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# Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?

Clay Calvert

*Pennsylvania State University*

Kelly Lyon

*WALB-TV*

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# ARTICLES

## Reporting on Child Pornography: A First Amendment Defense for Viewing Illegal Images?

BY CLAY CALVERT\*  
& KELLY LYON\*\*

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Assistant Professor of Communications & Law and Co-Director of the Pennsylvania Center for the First Amendment at The Pennsylvania State University. B.A. 1987, Communication, Stanford University; J.D. (Order of the Coif) 1991, McGeorge School of Law, University of the Pacific; Ph.D. 1996, Communication, Stanford University. Member, State Bar of California. Professor Calvert thanks Professor Theodore L. Glasser of Stanford University for his thoughtful comments on the topic of this Article and Kelly Bradish of The Pennsylvania State University for her careful proofreading and editing.

\*\* News Producer, WALB-TV, Albany, Georgia. B.A. 2000, Journalism and American Studies (with Honors and Phi Beta Kappa), The Pennsylvania State University.

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## INTRODUCTION

When it comes to speech, child pornography<sup>1</sup> is perhaps more reviled in the United States than any other form of expression. Its distribution and possession fall outside the scope of First Amendment<sup>2</sup> protection.<sup>3</sup> Even “virtual” child pornography—images

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<sup>1</sup> The United States Supreme Court has never established, as one federal appellate court recently put it, “a single one-size-fits-all constitutional definition of child pornography.” *United States v. Hilton*, 167 F.3d 61, 69 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999). In contrast, the Court has defined a specific, three-part test for another category of sexually explicit speech: obscenity. *Miller v. California*, 413 U.S. 15, 24 (1973) (setting forth the three-part constitutional standard for determining obscenity). Child pornography is defined for purposes of federal law at 18 U.S.C. § 2256(8) (Supp. IV 1998).

<sup>2</sup> The First Amendment to the United States Constitution provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>3</sup> *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that the distribution of materials defined as child pornography under New York law is “without the protection of the First Amendment”); *Osborne v. Ohio*, 495 U.S. 103, 103 (1990) (holding that “Ohio may constitutionally proscribe the possession and viewing of child pornography”).

that merely *appear* to be of minors engaged in sexual conduct—is banned under federal law.<sup>4</sup>

And when it comes to professions and occupations, none is perhaps more loathed and distrusted than that of journalists.<sup>5</sup> After sensational and excessive coverage of the scandal between President Bill Clinton and erstwhile intern Monica Lewinsky in 1998,<sup>6</sup> public anger at news organiza-

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<sup>4</sup> See 18 U.S.C. § 2256(8)(B) (Supp. IV 1998) (defining child pornography to include, among other visual depictions, computer-generated images of minors who appear to be engaging in sexually explicit conduct). The legislative record behind the law on virtual child pornography reveals that Congress was concerned that new technologies allow for the creation of visual images “of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct.” S. REP. NO. 104-358, at 2 (1996). How are these images created? Professor Debra Burke writes:

No longer are children needed in the production of child pornography. Through a technique know as *morphing*, the image of a *Penthouse* Pet can be scanned into a computer, then transformed fairly inexpensively through animation techniques into the image of a child. This computer-generated pornography, or *virtual child pornography*, can be customized to suit specific sexual preferences and used to alter non-obscene pictures of existing children. It can also be created imaginatively from adult pornography.

Debra D. Burke, *The Criminalization of Virtual Child Pornography: A Constitutional Question*, 34 HARV J. ON LEGIS. 439, 440-41 (1997) (footnotes omitted).

<sup>5</sup> Bruce Sanford, a media defense attorney and partner with the law firm Baker & Hostetler, wrote in 1999 that “[a] canyon of disbelief and distrust has developed between the public and the news media. Deep, complex and so contradictory as to be airless at times, this gorge has widened at an accelerating rate during the last decade. Its darkness frightens the media.” BRUCE W. SANFORD, DON’T SHOOT THE MESSENGER: HOW OUR GROWING HATRED OF THE MEDIA THREATENS FREE SPEECH FOR ALL OF US 11 (1999). Even journalists today often “find fault with how they do their jobs.” Dylan Loeb McClain, *More Journalists Are Critical of the Media*, N.Y. TIMES, Apr. 5, 1999, at C9.

<sup>6</sup> Lewinsky was alleged to have had “sexual liaisons with President Clinton.” William Booth & William Claiborne, *Lewinsky Seeks A ‘Normal’ Life*, WASH. POST, Feb. 4, 1998, at A12. President Clinton acknowledged in a televised speech on August 17, 1998, that he had “a relationship with Miss Lewinsky that was not appropriate.” Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal ‘Prying’*, WASH. POST, Aug. 18, 1998, at A1. For background on the upbringing and life of Monica Samille Lewinsky, see Romesh Ratnesar, *The Days of Her Life*, TIME, Feb. 2, 1998, at 36.

tions was “boiling over.”<sup>7</sup> Recent surveys confirm what common sense suggests—that many people today see journalists as often biased individuals who invade others’ privacy and over-sensationalize stories to sell newspapers.<sup>8</sup>

Now put the two together, and it seems clear that a journalist caught transmitting and receiving child pornography on the Internet is highly unlikely to receive any public sympathy. “Lock up the pervert and throw away the key,” one can imagine onlookers shouting at the offending reporter as he’s hauled off to jail.

But it may not always be that simple or quite such an open-and-shut case. A rush to judgment may not only be hasty, in fact, but thoroughly shortsighted and seriously misguided. Consider the following questions, each adding complicating facts to the above-mentioned scenario:

- What happens if the journalist was viewing the offending images as part of his research for a news story “investigating the frightening and horrifying cyberworld which involves the sexual exploitation of children”<sup>9</sup>

- What happens if the same journalist professes to be “dedicated to the ideals of journalism as a source of information for the public regarding matters of significance to society”<sup>10</sup> and maintains that trading child pornography “was an unfortunately necessary means of gathering information”<sup>11</sup> and securing access to a world from which he otherwise would have been excluded?

- And does it make any difference that the same journalist earlier had done a three-part story for a major Washington, D.C. radio station—WTOP—reporting on the phenomenon of child pornography on America Online, a major Internet service provider?<sup>12</sup>

According to the Fourth Circuit Court of Appeals in its April 2000 ruling in *United States v. Matthews*,<sup>13</sup> these added facts *don’t* make a

<sup>7</sup> Tom Hamburger, *Impeach the Media?*, STAR TRIB. (Minneapolis, Minn.), Feb. 15, 1999, at 13A.

<sup>8</sup> Susan Sward, *Newspaper Editors Study Ways to Regain Public Trust, Respect*, S.F. CHRON., Apr. 12, 1999, at A1.

<sup>9</sup> Brief of Appellant at 4, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 8 (detailing when Lawrence C. Matthews first began investigating the exploitation of children on the Internet). In January 2000, America Online engaged in a “stunning takeover” of traditional media giant Time Warner. Allan Sloan, *Hunting the Big Bucks*, NEWSWEEK, Jan. 24, 2000, at 28.

<sup>13</sup> *United States v. Matthews*, 209 F.3d 338 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

difference.<sup>14</sup> The appellate court unanimously denied Lawrence C. Matthews, an award-winning veteran journalist,<sup>15</sup> the right to present a First Amendment-based free press defense to criminal charges that he sent and received child pornography over the Internet.<sup>16</sup> The court concluded that although Matthews's claim that he traded in child pornography for a proper purpose—solely as a journalist engaged in the process of gathering information for a news story—“has visceral appeal,”<sup>17</sup> his “asserted First Amendment defense simply enjoys no support in the law. Accordingly, we must reject it.”<sup>18</sup>

The decision conflicts with those from other federal courts that have allowed defendants to present what might be thought of as a First Amendment-grounded “legitimate-use defense” to charges of transporting or possessing child pornography. In an unpublished order in 1992, a federal district court in the state of Washington held that “[a]n academic researcher who transports or possesses child pornography does not run afoul of the legislative purposes behind banning transportation or possession of child pornography.”<sup>19</sup> The trial court thus concluded that child pornography legitimately possessed or transported for academic purposes is one of the “narrow categories” of that material protected by the First Amendment.<sup>20</sup>

More importantly and recently, a federal district court in New York held in a reported decision that a psychiatrist “may well advance the argument that his possession of child pornography was pursuant to research he was undertaking in his capacity as a psychiatrist at the Auburn Correctional Facility.”<sup>21</sup> The court suggested that this “as-applied”<sup>22</sup> defense could be presented to the jury to “evaluate the credibility of defendant’s proffered explanation.”<sup>23</sup>

Given both this split of authority among federal courts located in different circuits and the hot-button topic of child pornography, the issue in *Matthews* was ripe for review by the United States Supreme Court. The

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<sup>14</sup> *Id.* at 344-50.

<sup>15</sup> Matthews won a George Foster Peabody Award for his reporting. *Id.* at 339

<sup>16</sup> *Id.* at 350.

<sup>17</sup> *Id.* at 344.

<sup>18</sup> *Id.* at 350.

<sup>19</sup> *United States v. Bryant*, No. CR92-35R, at A7 (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress).

<sup>20</sup> *Id.*

<sup>21</sup> *United States v. Lamb*, 945 F. Supp. 441, 450 (N.D.N.Y. 1996).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

Supreme Court, however, denied Lawrence Matthews's petition for a writ of certiorari in late 2000. Perhaps the most important reason the case should have been heard is simply this: the only way the public will be able to know the true extent of the twin problems of child pornography and sexual exploitation of minors on the Web (as well as to determine how effectively law enforcement agents are policing that unseemly online world) is if journalists like Lawrence Matthews and academic researchers are able to conduct research freely on these topics and to report their findings to the public in mass media outlets and scholarly journals.

This Article thus argues that the Fourth Circuit's decision in *Matthews* was, in a word, wrong. Journalists—like professors and psychiatrists—should be allowed, at the trial court level, to make a First Amendment-based argument in their defense that their receipt and transmission of child pornography constitutes a legitimate or good use. The ability to assert such a defense is highly controversial because, in essence, it amounts to a request to possess a right to engage in criminal conduct in order to gather news.

This Article further contends that Lawrence Matthews ultimately was attempting to engage in speech affecting political decision making, arguably the most prized form of expression under the First Amendment.<sup>24</sup> In particular, it argues that First Amendment interests in gathering facts for news stories that could affect or influence legislative initiatives and actually change the laws on child pornography outweigh those that prevent journalists from raising a "legitimate-use" defense. A journalist should at least be able to assert this defense—an opportunity that Matthews was denied—and it should be left for the fact finder to determine whether, in fact, the use was legitimate.

The *Matthews* case raises a number of important questions related to the viability of a "legitimate-use" defense. The threshold issue is whether there is any precedent that would support a defense or privilege for a journalist to violate generally applicable laws, such as those against child pornography, when conducting research for an article that could affect public laws and policies. Even in the absence of any precedent, one still must consider whether there are any valid policy considerations that support the creation of such a defense or privilege.

Assuming that such an argument can be made, another important issue arises: *Who* should be allowed to assert this defense? This question ensues

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<sup>24</sup> "There is little disagreement that political speech is at the core of that protected by the First Amendment." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.1.2, at 752 (1997).

because the Fourth Circuit framed the case as presenting “an issue of first impression in this circuit: does the First Amendment permit a *bona fide reporter* to trade in child pornography to ‘create a work of journalism’?”<sup>25</sup> Defining who constitutes a “bona fide reporter” may be a difficult task, because journalism is an unlicensed profession in the United States. The Third Circuit Court of Appeals, however, in *In re Madden*,<sup>26</sup> recently set forth a three-part test<sup>27</sup> for determining who is a journalist within the context of a qualified reporter’s privilege not to divulge the identity of sources.<sup>28</sup>

Finally, another critical issue involves the instructions that a jury should receive for determining whether, in fact, the defendant was engaged in a legitimate use of child pornography for a valid journalistic purpose. This Article proposes, for scholarly critique and judicial review, a set of criteria that might be useful in guiding jurors through this process.<sup>29</sup> The suggested guidelines articulated here are to be considered by juries in a totality-of-the-circumstances approach, with no one factor controlling or dominating the analysis.

Part I of this Article describes the twin problems of child pornography and sexual predators in cyberspace.<sup>30</sup> Part II then sets forth the facts, issues and arguments in *United States v. Matthews*, as well as the Fourth Circuit’s reasoning in denying Matthews the right to present a First Amendment-based “legitimate-use” defense.<sup>31</sup> Part III critiques and criticizes the decision.<sup>32</sup> Part III also explores the consequences and ramifications of the

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<sup>25</sup> *United States v. Matthews*, 209 F.3d 338, 342 (4th Cir.) (emphasis added), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>26</sup> *In re Madden*, 151 F.3d 125 (3d Cir. 1998).

<sup>27</sup> *Id.* at 131 (“[I]ndividuals claiming the protections of the journalist’s privilege must demonstrate the concurrence of three elements: that they 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the news-gathering process to disseminate this news to the public.”).

<sup>28</sup> See generally Clay Calvert, *And You Call Yourself a Journalist? Wrestling With a Definition of “Journalist” in the Law*, 103 DICK. L. REV. 411 (1998) (analyzing the decision in *In re Madden*).

<sup>29</sup> See *infra* pp. 60-63.

<sup>30</sup> See *infra* notes 36-63 and accompanying text. “Cyberspace, originally a term from William Gibson’s science-fiction novel *Neuromancer*, is the name some people use for the conceptual space where words, human relationships, data, wealth, and power are manifested by people using CMC [computer-mediated communication] technology.” HOWARD RHEINGOLD, *THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER* 5 (1993).

<sup>31</sup> See *infra* notes 64-250 and accompanying text.

<sup>32</sup> See *infra* notes 251-300 and accompanying text.

*Matthews* ruling for both journalism and the public, and it situates that result within the broader context and framework of a growing public and legal backlash against aggressive journalistic news-gathering practices. The Article argues, in brief, that this public hostility toward the press produces a climate in which investigative journalists are not likely to receive judicial sympathy for their surreptitious and duplicitous news-gathering activities, regardless of their actual merit or necessity.<sup>33</sup> The *Matthews* decision is more easily understood and better explained when placed in this broader context.

Part IV then articulates a set of potential jury instructions for determining when a journalistic use of child pornography might be legitimate, should federal appellate courts other than the Fourth Circuit decide to adopt such a defense.<sup>34</sup> Bridging law with ethics, the Conclusion ultimately posits that, given both the extent and gravity of the dual problems of online child pornography and sexual predators today, the Court should not only have granted certiorari in *Matthews* but also should have allowed journalists and other researchers the opportunity to present a “legitimate-use” defense in cases in which they are accused of trafficking in child pornography.<sup>35</sup> The case represented an excellent chance for journalists to explain cogently to the Court and the public the importance of news gathering and the watchdog role of the press in the new millennium. The case also presented a chance to quiet criticism of the journalism profession.

