an interesting point.

LAWRENCE SOLUM: Is balancing the way to go here? After reading *Bartnicki* I really have trouble knowing how the next case coming down the pike will be decided. And it's not that the court is saying, "Well, here we have a class of situations and we are going to balance and craft a rule based on the balance." They seem to be saying that in each case, a district court judge or a trial judge is going to balance the First Amendment value against the privacy value and somehow come up with a decision as to whether or not this speech is protected. Does that really serve anyone's interest?

NEVILLE JOHNSON: I don't know how else you can do it but, actually, that is a very perceptive comment. I've always looked at the case from the point of view of, this is a violation of the federal wiretapping statute. But really, what the court did here and what you were saying—and I think I agree with it—is that they're going to have to engage in a publication of private facts analysis in each case, which does involve a question of newsworthiness and then a balancing of the newsworthiness against the level of intrusion in the particular case.

Also, one other point that relates to this as well is, to what extent was the business about the affair published anywhere else? Was it published privately? Did it go outside the newsroom? Do we have invasion of privacy issues relating to that as well? The newsroom had better be careful to seal itself off so it doesn't contaminate others and therefore open itself

up to liability.

CLAY CALVERT: That would be the public disclosure of private facts, assuming that no one else knew in this case.

NEVILLE JOHNSON: Well, that's what I am saying: you transform what may be a wiretapping statutory violation into now what may be a common law tort.

LAWRENCE SOLUM: I've got plenty of questions for the panel, but we've reached the halfway point so it might be a good time to open this up to the floor if you have questions.

NANCI NISHIMURA (*Audience Member*): . . . I've heard from the defense side an assumption that the subject matter of the tape was of public interest. But no one took a step back [to examine] the lawfulness or unlawfulness of how that information came about. And, if it's unlawfully obtained, whether or not it is a matter of public interest, I would make a claim that it is irrelevant. Because you have unlawfully obtained this information and you've published it, the publication is part of your damages. What would your defenses be to my claim?

LAWRENCE SOLUM: Gary, can you take a stab at this?

GARY BOSTWICK: I'll take a stab at it, but I think that you do have one thing backwards: I don't think you find that something is unlawful without factoring in how important was the public interest in knowing it. You make it sound as if it's simple to just determine whether something is unlawful.

NANCI NISHIMURA (*Audience Member*): There seems to be a presumption here that the matter was of public interest and therefore you go from there.

GARY BOSTWICK: If you are looking at it beforehand, you would want to make sure that it is a matter of public interest. If you are looking at it after Neville has filed his lawsuit and you are trying to defend against it, one of the things that you're obviously going to try to do is to prove that it is of major importance to everybody who is reading it, that the reasonable reader would need to know it in order to be able to regulate his or her life in a certain way about something that is important to the governance of the nation and the culture we live in. That is one of the things that is constantly at issue when these litigations come up, why if in fact it is just private gossip. I mean if this were a tape of Tommy Lee and Pamela Anderson Lee talking about what it is they were going to do that evening, that is an easy call—if we're sued that way, we know that we're not going to be able to say that that's a matter of public interest, except in the most vicarious sort of way of "it's got to be interesting because it's Eddie Murphy." . . . If you're asking whether or not on the defense side what we do is, we look at

it and say, "Well it's a matter of public interest okay, no problem . . . ."

NEVILLE JOHNSON: If it was illegally obtained, they are going down. If the newspaper or the broadcaster had anything to do with the illegal obtaining of it, I think they are going down. I think the court didn't address the issue of what they were going to do if the journalistic organization was involved in the wrongdoing. But I can tell you my bet would be that they would go down if they were at all involved in the unlawful obtaining of the information.

GARY BOSTWICK: That's one thing that I think you can take away, that everyone on this panel agrees that if the producers in fact procured the tape illegally, everyone's in trouble.

