THE PRIVACY OF DEATH ON THE INTERNET: A Legitimate Matter of Public Concern or Morbid Curiosity

INTRODUCTION

Nicole Catsouras was only eighteen years old when she crashed her father’s Porsche driving over 100 mph into a toll booth on Halloween, 2006. Nicole was killed instantly by massive head trauma which caused her partial decapitation. Despite the tremendous grieving process that ensued for the surviving relatives, something even more devastating subsequently emerged to challenge their fragile well being. Images of Nicole’s accident scene investigation started proliferating over the Internet. These grisly pictures vividly captured her corpse, half decapitated, seated in her father’s crumpled Porsche Carrera. Once on the Internet, the images aggressively spread on to as many as 2,500 websites specializing in the morbid curiosities, and bulletin boards where users can upload content and exchange warped opinions. To make matters worse, Nicole’s parents and three younger sisters were tormented by further
abuse over the Internet when they received spam e-mails that contained attached photos of Nicole’s corpse, and noticed fake MySpace.com pages set up after her death.\(^7\)

It was later revealed that the source of this outbreak was credited to two California Highway Patrol (hereinafter CHP) dispatchers, who are now seeking refuge behind the First Amendment.\(^8\) The lawsuit against the CHP was dismissed in March, 2008 by the Orange County Superior Court, which held that the dispatchers had no special duty to protect the privacy of the Catsouras family.\(^9\) In addition, efforts to have the images removed from the Internet have been futile,\(^10\) and the horrific images remain available for world consumption.\(^11\)

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\(^7\) See Barret, supra note 3 (stating that Nicole’s father, Christos Catsouras, received an email from an anonymous Yahoo account “Im Alive[sic]” that read “[w]hoaaaaaaaaaaa I am here daddy.” Nicole’s mother, Leslie Catsouras, was horrified when she accidentally stumbled on to the accident images while on the Internet searching through an article on her daughter’s death stating that, “I’ve spent 41 years seeing good in the world. Now I see the bad”); see also Hardesty, supra note 1 (explaining that the taunting got so bad for Nicole’s sixteen year old sister Danielle that she had to be home-schooled).

\(^8\) See Hardesty, supra note 1 (commenting that Thomas O’Donnell of the CHP admitted e-mailing the photos to his home computer and Aaron Reich of the CHP had admitted to e-mailing the photos to a few friends and relatives).

\(^9\) See Ron Gonzales, Appeal Over Graphic Photos Fuels Response, ORANGE COUNTY REGISTER, Aug. 28, 2008, available at 2008 WLNR 16666057 (noting that the Catsouras family is currently appealing the decision in a state appellate court claiming “the right to seek damages from the CHP because the agency made public what should have remained private, subjecting them to deep emotional anguish”).

\(^10\) See Hardesty, supra note 1 (stating that the family hired “Reputation Defender, to try to get Web site operators to take down the offensive images”).

\(^11\) Navigating the Internet using Google’s search engine at www.google.com with the keywords “Nicole Catsouras,” “Porsche Girl,” or “Accident Photos” will yield results that include the gruesome images of Nicole’s corpse. See, e.g., supra note 5.
The anguish that the Catsouras family has endured illustrates the dark possibilities that the Internet enables, and the seemingly inadequate protection that privacy law provides. First, the websites that post these images and manage their own content can invoke the First Amendment and declare the photographs newsworthy.\(^\text{12}\) Second, Internet Service Providers (hereinafter ISPs) are currently absolved from liability under the Communications Decency Act (hereinafter CDA), and will therefore refuse to remove material generated by users on Internet bulletin boards and other forums where users interact and dictate content.\(^\text{13}\) Lastly, the right to privacy after death remains a controversial and emotionally charged unsettled area of law. Although common law has predominantly established that the right of privacy dies with the decedent,\(^\text{14}\) the Supreme Court decision in National Archives and Records Administration v. Favish,\(^\text{15}\) and several state statutes limiting access to autopsy

\(^{12}\) See generally Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 489-91 (1975) (finding that the tort of public disclosure of private fact "most directly confront[s] the constitutional freedoms of speech and press." As a result, the interest in privacy can sometimes be "overborne by the larger public interest, secured by the Constitution, in the dissemination of truth").


