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Narrowly Restricting "Clearly Established" Civil Liberties: The Constitutional Ramifications of a Family Member's [Under] Protected Federal Privacy Rights in the Dissemination of Postmortem Images in Marsh v. County of San Diego

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NOTE

NARROWLY RESTRICTING "CLEARLY ESTABLISHED" CIVIL LIBERTIES: THE CONSTITUTIONAL RAMIFICATIONS OF A FAMILY MEMBER'S [UNDER]PROTECTED FEDERAL PRIVACY RIGHTS IN THE DISSEMINATION OF POSTMORTEM IMAGES IN *MARSH V. COUNTY OF SAN DIEGO.*

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"Nothing in constitutional law is more controversial than substantive due process."[1]

INTRODUCTION

When tragedy befalls a family, and a loved one is lost, the beloved's life should be commemorated with unforgettable, cherished images of

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

the individual's triumphant and revered character.[2] In the tender wake of such a tragic loss, it becomes exceedingly difficult to maintain these jovial memories when a vile postmortem photograph of the individual is publicly disseminated.[3] These graphic pictures depict uncensored information about the deceased family member, with the understandable cognitive and emotive impact of such ghastly images.[4] Naturally, a sense of familial grief emerges from imagining the degree of suffering the dearly departed endured. The dismay and shock are intensified when the family is made aware of the multitude of spectators feasting on these images to satiate their voyeuristic appetite through the ubiquitous presence and viral nature of the Internet.[5] Recently, in *Marsh v. County of San Diego*,[6] the U.S. Court of Appeals for the Ninth Circuit[7] examined the federally protected right to privacy concerning the public dissemination of a family member's death images and the power, or lawful right, to prevent these images from being circulated.

Images can be more powerful and telling than mere words.[8] Such appalling and gruesome images are destined to foment emotions—ones tied to grief and memory—that represent the "intangible injury that a constitutional right of familial privacy over images of death guards against."[9] Relatedly, the fond familial memory of a child as the child lived should not be unnecessarily besmirched by public access to disturbing images of the child in death. For in the eyes of society, the deceased child will be associated with cruelty and violence, without

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[2] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1152 (9th Cir. 2012).

[3] *Id.* at 1152.

[4] *Id.*

[5] *See generally* Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 279-80 (1999) ("As a culture, we like to watch others and take pleasure from the watching experience, even though we don't always like to admit to it. We rely on the media to satisfy our craving for lurid and/or private [peeks] at others' lives and intimate moments." (footnote omitted)).

[6] *See generally Marsh*, 680 F.3d 1148.

[7] *History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/home.nsf/page/courts_coa_circuit_09.html (last visited Sept. 21, 2013). As the largest court of appeals in the nation with twenty-nine active judgeships and comprising a fifth of the nation's states, the Ninth Circuit plays a vital role in correctly interpreting, and thus molding, future precedent by broadly applying fundamental Supreme Court precedent, where appropriate.

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

[9] Clay Calvert, *A Familial Privacy Right over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions*, 40 HASTINGS CONST. L.Q. 475, 490 (2013).

regard to the softheartedness and sheer innocence the child embodied in life.

In *Marsh*, the Ninth Circuit held that a prosecutor who photocopied and kept a child's autopsy photograph (and after retirement gave the copy to the press) was entitled to qualified immunity.[10] The court reasoned that there was no "clearly established" law to inform the prosecutor that his earlier conduct in making and keeping the photocopy was unlawful.[11] In so holding, the Ninth Circuit relied on *American Manufacturers Mutual Insurance Co. v. Sullivan*,[12] which held that a plaintiff must prove that he or she was "deprived of a right secured by the Constitution or laws of the United States."[13] Moreover, a plaintiff must show that the federal right was "clearly established" at the time of the violation; otherwise government officials are entitled to qualified immunity.[14]

The Ninth Circuit should have adopted a broader approach in finding a "clearly established" right to control a family member's death images when addressing the prosecutorial misconduct at issue. After all, the *Marsh* Court based its ruling on precedent that such a right is "deeply rooted in this Nation's history and tradition" as it relates to the privacy rights under the Fourteenth Amendment; thus, securing the right under the Constitution as required by *Sullivan*.[15] Yet the court declined to go a step further and hold the prosecutor accountable. By recognizing the "deeply rooted" history and tradition of these privacy rights and applying a broader standard to the instant case, the government official in *Marsh* should not have been entitled to qualified immunity because the federal privacy right was "clearly established" at the time of his unlawful conduct. Instead the court should have focused on whether a reasonable deputy prosecutor would have understood that keeping a photograph as a personal memento (as opposed to him giving it to the press to vindicate himself in the eyes of the public) violated Marsh's federal rights.[16]

The Ninth Circuit decided two issues in *Marsh*: (1) whether Brenda Marsh, as a mother, had a constitutionally protected right to privacy over her child's death images[17] and (2) whether the right was a "clearly

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[10] *Marsh*, 680 F.3d at 1160; *see infra* note 52 et seq. and accompanying text (discussing qualified immunity doctrine).