REX HEINKE: If the media did the taping, not it just came in, but they turned on their little receiver and taped it themselves, I think we've got a completely different case and a really serious problem there. In terms of defending this case, what I'd be really interested in besides whatever is here, is what else is there that proves this is true, because that I think is going to color the complete outcome of this case. If you can't prove in the end that it is true that these folks were making anthrax, you're really going to get your head kicked in. And if you can prove it, a lot of these other things are going to seem awfully minor, about mentioning the affair. This doesn't mean, as I said before, that I would suggest to them that they should do anything like that, but in the overall context of what's going to happen here, if you prove that these folks were making anthrax and putting it in envelopes and sending it out, this case is essentially over for all practical purposes.

ROD SMOLLA (*Audience Member*): I want to talk a little bit about the balance in *Bartnicki* and ask you to imagine for a minute if the case had been 5-4 the other way . . . that would be a blockbuster case, that would be the *Brown v. Board of Education*[10] of privacy, because that would punch through a giant barrier. Now we would have a kind of information contraband and a fruit of the poisonous tree. Once that material is illegally obtained, once privacy contraband exists, you can't traffic it, you can't retransmit it. That has gigantic implications, right? So you think about that for a second and then you think, look how close this baby is, because it's not a clean 5-4, it's 3-2-4 and there are at least two very glib sentences, one in Stevens' opinion and one in Breyer's concurrence.

Stevens' whole analysis about why this is newsworthy—this is a little bit exaggerated, but pretty much his whole analysis is . . . well, if they had said this in a public setting, it would have been newsworthy. Well, come

10. 349 U.S. 294 (1955).

on, I say a lot of things myself, say about a faculty meeting driving home, that I would never say in a public setting. It is the fact that I am saying it in a private setting that means I the speaker don't intend for it to be newsworthy. But he doesn't draw that distinction, that's vulnerable and people are going to come back at that question. The other weakness which makes the concurring opinions very, very close is, Breyer and O'Connor say, "We are only going along with the program because there is a really high public importance here." But really what they say as much as anything is, it's because these guys are talking about committing a crime, a crime of violence. Well, you know, I don't really think so: I think these were union guys, you know, "If the other guy doesn't move we're going to have to break some legs and blow up some porches."

NEVILLE JOHNSON: They're going to read the *Hitman* book.[11]

ROD SMOLLA (*Audience Member*): [The idea] was not really violence I don't think . . . I think it's kind of a lame weasely dodge that those two justices (who I like a lot) did, got themselves off the hook in this case based on that. And that is really not a persuasive argument, which means this case really could go the way that Neville is talking about. You can have a "*Bartnicki II*" with a slightly different set of facts and you do get that blockbuster opinion.

GARY BOSTWICK: Two hours before the *Bartnicki* decision came out, I thought it was the biggest case we'd seen in a decade. And two hours after it was out, I thought it was nothing particularly important anymore. Not because we had won, but because the fact is, if you're looking at it from a defense point of view, it was scary as to what could happen. What did happen was: not much.

LAWRENCE SOLUM: Let's talk a little bit about what could happen. Just to give you a flavor of Justice Breyer's concurring opinion joined by Justice O'Connor— and without those two votes the case comes out the other way, without those two votes it's 5-4 the other way—Justice Breyer said, "I joined the court's opinion because I agree with its narrow holding limited to the special circumstances present here," and he talks about the fact that the broadcaster was not involved in anything illegal in acquiring the tape. And then he said, "The information publicized involved a matter of *unusual* public concern; namely, a threat of physical harm to others." So suppose this tape is a conversation between [Vice President] Dick Cheney and [former Enron CEO] Kenneth Lay, now that is a matter

11. REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS (1983), http://www.lizmichael.com/hitman.htm.; *see also* Rodney A. Smolla, *From* Hit Man *to* Encyclopedia of Jihad*: How to Distinguish Freedom of Speech from Terrorist Training*, 22 LOY. L.A. ENT. L. REV. 479 (2002).

of public concern and maybe that's even unusual public concern. But it certainly isn't going to be a threat of potential physical harm to others. Of course, prognostication is always dangerous, but can we imagine that the court could have come out the other way if there had not been a threat of physical harm?