\(^{15}\) 541 U.S. 157 (held that decedent’s relatives have a valid privacy claim).
photographs promote the adoption of a stronger privacy interest in response to our voyeuristic culture.\(^{16}\)

Privacy is an important right in the context of death, and should be afforded some measure of protection against public exploitation. To the contrary, the Internet has turned our right of privacy upside down by disguising gruesome images of death as a matter of a public interest. This explicit content represents a quantum leap from the standard obituary or the occasional article containing a photograph of the deceased. Often devoid of informative value, these digital images present a challenge to our privacy law that is unlike anything our courts have permitted in prior holdings.\(^{17}\) For this reason, it is necessary for the courts and legislators to reconsider the right of privacy in this narrow context and to carefully tailor a law that properly balances the interests at stake.


\(^{17}\) In dealing with the right to privacy and death with other mediums, courts are frequently exposed to circumstances that are factually distinct from the exploitation that takes place on the Internet. Compare Hardesty, supra note 1 (highlighting Nicole’s grisly images that are permanently portrayed over the Internet) with Hendrickson v. California Newspapers, Inc., 48 Cal. App. 3d 59 (1975) (holding that the relatives of the decedent could not maintain a privacy cause of action where newspaper obituary revealed prior criminal conviction of deceased); and Flynn v. Higham, 149 Cal. App. 3d 677 (1983) (holding that the decedent’s relatives could not maintain a privacy cause of action arising from a book that referred to the sexual and political activities of their deceased father).
This Note will argue for a stronger privacy right for decedents and their relatives with respect to Internet publications of death-images. The depictions warranting greater protection under this Note will include those that capture images of a decedent’s autopsy, corpse, cause of death or manner by which he or she died, body parts of the deceased, or any other depiction that portrays the decedent’s actual death. In order to achieve sufficient protection for relatives, this Note proposes a necessary amendment to the CDA that affords decedent’s relatives proper recourse when seeking the removal of death-images generated by third-parties. In addition, this Note offers a two-part test for courts to implement when analyzing the newsworthiness of death-images published by information content providers who are outside the scope of the CDA.\textsuperscript{18} Part I discusses the historical treatment of the right of privacy after death, and highlights the disparity amongst courts in striking a balance. Part II examines the privacy of death over the Internet, including the current system that abrogates ISP liability. Part III provides a critique of the current status of the law and its deficiency in providing sufficient protection. Finally, Part IV proposes an amendment to the CDA, and a two-part test for courts to implement when dealing with the privacy of death on the Internet.

\textsuperscript{18} See discussion \textit{infra} Part III.A.2.
I. The Right of Privacy

The right against "publicity given to private life" has been a recognized privacy interest in our jurisprudence for over one-hundred years.\(^{19}\) Today, almost every state has codified some variation of the constitutional right to nondisclosure of personal matters,\(^{20}\) or at least accepts it as a cognizable right under the common law.\(^{21}\) Under the commonly adopted Restatement Second of Torts, the right is defined as “[o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”\(^{22}\) Given its potential conflict with the First Amendment freedom of the press, the foundation of this privacy right is often contingent upon the newsworthiness of the

\(^{19}\) See, e.g., Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895); see also Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 HARV. L REV. 193 (1890) (highlighting the concern over the press’ frequent intrusion into private matters); Dean W. L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960) (categorizing and defining the four basic privacy interests later used in the Restatement Second of Torts, including “[p]ublic disclosure of embarrassing private facts about the plaintiff”).


\(^{21}\) See, e.g., all cases supra note 14 (Texas, California, Michigan, Florida, and Ohio all recognize the tort of public disclosure of private fact); see also Peter Gielniak, Tipping the Scales: Courts Struggle to Strike a Balance Between the Public Disclosure of Private Facts Tort and the First Amendment, 39 SANTA CLARA L. REV. 1217, 1225 (1999) (noting the historical origin of the right to privacy and its acceptance as a common law cause of action throughout the country).

disclosure.\textsuperscript{23} Hence, the element critical in most cases dealing with the public disclosure of private facts is “the presence or absence of legitimate public interest” \textsuperscript{24} or the “’newsworthiness’ of the facts disclosed.”\textsuperscript{24} In weighing these interests, the Restatement is clear in making the distinction between giving publicity to information to which the public is entitled, and giving publicity to information that “becomes a morbid and sensational prying into private lives for its own sake,” with which a reasonable member of the public would admit is of no concern.\textsuperscript{25} Section A explores how courts historically treated a private facts action brought by decedents’ relatives. Section B introduces new trends in the law that encourages a greater privacy right for decedent’s relatives. And lastly, Section C juxtaposes the two diverging applications of the law concerning the right of privacy after death.