#### I. THE SORDID SEXUAL UNDERGROUND OF CYBERSPACE: PREDATORS, PORNOGRAPHY, AND THE PROMISED LAND FOR PEDOPHILES

Anyone surfing the World Wide Web<sup>36</sup> today certainly is aware that “this new marketplace of ideas”<sup>37</sup> is, in fact, a virtual and vibrant market-

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<sup>33</sup> See generally Clay Calvert, *The Psychological Conditions for a Socially Significant Free Press: Reconsidering the Hutchins Commission Report Fifty Years Later*, 22 VT. L. REV. 493, 517 (1998) (arguing that “[a] public that does not value the press when it plays its roles as educator and watchdog is a public primed to penalize it”).

<sup>34</sup> See *infra* notes 301-11 and accompanying text.

<sup>35</sup> See *infra* notes 312-30 and accompanying text.

<sup>36</sup> The World Wide Web “is a global hypertext system that runs on the Internet” and allows one to “navigate by clicking on hyperlinks (embedded links) that connect to other documents or graphic, audio or video resources.” Joseph Kershenbaum, *E-Commerce Primer: A Concise Guide to the New Public Network*, E-COMMERCE L. REP., Sept. 1999, at 14, 14-15.

<sup>37</sup> *Reno v. ACLU*, 521 U.S. 844, 885 (1997). The concept of a marketplace of ideas is not new. It “is perhaps the most powerful metaphor in the free speech

place of pornography.<sup>38</sup> One particularly pernicious and related problem is that of sexual predators who not only receive and transmit child pornography on the Web,<sup>39</sup> but also lure and entice minors, via chat room conversa-

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tradition." RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992). The marketplace metaphor "consistently dominates the Supreme Court's discussions of freedom of speech." C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 7 (1989). The metaphor is used frequently today, more than eighty years after it first became a part of First Amendment jurisprudence with Supreme Court Justice Oliver Wendell Holmes, Jr.'s often-quoted admonition "that the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). See generally W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 *JOURNALISM & MASS COMM. Q.* 40 (1996) (providing a recent review of the Court's use of the marketplace metaphor).

<sup>38</sup> According to Forrester Research, a company that tracks the Internet pornography industry, the market for online adult fare now is worth approximately \$1 billion in sales annually. David Lazarus, *Tricks of the Trade*, *S.F. CHRON.*, Sept. 11, 1999, at D1.

<sup>39</sup> A review of police and court-related stories from newspapers across the United States during just a three-month period—March through May 2000—suggests that the receipt and transmission of child pornography on the Internet is a serious problem. See, e.g., Nathan Collins, *Teen Girl Caught in Porn Sting*, *DETROIT NEWS*, May 5, 2000, Metro, at 5 (describing the case of a seventeen-year-old Michigan girl arrested and accused of distributing over the Internet sixteen "images of minors having sex with other kids, adults and animals"); Henry K. Lee, *Pleasanton Coach Faces Child-Porn Charges*, *S.F. CHRON.*, Mar. 21, 2000, at A20 (describing the case of a California man charged with two counts of child pornography related to downloading more than fifty lewd images of children in a two-month period in 1999 and possessing child pornography); Russell Lissau, *Woman Arrested on Charges of Child Porn*, *CHI. DAILY HERALD*, May 9, 2000, at 1 (describing the case of an Illinois woman who was "accused of sending pornographic images of young children having sex with adults to computer users in California"); Lesley Rogers, *Ex-UW-Official To Stand Trial in Child Porn Case*, *WIS. ST. J.*, May 17, 2000, at 3B (describing the case of a former University of Wisconsin-Madison assistant dean accused of using a University computer to download "thousands of files of pictures of adults having sex with children"); *Pawtucket Man Sentenced in Child-Pornography Case*, *PROVIDENCE J.-BULL.*, May 20, 2000, at 10A (describing the case of a Rhode Island man who was sentenced to thirty-three months in federal prison for possessing images on his computer of children engaging in sexually explicit activity); Rosa Maria Santana, *Strongsville Man Charged With Having Web Child Porn*, *PLAIN DEALER* (Cleveland, Ohio), May 19, 2000, at 3B (describing the case of an Ohio man who allegedly had more than 600 computer images involving child

tions, into illegal sexual conduct at arranged meeting places.<sup>40</sup> By the year 2002, an estimated forty-five million children are expected to be online, giving cyber-stalking pedophiles a huge pool of potential victims from which to choose.<sup>41</sup> As one federal prosecutor told a jury in a 1999 case involving a man accused of raping a fourteen-year-old girl after using Internet chat rooms to bait her to a motel, “[t]he Internet is a powerful tool that can be used for good, but it’s also a powerful tool for predators looking to prey on young girls.”<sup>42</sup> Or, as a prosecutor in Orange County, California recently put it, the Internet “really is the promised land for child molesters.”<sup>43</sup>

The numbers bear out this carnal capacity. The FBI’s Innocent Images Task Force, a group that polices cyberspace for sexual predators, “opened 1500 criminal cases in 1999 focusing on children and the Internet.”<sup>44</sup> The task force was founded in 1993 and made its first well-publicized arrests in 1995 of individuals transmitting child pornography and soliciting sex from minors using America Online.<sup>45</sup> According to a recent report on the CBS news magazine *48 Hours*, investigators believe there could be tens of thousands of sexual predators searching the Internet for victims.<sup>46</sup>

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pornography on a computer seized from his home); Linda Satter, *Man Faces Child Porn Site Charge*, ARK. DEMOCRAT-GAZETTE, May 11, 2000, at B5 (describing the case of an Arkansas man accused in federal court “of operating an Internet site featuring child pornography”).

<sup>40</sup> See, e.g., M. J. Zuckerman, *Net Entices, then Traps Pedophiles*, USA TODAY, Apr. 19, 2000, at 7D (describing the case of a married doctor with two young children who was sentenced in May 2000 to thirty months in federal prison for “sex crimes involving a child and initiated on the Internet,” and on whose computer were found 250 images of child pornography).

<sup>41</sup> Janet H. Cho, *\$300,000 U.S. Grant to Fight Online Predators*, PLAINDEALER (Cleveland, Ohio), May 12, 2000, at 3B.

<sup>42</sup> Michael James, *Online Sex Trial Opens*, BALT. SUN, Dec. 8, 1999, at 1B. The story of one young female victim of an Internet sexual predator is told in a book called *Katie.com*. Claudia Feldman, *This is Katie.*, HOUSTON CHRON., May 7, 2000, Lifestyle, at 1 (describing the saga of Katie Tarbox and her ordeal as a fourteen-year-old girl with a forty-one-year-old sexual predator).

<sup>43</sup> Jack Leonard, *Online Sex Banter Leads to Criminal Case*, L.A. TIMES (Orange Co. ed.), June 2, 2000, at B1.

<sup>44</sup> Maria Gold, *Mom Hunts Pedophiles on Internet*, WASH. POST, Apr. 10, 2000, at A1.

<sup>45</sup> Kara Swisher, *On-Line Child Pornography Charged as 12 Are Arrested*, WASH. POST, Sept. 14, 1995, at A1.

<sup>46</sup> *48 Hours: Cyberstalker* (CBS television broadcast, Mar. 30, 2000) (transcript on file with authors).

To catch these individuals, law enforcement officials often go online and pose as youngsters.<sup>47</sup> FBI agents, for instance, probe chat rooms “identified as popular meeting places for predators and their [young] victims.”<sup>48</sup> These undercover sting operations are so common today that Shari Steele, an attorney for the Electronic Frontier Foundation,<sup>49</sup> recently remarked that “[t]he vast majority of 12- to 14-year-old girls hanging out in chat rooms with sexually explicit titles to them are most likely cops, and if pedophiles don’t realize that, they’re pretty stupid.”<sup>50</sup>

Consider the job of FBI agent Bruce Applin. His undercover work posing as a thirteen-year-old girl on the Internet was instrumental in the March 2000 guilty plea of Patrick Naughton,<sup>51</sup> a former Infoseek Corp. executive, for attempting to solicit sex from a minor.<sup>52</sup> Applin works out of

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<sup>47</sup> Jim Walsh, *Cybersex Crime Fight Intensifies*, ARIZ. REPUBLIC, Mar. 31, 2000, at B7

<sup>48</sup> *Id.* In one such recent case, a former Allentown, Pennsylvania preacher was convicted for using a computer and an Internet chat room to send child pornography to someone that he believed was an eleven-year-old girl. Elliot Grossman, *Ex-Predator Imprisoned Over Porn*, MORNING CALL (Allentown, Pa.), Apr. 27, 2000, at B1. The recipient turned out to be an FBI task force member. *Id.* A search of the ex-predator’s three home computers revealed more than 20,000 electronic images of child pornography. *Id.*

<sup>49</sup> For information about the Electronic Frontier Foundation and its activities, see the organization’s Web site *Electronic Frontier Foundation*, at <http://www.eff.org> (last visited June 18, 2000).

<sup>50</sup> Suzanne Choney, *Cops Prowl Web to Trap Pedophiles*, SAN DIEGO UNION-TRIB., Oct. 3, 1999, at A1. Some pedophiles, in fact, may be catching on to the online sting operations. The U.S. mail is becoming the “preferred route” once again for transmitting and trading child pornography. Ted Sherman, *Internet Child Pornography Sneaks Past Federal Stings into Mail*, SEATTLE TIMES, Aug. 1, 1999, at A14. Use of the mail, however, is not necessarily any safer for pedophiles and pornographers. Postal inspectors frequently run sting operations to lure those trafficking in child pornography and make controlled deliveries to arrest customers. *Id.*

<sup>51</sup> Naughton is a former executive vice president of Walt Disney Co.’s Go.com Internet site and was employed by Infoseek Corp. at the time of his arrest. Greg Miller, *Former Exec Pleads Guilty to Soliciting Sex with Minor on Net*, L.A. TIMES, Mar. 18, 2000, at C1. He was arrested on the Santa Monica Pier in Southern California in September 1999, when he showed up for what he allegedly expected to be a “sexual rendezvous with a teenage girl” whom he corresponded with in a chat room. *Id.* Naughton, however, claimed it was all just a fantasy and that he believed he was actually corresponding with an adult pretending to be a young girl. *Id.*

<sup>52</sup> Greg Miller, *Careers: A Closer Look at ‘Dream Jobs’*, L.A. TIMES, Mar. 27, 2000, pt. C2 (Business), at 10.

an FBI office on Wilshire Boulevard in Los Angeles, where he and fellow agents sign on to the Web under teenage identities, then enter chat rooms and wait for pedophiles to approach.<sup>53</sup> He generally spends about twenty hours out of a typical sixty-hour week online.<sup>54</sup>

Local law enforcement agencies are also playing an active role in policing this new, technology-facilitated crime wave.<sup>55</sup> For instance, an Ohio man in May 2000 pleaded guilty in federal court to charges stemming from online conversations with someone whom he thought was a thirteen-year-old boy.<sup>56</sup> When he flew to Texas to meet the boy and have sex with him, the suspect was arrested and, undoubtedly, quite surprised to find out that he had been conversing with a Houston police officer.<sup>57</sup>

These pedophile predators are referred to as “travelers” by law enforcement personnel because they often travel from state to state to meet the youths whom they contact online.<sup>58</sup> Almost every day police officers or federal agents arrest a traveler.<sup>59</sup> Although the FBI is often successful in prosecuting the travelers that it traps online, the average sentences are not particularly stiff, usually ranging from just eighteen to twenty-four months.<sup>60</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> One of the top local efforts in the United States is that of Operation Blue Ridge Thunder, run by the Bedford County Sheriff's Office in Virginia. *See Operation Blue Ridge Thunder*, at <http://www.blueridgethunder.com> (last visited May 27, 2000).

<sup>56</sup> *6 1/2-Year Sentence Imposed on Man in Online Sex Case*, COLUMBUS DISPATCH, May 27, 2000, at 4C.

<sup>57</sup> *Id.*

<sup>58</sup> Parry Aftab, *The Cybercops*, LEGAL TIMES, Jan. 31, 2000, at 24.

<sup>59</sup> *CBS Evening News: Sexual Predators on the Internet Being Staked Out by Federal Agents and Other Law Enforcement* (CBS television broadcast, May 22, 2000) (transcript on file with authors) [hereinafter *CBS Evening News*].

<sup>60</sup> M.J. Zuckerman, *Crackdown Stung by Short Sentences*, USA TODAY, Apr. 19, 2000, at 2D. In one egregious case, the Fourth Circuit Court of Appeals ruled that a trial court judge who had given a former Belgian consulate official six months of house detention because he believed the crime was “victimless” had abused his discretion in giving such a lenient sentence. Eric Siegel, *Debeir to Get Longer Sentence*, BALT. SUN, July 31, 1999, at 1B.

In May 2000, the U.S. Sentencing Commission called for Congress to consider a new set of sentencing guidelines with substantially higher prison sentences for sexual predators who stalk minors on the Web. Gary Fields, *Congress to Address Cybercrime Sentencing*, USA TODAY, May 1, 2000, at 3A.

Not only are the sentences short, but the incidence of adult sexual predators meeting minors is increasing.<sup>61</sup>

“We don’t have another crime problem growing like this,” FBI agent Jack Boyle remarked in May 1999.<sup>62</sup> In fact, one year later in May 2000, the Innocent Images task force was taking about twenty-six new cases each week.<sup>63</sup>

## II. TRADING IMAGES, DOING TIME: HOW LAWRENCE MATTHEWS WENT FROM JOURNALIST TO FELON

It was into this sordid world of chat rooms, child pornography and sexual predators that Lawrence Matthews allegedly plunged headfirst in 1996, using screen names such as “MrMature” and “Dd4SubFem” to mask his identity.<sup>64</sup> According to the federal government’s case against him, Matthews’s America Online usage records revealed that in 1996, from July 7 through December 11, he allegedly logged on using these or other screen names nearly every day and, often, several times each day.<sup>65</sup> Frequently, Matthews would venture into the “Preteen” chat room, a place in which he allegedly sent and received at least 160 photographs depicting child pornography.<sup>66</sup>

But that was not all Matthews allegedly did in the chat room. He had online conversations with the type of individuals described in Part I<sup>67</sup>—members of the Innocent Images task force posing as minor females.<sup>68</sup> In one case, Matthews told a federal agent posing as a thirteen-year-old girl that if she agreed to meet him, he would perform oral sex on her, make her climax via manual stimulation and oral sex, and have intercourse with her.<sup>69</sup> He also said he would ask her to perform a strip tease for him.<sup>70</sup> According to the government’s brief filed with the Fourth Circuit Court of

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<sup>61</sup> See Mike Snider, *Study: Kids Lacking Net Supervision*, USA TODAY, May 27, 1999, at 1A.

<sup>62</sup> *Id.*

<sup>63</sup> *CBS Evening News*, *supra* note 59.

<sup>64</sup> Brief of Appellee at 5-8, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>65</sup> *Id.* at 6.

<sup>66</sup> *Id.* at 6-7.

<sup>67</sup> See *supra* notes 44-50 and accompanying text.

<sup>68</sup> Brief of Appellee at 7, *Matthews* (No. 99-4183).

<sup>69</sup> *Id.* at 7-8.

<sup>70</sup> *Id.* at 8.

