

PRIVACY, FREE SPEECH & THE GARDEN GROVE CYBER CAFÉ EXPERIMENT

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ABSTRACT

In response to gang violence at local “cyber cafés,” the City Council of Garden Grove, California, passed an ordinance requiring cyber cafés to install video surveillance systems. The constitutionality of the provision was subsequently challenged, and a California Court of Appeal determined that the video surveillance requirement did not violate free speech or privacy protections under either the federal or California Constitutions. This decision was immediately challenged, by commentators and a dissenting judge, as opening the door to Orwellian-type, government intrusions into individuals’ personal lives. This iBrief analyzes the appellate court’s decision and concludes that not only did the majority reach the correct conclusion, but that there is no merit to the dissent’s Orwellian fears.

INTRODUCTION

The Internet has become a vital communication and recreation tool in twenty-first century society; as part of this movement a new model of commercial dissemination has arisen—cyber cafés. However, the regulation of these establishments has created conflict between the vital rights of free speech and privacy, and the need of government to protect community health and safety. In January 2004, a Court of Appeal for the State of California handed down the first appellate attempt to balance these interests—*Vo v. City of Garden Grove*.² In the opinion, the court validated a city ordinance that required cyber cafés to take certain safety measures aimed at stopping gang violence. One of these safety measures, installing video surveillance systems capable of recording the physical characteristics of patrons, was challenged by cyber café owners, who argued that the ordinance violated patrons’ rights of free speech and privacy. This iBrief analyzes both the majority and dissenting opinions in light of the federal right of free speech and California state privacy rights, and concludes not only that the majority correctly interpreted the law, but that the decision does not signal the impending Orwellian nightmare suggested by the dissent.

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² 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004).

I. BACKGROUND

A. Cyber Cafés – Not Your Ordinary Cup o’ Joe

¶2 Cyber cafés generally offer networked computers for hire by the hour.³ Patrons have a variety of Internet applications available to them, including web surfing, e-mail, and chat rooms.⁴ Some cafés also provide office-type applications.⁵ In *Vo*, a particular breed of cyber cafés were becoming prevalent in the City of Garden Grove, California: cafés built primarily for online gaming and marketed to youth males. These cafés, known as “PC Bangs” in some Asian countries,⁶ feature first-person, role-playing combat games, such as Counterstrike, Doom, and Diablo.⁷ Patrons can participate in a networked tournament against other patrons locally, or even compete against other users worldwide.⁸ One of the most popular—and controversial—games is Counterstrike, which vividly depicts violence and death as terrorists fight counterterrorists.⁹ Jefferson Graham’s description of a gaming café adds a little flavor: “[C]onsider the dark lighting, moody orange walls, upbeat hip-hop music on the stereo and rows of computers and headphones. Most of the screens display violent game images of pistols, shotguns, assault rifles and AK-47s decimating terrorists – and counterterrorists.”¹⁰

B. The Garden Grove Experience

¶3 In recent years, Southern California has become a hotbed of growth for cyber cafés that cater to gamers.¹¹ For example, Garden Grove has seen incredible increases in the number of cyber cafés, growing from three in

³ See Jefferson Graham, *Cybercafes serve an explosive brew*, at <http://www.almenconi.com/news/feb02/022502.html> (Feb. 25, 2002) (a patron brings along \$5 for a 2 ½ hour visit.). Some cafés are as cheap as 50 cents per hour, Robert Chacon, *Small Business; Cities boot up laws to quell violence at cyber cafes*, BUS. PRESS, Feb. 24, 2003, at 10, available at 2003 WL 8388326.

⁴ Chacon, *supra* note 3, at 10.

⁵ Patrick Vuong, *Vanquishing virtual stereotypes*, PLACENTIA NEWS-TIMES, Feb. 27, 2003, available at 2003 WL 6988519.

⁶ *Id.* (bang is Korean for “room”).

⁷ *Id.*; Gretchen Hyman, *Violence Breaks out in Los Angeles Cyber Cafes*, SILICONVALLEY.INTERNET.COM, Jan. 3, 2003, at <http://siliconvalley.internet.com/news/article.php/1564001>.

⁸ See Vuong, *supra* note 5.

⁹ Paul Wilborn, *Cybercafes seek to curb violence*, SAN JOSE MERCURY NEWS, Mar. 9, 2003, at 27, available at 2003 WL 14982935 (a 14-year-old patron describes that “[virtual] fighters die regularly in vivid splatters of blood”).

¹⁰ Graham, *supra* note 3.

¹¹ *Id.*

1999 to twenty by December 2001.¹² Unfortunately, the rise of cyber cafés in Southern California has been anything but seamless. Outbreaks of violence have occurred at cyber cafés in different communities, with some involving gang violence, and even resulting in loss of life.¹³ In December 2001, the Police Department of Garden Grove issued a report to the City Council that outlined seven incidents over the course of three months, five of which involved gang activity.¹⁴ These incidents included:

- November 3, 2001 – inside a cyber café, two patrons were assaulted by four others with baseball bats and wrenches.¹⁵
- December 16, 2001 – seven to nine people entered a cyber café and beat and stabbed a patron.¹⁶
- December 30, 2001 – in a cyber café parking lot, a 20-year-old was stabbed to death with a screwdriver.¹⁷

The violence in Garden Grove continued in 2002, with a fight among approximately thirty people in a cyber café parking lot, and the murder of a 14-year-old boy who was leaving a cyber café.¹⁸

^{¶14} The problem of cyber café-related violence has not been confined to Garden Grove. In December 2002, a PC game-related dispute occurred outside a cyber café in another area of Southern California.¹⁹ One teenager was shot in the leg, another suffered a head wound. The brawl included over one-hundred people, and several teens used chairs and steel pipes as weapons.²⁰

¹² Vo v. City of Garden Grove, 9 Cal. Rptr. 3d 257, 262 (Cal. Ct. App. 2004).