[11] *Id.*

[12] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999).

[13] *Id.* at 49.

[14] *Marsh*, 680 F.3d at 1160.

[15] *Marsh*, 680 F.3d at 1154.

[16] *Id.* at 1158-59.

[17] *Id.* at 1152.

established" law at the relevant time, sufficient to inform the prosecutor that his conduct violated Marsh's right of privacy, thus stripping the prosecutor of qualified immunity.[18] This Note focuses on the latter "clearly established" standard, calling into question the validity of the prosecutor's qualified immunity status in *Marsh*.

Part I of this Note presents a background of the facts and procedural history of *Marsh v. County of San Diego* and the relevant constitutional law discussed in its holding, such as the Due Process Clause of the Fourteenth Amendment and the doctrine of qualified immunity. Part II further highlights the due process protections of the federally recognized right to privacy under substantive due process and substantive state laws protected by procedural due process. Part III argues that the Ninth Circuit should have adopted a broader analytical approach of *National Archives & Records Administration v. Favish*[19] regarding a "clearly established" right to privacy over a family member's postmortem images. Part IV discusses how the *Marsh* Court's narrow application of a "clearly established" right to privacy in *Favish* compelled the court to overlook the historical traditions of familial interests relating to death images and prematurely grant a government official qualified immunity. The Note concludes by emphasizing that a broader application of *Favish* would have resulted in the denial of qualified immunity for the prosecutor in *Marsh*.

I. FACTUAL AND PROCEDURAL HISTORY OF *MARSH V. COUNTY OF SAN DIEGO*

On April 28, 1983, Brenda Marsh's two-year old son, Phillip Buell, died from a severe head injury when he fell off the couch and hit his head against the fireplace hearth.[20] At the time of the incident, Phillip was in the care of his mother's then-boyfriend, Kenneth Marsh.[21] Kenneth Marsh was charged and convicted of second-degree murder.[22] Nearly two decades later, the San Diego County Superior Court granted Kenneth Marsh's second habeas petition.[23] The petition was granted after the San Diego County District Attorney's consulted expert could not conclude beyond a reasonable doubt that Phillip had been the victim

[18] *Id.*
[19] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).
[20] *Marsh*, 680 F.3d at 1152.
[21] *Id.*
[22] *Id.*
[23] *Id.*

of child abuse.[24] As a result, Kenneth Marsh's conviction was set aside, and he was released in 2004.[25]

Soon after his release, Kenneth Marsh sued the County of San Diego and the medical personnel who conducted Phillip's autopsy.[26] Marsh's attorneys deposed Jay S. Coulter, the San Diego County Deputy District Attorney who prosecuted Marsh in 1983.[27] During the deposition, Coulter disclosed that he photocopied sixteen autopsy photographs of Phillip's corpse while he was deputy district attorney.[28] Coulter also mentioned that after he retired in 2000 he kept one of the photographs as a "memento of cases that [he] handled."[29] Soon after Marsh's release, Coulter sent a newspaper and television station a copy of the photograph he had kept, along with a memorandum titled "What Really Happened to Phillip Buell?"[30]

Brenda Marsh sued Coulter and the County of San Diego under 42 U.S.C § 1983,[31] alleging that the copying and dissemination of her late son's autopsy photographs violated her Fourteenth Amendment Due Process rights,[32] in particular, a federal right to control the autopsy photographs of her child.[33] Defendants moved to dismiss the claims relating to Coulter's conduct after he retired, which the district court

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[24] *Marsh*, 680 F.3d at 1152.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Marsh*, 680 F.3d at 1152.

[31] 42 U.S.C. § 1983 was first enacted as part of the Civil Rights Act of 1871. *See* Mitchum v. Foster, 407 U.S. 225, 238 (1972). The statute provides for equitable and legal remedies, including damages, for a person whose constitutional rights have been violated by another person acting under state authority. Prior to the enactment of § 1983, only equitable remedies, including injunctions by the courts, historically remedied violations of constitutional rights. Section 1983 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (Westlaw 2014) (emphasis added).

[32] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1152 (9th Cir. 2012).