Appeals, Matthews had a similar sexually charged conversation with another agent posing as a fourteen-year-old girl.<sup>71</sup>

With allegations of such prurient behavior pending against him, one would anticipate a flat denial from the suspect. But that was far from the response of Lawrence Matthews. "He readily admitted," to FBI agents and in his brief to the Fourth Circuit, that "he was on-line communicating with persons in the chat rooms and trading pornography."<sup>72</sup> More importantly, Matthews had a ready explanation for his conduct—he was a journalist who "wanted to know who the people in these chat rooms were and what role law enforcement played in both investigating and prosecuting persons involved in the exploitation of children."<sup>73</sup> Furthermore, he wanted to write a magazine story on these issues<sup>74</sup> and, to do so, this was, as Matthews's attorneys wrote, "an unfortunately necessary means of gathering information."<sup>75</sup> Matthews, in brief, was playing a journalist's watchdog role, serving as a check on the government's efforts to clean up cyberspace.<sup>76</sup>

But Matthews offered more than this general explanation for his online conduct. He could, in fact, offer the federal government reasons for nearly every specific activity in which he engaged. Consider the following queries and Matthews's responses to them:

- Why did Matthews actually *transmit* child pornography himself rather than merely *receive* it? Because, he contended, child pornography is the "com of the realm" and trading it is "a means to maintain contact with persons in the chat rooms and gain access to their secrets."<sup>77</sup>

- Why didn't Matthews identify himself as a journalist in the chat rooms? Because "[h]e felt that only by going 'undercover' and acting like the persons in the [chat] rooms would he be able to penetrate this world and

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<sup>71</sup> *Id.*

<sup>72</sup> Brief of Appellant at 4, *Matthews* (No. 99-4183).

<sup>73</sup> *Id.* at 4-5.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> *Id.* at 11.

<sup>76</sup> It is sometimes asserted that "the press has special institutional responsibility as a watchdog of government." KATHLEEN M. SULLIVAN & GERALD GUNTHER, *FIRST AMENDMENT LAW* 419 (1999). See generally LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 260-87 (1991) (describing the "Fourth Estate" model of press freedom in which journalists must receive First Amendment protection in order to serve as a check on transgressions of the three branches of government in the fulfillment of their duties).

<sup>77</sup> Brief of Appellant at 5, *Matthews* (No. 99-4183).

gain some insight into this murky, strange, cyberspace reality”<sup>78</sup> What’s more, Matthews contended that when he did reveal his true identity while working on a similar story for WTOP radio in 1995, “[h]e found that this admission caused the rooms to empty, making it impossible to investigate the story.”<sup>79</sup>

• Why was it necessary to spend six months in these chat rooms? Because immersing himself in the seamy underbelly of the worlds on which he reported and consorting with the unsavory characters who reside therein was simply part of Matthews’s standard journalistic investigative techniques, he argued.<sup>80</sup> In their brief to the Fourth Circuit, for instance, Matthews’s attorneys noted that “[e]arly in his career, he did a story on prostitution in Washington, D.C. and spent several nights walking the streets with the prostitutes.”<sup>81</sup> On another story—this one about the growing homelessness problem in the mid-1980s—Matthews “spent a few days living on the streets as a homeless person, sleeping in shelters and spending time with the homeless as one of them.”<sup>82</sup>

This time around, however, the problem for Matthews was that the FBI believed he really was “one of them”—a sexual predator distributing child pornography on the Internet.<sup>83</sup> It probably didn’t help that Matthews was working at this time as a freelance journalist rather than as one employed by a news agency and specifically assigned to the topic.<sup>84</sup> It also didn’t aid his cause that, when Matthews’s residence was searched in December 1996, “no notes, drafts of articles, completed articles, research materials or other work papers regarding child pornography or child prostitution were found.”<sup>85</sup>

But Matthews had an explanation even for this. He didn’t have any drafts or notes because “he never found the ‘hook,’ the angle, and he kept looking.”<sup>86</sup> He also claimed that “since he had not yet determined the focus of the story, he had not felt the need to print out his communications or

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<sup>78</sup> *Id.* at 11.

<sup>79</sup> *Id.* at 8-9.

<sup>80</sup> *See id.* at 6.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Brief of Appellee at 7-11, *Matthews* (No. 99-4183).

<sup>84</sup> The Fourth Circuit accepted as true Matthews’s version of the facts that he was acting as a journalist. *United States v. Matthews*, 209 F.3d 338, 350 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>85</sup> Brief of Appellee at 10-11, *Matthews* (No. 99-4183).

<sup>86</sup> Brief of Appellant at 11, *Matthews* (No. 99-4183).

make extensive notes.<sup>87</sup> What Matthews had termed as his own “stake out”<sup>88</sup> simply had not panned out.<sup>89</sup>

Despite Matthews’s lack of notes and story drafts, he did have three other potentially important facts in his favor suggesting that his “journalistic purpose” claim was true. First, just one year before, Matthews had researched and reported a three-part series for WTOP radio regarding the availability of child pornography on America Online.<sup>90</sup> Second, during his research for this earlier story, he actually had initiated contact on his own volition with the FBI to report “a person whose screen name was ‘Martha4U’ and who claimed to be prostituting her children.”<sup>91</sup> He could appear, in brief, to be acting as a good cyberspace Samaritan. Third, Matthews had never before had criminal charges filed against him.<sup>92</sup>

Ultimately, however, these facts and their potential for exculpation proved meaningless. Matthews was indicted by a federal grand jury in July 1997 and charged with six counts of transmitting child pornography and nine counts of receiving such material.<sup>93</sup> He eventually pleaded guilty in June 1998 to two charges of transmitting and receiving child pornography<sup>94</sup>—one involving a depiction of a prepubescent minor female engaged in sexual intercourse with a male adult and the other showing a female performing oral sex on a prepubescent minor female.<sup>95</sup> Matthews was sentenced in March 1999 to eighteen months in federal prison and was fined \$4000.<sup>96</sup> His unsuccessful efforts to assert a First Amendment-based defense against the charges at both the district and appellate court levels are described and analyzed below

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<sup>87</sup> *Id.* at 13.

<sup>88</sup> *Id.* at 10.

<sup>89</sup> *Id.* at 13.

<sup>90</sup> *Id.* at 8.

<sup>91</sup> *Id.* at 9.

<sup>92</sup> *United States v. Matthews*, 209 F.3d 338, 340 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>93</sup> Brief of Appellee at 2, *Matthews* (No. 99-4183). See 18 U.S.C. § 2252(a)(1)-(2) (1994) (setting forth the federal law for transporting and receiving child pornography under which Matthews was charged).

<sup>94</sup> Craig Whitlock, *Reporter Gets 1-1/2 Years for Child Pornography*, WASH. POST, Mar. 9, 1999, at B1.

<sup>95</sup> *Matthews*, 209 F.3d at 346.

<sup>96</sup> Whitlock, *supra* note 94.

### A. *Raising the Defense, Framing the Issue*

Matthews first raised and argued his “legitimate-use” defense in a Maryland federal district court, in a motion to dismiss the charges against him.<sup>97</sup> He contended that federal child pornography laws were “unconstitutional as applied to a journalist’s news gathering activities.”<sup>98</sup> More specifically, Matthews argued that “his use of the pictures is protected by the First Amendment’s protection of the press.”<sup>99</sup> The district court thus framed the issue before it as “whether the First Amendment requires that the Defendant be granted relief from this general prohibition [against transporting and receiving child pornography] if he violated the law during news gathering activity.”<sup>100</sup>

It is important to note that Matthews was *not* claiming that he should be protected automatically, or as a matter of law, by the First Amendment. Rather, he simply sought the *opportunity* to present a First Amendment-based defense to the jury.<sup>101</sup> The district court, however, denied him this opportunity and rejected the motion to dismiss.<sup>102</sup>

On appeal, the First Amendment-based issue was similarly framed. The Fourth Circuit wrote that “Matthews presents an issue of first impression in this circuit: does the First Amendment permit a bona fide reporter to trade in child pornography to ‘create a work of journalism?’”<sup>103</sup> The appellate court agreed to use Matthews’s terminology that he was seeking a First Amendment *defense* against the charges, but it took the time to characterize this as an “as-applied” challenge to the federal child pornography laws.<sup>104</sup>

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<sup>97</sup> *United States v. Matthews*, 11 F. Supp. 2d 656 (D. Md. 1998), *aff’d*, 209 F.3d 338 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>98</sup> *Id.* at 660.

<sup>99</sup> *Id.* at 661.

<sup>100</sup> *Id.* at 662. Matthews also asserted that the relevant federal statute—18 U.S.C. § 2252—was unconstitutional because it failed to include a sufficient mens rea requirement beyond the requirement of “knowingly” transporting or receiving child pornography. *Id.* at 659-60. This argument, which was rejected by both the district and appellate courts, is beyond the scope of this Article which, instead, focuses on the First Amendment-based “legitimate-use” defense.

<sup>101</sup> *See id.* at 660.

<sup>102</sup> *Id.* at 664.

<sup>103</sup> *United States v. Matthews*, 209 F.3d 338, 342 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>104</sup> *Id.* at 341 n.1.

As was the situation at the trial court level, Matthews did not claim on appeal that journalists engaged in news-gathering activities are automatically entitled to a special exemption from child pornography laws.<sup>105</sup> Rather, he contended that the trial court judge should have allowed him to present a First Amendment defense to a jury.<sup>106</sup> Referring to the arguments of Matthews and various amici,<sup>107</sup> the Fourth Circuit wrote: "Let the jury decide, they argue: if the jury concludes that Matthews traded in pornography solely for a proper purpose, then the First Amendment prevents conviction; if the jury concludes that he acted for another purpose, then conviction is appropriate."<sup>108</sup>

With the issue now framed, the next two sections describe the arguments on both sides. Section B, culling from Matthews's brief to the Fourth Circuit Court of Appeals as well as the amicus briefs filed on his behalf, details the arguments in favor of allowing a journalist-defendant to present a "legitimate-use" defense. Section C, drawing from the government's brief, then addresses the arguments against this alleged right.

### *B. The Arguments on Behalf of Matthews*

Six related lines of argument on behalf of Matthews's right to have the opportunity to present a "legitimate-use" defense can be distilled from the various briefs filed in the case: 1) the First Amendment provides protection for news gathering; 2) the public has a right to know information that affects laws and law enforcement; 3) the United States Supreme Court's decision in *New York v. Ferber*<sup>109</sup> carves out an exception for legitimate uses of child pornography and suggests the right to make a "legitimate-use" defense; 4) lower courts in other federal circuits have recognized the right to assert a defense in similar circumstances; 5) the legislative intent behind child pornography laws is not served by punishing Matthews for his use of sexually explicit images of minors; and 6) the failure to recognize a "legitimate-use" defense for journalists would have a slippery slope effect on other legitimate uses. These lines of reasoning are addressed below, in order.

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<sup>105</sup> *Id.* at 344 n.3.

<sup>106</sup> *Id.* at 344.

<sup>107</sup> Briefs of amici curiae were filed on appeal on behalf of Lawrence Matthews by the Reporters Committee for Freedom of the Press (joined by other journalism organizations) and the American Civil Liberties Union.

<sup>108</sup> *Matthews*, 209 F.3d at 344.

<sup>109</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

1. *A First Amendment Right to Gather News Protects Matthews*

“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>110</sup>

As might be anticipated, attorneys for Lawrence Matthews trotted out this language from the United States Supreme Court’s 1972 decision in *Branzburg v. Hayes*.<sup>111</sup> In *Branzburg*, a divided Court refused to create a First Amendment privilege for journalists not to testify in grand jury proceedings but also wrote that “news gathering is not without its First Amendment protections.”<sup>112</sup>

The Reporters Committee for Freedom of the Press (“RCFP”), in an amicus brief to the Fourth Circuit that was joined by other prominent journalism organizations such as the Radio-Television News Directors Association (“RTNDA”), National Public Radio, Inc. (“NPR”), and the Society of Professional Journalists (“SPJ”), also seized upon the *Branzburg* decision.<sup>113</sup> The RCFP opened its brief by admonishing the appellate court that:

It is important to begin by noting that the First Amendment’s guarantee of press freedom is meaningless if journalists do not possess a concomitant right to gather the news. In *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), the U.S. Supreme Court recognized that the First Amendment’s protection of a free press carries with it protection for essential newsgathering.<sup>114</sup>

Several federal appellate courts, relying on the dissenting opinions and the concurrence of Justice Powell in *Branzburg*, have adopted a qualified or conditional privilege that excuses reporters from disclosing the identity of confidential sources in some circumstances in criminal and civil proceedings.<sup>115</sup> The purpose of this testimonial privilege, much like the

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<sup>110</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

<sup>111</sup> Brief of Appellant at 30, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>112</sup> *Branzburg*, 408 U.S. at 707

<sup>113</sup> Brief of Amici Curiae in Support of Appellant Seeking Reversal at 3, *Matthews* (No. 99-4183).

<sup>114</sup> *Id.*

<sup>115</sup> See *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998) (observing that “some courts have taken from Justice Powell’s concurrence a mandate to construct

First Amendment-based defense asserted and sought by Lawrence Matthews, is to help journalists to gather news.

For instance, the Second Circuit Court of Appeals in *Baker v. F & F Investment*,<sup>116</sup> in recognizing a qualified reporter's privilege, wrote that "[c]ompelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis."<sup>117</sup> The appellate court in *Baker*, citing what it called "a paramount public interest in the maintenance of a vigorous, aggressive and independent press,"<sup>118</sup> added that "[t]he deterrent effect" that "disclosure is likely to have upon future 'undercover' investigative reporting . . . threatens freedom of the press and the public's need to be informed."<sup>119</sup> It is language from decisions such as *Baker* that supports news-gathering testimonial privileges and, Lawrence Matthews hoped by extension, a First Amendment defense to trade child pornography in the course of news gathering.

The problem with this argument, however, is, as media attorney John K. Edwards recently wrote, that "the U.S. Supreme Court has been slow to fully acknowledge the constitutional significance of newsgathering activities"<sup>120</sup> and that "many lower courts have not accepted the existence of any constitutional right to gather the news."<sup>121</sup> In their 1999 treatise on news gathering, C. Thomas Dienes and his colleagues concur with these sentiments, acknowledging that the dimensions of the First Amendment news-gathering right are "decidedly uncertain."<sup>122</sup>

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a broad, qualified newsreporters' privilege in criminal cases" but declining to join with these courts). The scope of the qualified privilege "varies greatly by jurisdiction." KENT R. MIDDLETON ET AL., *THE LAW OF PUBLIC COMMUNICATION* 447 (5th ed. 2000). A complete discussion of testimonial privileges protecting confidential sources and other information is beyond the scope of this Article. For current information on testimonial privileges and shield laws protecting reporters from revealing sources and information, see the Reporter Committee for Freedom of the Press' Web page on this subject, *Confidential Sources and Information*, at <http://www.rcfp.org/csi/> (Summer 1998).

<sup>116</sup> *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972).

<sup>117</sup> *Id.* at 782.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, *COMM. LAW.*, Spring 2000, at 8, 8.

<sup>121</sup> *Id.* at 9.