A. The Privacy of Death: The Courts Historical Approach

Generally courts have been unwilling to extend the right of privacy to decedents or their relatives.\textsuperscript{26} Following this

\begin{itemize}
  \item \textsuperscript{23} See, \textit{e.g.}, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (upholding the press’s right to publish a seventeen year old rape victim’s identity which already appeared in the public record).
  \item \textsuperscript{24} Savala v. Freedom Communications, Inc., 2006 WL 1738169, at 5 (Cal.App. 5 Dist. 2006).
  \item \textsuperscript{25} See Restatement, \textit{supra} note 22, at comment h (noting this limitation is based upon common decency, and respecting both the feelings of the individual and the harm that will result from exposure).
  \item \textsuperscript{26} See Justice v. Belo Broadcasting Corp., 472 F. Supp. 145 (N.D. Texas 1979) (holding that the plaintiffs could not bring a representative action for the invasion of their deceased son’s privacy because the right is “personal and unassignable”); see also Smith v. City of Artesia, 772 P.2d 373 (N.M.App.}
\end{itemize}
tradition, courts have recognized two significant factors when rejecting a cause of action for invasion of privacy. First, as a threshold matter, courts have predominantly found that the right of privacy is personal and extinguishes upon death. Second, assuming the court allows the plaintiff to maintain a cause of action, the plaintiff still carries the difficult burden of proving that the subject content is not newsworthy.

Taking the preceding factors into account, plaintiffs have often conceded their right(s) of privacy in the interests of the public’s right to know. For instance, in Savala v. Freedom Communications, Inc., the plaintiffs commenced an action for invasion of privacy after a crime scene photograph of their relative’s murdered corpse had appeared in an end-of-the-year newspaper article about the number of shootings in the city. First, the court held that the subject of violent crime was a

1989) (holding that the right to privacy is personal and could only be maintained by a living person); Swickard v. Wayne County Med. Examiner, 475 N.W.2d 304 (Mich. 1991) (holding that the right to privacy cause of action could not be maintained after the death of the person whose privacy had been invaded); Long v. American Red Cross, 145 F.R.D. 658 (S.D. Ohio, 1993) (holding that the privacy interest extinguishes upon death); Williams v. City of Minneola, 575 So.2d 683 (Fla.App. 1991) (holding that the right to privacy is personal and an action could only be brought by the person whose privacy was invaded).

See Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 1485 (Cal. 1986) (stating that the right of privacy “does not survive but dies with the person”).

See, e.g., Shulman v. Group W Productions, Inc., 955 P.2d 469, 478-79 (stating that it’s the plaintiff’s burden to prove the alleged private facts lack any newsworthy value) (emphasis added).

See, e.g., Savala, 2006 WL 1738169 at 5 (noting that the privacy analysis “incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest”).

See id.
matter of legitimate public concern.\textsuperscript{31} Next, the court held that the crime scene photograph had "'some substantial relevance'" to that subject. Despite the photo's controversial depiction, the court was unwilling to "sit as superior editors of the press" and question the newspaper's protected decision to publish such content.\textsuperscript{32} Upon rejecting the plaintiffs' claims, the court reinforced the personal nature of the privacy interest invoked, stating that the claim "cannot be asserted by anyone other than the person whose privacy has been invaded."\textsuperscript{33}

The Savala case reflects a longstanding principle that most courts accept when dealing with the privacy rights of the deceased and their relatives.\textsuperscript{34} Moreover, instead of summarily rejecting the plaintiff's claim, the court in Savala explained its reasoning for finding the content newsworthy.\textsuperscript{35} In its analysis, the court highlighted the importance of showing great deference to the press, while defining the parameters of what constitutes matters of legitimate public concern. Reluctant to become a substitute editor of the press, the court employed an extremely deferential "substantial relevance" standard.\textsuperscript{36} Under this standard, the court will allow the disclosure of content

\begin{itemize}
\item \textsuperscript{31} Id. at 7.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Id. at 8.
\item \textsuperscript{34} See, \textit{e.g.}, all cases infra note 26.
\item \textsuperscript{35} See, \textit{e.g.}, id. (highlighting several court decisions where the plaintiff's claim was summarily dismissed).
\item \textsuperscript{36} See Shulman, 955 P.2d 469, 481 (1998) (implementing the same standard, the court noted that there must be a "logical relationship or nexus" between the facts disclosed and the event that brought the person into the public eye).
\end{itemize}
with “some substantial relevance” to a subject of legitimate public concern. It is, however, uncertain just how attenuated the logical nexus will have to become before the court finds that the content is irrelevant to the public’s interest.