[33] *Id.*

granted. The parties then cross-moved for summary judgment, and the district court granted the defendants' motion.[34] Marsh appealed.[35]

A. THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE RIGHT TO PRIVACY

> No state shall . . . deprive any person of life, *liberty*, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[36]

By directly addressing the states, Section One of the Fourteenth Amendment expands the protection of civil rights to all Americans.[37] The Due Process Clause guarantees any person "due process of law" and limits states from passing arbitrary or unfair laws.[38] The clause also establishes substantive and procedural requirements that state laws must satisfy. These broad guarantees of rights form, together with the Bill of Rights,[39] the heart of civil liberties for American citizens.

The United States Supreme Court has recognized that one aspect of "liberty" protected by the Due Process Clause is "a right of personal privacy, or a guarantee of certain areas or zones of privacy."[40] This right of privacy protects two types of interests: (1) informational control, that is, "avoiding disclosure of personal matters,"[41] and (2) familial integrity and decisional autonomy, that is, "making independent choices and decisions related to and affecting certain familial matters,"[42] including family relationship dynamics and child-rearing practices.[43]

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[34] *Id.*

[35] *Id.*

[36] U.S. CONST. amend. XIV, § 1 (emphasis added).

[37] *See Primary Documents in American History*, THE LIBRARY OF CONGRESS (Nov. 18, 2013), http://www.loc.gov/rr/program/bib/ourdocs/14thamendment.html.

[38] *Id.*

[39] U.S. CONST. amends. I–X.

[40] Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977) (quoting Roe v. Wade, 410 U.S. 113, 152 (1973)).

[41] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1153 (9th Cir. 2012) (quoting Whalen v. Roe, 429 U.S. 589, 599–600 (1977)).

[42] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 798 (3d ed. 2006) (observing that "the Court has expressly held that certain aspects of family autonomy are fundamental rights," adding that these specific familial liberty rights include "the right to marry, the right to custody of one's children, the right to keep the family together, and the right to control the upbringing of one's children").

[43] *Carey*, 431 U.S. at 684.

The Justices have adopted two, often conflicting, approaches to determine whether a case involves a fundamental right. The more conservative Justices generally favor a historical approach for identifying fundamental rights.[44] They acknowledge that a common-law right "*rises to the level of a substantive due process right* if it is 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.'"[45] The time-old phrase "deeply rooted" in American history and traditions has been used with respect to fundamental rights relating to the institution of family.[46] Conversely, in an effort to protect minority interests, the more liberal Justices question whether a right is central to "personal dignity and autonomy or is at the heart of liberty."[47]

Therein lies a right to possession and disposition, and a "parent's right to control a deceased child's remains and death images flows from the *well-established* substantive due process right to family integrity."[48] A parent's right to choose how to care for a child's life reasonably extends to decisions involving death.[49] Examples include whether to have an autopsy, whether to have a memorial service, whether to publish an obituary or photographs, and how to dispose of the remains.[50] Naturally, a common-law right to privacy regarding the memory of a deceased family member is ingrained in our nation's traditions and is thus protected in our Constitution under substantive due process.[51]

B. THE RIGHT TO BE PROTECTED FROM SUIT UNDER THE DOCTRINE OF QUALIFIED IMMUNITY

Under the qualified immunity doctrine, a government official is afforded protection from suit, not just a defense to liability.[52] The doctrine serves as a privilege not to stand trial or face the other accompanying burdens of litigation.[53] Thus, in the absence of a genuine factual dispute affecting the applicability of immunity, a defendant

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[44] Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 602 (2006).

[45] *Marsh*, 680 F.3d at 1154 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)) (emphasis added).

[46] *Id.*

[47] Goldman, *supra* note 44, at 602.

[48] *Marsh*, 680 F.3d at 1154 (emphasis added).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

[53] *Id.*

protected by qualified immunity is entitled to summary judgment.[54] When applied correctly, qualified immunity serves to uphold a citizen's constitutional rights, while vindicating the actions of a public official's proper exercise of discretionary duties.[55] In essence, the doctrine creates a balance between providing private redress when government officials abuse their authority and protecting responsible officials from civil liability who diligently perform their duties.[56]

An official may enjoy this shield so long as his or her actions "[do] not violate clearly established statutory or constitutional rights of which a reasonable person should have known."[57] This standard protects vulnerable public officials from the threat of frivolous litigation, which would pose a substantial burden to society.[58] Otherwise it would become increasingly difficult to attract potential candidates for public positions, and the risk of incurring liability would ultimately inhibit the zealous performance of current officials.[59] Moreover, when reasonably competent officials could disagree as to whether the conduct at issue would violate "clearly established" rights, the immunity defense is available.[60] The main concern surrounding the immunity inquiry is acknowledging "[r]easonable mistakes can be made as to the legal constraints on particular police conduct."[61] Thus, qualified immunity protects all public officials with the exception of those who are incompetent or who knowingly and purposefully violate the law.[62]