<sup>122</sup> C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* § 1-5, at 15 (2d ed. 1999).

What's more, any constitutional right to gather news conflicts with what the Supreme Court in *Cohen v. Cowles Media Co.*<sup>123</sup> called its "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>124</sup> The laws against transmission and receipt of child pornography, of course, are generally applicable: they don't single out or target members of the press.<sup>125</sup> Parsed in its most blunt and controversial form, then, what Matthews was requesting was not just a First Amendment right to gather news, but a *First Amendment right to engage in criminal conduct* in the process of gathering news. This is a right the Supreme Court has never recognized.<sup>126</sup> If there is no First Amendment right to violate generally applicable civil laws in news gathering,<sup>127</sup> then there clearly is no right to violate generally applicable criminal laws. In fact, in the same decision in which the Court suggested that the First Amendment protects news gathering, it also wrote that "[i]t would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws."<sup>128</sup>

On the other hand, Matthews was *not* claiming that the First Amendment gives journalists absolute or blanket protection—what the *Branzburg* Court called "a license"<sup>129</sup>—from generally applicable criminal laws. Instead, he was contending that the First Amendment should provide journalists with the opportunity to argue and to prove before a jury that in *some* circumstances the interest in gathering news outweighs the interest in enforcement of a particular criminal law.<sup>130</sup> The fact finder would be left to decide whether the interest was sufficient to overcome application of the law given the particular circumstances in each case.

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<sup>123</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>124</sup> *Id.* at 669.

<sup>125</sup> See 18 U.S.C. § 2252(a)(1)-(2) (1994) (setting forth the child pornography laws under which Matthews was prosecuted and which apply to "any person," not just to journalists or members of the press).

<sup>126</sup> See *Cohen*, 501 U.S. at 669 (observing that "[t]he press may not with impunity break and enter an office or dwelling to gather news").

<sup>127</sup> See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 520-22 (4th Cir. 1999).

<sup>128</sup> *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972).

<sup>129</sup> *Id.*

<sup>130</sup> *United States v. Matthews*, 209 F.3d 338, 344 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

## 2. *The Public's Right to Know Protects Matthews*

Although the First Amendment does not explicitly provide protection for the public's so-called "right to know," the United States Supreme Court has recognized that the First Amendment freedoms of speech and press include peripheral rights encompassing the right to receive information and the freedom of inquiry.<sup>131</sup> An appeal to a tenuous and unenumerated First Amendment public right to know,<sup>132</sup> in fact, "serves as the core element of the journalism ethos."<sup>133</sup> The right to know mantra is so appealing to journalists, writes Professor Christopher Meyers, because it "provides a *greater good* defense, giving journalists (supposed) valid moral reasons for engaging in what would otherwise be seen as improper behavior."<sup>134</sup> As applied to the case of Lawrence Matthews, this would mean that the greater good of exposing sexual exploitation of minors and the trafficking in child pornography on the Internet provides a valid moral reason for engaging in criminal conduct in the news-gathering process.

It is not surprising, then, that the RCFP's brief took up the public's right to know argument, contending:

The free flow of information to the public is vital to democracy. The public has a strong interest in knowing both about the prevalence of child pornography on the Internet, and about law enforcement efforts to eradicate it. Arguably, the most effective way to report on these issues is to gain access to the Internet to observe these matters first-hand.<sup>135</sup>

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<sup>131</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (recognizing that the First Amendment includes the right to receive information); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing that the First Amendment includes freedom of inquiry).

<sup>132</sup> C. Thomas Dienes and his colleagues explain the tenuous nature of the right to know:

[T]he beguiling phrase "the right to know" straddles the often fine line between governmental restriction on the right to receive information, which the freedom of expression principle typically will not tolerate, and an affirmative right to compel government to disclose that which it would prefer to hold in confidence, a right that has not traditionally been held to be secured by the First Amendment.

DIENES ET AL., *supra* note 122, § 1.3, at 11 (footnote omitted).

<sup>133</sup> Christopher Meyers, *Justifying Journalistic Harms: Right to Know vs. Interest in Knowing*, 8 J. MASS MEDIA ETHICS 133, 134 (1993).

<sup>134</sup> *Id.*

<sup>135</sup> Brief of Amici Curiae in Support of Appellant Seeking Reversal at 12, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

Matthews's brief also strongly suggested a right to know argument linking the First Amendment and journalism. In particular, Matthews's attorneys described him as "dedicated to the ideals of journalism as a source of information for the public regarding matters of significance to society."<sup>136</sup>

The ACLU, in its amicus brief, also made a right to know argument in support of a legitimate-use defense. Writing for the ACLU, Ann Beeson argued:

It is wholly inconsistent with the First Amendment for the government to threaten with criminal sanctions legitimate researchers who study, investigate, and report on the phenomenon of child pornography. With no First Amendment defense, child pornography statutes would *prohibit the public from learning anything about the problem of child pornography* outside the limited information law enforcement was able and willing to provide.<sup>137</sup>

Arguably, the public's right to know in *Matthews* is at its highest level because the defense in question relates to the functioning of government agencies. The United States Supreme Court wrote in *Richmond Newspapers, Inc. v. Virginia*<sup>138</sup> that the First Amendment freedoms of speech and press "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."<sup>139</sup> Lawrence Matthews, it will be recalled, intended to write a magazine article relating to how well the government was policing the Internet and protecting minors from sexual exploitation in cyberspace.<sup>140</sup> The article, in other words, was to have dealt with what the *Richmond Newspapers* Court termed "the functioning of government."<sup>141</sup>

That this article may have been critical of the government's efforts to patrol cyberspace further militates in favor of allowing Matthews to assert a First Amendment-based "legitimate-use" defense. Why? Because the

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<sup>136</sup> Brief of Appellant at 5, *Matthews* (No. 99-4183) (emphasis added).

<sup>137</sup> Brief of Amici Curiae The American Civil Liberties Union, the ACLU of Maryland, the ACLU of the National Capital Area, and the National Association of Criminal Defense Lawyers in Support of Appellant, and Reversal at 14-15, *Matthews* (No. 99-4183) (emphasis added).

<sup>138</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

<sup>139</sup> *Id.* at 575.

<sup>140</sup> See *supra* notes 73-74 and accompanying text.

<sup>141</sup> *Richmond Newspapers, Inc.*, 448 U.S. at 575.

Supreme Court has made it clear that the First Amendment must provide enhanced protection “for the citizen-critic of government.”<sup>142</sup> As the Court wrote in *New York Times Co. v. Sullivan*,<sup>143</sup> “criticism of official conduct” is “the central meaning of the First Amendment.”<sup>144</sup>

On top of this, one may logically argue that the article Matthews hoped to write based on his Internet research could be classified as political expression affecting legislative decision making. One of his alleged goals was to inform the public about the dangers of sexual predators and the sexual exploitation of minors on the Internet.<sup>145</sup> An article on this subject would provide the public with information and knowledge necessary to engage in informed political debate on the topic. This debate, in turn, could influence or affect legislative decision making by leading to the revision or creation of laws relating to child pornography, sexual predators and the Internet.

Viewed in this light, Matthews’s right-to-know argument also draws support from fundamental theories of free expression. In particular, the public’s right to know about matters of public concern that could affect legislative decision making was at the heart of the theory of free expression espoused by the late philosopher-educator Alexander Meiklejohn.<sup>146</sup> He believed that “the principle of the freedom of speech springs from the necessities of the program of self-government.”<sup>147</sup> In a self-governing democracy—one in which the “[r]ulers and ruled are the same individuals”<sup>148</sup>—wise decisions about public policy require that “all facts

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<sup>142</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).

<sup>143</sup> *Id.* at 254.

<sup>144</sup> *Id.* at 273.

<sup>145</sup> See *supra* notes 73-74 and accompanying text.

<sup>146</sup> Meiklejohn was far more than a free speech theorist. See generally ALEXANDER MEIKLEJOHN: TEACHER OF FREEDOM (Cynthia Stokes Brown ed., 1981) (combining a collection of Meiklejohn’s educational, philosophical, and legal writings with biographical information). Meiklejohn “wanted higher education to develop social intelligence in students,” which he defined as “the ability to control one’s social environment.” MICHAEL R. HARRIS, FIVE COUNTERREVOLUTIONISTS IN HIGHER EDUCATION 46 (1970). Ultimately, he “believed that the college, standing apart from its social environment, should develop in its students the intelligence to become responsible citizens of a democratic society.” *Id.* at 163.

<sup>147</sup> ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1948).

<sup>148</sup> *Id.* at 12.

and interests relevant . . . shall be fully and fairly presented.”<sup>149</sup> As Meiklejohn wrote, “[s]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>150</sup> The ultimate aim of free expression, then, “is the voting of wise decisions.”<sup>151</sup>

Matthews’s research on child pornography might have provided the foundation for an article that could have affected, concomitant with the Meiklejohnian tradition, the voting of wise decisions on child pornography laws. A strong argument thus can be made that, in order for the public to know as much information as possible about the topics of child pornography and sexual predators on the Internet, Matthews should have been able to assert a “legitimate-use” defense.

### 3. Ferber Created an “As-Applied” Exception that Protects Matthews

One of Lawrence Matthews’s key arguments on appeal was that the United States Supreme Court in *New York v. Ferber*,<sup>152</sup> a 1982 decision holding that child pornography falls outside the scope of First Amendment protection for speech,<sup>153</sup> recognized that there may be some uses of child pornography that are constitutionally protected.<sup>154</sup> In particular, Matthews argued that “the *Ferber* Court recognized that even child pornography receives First Amendment protection when used as part of a work of medical, educational, or artistic value.”<sup>155</sup> He contended, in turn, that his own Internet research was “in connection with the intended creation of a work of educational, literary, and political value.”<sup>156</sup>

Matthews’s brief, however, does not identify any specific language from the majority opinion in *Ferber* that creates an explicit or direct

<sup>149</sup> *Id.* at 26.

<sup>150</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP CT. REV 245, 255.

<sup>151</sup> MEIKLEJOHN, *supra* note 147, at 26.

<sup>152</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>153</sup> *Id.* at 763 (stating that “[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with our earlier decisions”).

<sup>154</sup> Brief of Appellant at 17, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 30.

exception for legitimate journalistic uses of child pornography. Instead, the brief cites the following language from *Ferber* relating to the possible overbreadth<sup>157</sup> of child pornography statutes as necessitating the availability of an "as-applied" exception to the general rule against the protection of this material: "whatever overbreadth may exist should be *cured through case-by-case analysis of the fact situations* to which its sanctions, assertedly, may not be applied."<sup>158</sup>

The *Ferber* majority, acknowledging concerns expressed by the New York Court of Appeals earlier in that case, suggested that such a case-by-case, fact-specific analysis might occur in situations of sexually explicit images of minors "ranging from medical textbooks to pictorials in the *National Geographic*."<sup>159</sup> Matthews's attorneys used this language, in part, to argue that "[t]he *Ferber* Court noted whether a particular use of child pornography is protected by the First Amendment should be determined on a case by case basis."<sup>160</sup>

There is other language in *Ferber* favorable to Matthews. In a concurring opinion joined by Justice Marshall, Justice Brennan wrote that the application of child pornography statutes "to depictions of children that in themselves do have serious literary, artistic, scientific, or medical value, would violate the First Amendment."<sup>161</sup> By extension, Matthews was seeking to examine child pornography that, although it did not possess in itself such serious values, could have led to a news story that *would* have serious literary value.

Perhaps the strongest language in *Ferber* cited by Matthews, suggesting an exemption for legitimate journalistic uses of child pornography,<sup>162</sup> is set forth in the concurring opinion of Justice Stevens.<sup>163</sup> Stevens wrote:

A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the

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<sup>157</sup> "An overbroad law sweeps in too much speech." SULLIVAN & GUNTHER, *supra* note 76, at 320.

<sup>158</sup> Brief of Appellant at 25, *Matthews* (No. 99-4183) (emphasis added) (quoting *Ferber*, 458 U.S. at 773-74 (citation omitted)).

<sup>159</sup> *Ferber*, 458 U.S. at 773.

<sup>160</sup> Brief of Appellant at 17, *Matthews* (No. 99-4183).

<sup>161</sup> *Ferber*, 458 U.S. at 776 (Brennan, J., concurring).

<sup>162</sup> See Brief of Appellant at 26-27, *Matthews* (No. 99-4183).

<sup>163</sup> *Ferber*, 458 U.S. at 778 (Stevens, J., concurring).

pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.<sup>164</sup>

As discussed later in Section D, the Fourth Circuit in *Matthews* rejected the idea that either this language from Justice Stevens's concurrence or the language from the majority opinion in *Ferber* created a First Amendment defense. The Fourth Circuit reached, instead, what it called "the inevitable conclusion that the *Ferber* Court rejected even the possibility of a broad First Amendment defense like that proposed by *Matthews*."<sup>165</sup>

#### 4. *Other Federal Courts Have Recognized a "Legitimate-Use" Defense*

*Matthews*'s attorneys argued that case precedent other than *Ferber* existed to support a First Amendment-based "legitimate-use" defense against child pornography charges.<sup>166</sup> They wrote that "[e]very court which has addressed the question of whether there is a defense available under *Ferber* to those who claim to possess child pornography for legitimate purposes have [sic] allowed the defendants to present such a defense to the jury."<sup>167</sup>

The two primary cases relied upon by *Matthews* for this proposition were *United States v. Lamb*<sup>168</sup> and *United States v. Bryant*.<sup>169</sup> Neither case, however, involved a journalist claiming a legitimate use of child pornography as part of his or her research for a news story. Instead, *Lamb* centered

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<sup>164</sup> *Id.*

<sup>165</sup> *United States v. Matthews*, 209 F.3d 338, 345 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>166</sup> Brief of Appellant at 28-30, *Matthews* (No. 99-4183).

<sup>167</sup> *Id.* at 28.

<sup>168</sup> *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996).

<sup>169</sup> *United States v. Bryant*, No. CR92-35R (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress).

on a prison psychiatrist who claimed that the possession of child pornography image files on his computer hard drive was necessary for his research,<sup>170</sup> while *Bryant* focused on the holder of a doctoral degree in psychology who had previously researched child prostitution for his masters thesis<sup>171</sup> and who claimed that the child pornography he possessed was “for additional research on the subject of child prostitution.”<sup>172</sup>

The federal district court in *Lamb*, citing favorably both the *Ferber* majority’s conclusion that overbreadth in a child pornography statute should be cured on a case-by-case basis<sup>173</sup> and the concurrences of Justices Brennan, Marshall and Stevens,<sup>174</sup> held that *Lamb* should be allowed to present an “unconstitutional-as-applied defense”<sup>175</sup> to the jury.<sup>176</sup> Perhaps more importantly, however, the court went beyond the language in *Ferber* to articulate how academic research on the topic of child pornography is closely related to wise and informed legislation in that area. The court observed that, in drafting certain pieces of child pornography legislation, the U.S. Senate relied on the research of Robyn Lloyd, who authored a book on boy prostitution that catalogued over 260 magazines featuring child pornography.<sup>177</sup> An academic researcher like Lloyd should be protected from the application of child pornography laws, the court suggested, writing that “it is difficult to imagine how a researcher today could catalog so many publications of this sort without running afoul of the child pornography law. The answer is that such activity may be protected by the Constitution.”<sup>178</sup> In other words, academic research may inform lawmakers about problems that need to be addressed by legislation. Without protection for such research, lawmakers could be left in the dark about problems that continue to fester.