B. The Trend Towards Affording Greater Protection

The Supreme Court’s decision in National Archives and Records Admin. v. Favish suggests a change in tide for privacy interests that may ultimately result in greater rights for decedents and their relatives under the common law. In addition, almost every state has now enacted specific laws rendering autopsy photographs confidential. This response is due in part to the challenges that recent technology has presented in the privacy of death context. Both courts and legislators are concerned about the potential injury that technology can cause in exploiting death and offending the privacy of surviving family.

37 See Savala, 2006 WL 1738169 at 7-8 (emphasis added).
39 See Brief of Amicus Curiae, supra note 16, at 24.
40 See Favish, 541 U.S. 157, 167 (highlighting the family’s fear of their relative’s suicide photos being disseminated by media and consumed on the Internet).
41 See Favish, 541 U.S. 157; see also Earnhardt v. Volusia County, 2001 WL 992068 at 3-5 (Fla. Cir. Ct., 2001) (noting the trial court’s concern for Dale Earnhardt’s autopsy photographs being posted on the world wide web. The publication and unnecessary inspection of such content on the web constitutes an extraordinary invasion of personal privacy of the decedent’s surviving family); Brief of Amicus Curiae, supra note 16, at 23-24 (explaining the Florida Legislature’s statute protecting autopsy photographs was enacted in response to the exploitation of such content over the Internet. Following Florida, the following States also have enacted similar protective measures against accessing autopsy photographs: Alaska, California, Delaware, Connecticut, Georgia, Indiana, Louisiana, Maine, Iowa, Maryland, Massachusetts, New Hampshire, Minnesota, New Jersey, New York, North Dakota, Oklahoma, South Carolina, Rhode Island, Texas, Utah, Washington, West
In *Favish*, the plaintiff filed a Freedom of Information Act (FOIA) action after the Office of Independent Counsel (OIC) refused the plaintiff’s request for ten death-scene photographs of Vincent Foster’s body compiled during a government investigation. The OIC’s refusal was based on FOIA exemption 7(C), which prevents disclosure of material that would result in “an unwarranted invasion of privacy.” First, the Court held that the statute’s personal privacy protection extended to Vincent Foster’s family. The Court noted that “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation.” Recognizing the family’s stake in the matter, the Court invoked an early decision by the New York Court Appeals, reigniting an old common law principle that surviving relatives have a right to protect the memory of the deceased. Having established the family’s right to privacy, the Court held that the plaintiff


42 *Favish*, 541 U.S. at 157 (Vincent Foster, Jr., deputy counsel to President Clinton, had committed suicide. Respondent Favish was skeptical of the Government’s investigation concerning the nature of his death and wished to administer his own investigation).
43 *Id.*
44 *Id.* at 163 (stating that the statute “extends to the memory of the deceased held by those tied closely to the deceased by blood or love”).
45 *Id.* at 168.
46 *Id.* (emphasizing the “well-established cultural tradition” recognized at common law, that the family controls the body and death-images of the deceased).
48 *Id.* at 168 (noting that “it is the right of the living, and not of the dead, which is recognized”).
failed to provide sufficient evidence to warrant disclosure and outweigh the countervailing privacy interest at stake.\textsuperscript{49}

The holding in \textit{Favish} was not a complete departure from prior court decisions concerning the privacy of death in a FOIA action.\textsuperscript{50} For example, in \textit{New York Times Company v. National Aeronautics and Space Administration},\textsuperscript{51} the United States District Court for the District of Columbia rejected a FOIA request for the audio tapes from the Challenger space shuttle, which captured the astronaut's last words, holding that the privacy rights of the family members outweighed the public's interest in access.\textsuperscript{52} Also, in \textit{Badhwar v. U.S. Dep't of Air Force},\textsuperscript{53} the D.C. Circuit Court refused a FOIA request for autopsy photographs of deceased pilots, finding that such disclosure would "shock the sensibilities of surviving kin" and was a "clearly unwarranted invasion of personal privacy."\textsuperscript{54}