1. The Two-Prong Test for Determining Whether a Federal Right is "Clearly Established"

It is inevitable that government officials will, in some cases, reasonably but mistakenly, take action that is later found to be unlawful. In these cases the officials who reasonably believed their actions were lawful should not be held personally liable.[63] Determining whether an official acted reasonably, and thus would be entitled to qualified

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[54] Lukos v. Bettencourt, 23 F. Supp. 2d 175, 178 (D. Conn. 1998).
[55] Carlo v. City of Chino, 105 F.3d 493, 500 (9th Cir. 1997).
[56] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Malley v. Briggs, 475 U.S. 335, 341 (1986).
[61] Saucier v. Katz, 533 U.S. 194, 205 (2001).
[62] *Id.* at 202 (quoting *Malley*, 475 U.S. at 341).
[63] Anderson v. Creighton, 483 U.S. 635, 641 (1987) (citing *Malley*, 475 U.S. at 344-45).

immunity, entails a two-step process.[64] The first step is usually for the court to determine whether the official's conduct violated a constitutional right.[65] This inquiry establishes whether there is a wrong to be addressed.[66] The second step is for the court to determine whether the right was "clearly established" at the time of the alleged incident; the heart of the issue discussed in *Marsh*.[67]

The "clearly established" analysis is an objective standard to be decided by the court as a matter of law.[68] To be "clearly established," the "contours of the right must be "*sufficiently* clear[69] that a *reasonable official would understand* that what he is doing violates that right."[70] The relevant, dispositive inquiry in determining whether a right is "clearly established" is whether it would be clear to a reasonable officer in a like situation that his or her conduct was unlawful.[71] Relatedly, in the instant case it would be clear that a reasonable deputy prosecutor such as Coulter, who is held to a higher ethical standard by way of his profession, would have understood that keeping Phillip's photograph as a personal memento (as opposed to contended issue of him giving it to the press to vindicate himself in the eyes of the public) violated Marsh's federal rights.

The "clearly established" inquiry requires that if the law did not put the officer on notice that his or her conduct violated a federally protected right of the plaintiff, then the officer is entitled to qualified immunity.[72] The Supreme Court has held that if reasonably competent officials would have taken the challenged action or if they could disagree on the issue, immunity should be recognized.[73] In cases where the factual record is undisputed, as in *Marsh*, the courts should decide whether the

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[64] *Saucier*, 533 U.S. at 201.

[65] *Id.* The court has discretion to reverse the order of these analytical steps, depending on the circumstances of the particular case. Pearson v. Callahan, 555 U.S. 223, 236 (2009) ("On reconsidering the procedure required in *Saucier*, we conclude that, while the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

[66] Curley v. Klem, 499 F.3d 199, 207 (3d Cir. 2007).

[67] Saucier, 533 U.S. at 201; *see* Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158–59 (9th Cir. 2012).

[68] Doe v. Groody, 361 F.3d 232, 238 (3d Cir. 2004); *see also Curley*, 499 F.3d at 208-11.

[69] *See generally* Weaver v. N.Y.C. Employees' Ret. Sys., 717 F. Supp. 1039 (S.D.N.Y. 1989) (noting that the unlawfulness must be apparent in light of preexisting law).

[70] *Saucier*, 533 U.S. at 202 (emphasis added).

[71] *Id.*

[72] *Id.*

[73] Malley v. Briggs, 475 U.S. 335, 345 (1986).

government official "*should have known* he was acting unlawfully."[74] In the instant case, Jay Coulter should have known he was acting unlawfully when he kept and copied Phillip's postmortem photograph and subsequently disseminated the photograph for his personal vindication.[75] However, the *Marsh* Court narrowly applied the "clearly established" standard and mistakenly glossed over Coulter's unreasonable and unlawful conduct. Thus, Coulter should not have been immune from suit.

2. *Under Color of State Law*

In addition to proving the existence of a "clearly established" constitutional right, it must also be shown that a government official was acting "under color of state law" at the time of the alleged violation.[76] Purely private conduct, no matter how discriminatory or unlawful, is excluded under color of state law.[77] Additionally, former government employee actions cannot give rise to an action without something more; otherwise, the state could be held liable for the misconduct of all its former employees.[78]

II. A CLOSER LOOK AT THE HISTORICAL DUE PROCESS PROTECTIONS OF THE RIGHT TO PRIVACY

The heart of *Marsh* centers on the aforementioned standard of a "clearly established" constitutionally protected right necessary to inform officials of their unlawful conduct, and consequently the validity of the official's qualified immunity status. In order to appropriately address this issue, this Note will examine the due process protections of the federal right to privacy under substantive due process and procedural due process before addressing the *Marsh* Court's narrow application of a "clearly established" analysis regarding the right to privacy over postmortem images.

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[74] Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990) (emphasis added).

[75] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158–59 (9th Cir. 2012).