The court in *Lamb* also noted that although the federal law against receiving child pornography<sup>179</sup> does not include an express affirmative defense for legitimate uses of child pornography by psychiatrists and

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<sup>170</sup> *Lamb*, 945 F Supp. at 450.

<sup>171</sup> *Bryant*, No. CR92-35R, at A2.

<sup>172</sup> *Id.* at A3.

<sup>173</sup> *Lamb*, 945 F Supp. at 448-49.

<sup>174</sup> *Id.* at 449-50.

<sup>175</sup> *Id.* at 449.

<sup>176</sup> *Id.* at 450.

<sup>177</sup> *Id.* at 450 n.4.

<sup>178</sup> *Id.*

<sup>179</sup> See 18 U.S.C. § 2252 (1994) (setting forth the child pornography law under which *Lamb* was prosecuted).

researchers, this absence does *not* preclude the existence of an “as-applied” First Amendment defense.<sup>180</sup> The court wrote:

Thus the fact that the affirmative defense was rejected could have just as easily meant that *Congress acknowledged that some small amount of material literally covered by the statute was nonetheless protected by the guarantee of free speech*, rendering the express defense redundant, or perhaps overly generous compared to what stands behind the First Amendment’s aegis.<sup>181</sup>

The other case precedent relied on by Matthews was an unpublished order issued by a Washington state federal district court in *United States v. Bryant*.<sup>182</sup> In that case, the court allowed a psychologist,<sup>183</sup> who had done prior research on child prostitution, to assert a First Amendment defense to charges of transporting child pornography under federal law.<sup>184</sup>

Ronald Bryant claimed that he had “a valid educational purpose” for transporting child pornography into the United States from Bangkok, Thailand.<sup>185</sup> In particular, he alleged that he possessed the child pornography “for additional research on the subject of child prostitution.”<sup>186</sup> The court accepted Bryant’s argument that he should be allowed to prove this to a jury, observing that “[a] social scientist cannot be forbidden access to primary research material based solely on the harmfulness of his subject matter.”<sup>187</sup> The court limited the right to possess child pornography, however, to that material “necessary for legitimate research purposes.”<sup>188</sup> The question of whether Bryant, in fact, had a legitimate research purpose was “a factual one the court must leave for the jury.”<sup>189</sup>

In summary, other federal courts—albeit none at the appellate level—have allowed defendants to assert “legitimate-use” defenses to

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<sup>180</sup> *Lamb*, 945 F Supp. at 449.

<sup>181</sup> *Id.* (emphasis added).

<sup>182</sup> *United States v. Bryant*, No. CR92-35R (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress).

<sup>183</sup> The defendant held both a masters and doctoral degree in psychology from the University of New Delhu. *Id.* at A2.

<sup>184</sup> *Id.* at A7

<sup>185</sup> *Id.* at A5.

<sup>186</sup> *Id.* at A3.

<sup>187</sup> *Id.* at A8.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

charges of transporting and possessing child pornography. Although these cases did not involve journalists, Matthews contended that his use of child pornography was similar to theirs because he too wanted to use the images “for the purpose of creating a work which could be categorized as either having educational, literary, or political value.”<sup>190</sup>

### 5. *The Intent of Child Pornography Laws is Not Served by Prosecuting Matthews*

Why do laws against child pornography exist? What interests do these laws protect? The United States Supreme Court made it clear in *New York v. Ferber*<sup>191</sup> that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”<sup>192</sup> More recently, the Ninth Circuit Court of Appeals observed that “[t]hroughout the legislative history, Congress has defined the problem of child pornography in terms of real children”<sup>193</sup> and, until the passage of laws regarding virtual child pornography,<sup>194</sup> “the actual participation and abuse of children in the production or dissemination or [sic] pornography involving minors was the *sine qua non* of the regulatory scheme.”<sup>195</sup> In particular, the Supreme Court has recognized that interests supporting child pornography laws include protecting minors from physical abuse during its production as well as the psychological trauma that can be caused by the permanent record it leaves behind, haunting the child in later life.<sup>196</sup> In addition, child pornography is regulated because it allegedly whets the appetites of pedophiles to molest minors.<sup>197</sup>

Given these compelling government interests, it is not surprising that the federal child pornography laws<sup>198</sup> fail to enumerate an exception for the receipt or transportation of child pornography for scientific or medical research or for educational purposes. The only express affirmative defense is for possession of less than three visual depictions of child pornography

<sup>190</sup> Brief of Appellant at 30, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>191</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>192</sup> *Id.* at 757

<sup>193</sup> *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1089 (9th Cir. 1999).

<sup>194</sup> *See supra* note 4 and accompanying text.

<sup>195</sup> *Free Speech Coalition*, 198 F.3d at 1089.

<sup>196</sup> *Osborne v. Ohio*, 495 U.S. 103, 108-11 (1990) (citing *Ferber*, 458 U.S. at 756-59).

<sup>197</sup> *Id.* at 111.

<sup>198</sup> 18 U.S.C. § 2252 (1994 & Supp. IV 1998).

that a defendant either took reasonable steps to destroy or reported to law enforcement.<sup>199</sup>

Despite the express absence of a “legitimate-use” defense, the federal district court in *Bryant* suggested that assertion of a First Amendment defense in some instances does not frustrate the legislative purpose of child pornography laws:

An academic researcher who transports or possesses child pornography does not run afoul of the legislative purposes behind banning transportation or possession of child pornography. An academic researcher who has not produced the materials does not ‘use’ the children as the subjects of child pornography. Nor has he transported the material for the purpose of satisfying others. Instead, he transports or possesses the material to further study the same problems legislators were concerned about in passing the anti-pornography laws.<sup>200</sup>

The key here, based on the court’s strategic use of quotation marks, seems to be the “use” to which child pornography is put. If the *children* portrayed are being used as the sexual subjects of child pornography, then this use is illegal. If the *images*, however, are used by a researcher in a manner that actually might punish child pornographers in the future, then Matthews has not caused further harm to the children but may actually help them. One thus can argue that Matthews’s individual use of *images*—not use of the *children* in those images—would not frustrate the compelling interests that underlie child pornography laws.

## 6. *The Slippery Slope Effect and Parade of Horrors*

In its amicus brief, the ACLU trotted out what amounts to a slippery slope argument about the horrors that could befall other legitimate uses of child pornography if the appellate court did not step in to protect legitimate uses by journalists.<sup>201</sup> For instance, the ACLU argued that the manufactur-

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<sup>199</sup> *Id.* § 2252(c).

<sup>200</sup> *United States v. Bryant*, No. CR92-35R, at A7 (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress) (citations omitted).

<sup>201</sup> See Brief of Amici Curiae The American Civil Liberties Union, the ACLU of Maryland, the ACLU of the National Capital Area, and the National Association of Criminal Defense Lawyers in Support of Appellant, and Reversal at 14-21, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

ers of filtering software designed to protect children from pornography on the Internet would no longer be able to perform this vital role if their staff members could not search out sites with child pornography.<sup>202</sup> The ACLU noted that “these companies employ staff who search for child pornography on the Internet on a daily basis, in order to add new sites to their list of sites that the product blocks.”<sup>203</sup>

The ACLU also suggested that the Sixth Amendment<sup>204</sup> rights of defendants in criminal cases would be hampered by the failure to recognize a “legitimate-use” defense:

The lack of a legitimate use defense would also impede the ability of criminal defense lawyers to provide adequate representation to defendants charged under child pornography laws. For instance, without an exception to possess the allegedly illegal images, a criminal defense lawyer would be seriously hampered in her ability to locate expert witnesses who could testify regarding whether the materials met the child pornography definition.<sup>205</sup>

Other researchers whom the ACLU argued would be negatively affected by the failure to recognize a “legitimate-use” defense include social scientists performing content analyses to document the amount of child pornography on the Internet, researchers studying the relationship between images and actions (in particular, images of child pornography and actions of sex offenders), art historians studying artistic and popular images of children, and English professors examining the portrayal of children in movies and books.<sup>206</sup> In a nutshell, the ACLU argued that the failure to grant Lawrence Matthews the chance to present a defense would lead to a parade of horrors and have ramifications far beyond the profession of journalism.

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<sup>202</sup> *Id.* at 18-19.

<sup>203</sup> *Id.* at 18.

<sup>204</sup> The Sixth Amendment provides in relevant part that the accused in criminal prosecutions shall “have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

<sup>205</sup> Brief of Amici Curiae The American Civil Liberties Union, the ACLU of Maryland, the ACLU of the National Capital Area, and the National Association of Criminal Defense Lawyers in Support of Appellant, and Reversal at 19, *Matthews* (No. 99-4183) (citation omitted).

<sup>206</sup> *Id.* at 15-18.

### C. *The Arguments Against Matthews*

The government countered Matthews by arguing that it was unclear whether the Supreme Court created an exception protecting some uses of child pornography.<sup>207</sup> As the government's attorneys wrote in their brief to the Fourth Circuit, "it is impossible to determine, based on the Court's opinion in *Ferber* or the concurring opinions, whether or not *Ferber* established a literary, scientific or medical exception under the First Amendment to a statutory ban on child pornography."<sup>208</sup>

Furthermore, even if such an exception did exist, the government contended that Matthews's use of child pornography did not fall within it.<sup>209</sup> Why? The government argued that because Matthews never actually intended to *use* the photographs themselves in his news story and never intended to describe them, he was not, at least literally, *using* them for a literary, scientific or medical purpose.<sup>210</sup> As the government's attorneys wrote:

[T]he defendant has never claimed that he was using, or planned to use, the pictures in an appropriate context or before an appropriate audience. Instead, he claimed that he was trading child pornography in order to, for want of a better word, befriend child pornographers in order to obtain information upon which he could base an article which he never actually began to write.<sup>211</sup>

The government's argument here seems somewhat silly when put into a research context—in order for a researcher studying child pornography to be protected under such a crabbed interpretation of a First Amendment defense, the child pornography itself must be *republished* in the final research report. Under this rule, social scientists who publish their findings from a content analysis regarding the amount of child pornography on the Internet would be protected *only* if they also appended the offending images to their report. Not only is this impractical given page limitations in peer-reviewed research publications that publish content analyses,<sup>212</sup> but

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<sup>207</sup> Brief of Appellee at 21-24, *Matthews* (No. 99-4183).

<sup>208</sup> *Id.* at 24.

<sup>209</sup> *Id.* at 24-27

<sup>210</sup> *Id.* at 26.

<sup>211</sup> *Id.* at 26-27

<sup>212</sup> For instance, the peer-reviewed *Journalism & Mass Communication Quarterly* publishes content analyses regarding the media. It limits manuscripts to

it is highly ironic because it entails *further* publication and dissemination of child pornography. It actually defeats the purpose of anti-child pornography legislation.

Perhaps the government's most important and well-supported argument against Lawrence Matthews was its position that "[t]he First Amendment does not provide journalists with a license to violate the law in the name of news gathering."<sup>213</sup> This argument directly attacks Matthews's "right-to-gather-news" theory set forth earlier.<sup>214</sup> The government quoted the Supreme Court's opinion in *Branzburg v. Hayes*<sup>215</sup> for the proposition that "[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability"<sup>216</sup> and for the principle that it is "frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news source[s] to violate valid criminal laws."<sup>217</sup>

The government buttressed this line of reasoning by citing the Supreme Court's 1991 decision in *Cohen v. Cowles Media Co.*<sup>218</sup> In that case, the Court held that journalists are *not* shielded from civil liability for promissory estoppel when they breach promises of confidentiality to their news sources.<sup>219</sup> Justice Byron White, writing for a narrow five-justice majority, concluded that the case was governed by a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."<sup>220</sup>

The government did not stop there, however. It contended that it knew there were other, *non-illegal* means that could be used to gather the information he sought just as effectively as the illegal means actually employed.<sup>221</sup> The government argued as follows in its brief to the Fourth Circuit:

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5000 words and never publishes photographs.

<sup>213</sup> Brief of Appellee at 1, *Matthews* (No. 99-4183).

<sup>214</sup> See *supra* notes 110-30 and accompanying text.

<sup>215</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>216</sup> Brief of Appellee at 28, *Matthews* (No. 99-4183) (quoting *Branzburg*, 408 U.S. at 682).

<sup>217</sup> *Id.* (quoting *Branzburg*, 408 U.S. at 691).

<sup>218</sup> *Id.* at 29.

<sup>219</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991).

<sup>220</sup> *Id.* at 669.

<sup>221</sup> Brief of Appellee at 31, *Matthews* (No. 99-4183).

[I]t is clear to even the untrained outsider that a resourceful journalist has various lawful means, not connected with the Government in any fashion, through which he or she may obtain information necessary to write an article about child pornography or law enforcement efforts in that area. A journalist could interview individuals convicted of trafficking child pornography, develop sources currently involved in child pornography, talk with medical health professionals who are experts in the field, observe the on line conversations taking place in chat rooms like 'Preteens' without sending or asking to receive any pornographic pictures himself, etc.<sup>222</sup>

The government, in brief, was telling the court that Matthews's research was unnecessary. More disturbingly, the government was telling journalists how to do their job—a troubling proposition for anyone who believes that the press must not be controlled by the government. On closer examination, however, the government's argument here raises important questions: Was Lawrence Matthews confusing the roles of investigative journalist and law enforcement agent? Was he playing cop rather than reporter? Should a distinction be made between these two roles?

Journalists have taken on law enforcement roles in the past. In the late 1970s, for instance, a group of reporters from the *Chicago Sun-Times* operated an aptly named bar—the Mirage—to expose fraud, bribery and corruption among city inspectors.<sup>223</sup> As philosopher and ethicist Sissela Bok writes, "in this scheme, *reporters assumed the investigative role of the police* and indeed worked closely with certain police officials."<sup>224</sup> As discussed later in this Article, practices such as this are controversial not only because they put the journalist in the role of police officer, but also because of the deception they entail.<sup>225</sup> Lawrence Matthews's conduct arguably blurs distinctions between *reporting* on criminal activities—monitoring chat room conversations and observing the trade of child pornography—and *participating* in criminal activities. To the extent that journalists view their role as detached and neutral chroniclers of events rather than involved and active participants, this is problematic. The

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<sup>222</sup> *Id.*

<sup>223</sup> See GENE GOODWIN & RON F. SMITH, *GROUPING FOR ETHICS IN JOURNALISM* 205-07 (3d ed. 1994) (describing the Mirage set up).

<sup>224</sup> SISSELLA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 259 (1982) (emphasis added).