¹³ See, e.g., Chacon, *supra* note 3, at 10; Hyman, *supra* note 7; Wilborn, *supra* note 9, at 27; Mai Tran, *Gang Killing Accomplice is Convicted*, LA TIMES, July 17, 2003, at B5, available at 2003 WL 2421138; but see Vuong, *supra* note 5 (describing the lack of crime in cyber cafés in Placentia, CA).

¹⁴ Vo, 9 Cal. Rptr. 3d at 262.

¹⁵ Appellant's Opening Brief at 2-3, Vo v. City of Garden Grove, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004) (No. G032058).

¹⁶ *Id.*

¹⁷ *Id.* See also Hyman, *supra* note 7; David Reyes, *Garden Grove's Cyber Café Laws Get Appeals Court OK*, LA TIMES, Feb. 2, 2004, at B3, available at 2004 WL 55889863.

¹⁸ Appellant's Opening Brief at 5-6, Vo v. City of Garden Grove, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004) (No. G032058).

¹⁹ Hyman, *supra* note 7.

²⁰ *Id.*

¶5 Because of these incidents, cyber cafés have gained a reputation as unsafe.²¹ The number of cyber cafés in Garden Grove decreased from twenty-three in December 2001 to only about half that in July 2003.²²

C. The City Council Responds

¶6 Garden Grove first responded to cyber café violence in 2002 by enacting an emergency interim ordinance that placed a moratorium on new cyber cafés.²³ The City Council then adopted an ordinance regulating the operations of cyber cafés.²⁴ Five cyber café owners challenged the ordinance and the city was temporarily enjoined from enforcing it.²⁵ After the City Council modified the original ordinance with Ordinance 2591, the regulations at issue in *Vo* included:

1. A requirement that existing cyber cafés apply for a conditional use permit.²⁶
2. A curfew for minors forbidding usage of cyber cafés during school hours or late at night unless accompanied by a parent or guardian.²⁷
3. Minimum employee staffing requirements.²⁸
4. The required presence of licensed, uniformed security guards during peak hours on Friday and Saturday nights.²⁹
5. The maintenance of a video surveillance system that is capable of showing the activity and physical features of persons and areas within the premises.³⁰

²¹ Vuong, *supra* note 5. See also Johnny Dwyer & Richard Weir, *Teen Dies in Cyberbrawl*, NEW YORK DAILY NEWS, Sept. 30, 2003, at 31, available at 2003 WL 65394863. The problem of gang violence around cyber cafés has not yet become a nationwide epidemic, but it is not completely confined to Southern California. For example, there was an incident in Brooklyn, where “a gang of pipe-wielding thugs” barged into a cyber café and “sparked a brawl that left one teenager dead and two others injured.” *Id.*

²² Tran, *supra* note 13, at B5.

²³ Garden Grove, Cal., Ordinance 2556 (Jan. 22, 2002).

²⁴ Garden Grove, Cal., Ordinance 2573 (July 9, 2002).

²⁵ *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 262 (Cal. Ct. App. 2004) (the temporary restraining order was issued on Aug. 7, 2002).

²⁶ Garden Grove, Cal., Ordinance 2591 (Dec. 10, 2002).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

In Ordinance 2591, the City Council also made the following findings:

- A significant number of the patrons of the twenty-three cyber cafés are minors.³¹
- There has been a consistent pattern of violence in and about cyber cafés since at least September 2001, posing an immediate threat to the public health and safety of the community.³²
- There are gang activities at a number of cyber cafés.³³
- The murders of two minors were connected with cyber cafés.³⁴
- The enactment of the ordinance will reduce the potential for criminal activity at cyber cafés.³⁵

^{¶7} In March 2003, the Orange County Superior Court granted the plaintiffs,³⁶ request for a preliminary injunction against enforcement of the ordinance.³⁷ The city immediately appealed, and in January 2004, a 2-1 majority of the California Fourth District Court of Appeal reinstated most of the ordinance provisions, including the video surveillance requirement.³⁸

D. The Ensuing Outcry

^{¶8} Although the ruling affected only a small number of business owners and their patrons, some national commentators quickly denounced the opinion as a significant step backward for individual privacy and autonomy rights. Anita Ramasastry, an Associate Professor of Law at the University of Washington School of Law in Seattle, argued that “[g]overnment-mandated video surveillance of cyber cafes should be seen

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Around the time that the City Council passed Ordinance 2591, two plaintiffs settled their lawsuits with the city and were granted conditional use permits for their cafés. See Minutes, Garden Grove City Council Meeting 9 (Dec. 10, 2002), available at <http://ch.ci.garden-grove.ca.us/internet/pdf/afm/cc/m12102002.pdf> (last visited Oct. 3, 2004). Two other plaintiffs, including Thanh Thuy Vo, took their case to trial.

³⁷ *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 263 (Cal. Ct. App. 2004).

³⁸ *Id.* at 261-62 (the court held that enjoining the conditional use permit requirement was not an abuse of discretion by the Superior Court). The plaintiffs did not appeal the decision to the California Supreme Court, and the deadline to do so has passed. See Cal. Ct. R. 28(e).

as a serious First Amendment issue, one deserving of much stronger legal scrutiny than it received by the majority [of the court in *Vo*.]³⁹ Similarly, an anonymous individual⁴⁰ posted this comment on the blog of privacy scholar Lawrence Lessig⁴¹:

[The dissent's] brilliant comments so eerily and poignantly represent what I view as the ever subtle and continuing trend of American jurisprudence, compounded by the unsatiable [sic] appetite of the Court's perennial accomplice, the Legislature, to persist in eroding the everyday civil rights of our citizenry, transferring [sic] that power in real-time into the hands of our myriad institutions. Meanwhile, the masses cower to the cold comfort of a television set . . . then pat themselves on the back for the prudent decision to insulate themselves from the scary world, all the while hailing those political leaders that would continue to violate their freedom and privacy in the name of unattainable security.⁴²

¶9 In fact, the *Vo* decision has already affected how other cities regulate cyber cafés. Los Angeles recently passed an ordinance similar to Garden Grove's, which mandates its thirty local cyber cafés to install video surveillance systems.⁴³ At a minimum, the *Vo* ruling may have important persuasive value in other jurisdictions.