In addition to the above pro-privacy holdings, several states have implemented protective legislation in a similar context.\textsuperscript{55} This state legislation generally restricts access to or release

\textsuperscript{49} See \textit{Favish}, 541 U.S. 157, at 175.
\textsuperscript{50} See \textit{Katz v. National Archives and Records Administration}, 68 F.3d 1438 (D.C. Cir. 1995) (refusing to release the autopsy photographs of former President John F. Kennedy, recognizing the privacy right of both the decedent and his family); see also \textit{Hale v. U.S. Dep't of Justice}, 973 F.2d 894 (10th Cir. 1992) (preventing the disclosure of photographs of a deceased victim, recognizing the personal privacy interest of a victim's family).
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} 829 F.2d 182, 185-86 (D.C. Cir. 1987).
\textsuperscript{54} \textit{Id.}
\textsuperscript{55} See Brief of Amicus Curiae, \textit{supra} note 16, at 23.
of autopsy photographs or information obtained in a government investigation. Florida, for example, strongly considered the repercussions of this sensitive content proliferating over the World Wide Web, expressing concern over the ease with which material is disseminated for mass consumption.\textsuperscript{56} To combat this exploitation, Florida only permits the disclosure of autopsy photographs, videotapes and recordings if “a court finds good cause” and the right to immediate disclosure remains with the family of the deceased.\textsuperscript{57} Mindful of the Internet’s potential abuse, forty-three states now follow the basic policy and reasoning underlying Florida’s statute.\textsuperscript{58}

C. The Conflict Between Courts Balancing the Interests Involved

Despite this recent support for protecting the privacy rights of the deceased, there still remains an irreconcilable difference amongst courts dealing with this issue.\textsuperscript{59} Under the

\textsuperscript{56} See id. (“The Legislature finds that photographs or video or audio records of an autopsy depict or describe the deceased in graphic and often disturbing fashion.” Such content “may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated.”).

\textsuperscript{57} The right to immediate disclosure remains with the decedent’s spouse and other specified family members. See Fla. Stat. § 406.135(1).

\textsuperscript{58} See Brief of Amicus Curiae, supra note 16, at 24 (noting that only Alabama, Idaho, Kansas, Kentucky, New Mexico, North Carolina and Wyoming have no restrictions on public access).

\textsuperscript{59} Compare Favish, 541 U.S. 157 (recognizing a privacy claim for decedent’s relatives and holding that the right to privacy outweighed the interest in disclosure), and Providence Journal Co., 2004 R.I. Super. LEXIS 136, at 12 (denying disclosure of 911 emergency calls made by the dying victims of a fire at West Warwick nightclub, the court recognized “the privacy interests and dignity of the victims and their family members”), with Miller v. National Broadcasting Co., 187 Cal.App.3d 1463, 1485 (Cal. 1986) (stating that the right to privacy “does not survive but dies with the person”), and
traditional common law, the right of privacy does not survive
death; in a FOIA action, however, courts have not only
recognized the relative’s right to proceed with his or her
claim, but they have also held that his or her interest prevails
against the public’s right to access. To illustrate, the court
in Savala expressly dismissed the application of the holding in
Favish, stating that there was a distinction between the common
law and the FOIA exemption statute: “[t]he privacy interest
recognized in Favish was a creature of statute not common law.”60
That is, the statutory interpretation of privacy under the FOIA
is not analogous to the tort action for invasion of privacy
under the common law.61 Distinguishing the two cases, the Savala
court went on to explain that the privacy interest in Favish was
also not balanced against the constitutional right of the press
to publish newsworthy information.62

The court in Savala overstates its differences from Favish and
overlooks the Supreme Court’s analysis interpreting the right to
privacy in the FOIA Exemption. Although the Court in Favish
observed that “the statutory privacy right protected by
Exemption 7(C) goes beyond the common law and the