<sup>225</sup> See *infra* notes 314-20 and accompanying text (discussing how some journalists consider any form of deception in gathering news to be inappropriate).

government's argument regarding alternative journalistic news-gathering methods suggests not only that participation in criminal activity is unprotected by the First Amendment, but that such techniques are not required for effective investigative reporting. Part III later discusses in more detail the implications of the *Matthews* case on the practice of investigative journalism.<sup>226</sup>

Before leaving the government's argument, it is important to note that the government's brief to the Fourth Circuit fails to mention either the *Lamb*<sup>227</sup> or *Bryant*<sup>228</sup> decisions, cases relied on by Matthews as precedent for a First Amendment-based defense.<sup>229</sup> Whether the product of intention or oversight, this omission proved far from fatal before the appellate court. That court's decision is described in the next section.

#### D. *The Appellate Court's Decision*

The Fourth Circuit ruled against Lawrence Matthews's right to present a First Amendment defense.<sup>230</sup> It concluded that, although his "version of the facts" appeared to create "a close question," "Matthews's asserted First Amendment defense simply enjoys no support in the law."<sup>231</sup>

The appellate court rejected Matthews's contention that the Supreme Court in *Ferber*<sup>232</sup> created an exception for uses of child pornography that lead to works with literary, educational, or political value.<sup>233</sup> The court belittled Matthews's argument as nothing more than "rhetoric" with "visceral appeal," and it concluded that "notwithstanding the skill of Matthews's advocacy, *Ferber* does not provide the broad defense he seeks to raise."<sup>234</sup>

The Fourth Circuit noted that although the Supreme Court created an escape hatch in obscenity law—under the third part of the test in *Miller v.*

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<sup>226</sup> See *infra* notes 251-300 and accompanying text.

<sup>227</sup> *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996).

<sup>228</sup> *United States v. Bryant*, No. CR92-35R (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress).

<sup>229</sup> See *supra* notes 168-89 (describing the *Lamb* and *Bryant* decisions).

<sup>230</sup> *United States v. Matthews*, 209 F.3d 338, 350 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>231</sup> *Id.*

<sup>232</sup> *New York v. Ferber*, 458 U.S. 747 (1982).

<sup>233</sup> *Matthews*, 209 F.3d at 343-44.

<sup>234</sup> *Id.* at 344.

*California*<sup>235</sup> works that possess “serious literary, artistic, political or scientific value,”<sup>236</sup> are protected—“the *Ferber* Court unequivocally rejected such a defense in the context of child pornography offenses.”<sup>237</sup> In particular, the Fourth Circuit cited the language in *Ferber* that “a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography”<sup>238</sup>

The Fourth Circuit, on this point, apparently failed to appreciate that Matthews’s ultimate work—the news story—would *not* actually “embody the hardest core of child pornography.” Matthews was *not* going to republish the images that he transmitted in chat rooms and thereby do further harm to the children portrayed in them. The child pornography would be used only as bait to lure pedophiles into conversations and to gather information for a story that would *not* involve the use of images of child pornography.

The appellate court found that granting Matthews the chance to make a First Amendment defense would fail to protect against what it called “the discrete set of harms to which child pornography legislation is addressed.”<sup>239</sup> These harms, however, relate to the physical and psychological abuse of minors in the creation of the images and to the psychological trauma caused by the permanent record and redistribution of the images that, in turn, fuel the market to create more child pornography. Matthews, of course, was *not* producing child pornography and his news story would *not* further disseminate child pornography. That the Fourth Circuit did not understand this is clear from its conclusion that “to permit a defense of the sort urged by Matthews” would “*allow the dissemination of depictions that threaten the very harms to children described in Ferber*”<sup>240</sup>

The Fourth Circuit also was unswayed by the concurrence of Justice Stevens in *Ferber*, which Matthews’s attorneys cited in their brief and which was described earlier in this Article.<sup>241</sup> The appellate court opined that while there was “intuitive appeal”<sup>242</sup> in Justice Stevens’s observation that the exhibition of child pornography “before a legislative committee

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<sup>235</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>236</sup> *Matthews*, 209 F.3d at 345 (quoting *Miller*, 413 U.S. at 24).

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* (quoting *Ferber*, 458 U.S. at 761).

<sup>239</sup> *Id.* at 348.

<sup>240</sup> *Id.* (emphasis added).

<sup>241</sup> See *supra* notes 163-64.

<sup>242</sup> *Matthews*, 209 F.3d at 348.

studying a proposed amendment to a state law, or before a group of research scientists studying human behavior”<sup>243</sup> would be a crime without a First Amendment defense, the argument was flawed because “*its doctrinal roots are unclear*”<sup>244</sup>

This last italicized statement reveals a clear unwillingness on the part of the Fourth Circuit—traditionally one of the most conservative appellate courts in the United States<sup>245</sup>—to create precedent where none exists. As discussed later in this Article, the current climate of hostility towards the news media likely contributes to such a reluctance to break new ground and to expand protection for the press. Indeed, the Fourth Circuit actually wrote that “mischief” could result from the adoption of a First Amendment defense.<sup>246</sup> All defenses, however, may be abused if courts do not actively monitor their application. Some people today think the insanity defense is abused in criminal cases, but it is not forbidden just because we fear some people may “get away” with crimes by pleading insanity. Courts have the responsibility to police defenses for possible abuse.

Apparently because the doctrinal roots were not clear—the appellate court noted but summarily rejected Matthews’s reliance on *Lamb* and *Bryant*<sup>247</sup>—the Fourth Circuit never bothered to reach the public policy arguments regarding the public’s right to know made by Matthews and the amici. It simply was unwilling to create precedent where none existed. The court also rejected the assertion that a First Amendment right to gather news protected Matthews; instead, the Fourth Circuit quoted language from *Cohen v. Cowles Media Co.*<sup>248</sup> reiterating that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”<sup>249</sup> Also, the Fourth Circuit rejected the idea that *Branzburg* protected Matthews.<sup>250</sup>

The Fourth Circuit’s decision in April 2000 thus went against Lawrence Matthews. The next Part of this Article examines some of the ramifications of that decision for the practice of investigative journalism

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<sup>243</sup> *Id.* at 347-48 (quoting *Ferber*, 458 U.S. at 778 (Stevens, J., concurring)).

<sup>244</sup> *Id.* at 348 (emphasis added).

<sup>245</sup> See James C. Goodale, *Shooting the Messenger Isn’t So Easy*, N.Y. L.J., Dec. 3, 1999, at 3 (describing the Fourth Circuit Court of Appeals as “one of the most conservative courts in the country”).

<sup>246</sup> *Matthews*, 209 F.3d at 348.

<sup>247</sup> *Id.* at 349.

<sup>248</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

<sup>249</sup> *Matthews*, 209 F.3d at 344 n.3 (quoting *Cohen*, 501 U.S. at 669).

<sup>250</sup> *Id.* at 344.

and places it within the context of the current climate of hostility facing journalists in the United States.

### III. INVESTIGATIVE JOURNALISM AND THE *MATTHEWS* RESTRAINT: AN UNFORTUNATE BUT INEVITABLE RESULT?

Investigative journalists, write professors James Ettema and Theodore Glasser, are “custodians of conscience.”<sup>251</sup> They “hold the means to report and disseminate stories that can engage the public’s sense of right and wrong” and they provide the public with “a morally engaged voice.”<sup>252</sup> In the process, investigative journalists give readers “accounts of victims, villains and institutions in disarray.”<sup>253</sup> As well, they are willing to “confront a certain sort of social reality—the reality of outrageous civic vice and, by implication, the possibility of enhanced virtue in the conduct of public affairs.”<sup>254</sup> When all is said and done, investigative journalists “help to articulate the moral order by showing that the actions of alleged transgressors are in fact transgressions.”<sup>255</sup>

Lawrence Matthews was, by these scholarly definitions and descriptions, the epitome of an investigative journalist. He was, if one believes his side of the case, attempting to report a story that would engage the public’s sense of right and wrong about transgressions in cyberspace, expose a set of innocent young victims preyed upon by pedophilic villains, and perhaps even show the alleged disarray of government efforts to patrol and police the Internet. The story itself could have resulted in both better law enforcement efforts in cyberspace and new legislation relating to the sexual exploitation of minors on the Internet—the legal equivalents, in brief, of “the possibility of enhanced virtue in the conduct of public affairs” described above by Glasser and Ettema.<sup>256</sup> All of Matthews’s activities, in fact, comport with the description of investigative journalism provided by Ettema and Glasser, with one important exception or caveat.

In particular, it will be recalled that they describe investigative journalists as individuals who “*hold the means* to report and disseminate stories that engage the public’s sense of right and wrong.”<sup>257</sup> The Fourth

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<sup>251</sup> JAMES S. ETTEMA & THEODORE L. GLASSER, CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE 3 (1998).

<sup>252</sup> *Id.* at 4.

<sup>253</sup> *Id.* at 10.

<sup>254</sup> *Id.* at 7.

<sup>255</sup> *Id.* at 62.

<sup>256</sup> See *supra* note 254 and accompanying text.

<sup>257</sup> See *supra* note 252 and accompanying text (emphasis added).

Circuit, however, legally stripped Matthews of what he claimed were the “*unfortunately necessary means* of gathering information.”<sup>258</sup> Matthews could not function effectively as an investigative journalist—could not perform his professional responsibility, in other words<sup>259</sup>—without the ability to trade child pornography and to engage in sexually explicit online conversations with individuals who identified themselves as young girls.

Accepting as true what one might call Matthews’s “necessity” contention regarding his news-gathering practices, an important issue arises: *To police the moral order, must investigative journalists have the right to engage in conduct that itself violates the moral order?* That is the paradoxical and ethical question—a question about what practices are right and wrong within the journalism profession<sup>260</sup> and a question that carries profound implications for the enterprise of investigative reporting—that underlies the legal considerations in the case of Lawrence Matthews.

Both the district and appellate courts answered the legal version of this query in the negative, denying journalists the right to engage in illegal conduct of their own in order to expose the illegal and immoral conduct of others. Although this result may hinder investigative journalists in their efforts to serve as watchdogs and to expose transgressions of the moral order, it is far from surprising. In fact, the legal accountability that this result promotes—its treatment of journalists *not* as an elite class above the strictures of the law but as common citizens subject and accountable to society for their own transgressions—may be viewed, in no small part, as a judicial reaction to the growing public sentiment that journalists are, to put it bluntly, out of control in their news-gathering tactics and not to be trusted.

Trust, credibility, and respect are essential commodities in the journalism profession.<sup>261</sup> When *trust* of the media is replaced by *anger* with

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<sup>258</sup> Brief of Appellant at 11, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183) (emphasis added).

<sup>259</sup> Some would argue that “journalism is not a ‘profession.’” JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 150 (1996) (arguing that journalism is not a profession because it lacks fixed standards for admission and does not require mastery over a specialized field of knowledge).

<sup>260</sup> This is an ethical question because “[m]edia ethics concerns right and wrong” actions “taken by people working for media.” John C. Merrill, *Introduction* to A. DAVID GORDON & JOHN MICHAEL KITROSS, *CONTROVERSIES IN MEDIA ETHICS* 1, 1 (2d ed. 1999).

<sup>261</sup> “The profession of journalism is built on trust. The loss of credibility can be ethically fatal to a news organization.” LOUIS A. DAY, *ETHICS IN MEDIA COMMUNICATIONS* 87-88 (3d ed. 2000).

media, the chances of journalists receiving either public or judicial sympathy are slim. The result of the public's current hostility toward the media, writes attorney Bruce Sanford, "has been a palpable willingness to silence the media—to curtail its ability to gather and report the news, and to make us more dependent than ever on the government for our understanding of human events."<sup>262</sup> In his 1999 book *Don't Shoot the Messenger*, Sanford argues that "the public's anger toward the media is being played out in the nation's courts, where judge after judge is limiting the public's right to receive information."<sup>263</sup> We now can add the names of the district and appellate court judges in *Matthews* to Sanford's list of "judge after judge."

The legal conclusion in *Matthews* certainly makes more sense when it is viewed within the framework articulated by Sanford. In rejecting *Matthews*'s right to present a First Amendment defense, both the district court and the appellate court were, consistent with Sanford's interpretation, limiting the public's right to receive information by limiting the press's ability to gather information.

The overt skepticism and outright distrust of the media today that leads to this result manifests itself clearly in the district court's opinion in *Matthews*. Although the district court faced only the narrow issue of whether *Matthews* should be allowed to present a First Amendment defense to a jury<sup>264</sup>—not the underlying substantive question on the merits of whether, in fact, Lawrence *Matthews* received and transported child pornography for a legitimate use—the court nonetheless went out of its way to draft dicta that, in fact, reached the merits.

Judge Alexander Williams, Jr. was openly skeptical of *Matthews*'s true motives and, more disturbingly from the perspective of investigative journalists, was more than willing to substitute his own news judgment for that of an award-winning reporter. Judge Williams second-guessed *Matthews*'s investigative tactics, writing:

Surely there are other ways of determining the amount of child pornography available on the Internet and whether the images are easy to obtain. While the Court is hesitant to give news gathering tips, the Court agrees with the Government that other, legal avenues of investigation are

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<sup>262</sup> SANFORD, *supra* note 5, at 10.

<sup>263</sup> *Id.* at 9 (emphasis added).

<sup>264</sup> "The question for the Court, therefore, is whether Defendant enjoys a First Amendment defense that can be presented to the jury." *United States v. Matthews*, 11 F. Supp. 2d 656, 660 (D. Md. 1998), *aff'd*, 209 F.3d 388 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

available. For example, a reporter could study the number of prosecutions brought by the government and examine the public records in those cases. A reporter could develop sources, including victims of child pornography and people already convicted of violations. Finally, a reporter could examine reports to public interest groups that track incidents of child pornography distribution.<sup>265</sup>

Despite his professed hesitancy to give news-gathering tips to journalists, the judge did not stop there. In Judge Williams's mind, there simply "must be other, admittedly more labor-intensive means of reporting this story"<sup>266</sup> He thus wrote:

The Court does not believe that the only way a reporter can confirm that pornography is available on the Internet is to obtain and distribute the images himself. Any person, reporter or otherwise, who wants to know whether child pornography is available on the Internet is free to come to federal court and observe a prosecution for a § 2252 violation.<sup>267</sup>

What is happening in Judge Williams's dicta is that a court is substituting its news judgment—its beliefs about how research can best be accomplished in the field of investigative journalism—for that of a seasoned reporter. *The judge is telling the journalist how to gather information.*

Perhaps this occurred because the credibility of journalists in print and broadcast has sunk so low in the eyes of many—including judges—that their credibility in court is no different.<sup>268</sup> *A lack of credibility in print, in brief, may translate to a concomitant lack of credibility in court.*

If the scenario were changed, however, to become one of judicial advice on how to *write* the news rather than on how to *gather* the news, such dicta from a judge would be radically inconsistent with fundamental First Amendment principles of editorial control. For instance, in its 1998 decision in *Shulman v. Group W Productions, Inc.*,<sup>269</sup> the Supreme Court

<sup>265</sup> *Id.* at 663.

<sup>266</sup> *Id.* at 664.

<sup>267</sup> *Id.*

<sup>268</sup> *Cf.* David Shaw, *Special Report: Crossing the Line*, L.A. TIMES, Dec. 20, 1999, § V3 (Special Report), at 4 (observing that "over the past two decades or so—as rumor, gossip, scandal and sensationalism have come to occupy ever more media space and time—news media credibility has plummeted").