¶10 Therefore, the issue is not only whether the majority in *Vo* was correct as a matter of law, but whether the decision signals an erosion of constitutional rights: Does the Garden Grove cyber café video surveillance requirement open the door for further government intrusion into citizens' lives, like Orwellian "telescreens"⁴⁴?

³⁹ Anita Ramasastry, *Can a City Require Surveillance Cameras in Cybercafes Without Violating the First Amendment?*, FINDLAW, at <http://writ.news.findlaw.com/ramasastry/20040219.html> (Feb. 19, 2004) (last visited Oct. 3, 2004).

⁴⁰ The writer only identified himself as "JA."

⁴¹ Professor of Law at Stanford Law School.

⁴² Posting of JA to Lessig blog at http://lessig.org/cgi-bin/mt/mt-comments.cgi?entry_id=1709 (Feb. 18, 2004) (last visited Oct. 3, 2004).

⁴³ L.A., Cal., Code §103.101.4 (Am. Legal Publ'g Corp. through Oct. 6, 2004 legislation); Phillip W. Browne, *Cafes Get Logged On; New City Rules Go Into Effect*, L.A. DAILY NEWS, Aug. 21, 2004, at N3, available at 2004 WL 58348543.

⁴⁴ See GEORGE ORWELL, 1984 6-7 (Signet Classic 1950) (1949) ("The telescreen received and transmitted simultaneously. Any sound that Winston made . . . would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. . . . You had to live—did live, from habit that became instinct—in the assumption

II. THE MAJORITY SIDES WITH GARDEN GROVE

¶11 The *Vo* court rejected the superior court's determination that the video surveillance provision should be enjoined.⁴⁵ The majority explained that the requirement: (1) did not unduly infringe any First Amendment right of free speech, and (2) did not violate a right of privacy guaranteed by the California Constitution.⁴⁶ In doing so, the court deferred to the City Council's characterization of the Garden Grove cyber cafés as businesses that tend to attract gang members,⁴⁷ stating "courts should not too readily discount the stated need for and justifications expressed by legislative bodies in support of laws even when those laws incidentally affect First Amendment rights."⁴⁸

¶12 The appellate court reviewed the superior court's decision *de novo* because the plaintiff's likelihood of prevailing on the merits turned on a question of law, rather than fact.⁴⁹ This *de novo* review resulted in greater deference to the legislature than to the lower court, elevating the legislature's findings over those made by the lower court.

A. Free Speech Rights & Narrow Tailoring

¶13 Both the U.S. and California Constitutions protect free speech. The First Amendment to the U.S. Constitution states,

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*⁵⁰

The California Constitution, however, includes a stronger standard.⁵¹ Specifically, Article I, Section 2(a) states:

that every sound you made was overheard, and, except in darkness, every movement scrutinized.").

⁴⁵ *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 277 (Cal. Ct. App. 2004).

⁴⁶ *Id.* at 276.

⁴⁷ *Id.* at 273. In contrast, dissenting Judge Sills dismissed the city's characterization, stating that cyber cafés are "the poor man's printing press and private library." *Id.* at 283.

⁴⁸ *Id.* at 270 (citing *Sundance Saloon, Inc. v. City of San Diego*, 261 Cal. Rptr. 841, 849 (Cal. Ct. App. 1989)).

⁴⁹ *Id.* at 264 (citing *Efstratis v. First Northern Bank*, 69 Cal. Rptr. 2d 445, 448 (Cal. Ct. App. 1997) and *Ohio v. Barron*, 60 Cal. Rptr. 2d 342, 344 (Cal. Ct. App. 1997)). The court found that a determination of whether a law is facially constitutional is a question of law. *Id.*

⁵⁰ U.S. CONST. amend. I (emphasis added).

⁵¹ *Gonzales v. Superior Court (City of Santa Paula)*, 226 Cal. Rptr. 164, 167 (Cal. Ct. App. 1986).

Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.⁵²

¶14 The *Vo* majority began its opinion by stating the general rule that commercial entrepreneurs must comply with reasonable regulations promulgated under the state police power even though First Amendment rights are being exercised on the premises.⁵³ One such reasonable regulation, a so-called “time, place or manner restriction,” is permitted so long as it (1) is justified without reference to the content of the regulated speech (“content-neutral”), (2) leaves open ample alternative channels for communication, and (3) is narrowly tailored to serve a significant governmental interest.⁵⁴

¶15 Under this test, the central inquiry in *Vo* was whether the city’s ordinance was narrowly tailored to serve a significant governmental interest because content-neutrality and availability of ample alternative communication channels were not seriously at issue.⁵⁵ The test for narrow tailoring is found in *Ward v. Rock Against Racism*.⁵⁶ The *Ward* Court explained that a restriction must promote “a substantial government interest that would be achieved less effectively absent the regulation.”⁵⁷ While a time, place or manner restriction may not burden substantially more speech than necessary to further the governmental interest, the regulation will not be invalid simply because the interest could have been adequately served by a less-speech-restrictive alternative.⁵⁸

¶16 However, the *Vo* court did not apply this framework directly to the video surveillance requirement; the court merely held that it was “not persuaded the video surveillance system affects First Amendment activity

⁵² Cal. Const. art. I, §2(a).