CLAY CALVERT: So monetary harm essentially in an Enron-type of situation is not counted.

LAWRENCE SOLUM: The public concern is just that energy policy is being unduly influenced by executives from Enron. That's clearly a public concern, but no one is going to get their porch blown up, no one is going to die.

CLAY CALVERT: Part of it may shift over if you look at public disclosure of private facts. In that tort, the idea of legitimate public concern is used, but it's also used interchangeably with newsworthiness, I think. And then we get into a question about how we are going to define what is newsworthy. Are we going to say public concern is newsworthiness, in which case a journalist gets to define it largely—not solely, a number of factors filter in—because certainly then newsworthiness sweeps up non-physical harm issues.

NEVILLE JOHNSON: To imagine this hypothetical where Lay and Cheney don't discuss anything of substance but golf and they are setting up their golf match: is it a public concern because the public wants to know that these guys have a close personal relationship? That is the cusp right there that I would be very concerned about. And I don't know, in light of what the court is saying, it will be a very touchy or close call.

GARY BOSTWICK: I can say that I would not be concerned with a case that was of unusual public concern, even if it didn't have to do with the threat of harm. I believe that we can see from the text that was merely an example, that namely he is explaining what he means. He's attaching the facts of this case to his abstract principle, which is unusual public concern. I think Cheney talking to Lay, that's unusual public concern these days. It doesn't matter if it has nothing to do with physical harm. If they are talking about going fly-fishing in Wyoming, then I think that's unusual public concern.

REX HEINKE: [Let's] take this hypothetical that we already have and take out Afghanistan and anthrax and all that kind of stuff, and turn it into a kind of garden-variety not big deal. What if they're just discussing that maybe they have some environmental problems on their property and it's possible that that might lead to problems for people in the community, but they're really not certain of that. They've had a scientist look into the thing and her conclusions are equivocal as to whether or not this chemical

that they dumped on this property ten years ago might or might not have any adverse affect on public health.

Once you kind of crunch it down like that, at some point I get pretty queasy about disclosing that, because there's just not a whole lot of "there" there. I would look at it and say, if I had to stand in front of twelve jurors, would I expect them to say, "Yeah, we want to know about that." If I think the answer is that twelve of them would say, "Yeah, we think it's reasonable that people know about that," and I'm also convinced that it's true, then I'm pretty confident of going.

NEVILLE JOHNSON: I had a lawsuit against NBC's "Dateline," where they were trying to sting certain people. I discovered in the course of that that they had secretly taped some gentleman in San Diego and never disclosed it to him and never ran the story because they said, "Well, we decided he was clean." That case hasn't been brought yet, of the individual who didn't get broadcast but who got secretly taped. And I query how many times this has happened to unsuspecting Americans, where the news media just goes out on a sort of drive-by shooting level to see who they could find who may have done or may be tempted to do something bad.

Until recently, ABC had an individual who worked fulltime going around secretly taping other Americans. When I took his deposition, he was clear: he had no journalistic training, he just taped anybody he was told to tape, anytime, with his hidden cameras. That's how bad it got. I don't know where it's at today, with respect to the news media and the hidden camera taping. But, the bottom line is, when the news media start crossing over into the police powers of the government and acting as quasi policemen, that's when the court system is going to step in and say, "Excuse me, these are the barriers, these are the boundaries." The worse the harm to the individual, the higher the stakes economically. Ultimately to the news entity, we make a policy many times of suing the journalists as well. Many times, we sue the lawyers and I want to make that clear to everybody here now and the people that are going to be reading this transcript.