<sup>269</sup> *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

of California wrote that “[t]he courts do not, and constitutionally could not, sit as superior editors of the press.”<sup>270</sup> This language builds from the United States Supreme Court’s reasoning in *Miami Herald Publishing Co. v. Tornillo*<sup>271</sup> that “[t]he choice of material to go into a newspaper . . . constitute[s] the exercise of editorial control and judgment.”<sup>272</sup> The Supreme Court has made similar pronouncements in cases involving the rights of broadcast journalists:

For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.<sup>273</sup>

The problem for investigative journalists, of course, is that news *gathering* and news *reporting* are fundamentally different activities as viewed by the judicial system. The deference given by courts to reporting the news will never be extended to gathering the news as long as the public and the judicial system have little confidence or trust in the ability of journalists to carry out their jobs in responsible manners. Rather than trust the judgment of Lawrence Matthews or, at the very least, give a jury the opportunity to evaluate his news-gathering judgment, courts will continue to be hostile toward journalistic news-gathering activities in an era in which journalism is perceived by many as nothing more special than any other business enterprise.<sup>274</sup> The press is not just another business, of course, but one that receives specific protection in the text of the First Amendment.<sup>275</sup>

<sup>270</sup> *Id.* at 488.

<sup>271</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>272</sup> *Id.* at 258.

<sup>273</sup> *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 124-25 (1973).

<sup>274</sup> See generally Richard M. Cohen, *The Corporate Takeover of News*, in CONGLOMERATES AND THE MEDIA 31, 36 (Erik Barnouw et al. eds., 1997) (describing how news, regrettably, has become just another business and observing that “[n]ews values, once no-frills, no-nonsense, have been recast according to corporate perceptions of what sells”); Neil Hickey, *Money Lust: How Pressure for Profit is Perverting Journalism*, COLUM. JOURNALISM REV., July-Aug. 1998, at 28, 30 (contending “that—more so than at any other moment in journalism’s history—the news product that lands on newsstands, doorsteps, and television screens is indeed hurt by a heightened, unseemly lust at many companies for even greater profits”).

<sup>275</sup> See *supra* note 2 (setting forth the relevant portion of the First Amendment).

Courts will not construe that text expansively, however, when it seems that many news enterprises simply use the First Amendment as means to ward off government control and to protect corporate profit.<sup>276</sup>

For every journalist who engages in illegal conduct with a noble intent to gather news that could affect the public interest and change laws, there is likely a journalist who engages in illegal conduct simply because he or she is too lazy to gather news through legal channels. The journalists who fall into this second category make it that much harder for journalists like Lawrence Matthews to receive judicial sympathy. Two cases decided shortly before the Fourth Circuit's opinion in *Matthews* illustrate the second category and provide the negative aura in which that opinion was written.

In 1998, journalist Mike Gallagher engaged in illegal conduct—illegally accessing the voice-mail system of employees at Chiquita Brands International—to gather news about that corporation's business practices.<sup>277</sup> When Gallagher was sentenced one year later in July 1999 to five years probation and 200 hours of community service for his actions, he openly admitted in court that he should have "found a better way."<sup>278</sup> But the harm to news gathering and First Amendment protection—however tenuous today it may be—had been done.

Judge Richard Niehaus admonished Gallagher for violating the public trust. "A person empowered by the First Amendment, a power given by the people, is in a position of trust," the judge told Gallagher.<sup>279</sup> In addition to the public ignominy, Gallagher was fired by the *Cincinnati Enquirer*, his employer at the time of the incident.<sup>280</sup>

Now consider an even better-known example of news gathering run amok—the lies used by ABC employees to gain access to Food Lion

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<sup>276</sup> See Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 296 (1999) (contending that the First Amendment today protects "not just news about events of political concern but largely the ability of corporate media to turn a profit by catering to our voyeuristic desire to watch others as they suffer in pain or revel in sexual passion on television and the Internet").

<sup>277</sup> See generally Nicholas Stein, *Banana Peel*, COLUM. JOURNALISM REV., Sept.-Oct. 1998, at 46 (describing the case involving Mike Gallagher, the *Cincinnati Enquirer*, and the investigative series on Chiquita Brands International).

<sup>278</sup> Dan Horn, *Former Reporter Given Probation*, CINCINNATI ENQUIRER, July 17, 1999, at B1. He also stated in court that accessing voice-mail messages was not appropriate behavior for reporters. *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> Dan Horn, *Former Enquirer Reporter Guilty*, CINCINNATI ENQUIRER, Sept. 25, 1998, at A01.

supermarkets to shoot hidden-camera footage of allegedly unsanitary food-handling practices.<sup>281</sup> In October 1999, the United States Court of Appeals for the Fourth Circuit—the same appellate court that dealt a blow to the investigative journalism tactics of Lawrence Matthews<sup>282</sup>—handed ABC News what at first appears to be a resounding and hard fought legal victory,<sup>283</sup> in a case that challenged investigative journalistic practices.<sup>284</sup>

*Food Lion, Inc. v. Capital Cities/ABC, Inc.*<sup>285</sup> was the cross-appeal of a \$5.5 million jury verdict<sup>286</sup>—later reduced by the trial judge to \$315,000<sup>287</sup>—against ABC's *PrimeTime Live* news magazine for a story about allegedly unsanitary activities at the Food Lion supermarket chain.<sup>288</sup> After the report first aired on ABC's *PrimeTime Live* on November 5, 1992, Food Lion sued ABC and its producers on four counts:<sup>289</sup> fraud,<sup>290</sup> breach of duty of loyalty,<sup>291</sup> trespass,<sup>292</sup> and unfair trade

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<sup>281</sup> See generally Goodale, *supra* note 245, at 3 (describing the case and summarizing the results at the trial and appellate court phases).

<sup>282</sup> Both the appellate decisions in the cases involving ABC and Lawrence Matthews were made by three-judge panels. The only judge in common in the two cases was Diana Gribbon Motz, who authored the court's opinion in *Matthews* and joined in the court's opinion in *Food Lion*.

<sup>283</sup> "ABC News President David Westin called the ruling a victory for the American tradition of investigative journalism." Lisa de Moraes, *With Appeals Court Ruling, ABC Won't Pay Food Lion's Share*, WASH. POST, Oct. 21, 1999, at C7.

<sup>284</sup> See generally JAY BLACKET AL., *DOING ETHICS IN JOURNALISM* 164-68 (3d ed. 1999) (analyzing ethical issues raised by the deceptive journalistic practices of ABC employees in gathering information about the Food Lion supermarket chain).

<sup>285</sup> *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

<sup>286</sup> See Howard Kurtz & Sue Anne Pressley, *Jury Finds Against ABC for \$5.5 Million*, WASH. POST, Jan. 23, 1997, at A1 (describing the jury verdict).

<sup>287</sup> *Food Lion*, 194 F.3d at 511.

<sup>288</sup> *Id.* at 510.

<sup>289</sup> *Id.*

<sup>290</sup> The fraud allegation requires proof that the defendant made a false representation of material fact, either knowing it was false or making it with reckless disregard of its truth or falsity, with the intent that the plaintiff rely upon it. *Id.* at 512. In addition, the plaintiff must be injured through reasonable reliance on the false representation. *Id.*

<sup>291</sup> A breach of duty of loyalty occurs if an employee: (1) "competes directly with her employer;" (2) "misappropriates her employer's profits, property, or business opportunities;" or (3) "breaches her employer's confidences." *Id.* at 515-16.

<sup>292</sup> Trespass is an entry upon another's property without consent. *Id.* at 517. An individual who exceeds the scope of consent to enter property commits a trespass.

practices.<sup>293</sup> The supermarket sought damages for the administrative costs associated with hiring the two producers, as well as publication damages for lost profits resulting from the broadcast.<sup>294</sup>

The Fourth Circuit ultimately threw out the fraud cause of action and the claim for unfair trade practices and it awarded Food Lion only the nominal sum of two dollars—one dollar for the claim of trespass and one dollar for the breach of loyalty cause of action.<sup>295</sup> The decision was a victory for the press because the appellate court prevented Food Lion from making what it correctly called “an end-run around First Amendment strictures”<sup>296</sup> by seeking publication damages *not* on a lawsuit for defamation<sup>297</sup> but rather on the grounds of how the news was gathered. Plaintiffs seeking publication damages for reputational or emotional harm cannot circumvent or bypass defamation law’s tough standards by seeking such relief through news-gathering torts.<sup>298</sup>

The triumph for investigative news gathering here, however, is precisely limited to this result—one cannot win publication damages by pleading around defamation law and focusing, instead, on how news is gathered. The victory, in brief, was one on the question of *damages*. It decidedly was *not* a judicial validation of deceptive news-gathering methods.

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*Id.* at 518.

<sup>293</sup> This claim was made under North Carolina’s Unfair Trade Practices Act, which “prohibits ‘[u]nfair methods of competition’ and ‘unfair or deceptive acts or practices’ that are ‘in or affecting commerce.’” *Id.* at 519 (quoting N.C. GEN. STAT. § 75-1.1(a) (1999)) (alteration in original).

<sup>294</sup> *Id.* at 511.

<sup>295</sup> *Id.* at 524.

<sup>296</sup> *Id.* at 522.

<sup>297</sup> Defamation includes both the torts of libel and slander. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984). The basic elements to state a cause of action for defamation include: (1) “a false and defamatory statement concerning another;” (2) “an unprivileged publication” of that statement to at least one third party; (3) fault; and (4) “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” RESTATEMENT (SECOND) OF TORTS § 558 (1977). “Libel is written or visual defamation; slander is oral or aural defamation.” ROBERT D. SACK & SANDRA S. BARON, LIBEL, SLANDER, AND RELATED PROBLEMS 67 (2d ed. 1994).

<sup>298</sup> See Alan Cooper, *Food Lion Fraud Claims Fail on Appeal*, NAT’L L.J., Nov 1, 1999, at A12 (observing that the appellate court’s decision means that a claim for losses based on reputation must withstand tests established by the United States Supreme Court on libel law).

Two points bear this out. First, it must be remembered that however nominal the final damage award may have been, the appellate court did rule in favor of *Food Lion* on both the trespass and breach of loyalty causes of action. In fact, the Fourth Circuit admonished ABC for its news-gathering methods, writing that “[w]e are convinced that *the media can do its important job effectively without resort to the commission of run-of-the-mill torts.*”<sup>299</sup> The court clearly did not endorse, in other words, the investigative news-gathering methods of ABC.

The second point that must not be forgotten is that even though ABC was forced to pay only two dollars in damages, the message sent by the jury with its more than five million dollar award to *Food Lion* is that the public is fed up with deceptive news gathering. It is hard for courts to expand news-gathering rights to individuals like Lawrence Matthews when public sentiment like that voiced by the *Food Lion* jury is so hostile to how news is gathered.

Results like that in *Matthews* thus are unfortunate for both the practice of investigative reporting and the public’s right to know, but, as the heading for this part of the article suggests, they are perhaps inevitable in an era of bad feelings toward the profession of journalism. It is true, as Bruce Sanford writes, that “[a] golden age that for fifty years saw the creation and expansion of a First Amendment right of the public to receive information has concluded.”<sup>300</sup>

But this does not mean that a new age replete with increased protection for news-gathering practices is not possible. Journalists now must attempt to foster an atmosphere in which a free press is viewed by the public and judiciary as socially significant—a free press that is trusted, respected, and valued in its roles as news gatherer, information provider, public educator, and watchdog on government and private corruption. A press that is trusted and respected in these vital roles in a self-governing democracy is more likely to receive public and judicial support when it is accused of violating generally applicable laws to gather information.

#### IV DISTINGUISHING LEGITIMATE USES FROM ILLEGITIMATE USES: AN UNRESOLVED ISSUE FOR OTHER COURTS?

By concluding that journalists may not present a First Amendment-based “legitimate-use” defense to child pornography charges, the Fourth Circuit escaped a knotty question: How is the trier of fact to distinguish

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<sup>299</sup> *Food Lion*, 194 F.3d at 521 (emphasis added).

<sup>300</sup> SANFORD, *supra* note 5, at 9.

between a *legitimate* use of child pornography and an *illegitimate* use of such material? Although the appellate court in *Matthews* avoided the issue, the question is far from idle because the federal district courts that decided the *Bryant*<sup>301</sup> and *Lamb*<sup>302</sup> cases recognized such a "legitimate-use" defense for academic researchers and psychiatrists yet provided no criteria for resolving the issue.<sup>303</sup>

Moreover, the sheer difficulty in distinguishing legitimate from illegitimate uses may provide justification for denying the judicial creation of such a defense in the first place. Just as the Supreme Court in *Branzburg v. Hayes* was hesitant to create a reporter's privilege because of the difficulty in defining who is a journalist<sup>304</sup>—a problem that would similarly plague the assertion of a "legitimate-use" defense by a journalist as well<sup>305</sup>—appellate courts other than the Fourth Circuit may be wary of creating a "legitimate-use" defense due to the definitional difficulty of the concept "legitimate use."

If other courts should allow journalists to present a "legitimate-use" defense to charges of transporting or possessing child pornography, then juries must have some basis for determining what constitutes a legitimate use. The most basic and direct form of evidence, of course, is the testimony from the journalist-defendant. But this may amount to little more than pure, self-serving professions of noble purposes.

The focus then must be placed on *circumstantial evidence* of legitimate use. There may be several types of circumstantial evidence that affect the "legitimate-use" analysis. If a trial court recognizes this defense, the judge might instruct a jury to consider a series of questions relating to circum-

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<sup>301</sup> *United States v. Bryant*, No. CR92-35R (W.D. Wash. May 13, 1992) (order denying motion to dismiss and setting an evidentiary hearing on motion to suppress).

<sup>302</sup> *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996).

<sup>303</sup> See *supra* notes 19-23 and accompanying text.

<sup>304</sup> Writing the opinion of the Court in *Branzburg*, Justice White observed: Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

*Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

<sup>305</sup> The Third Circuit Court of Appeals recently developed a three-part test for defining "journalist" in the context of a journalist's privilege not to testify in certain proceedings. See *supra* notes 26-28 and accompanying text.

stantial evidence, the resolution of which would influence this determination.

In particular, it would seem that two distinct sets of questions—questions relating to *journalistic indicia* and questions relating to *research indicia*—would facilitate jurors in the decision-making process. The journalism indicia questions include:

- *Is the defendant really a journalist?* This determination might be made by applying the three-part test articulated by the Third Circuit Court of Appeals in *In re Madden*<sup>306</sup> or by the definition of journalist or reporter set forth in the shield law of the state of jurisdiction.<sup>307</sup>

- *Does the defendant have a contract or assignment to write, produce or complete a report on child pornography?* This could be evidenced by a verbal agreement with an editor, news director or other manager if the defendant is employed by a journalism organization, or by a contract if the defendant is a freelance reporter such as Lawrence Matthews. The presence of a story assignment or contract militates in favor of finding a legitimate use. Even if a contract does not exist in the case of a freelance journalist, the jury should consider whether the defendant pitched or proposed the story idea to editors at various publications in an effort to land a contract. This too would suggest that the defendant was attempting to use child pornography for a legitimate purpose.