⁵³ *Vo*, 9 Cal. Rptr. 3d at 265 (citing *Burton v. Municipal Court*, 441 P.2d 281 (Cal. 1968)).

⁵⁴ *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

⁵⁵ See *id.* at 273.

⁵⁶ *Id.* at 265 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Although the California free speech protections are considered to be stronger than those granted by the U.S. Constitution, the application of narrow tailoring to content-neutral restrictions in California follows the same rule as the federal analysis. See *Los Angeles Alliance For Survival v. City of Los Angeles*, 993 P.2d 334, 340 (Cal. 2000); but see *Statesboro Pub. Co., Inc. v. City of Sylvania*, 516 S.E.2d 296, 299 (Ga. 1999) (the Georgia Supreme Court interpreted its constitutional protection of free speech to require its regulations to be narrowly drawn “to suppress no more speech than is necessary to achieve the city’s goals”).

⁵⁷ *Vo*, 9 Cal. Rptr. 3d at 265 (citing *Ward*, 491 U.S. at 799).

⁵⁸ *Id.*

any more than does the presence of an adult employee and/or security guard.⁵⁹ Consequently, the court focused on the staffing and security guard requirements, attempting to balance them with the harm they were designed to prevent. The majority's "tailoring" consisted of the following arguments:

- The city had a "substantial interest in public safety."⁶⁰
- The Police Department's report identified the potential for gang violence at cyber cafés.⁶¹
- The city reasonably concluded that the presence of two adults at all times and security guards at peak hours would advance the city's interest in public safety.⁶²
- Absent the regulations, the city's interest in public safety and deterring gang violence would be less effectively served.⁶³
- The staffing requirements were not broader than necessary.⁶⁴

^{¶17} Implicit in the majority's balancing was a highly deferential attitude toward the city's conclusions, especially when contrasted to its posture toward the findings of the superior court.⁶⁵ Most notably, the *Vo* court did not consider dispositive the fact that only three of the twenty-two cyber cafés had experienced gang-related violence. In Section V of this iBrief, the issue of deference is considered in greater depth with regard to the dissent's counter to this argument.

B. Right of Privacy & the Hill Test

^{¶18} The second issue in *Vo* was the right to privacy under the California Constitution. Article I, Section 1 states,

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty,

⁵⁹ *Id.* at 275.

⁶⁰ *Id.* at 273.

⁶¹ *Id.*

⁶² See *id.* at 274 ("Absent the requirements of . . . a security guard during high volume hours, the city's interest in public safety and deterring gang violence would be less effectively served.").

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *id.* (citing *City of San Jose v. Superior Court*, 38 Cal. Rptr. 2d 205, 210 (Cal. Ct. App. 1995)) ("Where ordinances are concerned, it is not the business of the court to write the statute.").

acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy.*⁶⁶

The phrase “and privacy” was added to the constitution through a ballot initiative in 1972.⁶⁷ The California privacy right has been interpreted to provide protection that is distinct from, and often greater than, the privacy protection provided by the U.S. Constitution.⁶⁸ Therefore, the privacy analysis in *Vo* focused exclusively on the grant of privacy protection found in the California Constitution.

¶19 The standard for establishing an invasion of privacy comes from *Hill v. NCAA*.⁶⁹ *Hill* dealt with an NCAA drug testing program that required random drug testing of college athletes competing in postseason championships and football bowl games.⁷⁰ Athletes testing positive were subject to disqualification from the sporting event.⁷¹ The *Hill* court explained that a plaintiff alleging an invasion of privacy must show each of three factors: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, which is an objective entitlement founded on broadly based and widely accepted community norms, and (3) conduct by the defendant constituting a serious invasion of privacy.⁷² For the first factor, the California Supreme Court identified only two classes of “legally recognized privacy interests”:

- *Informational privacy*: “interests in precluding the dissemination or misuse of sensitive and confidential information.”⁷³
- *Autonomy privacy*: “interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference.”⁷⁴

The court continued that, although the drug testing program implicated legally protected privacy interests,⁷⁵ the nature of collegiate athletics and

⁶⁶ Cal. Const. art I, § 1 (emphasis added).

⁶⁷ *Hill v. NCAA*, 865 P.2d 633, 641 (Cal. 1994).

⁶⁸ See generally *id.* at 641-44.

⁶⁹ 865 P.2d 633 (Cal. 1994).

⁷⁰ *Id.* at 637.

⁷¹ *Id.*

⁷² *Id.* at 657 (emphasis added).

⁷³ *Id.* at 654.

⁷⁴ *Id.*

⁷⁵ *Id.* at 658 (noting that the observation of urination implicated autonomy privacy and the disclosure of medical information implicated informational privacy).

provisions for advance notice and informed consent all weighed against any reasonable expectation of privacy.⁷⁶

¶20 Applying *Hill*, the *Vo* court summarily rejected the plaintiffs' privacy claim, citing the inadequacy of their brief, which only made "general references" to privacy cases.⁷⁷ The brief cited only one case, *White v. Davis*,⁷⁸ in which the California Supreme Court first examined California's recently adopted right to privacy.⁷⁹ In addition, the brief did not actually make any reasoned argument using *White* as a basis.⁸⁰

¶21 However, in the dicta that followed, the *Vo* majority stated that *even if* the privacy claim was not waived, the plaintiffs would have failed to establish a claim on all three elements of the *Hill* test.⁸¹ First, the court stated that there was no legally protected privacy interest, finding that because the video surveillance system was only required to record a person's physical features, which are not confidential information, the interest was not one of informational privacy.⁸² The court also quickly rejected any autonomy privacy argument, stating that simply observing persons using computers in a cyber café cannot reasonably be understood to involve an intrusion upon an intimate personal decision.⁸³ Second, the majority declared that a reasonable expectation of privacy was "wholly lacking," citing the "near ubiquitous use of video surveillance" in other retail establishments and even in some public places, like road intersections.⁸⁴ Finally, the court stated that the plaintiffs presented no evidence that the invasion of privacy was serious.⁸⁵

¶22 Since the plaintiffs did not meet any of the three requirements outlined in *Hill*, the majority did not engage in an explicit balancing test apart from the one employed under the freedom of speech analysis.⁸⁶

⁷⁶ *Id.* at 658-59.