If you are a lawyer and you tell somebody that it's okay to tape and it was not okay to tape, you have just authorized the commission of a crime. You have just put your Bar license in jeopardy. You do that twice and you're going to really have some big problems with any State Bar, anywhere. So, the problem is that many of these lawyers at the news media organizations are playing a game of chicken with the plaintiffs' Bar saying, "Well, let's see how close we can come without crossing over the line of a tort." And I'm saying, "No, you should be thinking outside the box and inside the box: what am I going to do to make sure that my journalist is not

going to get tagged so there's no problem whatsoever?" The journalist and his lawyer should not be thinking, "Where's the loophole in this particular law?"

What I want to promote is good, hard-core, serious shoe-leather journalism, and if you look at the one hundred greatest stories of the last century, as prepared by, I think, the *New York Times*, none of them—not one—involved impersonation or hidden cameras. That's not what it was about. The great stories are [people like] Seymour Hirsch . . . who uncover [the Vietnam War's] My Lai Massacres and things like that.

LAWRENCE SOLUM: I think Jay wants to jump in.

F. JAY DOUGHERTY (*Audience Member*): Last week or so I saw two stories on the news involving hidden cameras.

NEVILLE JOHNSON: Well, what month is this? Is this February? It must be sweeps.

JAY DOUGHERTY: Yeah, it is sweeps this week, but these may have been on before sweeps. One of them was about valet parking in Los Angeles. They had cameras inside the car, so that once they parked their car they could film valets and what they did. And they repeatedly showed valets in top Los Angeles restaurants immediately taking any money that was in the car, looking around the car for wallets, taking money out of wallets, taking whatever they could.

The other story I think was during the last few days. It was a story about unlicensed real estate brokers who sell supposedly available apartments that aren't really for rent. In the valet parking story, they just had cameras in the cars, although presumably the only reason they're at the restaurant is to do the story. And in the other case, they had people going in and pretending to be customers, with a camera.

I was really glad to see those stories and I wonder two things. Is this unlawful enough to make these stings actionable? And secondly, why shouldn't the media be serving this kind of function? Hasn't it served this kind of function for one hundred years? These may not be within the top one hundred stories of the last century, for sure.

NEVILLE JOHNSON: I didn't say you couldn't ever use a hidden camera. It always comes down to an expectation of privacy. That's what it's about. Expectation of privacy and intrusion; when you get into the seduction and these elaborate stings and you don't give the person the opportunity to rebut, and then it always ends up with somebody barging in somewhere and showing them the picture and saying, "What have you got to say?" Who in their right mind is ever going to stop on a street and say, "Sure, you've entered into my premises on a falsehood and I should sit here and give you some sort of an interview?"

There was one case I had in which I showed up and they had been knocking on my client's door saying, "I want to come in right now." I said, "Who do you people think you are, the Gestapo? I'll tell you what, here's the deal, you can have one hour with my client and you can ask him any questions you want. We're going to do it at the U.S.C. School of Journalism. And then I get one hour with you. Is that okay?" No, they didn't want to do that deal with me. The name of the game is called confrontation journalism and it's always about a little morality play, in which the journalist is supposed to be some kind of hero.

With respect to this particular story of a valet parker, it doesn't sound to me like there may necessarily be an expectation of privacy for a valet parker when he gets into somebody else's car.

LAWRENCE SOLUM: Sounds like Gary has something he wants to say.

GARY BOSTWICK: The whole point here is that if you don't think those valet guys had an expectation of privacy when they were stealing that money, I just don't think we've got any grounds to talk about. The press frequently takes situations where things are happening which are wrong, they should not be happening, and we do not want them to be happening. Yet the state is so strapped worrying about things that are so much more problematic, that they're not doing anything about it. And they won't do anything about it. And, in fact, sometimes the only people who will be able to bring these things out are really good reporters.

I spent some time with a couple of reporters from the *Los Angeles Times* who broke the Rampart story and have been following it ever since. [It is] amazing, what they were able to find out and what they came to—things that they brought forward, that the state would not have brought forward. Yet we, as a society, in fact want to know those things. We need to know those things. Those things are happening and they are affecting our lives. So, there is no way that anybody can draw a complete black-and-white litmus test as to whether or not a reasonable expectation of privacy is how we as a society decide whether the press ought to be able to do something like intrude. It's just not smart. That's not the way we should be building our government or our society.