Savala, 2006 WL 1738169 (recognizing the press’s right to publish a murder
scene photograph of plaintiff’s brother).
60 See Savala, 2006 WL 1738169 at 8.
61 See id. at 9.
62 See id. In Favish, it was not the press requesting the death-scene
photographs, but was an independent investigator. See Favish, 541 U.S. 157.
Constitution,” in extracting the statute’s meaning, the Court cited several common law principles and cultural traditions to support its holding. For instance, the Court in *Favish* alluded to several state court cases that recognized the decedent’s relatives’ right of privacy under the common law. Next, the Court referred to several “well-established cultural tradition[s]” in our society that support an absolute right of family members to protect the privacy of the deceased. Synthesizing our case law and cultural traditions, the Supreme Court concluded that Congress’ use of the term “personal privacy” was “intended to permit family members to assert their own privacy rights against public intrusions.” It is therefore unclear why the court in *Savala* failed to consider this portion of the *Favish* analysis that relied heavily on the common law and conventional norms. The court in *Savala* was correct in

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63 See *Favish*, 541 U.S. at 170.
64 See id. at 167.
65 See *Schuyler v. Curtis*, 147 N.Y. 434, 447 (1895) (recognizing the privacy right of surviving relatives to protect the memory of the deceased); see also *Bazemore v. Savannah Hospital*, 171 Ga. 257 (1930) (recognizing the parents’ right to privacy in photographs of their deceased child’s body); *Reid v. Pierce County*, 136 Wash.2d 195, 212 (1998) (“[T]he immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent.”); *McCambridge v. Little Rock*, 298 Ark. 219, 231-32 (1989) (recognizing the right to privacy of the murder victim’s mother in crime scene photographs); see also Restatement Second of Torts § 652D, at comment b, illustration 7 (1977) (stating that the publication of a photograph of a deceased infant “child with two heads” in a newspaper against the father’s objection would result in an invasion of the father’s privacy).
66 See *Favish*, 541 U.S. at 167-69 (finding in “our case law and traditions” the right to honor our deceased relatives, to preserve the memory and integrity of the deceased, control the disposition of the body, prevent others from exploiting pictures of the deceased and to respectfully mourn their deaths).
67 Id. at 167.
distinguishing Favish for not dealing with the constitutional implications of a newsworthy defense.\textsuperscript{68} The Court in Favish did consider a Brief of Amici Curiae from several interested parties of the press before rendering its decision.\textsuperscript{69} Moreover, the court in Savala should have considered the holding in National Aeronautics where the United States District Court for the District of Columbia did consider the right of the press in a FOIA action, and precluded the New York Times’ access to content that would offend the privacy right of the decedent’s relatives.\textsuperscript{70}

II. THE PRIVACY OF DEATH ON THE INTERNET

“Free speech on the Internet is not for the faint of heart.”\textsuperscript{71}

As is the case with Nicole Catsouras, the Internet’s powerful use can be misused to exploit the privacy, memory and integrity of a decedent.\textsuperscript{72} A casual perusal of the Internet using a search engine and search terms like “horrible death pictures” or

\textsuperscript{68} See Savala, 2006 WL 1738169 at 9 (noting that the privacy interest in Favish “did not implicate the same counterbalancing constitutional considerations protecting the right of the press to publish newsworthy information”).


\textsuperscript{72} See Hardesty, supra note 1.
“horrible deaths caught on tape” will quickly introduce a user to an unimaginable world of second-hand death.\textsuperscript{73} Although the television news media has pushed the boundary on sensationalizing death as a matter of public interest,\textsuperscript{74} the Internet’s exploitation of death presents a far greater challenge to our privacy in the future.\textsuperscript{75} Section A discusses the First Amendment implications of regulating death-images on the Internet, and Section A.1 illustrates the impact that the CDA has on regulating such content. Section B examines the First Amendment newsworthy counterbalance to the public disclosure of private facts. Finally, Section C describes the depictions of death that are currently flourishing over the Internet.

A. The First Amendment Implications

The Internet offers distinct advantages that make it superior to other forms of communication\textsuperscript{76} and regulating death-images may have a broad-sweeping effect on eroding its informative value.\textsuperscript{77}