⁷⁷ *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 276 (Cal. Ct. App. 2004) (citing the rule in *People v. Stanley*, that "a brief must contain reasoned argument and legal authority to support its contentions, or the court may treat the argument as waived," 897 P.2d 481, 497 (Cal. 1995)).

⁷⁸ 533 P.2d 222 (Cal. 1975).

⁷⁹ Respondents' Brief at 20-22, *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004) (No. G032058).

⁸⁰ *Id.*

⁸¹ *Vo*, 9 Cal. Rptr. 3d at 276-77.

⁸² *Id.* at 277.

⁸³ *Id.* (adding in footnote 15, "[p]eople don't do things 'fundamental to personal autonomy' in a public retail establishment").

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ See *id.* at 276-79.

Although this view commanded a majority, it resulted in an animate dissent by Judge Sills.

III. THE DISSENTER'S RESPONSE

A. *Soft Judicial Whispers*

¶23 Judge Sills' dissenting opinion angrily lashed out at the majority:

The majority opinion represents a sad day in the history of civil liberties. They see no infringement on privacy when a video camera is, literally, looking over your shoulder while you are surfing the Internet. . . . This is the way Constitutional rights are lost. Not in the thunder of a tyrant's edict, but in the soft judicial whispers of deference.⁸⁷

In addition, Judge Sills expressed the view that the use of video surveillance measures as a reasonable method for deterring gang violence was an unconscionable concept:

[T]he essence of their opinion is nothing less than almost slavish deference to an unsupported and illogical conclusion of the city's police chief and city council.

Do my colleagues not realize the – there is no other word for it – Orwellian implications of their ruling today? They approve an ordinance which *literally* forces a "Big Brother" style *telescreen* to look over one's shoulder while accessing the Internet.⁸⁸

B. *Merging Privacy and Expression*

¶24 The schism between the majority and dissent is whether the video surveillance equipment implicated a privacy interest. Unlike the majority, which compartmentalized its discussion into separate free speech and privacy analyses,⁸⁹ the dissent merged the two into a single privacy interest.⁹⁰ The dissent argued that because a privacy interest was implicated the court should have engaged in some level of balancing, either under "compelling state interest"⁹¹ or a general balancing test.⁹²

⁸⁷ *Id.* at 286 (Sills, J., dissenting).

⁸⁸ *Id.* at 279.

⁸⁹ *Id.* at 275-26 (free speech); *id.* at 276-77 (privacy).

⁹⁰ *Id.* at 279-84.

⁹¹ *Id.* at 280-82.

⁹² *Id.* at 282-83.

1. Untangling Hill from White v. Davis

¶25 The dissent's idea to merge privacy and expression came from *White v. Davis*. The dissent, citing *Hill*'s discussion of *White*, stated that for "government action impacting freedom of expression and association," the correct standard of review is one of "compelling state interest."⁹³

¶26 *White* involved allegations of a covert intelligence gathering operation at UCLA, where members of the Los Angeles Police Department registered as college students and posed as "secret informers and undercover agents" to collect information from class discussions and organization meetings.⁹⁴ The *White* court held that the taxpayer-funded program presumptively violated both the federal and state constitutional protections of free speech and expression⁹⁵ and constituted a *prima facie* violation of the state constitutional right to privacy.⁹⁶ In both its free speech and privacy holdings, the court in *White* used "compelling interest" as the standard to judge whether the state action was permissible.⁹⁷ It was this merger of free speech and privacy infringement that the dissent in *Vo* cited as authoritative.⁹⁸

2. The Existence of a Protected Privacy Right & the Appropriate Standard

¶27 In applying the rules from *Hill*, the dissent stated that the free speech implications of the surveillance system required that the issue be analyzed using the compelling interest standard.⁹⁹ Specifically, Judge Sills saw cyber cafés very differently than the Garden Grove City Council and the majority did. He stated:

Cyber cafés allow people who cannot afford computers (or, often, who cannot afford very high speed internet connections) the freedom of the press. They can post messages to the whole world, and, in theory (if they get enough "hits") can reach more people than read the hard copy of the New York Times every morning. . . . With the Internet, the average computer blogger has, in effect, his or her own printing press to reach the world. . . . Logging on is an exercise of free speech.¹⁰⁰

The implication of this declaration is that exercising free speech in a cyber café is not only a protected privacy interest, but one serious enough that infringing upon it requires a compelling state interest.

⁹³ *Id.* at 280.

⁹⁴ *White*, 533 P.2d 222, 225 (Cal. 1975).

⁹⁵ *Id.* at 232.

⁹⁶ *Id.* at 234.

⁹⁷ *Id.* at 232, 234.

⁹⁸ *Vo*, 9 Cal. Rptr. 3d at 280 (Sills, J., dissenting).

⁹⁹ *Id.* at 279.

¹⁰⁰ *Id.* at 281.