NEVILLE JOHNSON: I just have one comment: the technique should not drive the story. And what happens is that hidden-camera stories are driven by the hidden camera. I want the story: I'm more for investigative journalism than probably anybody in this room. I love it. I grew up on it. I think it's fantastic and Gary's completely right, that we need it as part of our system of checks and balances.

LAWRENCE SOLUM: You've been waiting to make a comment.

ROD SMOLLA (*Audience Member*): I want to suggest a bridging idea . . . I think it's possible that what could emerge after *Bartnicki* are two different defenses. The routine newsworthiness defense, which applies to causes of action in the nature of revelation of private events, either a common law cause of action or something to that effect where, essentially, the press almost always wins because the newsworthiness defense is co-permanent with the idea of matters of public concern. . . . Intrusion is not a great success from the plaintiff's perspective. It's a good, strong, hard-nosed tort and the press has no First Amendment license to break the law. . . . The problem is that the intrusion is done by somebody else, not by the journalistic entity itself, and so they get off that way.

Well, even if the journalist does engage in the intrusion in some hidden camera cases . . . you've got the damages problem, that you're only supposed to get damages that flow from the invasion as opposed to the embarrassment you feel at the revelation. So now to wrap up, [this hypo presents] what I think is an interesting case because there's a kind of combination of ingredients sort of fact that is a combination of an intrusion aspect, albeit by somebody else, and a revelation of a conversation that people wouldn't want revealed.

What I'm thinking is that we'll have the routine newsworthiness defense, which would apply in the ordinary revelation case. But, when the revelation comes through some antecedent tort, when there's an intrusion and a revelation, and you know there was an intrusion—you didn't see it, but you know there had to be one [as in the case of] a cell phone conversation—you will not see courts applying the same broad newsworthiness defense. It'll be a super-newsworthiness defense. It'll have to be particularly newsworthy.

You'll note the language from Breyer. And it may be that what you're talking about, Gary, is going to be it. It may not be physical violence, but it'll be wrongdoing in some calculable sense, as opposed to just embarrassment in some generalized way. . . .

You intrude at your peril. If you do it, you'd better check, in case you're doing something wrong, because if you don't catch it, if you're doing something wrong and you still go with the story, and it's juicy, you may find yourself in that situation. You won't get the defense.

NEVILLE JOHNSON: If you read *Shulman v. Group W. Productions, Inc.*,[12] you will see this kind of differential analysis in perhaps what you might call quantum mechanical ambiguity. You can be intruding, but it's okay to publish what you got when you did intrude. It was an

12. 955 P.2d 469 (Cal. 1998).

interesting opinion.

CLAY CALVERT: Exactly. We just divide it up along the intrusion versus public disclosure torts. For those in intrusion, it seems as though the one back door for newsworthiness is the intruder's motive, which can be factored in, in terms of whether it's highly offensive to a reasonable person. And then you would say, "Well, my motive was noble, it's less offensive," but will that save it or not?

REX HEINKE: There was a law review article quite a few years ago by Professor Hill at Columbia which went through some of these things and he had an example of two intrepid reporters in upstate New York.[13] They find the location of the mob meeting, they somehow sneak onto the estate, and get up in the attic. They wire it for sound and cameras and then they tape the whole meeting and somehow get out alive and broadcast it. What Hill said in his article was, who is it that's really going to decide to punish these people, even though they broke every one of the rules, coming and going? They're on private property, they're trespassing, it's certainly a confidential meeting, they're doing it without permission, and so on. Nobody in that kind of situation is going to punish these people and maybe that, in the end, is kind of like what you're suggesting: it's the super-public interest. If you have a super-public interest, then it's not going to be actionable, whether you say it's under *Bartnicki* or some other kind of analysis. In the end, what you're doing is finding that some other public interest outweighs any illegal or tortious conduct because of the importance of getting the information out.