- *Has the defendant worked as a journalist on similar stories in the past?* Evidence that the defendant has investigated and written about the

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<sup>306</sup> *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998) (“[I]ndividuals claiming the protections of the journalist’s privilege must demonstrate the concurrence of three elements: that they 1) are engaged in investigative reporting; 2) are gathering news; and 3) possess the intent at the inception of the news gathering process to disseminate this news to the public.”).

<sup>307</sup> Thirty-one states and the District of Columbia have shield laws. Jean-Paul Jassy, *The Prosecutor’s Subpoena and the Reporter’s Privilege*, COMM. LAW., Winter 2000, at 7, 8. State shield laws vary in how they define journalist or reporter. For instance, Alaska’s statute defines reporter as “a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege.” ALASKA STAT. § 09.25.390(4) (Michie 1998). In contrast, Colorado defines a “newsperson” as “any member of the mass media and any employee or independent contractor of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write, or edit news information for dissemination to the public through the mass media.” COLO. REV STAT. § 13-90-119(1)(c) (1999).

topic of child pornography previously in his or her capacity as a journalist would suggest that the defendant has a legitimate use in pursuing the subject matter further.

• *How do others in the profession regard the defendant's work?* The opinion of colleagues in the industry speaks to the credibility of the defendant. The more highly that prior work is regarded as quality investigative reporting, the more likely it is that the use of child pornography in question is legitimate.

The four journalism *indicia* questions would be considered in a totality-of-the-circumstances approach, with no single factor controlling the jury's decision. In the case of Lawrence Matthews, some of these factors weigh in his favor—he was well-respected by colleagues and had written about the topic in the past—while others militate against him. In particular, he did not have a contract for the article for which he allegedly was conducting research and his status as a journalist was somewhat suspect because he was not employed by a news organization at the time the research in question took place.

The other set of questions that a judge might instruct a jury to consider—the *research indicia* questions—includes:

• *How much illegal conduct did the defendant engage in during his alleged research?* This question is important because it suggests that there surely must be a cutoff point when the consumption and transportation of child pornography becomes so excessive or exorbitant that it would appear unnecessary for legitimate journalistic uses. Although it is impossible, for instance, to say with bright-line clarity that transmitting child pornography more than one dozen times is excessive, sending child pornography more than 1000 times may appear too much for a reasonable juror to constitute a journalistic use and may seem, instead, to establish a use for personal sexual gratification. There must, in brief, be some point of *research overkill* at which a use of child pornography transcends what appears necessary for researching a story to that which appears aimed at individual pleasure.

• *What type of research work product does the defendant possess?* Jurors addressing this question would consider whether the defendant possessed notes of his research activities that: 1) document screen names of individuals with whom the journalist-defendant traded child pornography; 2) contain the transcripts of online conversations with individuals whom the defendant-journalist believes are sexual predators, including dates, times and chat rooms in which those conversations took place; and 3) list the email and Web site addresses of individuals and entities from whom the defendant received child pornography. Jurors, in other words,

would try to determine if the defendant-journalist possessed information that would, in fact, be useful in preparing a news story on the topic of child pornography on the Internet and/or the sexual exploitation of minors in cyberspace. Expert testimony on journalistic note-taking and note-keeping procedures might prove useful in resolving this question.

It will be recalled that Lawrence Matthews did not possess notes or other research documents regarding child pornography or child prostitution when agents searched his home.<sup>308</sup> Matthews contended, however, that “since he had not yet determined the focus of the story, he had not felt the need to print out his communications or make extensive notes.”<sup>309</sup> The FBI was able, however, to document that Matthews either sent or received at least 160 photographs of child pornography from July 1996 through December 1996.<sup>310</sup> Whether this quantity or volume is excessive during a six-month window should be left to the jury to determine, perhaps guided by expert testimony from other investigative journalists who understand what it takes to gather material for in-depth articles. Matthews’s own attorneys argued that their client’s “long hours of surveilling the Internet and the abrupt commencement of long periods of time on line, are *classic indicia of researching a news story*.”<sup>311</sup>

In summary, juries should consider a number of different questions or factors on the issue of legitimate journalistic use. Both the prosecution and the defense should have the opportunity to put on evidence relevant to these factors. And, ultimately, it should be left to the jury, weighing all of the factors and considering all of the evidence, to decide whether to grant the defendant a First Amendment-based exemption from charges of transporting and receiving child pornography.

### CONCLUSION

There are different spins that can be placed on the decision of the Fourth Circuit Court of Appeals in *United States v. Matthews*.<sup>312</sup> From one perspective, the decision can be seen as unleashing a damaging blow to undercover investigative reporting, the watchdog role of the press, and the public’s right to know. Conversely, one can see it as a victory for the

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<sup>308</sup> *United States v. Matthews*, 209 F.3d 338, 340 (4th Cir.), *cert. denied*, 121 S. Ct. 260 (2000).

<sup>309</sup> Brief of Appellant at 13, *Matthews* (No. 99-4183).

<sup>310</sup> *Matthews*, 209 F.3d at 340.

<sup>311</sup> Brief of Appellant at 11, *Matthews* (No. 99-4183) (emphasis added).

<sup>312</sup> *Matthews*, 209 F.3d at 338.

fundamental principle of equality that no person—not even a journalist—is above the law, for the government’s efforts to crack down on those who traffic in child pornography, and for a public tired of intrusive news-gathering methods employed by journalists in the name of ratings and readership.

Between these extremes, however, there may be other ways to look at the decision. Some journalists, in fact, might view the decision not as a blow to their profession but as a victory for honest, law-abiding journalists and non-deceptive news gathering. Although prominent and well-respected journalism organizations including the RCFP, RTNDA, and SPJ joined in an amicus brief on behalf of Lawrence Matthews’s right to present a First Amendment defense at trial,<sup>313</sup> other journalists might argue that, in order to be ethical, journalists *never* should violate the law or use deception to obtain information, no matter how much public significance or consequence that information might possess.<sup>314</sup> These journalists, following an absolutist maxim or principle against deception, thus might view the *Matthews* decision as a *victory* for investigative journalism—in particular, as a victory for all investigative journalists who *don’t* resort to illegal and deceptive conduct to gather news.

These journalists’ beliefs are grounded in the deontological philosophy of Immanuel Kant, for whom “all deception is morally wrong.”<sup>315</sup> What’s more, as media ethics scholar Clifford Christians and his colleagues point out, “Kant’s doctrine does not tolerate lawbreaking.”<sup>316</sup> For Kant the maxims and duties of truth-telling and honesty are universal and unconditional or, to use his term, “categorical.”<sup>317</sup> Those duties should not be broken, even if beneficial consequences might occur.<sup>318</sup> The benefits of informing the public about the sexual exploitation of minors on the Internet and the horrors of child pornography in cyberspace, in other words, would *not* justify breaking the law or engaging in deception to gather that information.

Lawrence Matthews, if one accepts his side of the story, knowingly engaged in deception by *pretending* to be personally interested in child

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<sup>313</sup> See *supra* notes 113-14 and accompanying text.

<sup>314</sup> “Some moral purists argue that, because truth is an animating principle of the journalistic profession, any form of deception is taboo. According to this Kantian view, such behavior erodes the bond of trust between reporters and their audiences.” DAY, *supra* note 261, at 85.

<sup>315</sup> CLIFFORD G. CHRISTIANS ET AL., MEDIA ETHICS: CASES AND MORAL REASONING 59 (5th ed. 1998).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 13.

<sup>318</sup> DAY, *supra* note 261, at 60.

pornography and *pretending*, during online conversations, that he was sexually interested in minors.<sup>319</sup> He was engaged, in brief, not only in illegal conduct but surreptitious and deceptive news-gathering methods. This clearly contradicts the beliefs of those journalists who “subscribe to a rigid rule, saying that any form of deception to obtain information is unacceptable in a profession whose mission is truth-telling.”<sup>320</sup>

When viewed in this light, the Fourth Circuit’s ruling against Matthews may *not* be a blow to investigative journalism after all. It actually may be a wake-up call for investigative journalists to clean up their acts—an arguably much-needed cleanup that could improve their credibility and trustworthiness among the public. It thus is not as clear as it initially may seem that denying Matthews the opportunity to present a First Amendment defense necessarily hurts the profession of investigative journalism.

There is another view within the profession that is diametrically opposed to this belief. To conclude that the decision in *Matthews* is, in fact, a destructive blow to aggressive investigative journalism, one must abandon the absolutist, deontological Kantian perspective and instead subscribe to a consequentialist or teleological approach to journalistic conduct. As John Merrill, professor emeritus of journalism at the University of Missouri-Columbia and a specialist in journalism ethics, writes, “[t]he journalist who is a teleologist would want to take the action resulting in the most good.”<sup>321</sup> A journalist in this journalistic camp might view the beneficial consequences of Matthews’s illegal conduct and deception as outweighing any harm caused by these actions. There may be, in other words, utility in the deception that justifies it or, to put it more bluntly, the ends may justify the means.<sup>322</sup>

This is the *moral* essence, of course, of Matthews’s *legal* argument—that to inform the public adequately and to play the role of watchdog, it was necessary to break the law. As the RCFP wrote in its amicus brief, journalists seeking to play a watchdog role “must, on rare occasions and as a last resort, engage in activity that may technically

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<sup>319</sup> Matthews felt that “only by going ‘undercover’ and acting like the persons in the rooms would he be able to penetrate this world.” Brief of Appellant at 11, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>320</sup> BLACK ET AL., *supra* note 284, at 161.

<sup>321</sup> JOHN C. MERRILL, *JOURNALISM ETHICS: PHILOSOPHICAL FOUNDATIONS FOR NEWS MEDIA* 67 (1997).

<sup>322</sup> Journalists who engage in deception often “defend such tactics on the grounds that as fiduciaries of the public, they are sometimes required to employ deception to uncover a greater truth. In other words, the end justifies the means.” DAY, *supra* note 261, at 85.

violate a criminal statute, particularly when the violation does not cause the harm that the law was intended to prevent.<sup>323</sup> The ends, in other words, justify the means and the benefits of deception and illegal conduct outweigh the harms, at least on some occasions. The greatest good for all concerned, from this perspective, is better served by allowing Matthews to violate the laws rather than by punishing his conduct.

The benefits from Matthews's behavior are multiple: 1) informing the public about a serious problem that affects the physical safety of minors; 2) exposing possible lax enforcement of child pornography laws by government agencies; and 3) influencing potential legislation to address the serious problems revealed. The harms, on the other hand, caused by protecting one individual's transmission and receipt of child pornography—not its production or creation—arguably are minor.

The authors of this Article believe that Lawrence Matthews's case should have been heard by the United States Supreme Court and that he should have been allowed to present a First Amendment-based defense. We reach this conclusion, however, *not* because we believe that the potential benefits of Matthews's activities outweighed the harms, but because the case represented a propitious opportunity for journalists—an opportunity at a time when public confidence in their profession approaches abysmal—to present a clear, cohesive and logical argument to the Supreme Court and, perhaps more importantly, to the American public about the importance of news gathering and the watchdog role of the press in the new millennium.

In particular, the public must be made to see that this issue is about more than just dirty pictures, dirty talk, and a dirty man on the Internet. It really is about the willingness of the public and judiciary to trust and to protect journalists when they attempt to play a role that, when exercised vigorously, protects the public. In order for that trust and protection to arise, however, arguments must be made that adequately explain the purpose and functioning of a free press in a democratic society. It is only then that the Court and the public will extend to journalistic news gathering the same deference they accord to journalistic reporting.

Without this deference and protection, we will become, as media defense attorney Bruce Sanford argues, increasingly reliant on the government for information.<sup>324</sup> That information may tell us only part of the story—a part of the story told from the perspective of the government

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<sup>323</sup> Brief of Amici Curiae in Support of Appellant Seeking Reversal at 2, *United States v. Matthews*, 209 F.3d 338 (4th Cir. 2000) (No. 99-4183).

<sup>324</sup> See *supra* note 262 and accompanying text.

and a part of the story that the government wants us to hear. In the Meiklejohnian sense, we may not have all of the information that we need for the voting of wise decisions and successful self-government.<sup>325</sup> It may, in other words, be a self-serving and incomplete story with which we are left.

This certainly may be the ramification of *Matthews* regarding our knowledge about the problems of sexual exploitation of minors on the Internet. In June 2000, for instance, the findings of a government-funded survey called *Online Victimization: A Report on the Nation's Youth* were released by the National Center for Missing and Exploited Children.<sup>326</sup> The survey, conducted on behalf of the government by the Crimes Against Children Research Center, found that approximately one in five of the 1501 children sampled in the United States had received a sexual solicitation or approach over the Internet in the previous year.<sup>327</sup> Sexual solicitations and approaches were defined as “[r]equests to engage in sexual activities or sexual talk or give personal sexual information that were unwanted or, whether wanted or not, made by an adult.”<sup>328</sup> Only three percent of the children, however, reported what the survey called “aggressive sexual solicitations”—solicitations that included an attempt to contact the minor in person, over the telephone, or by mail sent through the U.S. Postal Service.<sup>329</sup>

The report attracted substantial media attention.<sup>330</sup> That’s good news. But there is bad news. The media were doing little more in this case than simply conveying the survey’s results to the public. Journalists were *not* independently investigating this issue on behalf of the public; they were *not* trying to determine the accuracy of the government’s data or attempting to conduct their own first-hand research. The press, in brief, was reduced to the role of megaphone or loudspeaker for information provided by the government about the sexual exploitation of minors in cyberspace.

If the Fourth Circuit’s decision in *Matthews* is adopted by other federal appellate courts, the role of journalism in informing the public about this

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<sup>325</sup> See *supra* note 147 and accompanying text.

<sup>326</sup> ONLINE VICTIMIZATION: A REPORT ON THE NATION’S YOUTH (June 2000), available at [http://www.ncmec.org/html/onlinevictim\\_report.html](http://www.ncmec.org/html/onlinevictim_report.html).

<sup>327</sup> *Id.* at ix.

<sup>328</sup> *Id.* at x.

<sup>329</sup> *Id.* at 1.

<sup>330</sup> See generally Miriam Garcia, *Online Sex Content a Threat to Kids, Survey Finds*, ATLANTA J. & CONST., June 9, 2000, at A11 (summarizing the results of the survey); Karen Thomas, *Kids Run a 20% Risk of ‘Cybersex’ Advances*, USA TODAY, June 8, 2000, at 1A (giving the survey results front-page coverage).

topic necessarily will be that of government mouthpiece. The vast amount of information the public would receive is that data which is given to the press by the government.

If we are content as a society in having the press play this role—as a provider of government information rather than as a watchdog on the government—then the *Matthews* decision was correct. But if we want the press to *do* something more and if we want the First Amendment to *mean* something more, then the decision was wrong and Lawrence Matthews should have been given the opportunity to prove to a jury that his use of child pornography represents the ideals embraced by investigative journalism and a watchdog press and merits protection under the Constitution.