[76] *See* Long v. Cnty. of L.A., 442 F.3d 1178, 1185 (9th Cir. 2006).

[77] Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999).

[78] *Marsh*, 680 F.3d at 1158.

A. THE ORIGINS OF FAMILIAL PRIVACY INTERESTS UNDER SUBSTANTIVE DUE PROCESS

The Supreme Court has held that several types of freedoms that do not appear in the plain text of the Constitution are nevertheless protected by the Constitution under substantive due process, a principle that allows federal courts to protect certain fundamental rights from government interference under the authority of the Due Process Clause.[79] Preventing postmortem images from becoming available to the general public is part of the constitutional right of familial integrity and autonomy interests under substantive due process. Relatedly, Marsh had a viable claim that she had a federal right to control the autopsy photographs of her deceased child, a right that exists (and has for some time) as a matter of substantive due process and also as a state-created liberty interest[80] protected by the constitutional procedural due process.[81] The *Marsh* Court held that this right encompasses the most basic decisions about family and parenthood,[82] noting that the *constitutional* right to privacy extends to *family relationships*, child rearing and education.[83] Certainly, a parent's right to control a deceased child's body and postmortem images encompasses matters relating to family relationships "flow[ing] from the *well-established* substantive due process right to family integrity."[84]

In 2000, the same year that Coulter retired as a prosecutor for the County of San Diego, the Supreme Court decided in *Troxel v. Granville*[85] that the interests of parents in the "care, custody, and *control of their children* . . . is perhaps the *oldest* of the *fundamental* liberty interests."[86] The Court further noted that a parent's right to choose how to care for a child reasonably extends to decisions dealing with death.[87] Not only did *Troxel's* holding reemphasize the fundamental nature of

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[79] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Today, the Court focuses on three types of rights under substantive due process in the Fourteenth Amendment that were first identified *Carolene Products*' famous footnote 4. Those three types of rights are (1) the rights enumerated in and derived from the first eight amendments in the Bill of Rights, (2) the right to participate in the political process, and (3) the rights of "discrete and insular minorities." *Id.*

[80] *See infra* notes 91-106 and accompanying text.

[81] *Marsh*, 680 F.3d at 1152-53.

[82] California v. FCC, 75 F.3d 1350, 1361 (9th Cir. 1996); *see also* Roe v. Wade, 410 U.S. 113, 152-53 (1973).

[83] *Marsh*, 680 F.3d at 1153.

[84] *Id.* at 1154 (emphasis added).

[85] Troxel v. Granville, 530 U.S. 57 (2000).

[86] *Id.* at 65 (emphasis added).

[87] *Id.*

familial interests and parental responsibilities, it also provided *sufficient notice* to government officials regarding the sanctity of the parent-child dynamic.[88] For over a decade, *Troxel* has stood for a parent's right to control any remains or images of a deceased child from unwarranted public exploitation, protected by the Constitution under substantive due process.[89] By photocopying and disseminating Phillip's autopsy photograph, Coulter unconscionably invaded Marsh's privacy, *without any reasonably legitimate* governmental purpose, thereby violating her substantive due process right.[90]

B. THE PRIVACY INTERESTS UNDER PROCEDURAL DUE PROCESS CREATED BY STATE LAWS

A liberty interest may arise from an expectation or interest created by state laws.[91] As a result, states may create liberty interests that are protected under the Due Process Clause.[92] The Ninth Circuit has held that a state official's failure to comply with state law that gives rise to a liberty interest may amount to a procedural due process violation, which can be vindicated under 42 U.S.C. § 1983.[93] The Ninth Circuit has further held that state law can create a right protected by the Due Process Clause only if the state law contains (1) substantive predicates governing official decisions, and (2) explicitly mandatory language indicating the outcome to be reached if the substantive grounds have been met.[94] To meet the "substantive predicates" requirement, the state law must do more than dictate procedure; it must protect some substantive end.[95]

The purpose of Section 129 of the California Code of Civil Procedure[96] is to vindicate the deceased's family's right to privacy to

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[88] *Id.*

[89] *Marsh*, 680 F.3d at 1154.

[90] *Id.* at 1155.

[91] Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

[92] Sandin v. Conner, 515 U.S. 472, 483-84 (1995).

[93] *See* Carlo v. City of Chino, 105 F.3d 493, 497-500 (9th Cir. 1997).

[94] Bonin v. Calderon, 59 F.3d 815, 842 (9th Cir. 1995).