NEVILLE JOHNSON: You know, the *Los Angeles Times* got hit so badly with the Staples debacle. It was just a public relations disaster from which it has never recovered and it ruined morale at the newspaper. I know a lot of journalists that work there. It was a scandal.

The *Food Lion* case was probably the worst thing that ever happened to ABC News and I am sure that Food Lion did a lot of bad things. The press has now become an issue of public interest. Press ethics is an issue of public interest and it's going to stay there when you've got Connie Chung doing whatever she was doing when she was interviewing the mother of Newt Gingrich, etc. These gaffes, problems, whatever, are going to cost the newspaper, not just in the court of law, but also in the court of public opinion. That's another reason why journalists should want to toe the line and be as careful as possible, to maintain the public wheel.

LAWRENCE SOLUM: We talked a lot about the cell phone part of

13. Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COL. L. REV. 1205, 1243 (1976).

the hypothetical and we've talked a little bit about going into the lab, and there seems to be a consensus on the panel that you certainly can't go in fraudulently. Is there any way you can go in? If you get an employee at the lab to cooperate voluntarily, can he videotape in the areas of the lab that he has legitimate access to?

NEVILLE JOHNSON: The false employee business isn't going to work. I think that's pretty standard across the board. The issue is more along the lines of the *J.H. Desnick, M.D. v. ABC, Inc.*[14] situation versus, say, a *Sanders*-type of situation. In *Desnick*, Judge Posner said it was sort of an open area and this person was more like a tester. On the other hand, we're [uncertain] as to whether Illinois even recognizes a right of privacy. Also, in that case, it was the corporation that was seeking to protect its interest as opposed to an individual, if I remember correctly.

We're going to argue [a case] in March in the Ninth Circuit . . . over a business meeting that took place in Arizona where there were impersonators from ABC. We lost in the district court level on summary judgment,[15] but I think it's going to get turned around. There was the case last year of *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*[16], which goes to show you the incredible power of the media.

LAWRENCE SOLUM: I think we've lost focus on the hypothetical. . . . Rex, if you are advising a client who wants to get into the lab, to get some video, is there any way he can do it that is legitimate (short, obviously, of getting permission from the lab owners)? Just to make it clean, let's assume that there's really anthrax being made in there and they'd like to have some video of that happening. Is there any way they could do it?

REX HEINKE: Well, I think it depends on what jurisdiction you're in, as to what the laws are. For example, California is an all-party consent jurisdiction. Everybody who's a party to the communications has to consent to the recording. A lot of jurisdictions either have no statutory law or allow single-party consent. So, much of this is going to depend on where you are. Some of it is also going to depend on why you're doing it. I think Gary pointed out earlier, for example, that while California law prohibits audiotaping, it doesn't prohibit taping of visual images. So you've got to look fairly closely at what the law is, in the jurisdiction you're in.

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14. 233 F.3d 514 (7th Cir. 2000).

15. Med. Lab. Mgmt. Consultants v. ABC, Inc., 30 F. Supp. 2d 1182 (D. Ariz. 1998).

16. 199 F.3d 1078 (9th Cir. 1999). The Ninth Circuit later withdrew that opinion. Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 237 F.3d 1007, 1008 (9th Cir. 2001).

LAWRENCE SOLUM: So, in California, if I can get an employee who works in the lab to go in and videotape, no problem?

REX HEINKE: I didn't say "no problem," but I think you've got a viable defense in that situation.

NEVILLE JOHNSON: Hey look, that's what *Sanders* was about. In *Sanders*, I lost on [California] Penal Code section 632. And the defense said, "That's it, we're out of the case, goodbye." I said, "Wait a minute, let's just go ahead with the images alone on the intrusion claim." The judge said, "Go ahead." We went all the way to the California Supreme Court. We prevailed on that.