\textsuperscript{73} See home page, www.google.com (search engine enables users to navigate the Internet).
\textsuperscript{74} See, e.g., Calvert, supra note 16, at 145 (discussing comments made by Robert Alt concerning the publication of death-images from Iraq, stating that it was “macabre voyeurism-masquerading-as-news”).
\textsuperscript{75} See The Nature of the Internet is Distinct from Other Forms of Media infra Part III.B.
\textsuperscript{76} See Amanda Groover Hyland, The Taming of the Internet: A New Approach to Third-Party Defamation, 31 HASTINGS COMM. & ENT. L.J. 79, 109-10 (noting that the Internet does not make access contingent upon political, social or economic clout. Web site operators, interactive blogs, chat rooms, and bulletin boards all contribute to “the most expansive” and “barrier-free marketplace of ideas ever to exist.”).
\textsuperscript{77} See e.g., Clay Calvert, Voyeur War? The First Amendment, Privacy & Images From the War on Terrorism, 15 Fordham Intell. Prop. Media & Ent. L.J. 147 (Recognizing the inherent political and social value that may result from death-images in times of war).
Nevertheless, the freedom of speech is not absolute and does not receive total immunity from regulation.\textsuperscript{78} Often, the First Amendment is weighed against countervailing societal interests and balanced accordingly.\textsuperscript{79} In Chaplinsky v. New Hampshire,\textsuperscript{80} the Supreme Court established a framework for identifying categories of unprotected speech. There, the Court allowed content-based restrictions on speech in limited categories which are “of such slight social value as to step the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”\textsuperscript{81} Applying this standard, courts have separated “low level speech” that deserves a “subordinate position in the scale of First Amendment values” and afforded this content lesser protection.\textsuperscript{82} Under this pretext, courts will have to determine the value of death-images under the First Amendment and regulate the Internet appropriately.

Attempts to regulate speech on the Internet have been futile, and are often vehemently opposed.\textsuperscript{83} Courts have found that the

\textsuperscript{80} 315 U.S. 568 (1942).
\textsuperscript{81} Id at 572.
\textsuperscript{82} See Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. REV. 189, at 194 (1983) (commenting that express incitement, obscenity, fighting words, false statements of fact, commercial speech, and child pornography are all examples of classes of speech having low First Amendment value).
\textsuperscript{83} See Dawn C. Nunziato, Freedom of Expression, Democratic Norms, and Internet Governance, 52 EMORY L.J. 187, 194 (2003) (noting that there is a strong
First Amendment standard varies depending upon the characteristics of the new media; therefore, different mediums demand different scrutiny.\(^{84}\) In *Reno v. ACLU*,\(^{85}\) the Supreme Court broadly affirmed the First Amendment’s application on the Internet,\(^{86}\) striking down restraints on speech imposed by the Communications Decency Act of 1996.\(^{87}\) Adjusting to the nature of the Internet, the Court emphasized its dissimilarity from other forms of media that were previously regulated. The Court noted that the scarcity of bandwidth, which was a motivating factor in regulating other media, was irrelevant with the Internet.\(^{88}\) Equally important, the Internet lacks the invasive element present in other forms of media.\(^{89}\) Lastly, the Government did not

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\(^{84}\) See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding that the government had a stronger interest in regulating speech on broadcast radio because of its limited frequencies and invasive nature); *see also Sable Communications v. FCC*, 492 U.S. 115 (1989) (holding that the government’s interest in regulating speech through telephone communication was less substantial because there is not a “captive audience” problem like there was in Red Lion where content could involuntarily reach listeners).

\(^{85}\) 521 U.S. 844 (1997) (holding that speech through the Internet is entitled to the highest protection from Governmental restriction).


\(^{87}\) Id.

\(^{88}\) Compare *Reno*, 521 U.S. 844 (noting that access is more readily available to anyone), *with Red Lion*, 395 U.S. 367 ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.").

\(^{89}\) Compare *Reno*, 521 U.S. 844 (stating that Internet content does not involuntarily reach users because users must take an affirmative step to encounter content), *with Red Lion*, 395 U.S. 367 (stating that broadcast radio projects content to a captive audience who have no control over the content that streams through the frequency).
traditionally impose regulations on the Internet.\textsuperscript{90} Despite the First Amendment interest upheld in Reno, the Court did not adopt a “bold affirmative rationale for keeping the Internet free from content regulation.”\textsuperscript{91}

1. The Communications Decency Act of 1996

In 1996, Congress, responding to the heavily criticized decision in \textit{Stratton Oakmont Inc. v. Prodigy Services Co.},\textsuperscript{92} enacted the Communications Decency Act (CDA) to limit liability for “interactive computer service providers” (ISPs).\textsuperscript{93} An ISP is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”\textsuperscript{94} In \textit{Stratton} the court imposed liability upon an ISP that monitored its content, and effectively subjected the ISP to the tough standards of publisher liability.\textsuperscript{95} This result was antithetical to the objectives of the CDA, at that time under consideration, which sought to encourage online service providers to remove