[95] *Id.*

[96] At the time of the relevant events in *Marsh*, Section 129 of the California Code of Civil Procedure provided in relevant part as follows:

> [N]o copy, reproduction, or facsimile of any kind shall be made of any photograph, negative, or print, including instant photographs and video tapes, of the body, or any portion of the body, of a deceased person, taken by or for the coroner at the scene of death or in the course of a post mortem examination or autopsy made by or caused to be made by the coroner, except for use in a criminal action or proceeding in this state which relates to the death of that person, or except as a court of this state permits, by order after good cause has been shown and after written notification of the request for the court order has been served, at least five

limit the reproduction of gruesome autopsy photographs,[97] and the statute shows a clear intention to create a liberty interest in protecting the death images of a family member.[98] Therefore, the statute provides a liberty interest protected by the Constitution, satisfying the "substantive predicates" and "mandatory language" requirements.[99]

At the time of the relevant events in *Marsh*, section 129 contained substantive limits on official discretion and provided that no copy of an autopsy photograph could be taken except for use in criminal proceedings or an action pertaining to the death of that individual, satisfying the substantive criterion.[100] The explicit and mandatory language of Section 129 limited an official's discretion.[101] For example, the statute stated, "[N]o copy, reproduction, or facsimile of any kind *shall be made of any* photograph . . . [o]f a deceased person . . . ."[102] except with court approval or under specific exemptions.[103] These exceptions limited the protected liberty interest by allowing the use of autopsy images in criminal trials relating to the decedent, with court approval, or other valid reasons.[104]

The *Marsh* Court found that California law regarding the reproduction of photographs and other images taken in the course of postmortem examination or autopsy created a right that the Due Process Clause protects.[105] Its reasoning was based on the substantive limits of an official's discretion contained in the law, in addition to its explicit and mandatory language limiting the official's discretion.[106] Under these due process protections, Marsh had a "clearly established" right to privacy over her son's postmortem images. This right was sufficiently grounded in the "deeply rooted" history and traditions of our nation under substantive due process, in addition to privacy interests created by state laws under procedural due process.

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days before the order is made, upon the district attorney of the county in which the post mortem examination or autopsy has been made or caused to be made.

CAL. CIV. PROC. CODE § 129 (2009). The statute has since been amended; the most recent amendment proscribes the dissemination as well as the making of a prohibited copy, reproduction, or facsimile. *See* CAL. CIV. PROC. CODE § 129 (Westlaw 2014).

[97] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1156 (9th Cir. 2012).

[98] *Id.* at 1155.

[99] *Id.* at 1156.

[100] *Id.*

[101] *Id.*

[102] CAL. CIV. PROC. CODE § 129 (2009) (emphasis added).

[103] *Marsh*, 680 F.3d at 1156.

[104] *Id.*

[105] *Id.*

[106] *Id.*

III. THE NINTH CIRCUIT SHOULD HAVE ADOPTED A BROADER ANALYTICAL APPROACH REGARDING A PARENT'S "CLEARLY ESTABLISHED" CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY OVER HIS OR HER CHILD'S DEATH IMAGES

Despite finding that Brenda Marsh had a federal privacy right to control the dissemination of her two-year-old son's autopsy photo, the Ninth Circuit stopped short of entirely deciding in her favor.[107] Rather, the court unanimously ruled that a former government official who distributed the autopsy photo to the media could not be held liable because the law was not "clearly established."[108] Thus, the former prosecutor was entitled to qualified immunity in Marsh's § 1983 action.[109] Although Section 129 was enacted prior to the conduct at issue, the Ninth Circuit said it previously had not been clear that the statute created a federally protected right to privacy interest in death images, and the prosecutor was not required to anticipate the court's ruling.[110] Instead, the court should have focused on whether a reasonable deputy prosecutor such as Coulter would have understood that keeping the photograph as a personal memento (as opposed to him giving it to the press to vindicate himself in the eyes of the public) violated Marsh's federal rights.[111]

A. COURTS HAVE RECOGNIZED A LONGSTANDING FEDERAL RIGHT TO PRIVACY SURROUNDING THE DISSEMINATION OF FAMILIAL POSTMORTEM IMAGES SUFFICIENT TO SHOW THE RIGHT WAS "CLEARLY ESTABLISHED"

Case law and "deeply rooted" traditions demonstrate that the familial right to control the disposition of a deceased family member's body and images is "clearly established" as a constitutional privacy right.[112] Over a century ago, in *Schuyler v. Curtis,*[113] the New York Court of Appeals held that surviving relatives of the deceased are entitled

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[107] *Id.* at 1148.

[108] *Id.* at 1160.

[109] *Id.* at 1148.

[110] *Id.* at 1159.

[111] *Id.* at 1158-59.

[112] Reid v. Pierce County, 961 P.2d 333 (Wash. 1998); McCambridge v. Little Rock, 766 S.W.2d 909 (Ark. 1989); Bazemore v. Savannah Hosp., 155 S.E. 194 (Ga. 1930) (per curiam).