¶28 In the alternative, Judge Sills argued that even if the privacy interest at stake did not require a compelling state interest, *Hill* requires a general balancing test, and, under such a test, the City Council's actions still went too far.¹⁰¹ He explained that the majority had not engaged in any balancing because it merely deferred to the legislature: "A court cannot just turn over to the city the balancing under the guise that it does not want to "reweigh" the evidence."¹⁰² Had the majority balanced, the dissent argued, they would have realized that the blanket video surveillance requirement for *all* cyber cafés was overbroad because only three of twenty-two had experienced gang violence¹⁰³ and no surrounding cities had reported any gang violence at cyber cafés.¹⁰⁴

3. Protection of One's Identity?

¶29 Judge Sills took his argument one step further and contested that a person has an expectation of privacy in one's *identity* when using a cyber café.¹⁰⁵ He analogized the City Council's actions with those of Communist governments, such as Vietnam and China. These countries have cracked down on access to cyber cafés in recent years by, among other things, forcing patrons to divulge their identities which, according to Judge Sills, has stifled the ability of their citizens to freely exchange ideas.¹⁰⁶

¶30 Judge Sills further rejected the majority's notion that a video camera is no different than a security guard: "A security guard is usually some guy standing around looking bored. A video camera is a permanent record of events, accessible to the police with a proper search warrant."¹⁰⁷ The majority responded that the record of events was to be destroyed after 72 hours.¹⁰⁸

¶31 Therefore, the essence of Judge Sills' merger of speech and privacy is the ability for individuals to keep their identities private. Communicating with an Internet-ready computer may include written or real-time communication that is analogous to using a printing press. Because a camera's recording of patrons' features may lead to the determination of their identities, video surveillance stifles a user's ability to anonymously communicate their ideas over the Internet.

¹⁰¹ *Id.* at 282.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 284 (citing the City Council's survey of surrounding communities).

¹⁰⁵ *Id.* at 282.

¹⁰⁶ *Id.* at 281-82.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 274.

¶32 In addition, with the legally protected privacy interest in free expression, a reasonable expectation of privacy as to one's identity, and an inferred serious invasion of privacy,¹⁰⁹ the dissent argues a privacy interest was implicated by Garden Grove's video surveillance provisions.¹¹⁰ Since the City Council's actions did not meet either the compelling state interest or general balancing standards, the video surveillance requirement violated, *per se*, the California Constitutional right of privacy.¹¹¹

IV. ANALYSIS

¶33 Three conclusions can be made about the *Vo* case. First, the plaintiffs did not make a viable freedom of speech claim. Second, the majority correctly ignored the balancing test requirement because the plaintiffs failed to establish even a single prong of the *Hill* test. Lastly, although this case may be a step backward in individual privacy, it is a very small step, one that hardly justifies the dissent's callous rebuke of the majority and the City Council.

A. No Freedom of Speech Infringement

¶34 The plaintiff's freedom of speech claim is the simplest to refute. Although the burden is on the proponent of the ordinance to show that it is a valid time, place or manner restriction on free speech,¹¹² it is clear that the city did not run afoul of free speech rights independent of privacy. First, the ordinance was content-neutral since it affected all speech taking place in a cyber café regardless of its content. Second, there are plenty of alternative channels for communicating over the Internet, such as personal computers at home, work, school, or public libraries.

¶35 The third inquiry, narrow tailoring, is the only element reasonably at issue. According to *Ward*, the regulation need not be the alternative that is least restrictive to free speech, but only one that "promotes a substantial government interest that would be achieved less effectively absent the regulation."¹¹³ Commentators (generally begrudgingly) describe the *Ward* analysis as toothless;¹¹⁴ that it "does not look to how the government has

¹⁰⁹ Note that the dissent does not reference this language directly or make an explicit claim that such an injury has taken place.

¹¹⁰ See *Vo*, 9 Cal. Rptr. 3d at 281-82 (Sills, J., dissenting).

¹¹¹ *Id.* at 282-83.

¹¹² *Id.* at 265 (a time, place or manner restriction on free speech must be (1) justified without reference to the content of the regulated speech ("content-neutral"), (2) leave open ample alternative channels for communication, and (3) be narrowly tailored to serve a significant governmental interest.).

¹¹³ *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

¹¹⁴ See, e.g., Carney R. Shegerian, *A Sign of the Times: The United States Supreme Court Effectively Abolishes the Narrowly Tailored Requirement for*

chosen to regulate the time, place or manner of the protected speech . . . it only examines whether the government's substantial interest is being furthered.”¹¹⁵

¶36 Given the low threshold the city was required to meet, it is understandable that the dissent tried to characterize the ordinance as “an unsupported and illogical conclusion” by the city;¹¹⁶ to do otherwise would require acknowledgement that the city’s regulation furthers its general interest in public safety by potentially deterring violence occurring in and around cyber cafés. As the city’s findings showed, there were a growing number of incidents occurring in or near cyber cafés.¹¹⁷ The city acted on the heels of two high-profile murders occurring outside cyber cafés.¹¹⁸ Patrons who might consider using violence will now be forced to think twice knowing that their presence will be captured on film. Because the city has a substantial interest in public safety and that interest would be less effectively achieved absent the regulation, the city easily meets its limited narrow tailoring burden.

B. No Illegal Privacy Infringement

¶37 The more interesting debate centers on the issue of whether the patrons of cyber cafés have a “protected privacy interest” at stake. As a legal matter, the question is whether surveillance in cyber cafés met the three-pronged test of *Hill*.¹¹⁹ The majority’s analysis, although minimal, correctly dismissed the plaintiff’s claim.

1. No Legally Protected Privacy Interest

¶38 While the dissent argued that the court must use either (1) the compelling interest standard or (2) a balancing test,¹²⁰ the majority claimed that because there is no legally protected privacy interest, there was no

Time, Place and Manner Restrictions, 25 LOY. L.A. L. REV. 453, 489-91 (1992); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1262-63 (1995).

¹¹⁵ Shegerian, *supra* note 114, at 490.