REX HEINKE: I thought what the court said . . . was that it was a triable issue.

NEVILLE JOHNSON: No, I had already won. I'd won. . . .

CLAY CALVERT: Let's go back to the hypothetical. The laboratory issue had two different parts to it. One is, it had windows down the hallway that you could shoot into and you could see into. Anybody going down the hallway that works there probably could see that. I don't think you really have an expectation of privacy if I can see into your place. I don't know about the videotaping part, but the second part is whether going in constitutes trespass into a lab that is specifically marked "Laboratory, Workers Only." Whether you get that, I don't know.

NEVILLE JOHNSON: There's an old California case, I think it was a pharmacy where they had taped from the street into the pharmacy, and I would say that it's a good defense probably that what can be seen more or less from the street [is not intrusion].

GARY BOSTWICK: Yes, but in this hypothetical you're inside already, presumably in an area that people walking down the street would not be allowed into—which is, of course, very similar to *Sanders*. Being inside, opening the door where you know you're not supposed to be because there is a sign, that's clear, that's very easy. But the other one, even when I read you're walking down the hall and there's windows there, I still think you've got a problem with *Sanders*, because people believe that people will be walking down that hall, but people do not believe there will be cameras that will show the program to millions of people [who then] will be walking down that hall. We're right back to the reasonable expectation.

NEVILLE JOHNSON: The distinction in *Sanders* was that you do not, as a co-worker, expect that your other co-worker is taping you for national television. But they left effectively open, and I think there's a good argument, that while you could think that maybe your employer might be taping you, you don't think that your co-employee is taping you.

But you might think that if a camera was on the street and a curtain was open, hey, they got me walking down the street, which still raises another issue. Do they have the right to show my image in such a situation that may still be a publication of a private fact or an intrusion? There are various cases and various jurisdictions that would find that.

LAWRENCE SOLUM: Gary, do you have more to say about this?

GARY BOSTWICK: There would be a way I'd feel perfectly comfortable having the cameras go in there, but it's so simple and so unlikely to happen. If you have a whistle-blowing employee who has enough authority, for instance the factory manager, the question now is: is it within the scope of his authority to allow people to be in there taping when, in fact, that was *ultra vires*? But if the factory director/manager said, "Yeah, you guys come in, I'm really worried about what's happening here, I thought this stuff was talcum powder and look what it is. And I didn't know, but I'm running the place and. . ." It's so unlikely, but there are ways where that sort of scenario with slight variations does get played out.

NEVILLE JOHNSON: I want to say one thing about that: it's okay if it's a pure motive alone for that particular individual. The big concern is a situation like a Food Lion or PETA [People for the Ethical Treatment of Animals] particularly, which loves to do it. What they were saying at Food Lion is, how can you serve two masters? You're supposed to be doing a good job as an employee. So, if you're truly a whistle-blower and you're not working for a journalistic organization or for the union or some competitor, okay, you've got a much more legitimate argument.

LAWRENCE SOLUM: We've got about six minutes left and so I think this is an appropriate time to give everyone one to two minutes for concluding reflections. We will start again with you, Clay.

CLAY CALVERT: With regard to the valet issue that was brought up: obviously, "Ferris Bueller" answered that question, because we all know what happened there. The *Desnick* case comes up on the trespass issue, with regard to the idea of customers that Jay brought up. If the ordinary course of business is not disrupted—and that seems to be Posner's decision in that case—then the goal of trespass law, which is the use and enjoyment of my property, is not interfered with. And that seems to be why [the case had] that result. The issues again come back to . . . the *Smith v. Daily Mail* analysis of lawfully obtained truthful information about an event of public significance. I had thought the only really key issues [in that decision] were "unlawfully obtained" and "public significance," but the "truthful" part really seems to play a part, too. Is this actually what was said? Do we know whether the underlying substance of it is true as well?

And so that comes into play. So I guess all three of the prongs for that test really come into play.

LAWRENCE SOLUM: Gary, any concluding thoughts?