[113] Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895).

to the privilege of protecting the deceased's memory.[114] The plaintiff's chief reason for bringing the action was to establish and maintain a principle that the right to privacy should be respected.[115]

The *Schuyler* Court noted that the right to privacy of the living, not the dead, may be violated by improperly interfering with the character or memory of a deceased relative.[116] The court further reasoned that this privilege exists for the benefit of the living and is bestowed on the surviving relatives to protect the family's feelings and "prevent a violation of their own rights in the character and memory of the deceased."[117] The age-old, powerful privilege discussed in *Schuyler* highlights the intangible familial privacy interests tethered to substantive due process, perfectly aligning with the constitutional right at issue in *Marsh*, which the Ninth Circuit did not thoroughly apply.

B. THE NINTH CIRCUIT ERRED IN NARROWLY RESTRICTING *FAVISH* AS SOLELY APPLICABLE TO THE FOIA CONTEXT

Plaintiff Brenda Marsh claimed that the familial right to control postmortem images of family members was "clearly established," notably relying on *National Archives and Records Administration v. Favish*.[118] Favish, an attorney, invoked the Freedom of Information Act (FOIA) in seeking public disclosure of death-scene photographs of former Deputy White House Counsel, Vincent W. Foster, Jr.[119] The Supreme Court ruled against the government in part, though it did acknowledge that Foster's family had a privacy interest that should be recognized by the law.[120] The *Favish* Court ruled that the government properly withheld death-scene photographs from the media and public exploitation, on the basis of FOIA Exemption 7(C), which exempts the disclosure of materials that could, if released, cause an "unwarranted invasion of personal privacy."[121] The Court also held that Exemption 7(C) "requires us to protect, in the proper degree, the personal privacy of citizens against the uncontrolled release of information compiled through the power of the state."[122]

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[114] *Id.* at 25.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See generally* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).
[119] *Id.*
[120] *Id.* at 159.
[121] *Id.* at 157.
[122] *Id.* at 172.

The *Favish* Court highlighted the aforementioned "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased."[123] Yet, the *Marsh* Court found *Favish* insufficient to "clearly establish" a federal right to control the dissemination of postmortem images noting that *Favish* was decided in the FOIA context, and a reasonable officer would not have been on notice that the right applies outside the statutory context, as a separate constitutional right.[124] Rather than prematurely limiting *Favish* as solely pertaining to the FOIA,[125] the Ninth Circuit should have applied its broader holding emphasizing that surviving family members have a right to control the disposition of a deceased's body, and to "*limit attempts to exploit pictures* of the deceased's remains *for public purposes*."[126]

Although *Favish* centers on the FOIA exception, its holding ultimately stands for a broader, fundamental protection of privacy. In making this right clear, the Supreme Court recognized the very principle in *Schuyler* noting that a privacy right belongs, not to the deceased, but to the survivors as "to prevent a violation of their own rights in the character and memory of the deceased."[127] The longstanding principles recognized in *Favish*, dating over a century to *Schuyler*, show that a "clearly established" right to privacy existed, as Marsh rightfully argued, when Coulter unlawfully disseminated Phillip's postmortem photographs. Based on these time-honored principles, the *Marsh* Court should have broadly applied the traditional notions of familial privacy rights, as the Supreme Court extensively discussed in *Favish*.

1. *Justice Kennedy's Opinion in* Favish *Affirms the Broader Longstanding Principles of Familial Privacy and Control Relating to Postmortem Images*

Justice Anthony Kennedy delivered the opinion for a unanimous Court and wrote that the lower courts (including the Ninth Circuit that heard *Favish* on appeal) distorted the rationales of privacy protection.[128] Justice Kennedy made it abundantly clear that "the concept of personal privacy under Exemption 7(C) is *not* some limited or 'cramped notion'

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[123] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1154 (9th Cir. 2012) (quoting Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168 (2004)).

[124] *Id.* at 1158-59.

[125] *Id.* at 1159.

[126] *Favish*, 541 U.S. at 167 (emphasis added).

[127] *Id.* at 168-69 (quoting Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895)); *see supra* note 117.

[128] *Favish*, 541 U.S. at 165.

of that idea."[129] Instead, he declared, Exemption 7(C) is *broad enough* to protect surviving families' own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.[130] To emphasize this longstanding principle, Justice Kennedy pointed to our "well-established cultural tradition" of respecting death-scene images, and in particular, a family's control over them throughout history.[131]

Justice Kennedy sternly noted, echoing *Schuyler*, that the right to personal privacy is "not confined" to the deceased but also includes the deceased's family.[132] He also made it clear that the Court recognized the survivor privacy principle.[133] The principle was applied based upon the family's own right and interest in personal privacy protection.[134] He characterized this interest as the privacy interest of the family members "to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility."[135] Understanding the depth of Justice Kennedy's reasoning, the *Marsh* Court should have broadly applied the "well-established" traditions explicitly acknowledged in *Favish*.