¹¹⁶ *Vo*, 9 Cal. Rptr. 3d at 279.

¹¹⁷ Appellant’s Opening Brief at 2, *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257 (Cal. Ct. App. 2004) (No. G032058).

¹¹⁸ *Id.* at 3-6.

¹¹⁹ *Infra ¶¶ 19-21* (a legally protected privacy interest, a reasonable expectation of privacy in the circumstances, and conduct by defendant constituting a serious invasion of privacy).

¹²⁰ *Vo*, 9 Cal. Rptr. 3d at 279.

interest to balance.¹²¹ Therefore, the threshold question is whether there was a privacy interest that is protected by law. Considering the two sets of privacy interests previously identified by court decisions (informational and autonomy),¹²² neither seems infringed upon by cyber café video surveillance. The majority correctly noted the obvious, that “[p]eople don’t do things ‘fundamental to personal autonomy’ in a public retail establishment.”¹²³ As a result, strict scrutiny does not apply in this case.¹²⁴

¶39 For a balancing test to apply, there must be a privacy interest “less central, or in bona fide dispute.”¹²⁵ The history of the California Privacy Initiative itself sheds some light on informational privacy:

[T]he California constitutional right of privacy ‘prevents government and business interests from [1] collecting and stockpiling unnecessary information about us and from [2] misusing information gathered for one purpose in order to serve other purposes or to embarrass us.’¹²⁶

¶40 Neither of these occurrences are inexorable results of the Garden Grove ordinance. All that the provision requires of cyber cafés is that they maintain a video surveillance system that is capable of showing the “activity and physical features of persons or areas within the premises,” keep the videos for 72 hours, and allow the city to inspect the system during business hours.¹²⁷ The ordinance does not authorize, nor do the plaintiffs allege, stockpiling, the misuse of the footage by café owners, or releasing the footage to any government official absent legal process.¹²⁸

¶41 Furthermore, contrary to what the dissent stated,¹²⁹ there is no reason to believe that the ordinance threatened a privacy interest in one’s *identity*. Commentator Christopher Slobogin, Professor of Law at the Levin College of Law, University of Florida, argued that people possess a “right to

¹²¹ *Id.* at 277 (noting in footnote 15, “[w]ithout identifying the privacy interest at stake, whether an informational interest or an autonomy interest, the balance can not be struck”).

¹²² *Id.*; *Hill v. NCAA*, 865 P.2d 633, 654 (Cal. 1994).

¹²³ *Vo*, 9 Cal. Rptr. 3d at 277.

¹²⁴ *Hill*, 865 P.2d 633 at 653.

¹²⁵ *Id.*

¹²⁶ *Id.* at 654 (citing the Privacy Initiative Ballot Argument).

¹²⁷ Garden Grove, Cal., Ordinance 2591 (Dec. 10, 2002).

¹²⁸ *Vo*, 9 Cal. Rptr. 3d at 274-75. In fact, plaintiff’s counsel stipulated that “we are not required, absent legal process, to turn a tape over to the city under the terms of this ordinance.” *Id.*

¹²⁹ *Id.* at 282 (“I will go so far as to say that there is an expectation of privacy even as to one’s *identity* when using a cyber café.”).

anonymity,” even when in public.¹³⁰ In the context of government surveillance of public places, he writes:

Continuous, repeated or recorded government surveillance of our innocent public activities that are not meant for public consumption is neither expected nor to be condoned, for it ignores the fundamental fact that we express private thoughts through conduct as well as through words.¹³¹

However, this argument does not apply to the Garden Grove situation. First, the surveillance was undertaken by the business owner, not the government. Any governmental use of the footage required legal process. Second, unlike the government of Malaysia, who forces all cyber café customers to register their names and identity cards,¹³² the ordinance did not authorize any automatic linkage between patrons and the video footage.¹³³ Patrons could be as anonymous as can be expected in public so long as they refrain from sharing their personal information with others.¹³⁴ The ordinance did not authorize cyber cafés to install any software to record user behavior or require patrons to identify themselves prior to using a computer. Therefore, the majority correctly dismissed any need to engage in a balancing test between individual privacy and government action.

¶42 Finally, the dissent misread *White v. Davis* in its proposition that the merging of privacy and free speech in *Vo* created a protected privacy interest worthy of a compelling interest standard.¹³⁵ In *Hill*, the California Supreme Court specifically limited the applicability of *White v. Davis*, stating that it stands for the proposition that, “some aspects of the state constitutional right to privacy—those implicating obvious government action impacting freedom of expression and association—are accompanied by a ‘compelling state interest’ standard.”¹³⁶ The *Hill* court also clarified that the particular context is key to what sort of balancing the court will

¹³⁰ Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 217 (2002).

¹³¹ *Id.*

¹³² *Vo*, 9 Cal. Rptr. 3d at 282.

¹³³ *But see* Garden Grove, Cal., Ordinance 2573 (Dec. 10, 2002). The original ordinance passed by the City Council included a provision for a “customer log,” which was to include patrons’ names, addresses, ages, and computer assignments, be verified by a governmental agency or educational institution, and maintained for at least 30 days. *Id.* That provision was removed by Ordinance 2591. Garden Grove, Cal., Ordinance 2591 (Dec. 10, 2002).

¹³⁴ *But see* Slobogin, *supra* note 130, at 216 (describing the advent of digital technology and biometric technology).

¹³⁵ *Vo*, 9 Cal. Rptr. 3d at 280.

¹³⁶ *Hill v. NCAA*, 865 P.2d 633, 653 (Cal. 1994).

engage in.¹³⁷ For obvious invasions of interests “fundamental to personal autonomy,” a compelling interest standard will apply; for other, less central, or genuinely disputed privacy interests, a general balancing test will be employed.¹³⁸ As just discussed, neither category of interest is implicated by the Garden Grove ordinance.