GARY BOSTWICK: Throughout the discussion, it seems to me that one of the concepts that keeps popping up—sometimes expressly and sometimes a little under the table—is the concept of newsworthiness. And I think that we have not fully explored that idea. The reason I say that is, there is no question in my mind that if two *Boston Globe* reporters had broken every rule of journalistic newsgathering that we know existed, but found, in time to foil the September 11th attacks, any information, any film, any audiotape, anything, there's not one court anywhere that would find them liable for anything.

And I think that that's an extreme, but what happened that day was extreme, too. The whole point is, for me, much of the time, newsworthiness is probably going to be the driver, even if the court doesn't talk about it. Even if the court doesn't admit it, newsworthiness, if it's high enough, is going to justify almost anything.

LAWRENCE SOLUM: Neville, concluding thoughts.

NEVILLE JOHNSON: The "journalist-as-a-caped-crusader" is an extremely troubling concept. The journalist who believes he can break the law for his own ends, is going to ultimately find himself in the witness box and he puts his career, his reputation, and his pocketbook in jeopardy and demeans all journalism, ultimately. Journalists must strive to get the truth, and do so by honest means. Journalists should not go into business with the government to prove whatever it is they want to prove. They need to watch the government. Journalists should not be driven by sensationalism and techniques such as the hidden camera. Journalists should not make themselves—and this is something that I've seen frequently—a participant in the story. When you do that, you are effectively covering yourself, and you lose all bias. Journalists, when they engage in investigative journalism, must bend over backwards, even though they detest doing so, to get the other side of the story so that the person who is an unwilling and possibly even unwitting subject of the story is given an opportunity to fairly present his position. The reason you want to do this is not only to find yourself in accordance with the strictures of the law, but also because it is humanistic to do so and it is inhuman and un-American to not allow somebody to fairly fight back and defend himself.

LAWRENCE SOLUM: Rex.

REX HEINKE: Well, I think breaking the law is in a sense really the question here, but we've seen the law evolve over time as to what is or is not an illegal activity or a tortious activity. . . . It was hornbook law at least

from the time of *Chaplinsky v. New Hampshire*[17] up until *New York Times v. Sullivan*[18] that if you made a libelous statement, the Constitution had no impact on whether you had liability in that situation. And since *Sullivan*, we have clearly seen the law of defamation evolve to the point that Constitutional law is maybe the single biggest area of defamation law at this time. Things that were actionable torts before *Sullivan* and its progeny are not actionable torts at all now. They are not violations of the law; in fact, they are perfectly lawful conduct. So, I don't think you can frame the question in terms of, "Is the media breaking the law," and say, "Well, because I think it's a tort, then they broke the law. They can't do it." It's a more complicated question. You've got to take the statutes or the common law. See if those have been violated. But that's not the end of the analysis to breaking the law. Then the question becomes, what is the impact of the Constitution on that and is it therefore lawful because of the Constitution?

And in this area, you get back to this fundamental tension that we've been talking about all afternoon: on the one hand, I think everybody recognizes there are legitimate privacy rights that need and must be protected. And on the other hand, all of us, I think, would want [the result described in] the story that Gary suggested about September 11, or in the hypothetical Professor Hill had about the mafia. Or even, I think, the *Bartnicki* [result]. So, the continuing debate is, how far are we going to shift in one direction or the other in deciding what constitutes breaking the law? How important do we think various types of information are to be gotten out to the public, versus the fact that the more information you take from people in the kinds of situations we've been talking about does certainly invade privacy to some extent—that's where the continuing debate is. I don't think it can be resolved by saying things like, "You can't engage in torts and you can't break the criminal law." That's part of the analysis; but the rest of it is, what's the impact of the Constitution on ultimately determining who's breaking the law?

LAWRENCE SOLUM: And with that I think we should thank our panel and the rest of the audience who participated.

17. 315 U.S. 568 (1942).
18. 376 U.S. 967 (1964).