2. *Congressional Intent Supports Familial Privacy Rights Related to Postmortem Images*

The *Favish* Court opined that Congress *intended* to allow the assertion of familial privacy rights against public intrusions related to the death of loved ones.[136] The Court found it "inconceivable that Congress could have intended a definition of 'personal privacy' so *narrow* that it would allow [these materials to be obtained] without limitations at the expense of surviving family members' personal privacy."[137] Justice Kennedy further noted that Congress "legislated against this background" in crafting Exemption 7(C) as a FOIA amendment.[138] Accordingly, the Court held that the FOIA "recognizes surviving family

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[129] *Id.* (emphasis added) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 763 (1989)).

[130] *Id.* at 167.

[131] *Id.* at 168.

[132] *Id.* at 165.

[133] *Id.* at 167.

[134] *Id.* at 166.

[135] *Id.*

[136] *Id.*

[137] *Id.* at 170 (emphasis added).

[138] *Id.* at 169.

members' right to personal privacy with respect to their close relative's death-scene images."[139] Moreover, the Court was stern in upholding fundamental privacy interests of surviving family members, inside the scope the FOIA with broad implications to be applied outside the FOIA.

Not only did the Supreme Court's decision in *Favish* reverse the Ninth Circuit's erroneous holding on appeal, it also encompassed a broad range of privacy protections to guide future privacy decisionmaking while preserving valuable "well-established" privacy interests, as the Ninth Circuit should have done in *Marsh*. As a matter of practicality, a distinct principle drawn from this landmark decision is that the disclosure of particularly sensitive personal information pertaining to a deceased person infringes the longstanding federal privacy interests of surviving family members. Accordingly, the proper application of *Favish* calls for the protection of a decedent's family from the reasonably expected harm of public disclosure.[140] *Favish* provides a solid foundation for this venerable "well established" right to privacy pertaining to a family member's death images, and if applied broadly, could have served well in *Marsh*.

IV. THE *MARSH* COURT'S NARROW APPLICATION OF A "CLEARLY ESTABLISHED" RIGHT IN *FAVISH* COMPELLED IT TO ERRONEOUSLY GRANT A GOVERNMENT OFFICIAL QUALIFIED IMMUNITY

Viewing *Favish* in a narrow context limited to the FOIA, *Marsh* overlooked the broad precedent and principles pertaining to the constitutional right to privacy of a deceased family member's photographs. The court reasoned that *Favish* was decided after Coulter retired (but before he distributed the autopsy photographs) and therefore Coulter could not be held accountable for violating Marsh's right to privacy.[141] The court further noted that the constitutional right at issue was not "clearly established" before the *Favish* ruling, thus entitling Coulter to qualified immunity.[142]

A public official can be held liable under § 1983 only if the contours of the right are sufficiently clear that a reasonable official would understand that what he or she is doing violates that right.[143]

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[139] *Id.* at 170.

[140] *Id.* at 167.

[141] Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158–59 (9th Cir. 2012).

[142] *Id.* at 1159.

[143] *See supra* notes 69-70 and accompanying text.

Based on "well established" traditions and precedent sufficiently holding that such a familial privacy right has existed from time immemorial, a reasonable official in a similar situation such as Coulter would have known his conduct would violate a longstanding and "clearly established" right.

Had the *Marsh* Court adopted a broader approach in finding a "clearly established" right outlawing Coulter's unreasonable conduct, the constitutional right at issue could have been appropriately addressed. After all, the court based its ruling on the same "deeply rooted" traditions relating to familial privacy interests under the Due Process Clause of the Fourteenth Amendment, yet ultimately failed to stretch its analysis to conform with our nation's "well-established" history and traditions.[144] Applying the aforementioned standards to the instant case, Coulter should not have succeeded with a qualified immunity defense.

CONCLUSION

Favish recognizes on our nation's "deeply rooted" history and traditions regarding familial privacy interests under substantive due process. A broad application of these longstanding principles that have been continuously affirmed in Supreme Court precedent highlight a "clearly established" right to inform Coulter, a government official, that his conduct was unlawful. Consequently, the *Marsh* Court should have applied a similarly rigorous application of *Favish*, albeit in a broader context, encompassing the longstanding traditions of surviving family members' right to control deceased family member's photographs. Therefore, Coulter violated Marsh's constitutionally protected right to privacy because the right was "clearly established" when Coulter photocopied and disseminated Phillip Marsh's postmortem photographs for all the wrong reasons.

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[144] *Marsh*, 680 F.3d at 1154.