2. No Reasonable Expectation of Privacy

^{¶43} Cyber café patrons lack a reasonable expectation of privacy. The situation is analogous to video surveillance in the workplace. In *Vega-Rodriguez v. Puerto Rico Tel. Co.*,¹³⁹ the U.S. Court of Appeals for the First Circuit held that although an employee had an objectively reasonable expectation of privacy in his or her exclusive private office, desk, and file cabinets, employees do not have a reasonable expectation against surveillance of open work areas, unenclosed desks, lockers or files.¹⁴⁰ Like these employees, patrons of the cyber café were not given private computer stations to which they had exclusive use. In fact, a major appeal of cyber cafés to youth is that they are a place to be with other youth in a common area to play games, do homework, or surf the Internet.¹⁴¹ The person seated next to you can see every e-mail written, instant message received, or web page visited.

^{¶44} As a practical matter, surveillance has become a fact of life, resulting in decreased individual privacy expectations:

Cameras are now common in retail establishments to assist in loss prevention and customer safety. Thus, surveillance cameras photograph a person who lives and works in a metropolitan area in the United States an average of twenty times per day. Cameras are found at intersections, in apartment and office building lobbies, in parking lots, in stores, in banks, and in elevators.¹⁴²

^{¶45} This observation illustrates the flawed circularity of the expectation of privacy concept. Shaun Spencer argues that this “expectation-driven” concept of privacy is vulnerable to incremental encroachment.¹⁴³ Although

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ 110 F.3d 174 (1st Cir. 1997).

¹⁴⁰ *Id.* at 179.

¹⁴¹ See Wilborn, *supra* note 9, at 27; Vuong, *supra* note 5.

¹⁴² Robert D. Bickel, et.al., *Seeing Past Privacy: Will the Development and Application of CCTV and Other Video Security Technology Compromise an Essential Constitutional Right in a Democracy, or Will the Courts Strike a Proper Balance?*, 33 STETSON L. REV. 299, 305-06 (2003).

¹⁴³ Shaun B. Spencer, *Security vs. Privacy*, 79 DENV. U. L. REV. 519, 521 (2002) (Adjunct Professor at Boston College Law School and Climenko/Thayer Lecturer on Law at Harvard Law School).

correct, it does not answer the legal question presented. Rather than trying to argue that a square peg fits into a round hole, the dissenting judge would have been better served arguing in favor of rewriting California privacy law.

3. No Serious Invasion of Privacy

¶46 The *Vo* dissent also erred by inferring the presence of a serious invasion of privacy. The *Hill* court stated, “[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.”¹⁴⁴ A video surveillance system installed in a retail business is not an egregious breach of any social norm for the same reasons underlying the other *Hill* requirements. Further, requiring cyber café businesses to install devices that they are already empowered by law to install on their own accord does not add any new privacy implications.

C. Who Polices the Erosion?

¶47 While the Garden Grove ordinance was correctly reinstated, the question remains whether this is the right result for society. Although vulnerable to incremental encroachment,¹⁴⁵ is it the proper role of the judiciary to police society’s tendency to overvalue the tangible benefits of added security in exchange for the intangible losses of abstract privacy notions?¹⁴⁶ There is obviously a balance that society needs to strike; as the *Hill* court aptly noted, “[n]o community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy.”¹⁴⁷

¶48 The dissent argues that because only three of the twenty-two have experienced gang-related violence, the government’s interest could have been realized with “much less intrusiveness.”¹⁴⁸ But is it clear that this is accurate? Requiring cameras at a handful of locations would only tend to shift the problem to other cyber cafés. Furthermore, while Judge Sills might believe that cyber cafés are not dangerous *per se*,¹⁴⁹ there is at least documentation supporting an argument that cybercafés are linked to violence in cities beyond Garden Grove.¹⁵⁰ How much deference should courts give municipal and state governments to correct their problems? Forcing the city to make an air-tight connection between all its actions and

¹⁴⁴ *Hill v. NCAA*, 865 P.2d 633, 655 (Cal. 1994).

¹⁴⁵ Spencer, *supra* note 143, at 521.

¹⁴⁶ See *id.* at 519.

¹⁴⁷ *Hill*, 865 P.2d at 655.

¹⁴⁸ *Vo v. City of Garden Grove*, 9 Cal. Rptr. 3d 257, 282 (Cal. Ct. App. 2004).

¹⁴⁹ See *id.* at 284 (claiming “[t]here is nothing *inherently* attractive about cybercafes to ‘gangs’”).

¹⁵⁰ Hyman, *supra* note 7.

the harms it seeks to remedy (i.e., that each and every regulated cyber café has experienced gang violence) seems unnecessarily burdensome on the city's ability to solve its problems.

¶49 Garden Grove's requirement of video surveillance in cyber cafés was a reasonable use of the city's police power and was rationally related to its interest in maintaining safety. To argue otherwise is to either take the position that courts are in a better position to legislate than the politically accountable City Council, or to argue that the council's actions were wholly arbitrary and capricious. While Judge Sills' contention that courts should strike down laws based on "slavish deference to an unsupported and illogical conclusion"¹⁵¹ is valid, the Garden Grove video surveillance ordinance is not such a law.

CONCLUSION

¶50 The *Vo* majority came to the correct result in holding the video surveillance requirements constitutional under the federal right of free speech and the California constitutional right of privacy. Although Judge Sills' fears of "Big Brother" rearing its ugly head in California certainly raise an eyebrow, he neglected to recognize that the freedoms of speech and privacy are not broad enough under current jurisprudence to encompass the installation of video surveillance in a public retail establishment.

¹⁵¹ *Vo*, 9 Cal. Rptr. 3d at 279.