\textsuperscript{90} See Reno, 521 U.S. 844.
\textsuperscript{92} No. 310063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995) (holding the computer network liable for third-party content because of its conduct in monitoring the content of its bulletin board). See Jonathan Band & Matthew Schruers, Safe Harbors Against the Liability Hurricane: the Communications Decency Act and the Digital Millennium Copyright Act, 20 CARDOZO ARTS & ENT. L.J. 295, 297 (2002) (the holding was thought to be an anomalous result because an ISP could be liable for its efforts to rid the Internet of offensive content).
\textsuperscript{93} The Communications Decency Act, 47 U.S.C. § 230 (1997). See Band & Schruers, supra note 93, 297 (noting that despite provisions being struck down in Reno as unconstitutional, Section 230 was left undisturbed.)
\textsuperscript{94} The Communications Decency Act, § 230, (1997).
\textsuperscript{95} \textit{Stratton}, No. 310063/94, 1995 N.Y. Misc. LEXIS 229.
inappropriate content without fear of liability.\textsuperscript{96} Specifically section 230 immunizes ISPs from liability for content published by third-persons, even if the ISP monitors its service.\textsuperscript{97} Section 230 satisfies two objectives: (1) to shield ISPs from liability and foster free speech; and (2) to encourage ISPs to suppress offensive speech without fear of offending the Constitution.\textsuperscript{98} Since its inception, the CDA has been construed to provide broad immunity from a variety of state law claims.\textsuperscript{99} The underlying goal behind this legislation was to foster the social value of ISPs by shielding them from liability that could threaten their continued benefit.\textsuperscript{100} Because of the CDA, intermediaries that thrive from third-party content such as Craigslist, America Online, YouTube, Amazon, and eBay can now set their own content standards, monitor their services, and use their own discretion without being treated like publishers.\textsuperscript{101} As a consequence, users or subscribers are free, within the confines of the ISP’s

\begin{footnotesize}
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\item \textsuperscript{96} See Band & Schruers, \textit{supra} note 93, at 297.
\item \textsuperscript{97} See \textit{id.}
\item \textsuperscript{98} See Tushnet, \textit{supra} note 100, at 1009.
\item \textsuperscript{99} See Parker \textit{v.} Google, Inc., 422 F.Supp.2d 492, 501 (E.D. Pa., 2006); see also Band & Schruers, \textit{supra} note 93, at 297 (noting the Act even includes “negligence, business disparagement, waste of public funds, and intentional infliction of emotional distress.”).
\item \textsuperscript{100} See Rebecca Tushnet, \textit{Power Without Responsibility: Intermediaries and the First Amendment}, 76 Geo. Wash. L. Rev. 986, 1009 (2008) (noting that “Congress believed that it needed to alter the common law, even more than it had been modified by the First Amendment, to give Internet intermediaries the chance to make their business models work.”).
\item \textsuperscript{101} See, \textit{e.g.}, Chicago Lawyers’ Committee \textit{v.} Craigslist, 519 F.3d 666 (7th Cir. 2008); Zeran \textit{v.} America Online, Inc., 129 F.3d 327 (4th Cir. 1997); see also Hyland, \textit{supra} note 77, at 83–84; Tushnet, \textit{supra} note 100, at 1009 (positing that the CDA subsidizes “new intermediary models by protecting them from otherwise applicable law, but only as a matter of legislative grace.”).
\end{itemize}
\end{footnotesize}
content standards, to publish material that can often offend and injure third-persons.\textsuperscript{102} In the event that injurious content is published, the CDA protects the ISP from having to remove content and cloaks the true publisher in anonymity.

\textbf{B. The Newsworthiness of Death}

The right to prevent public disclosure of private facts is always balanced against the First Amendment right to publish newsworthy content.\textsuperscript{103} In a private facts action, it is the plaintiff's burden to prove the subject information lacks newsworthiness.\textsuperscript{104} The press cannot be forestalled from publishing matters of legitimate public concern, so courts are left to balance the societal interest in the matter against the privacy interest at stake.\textsuperscript{105} Since the CDA does not limit liability for "information content providers" or "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other active computer service," any death-related content on the Internet falling within this category

\textsuperscript{102} See, e.g., Zeran, 129 F.3d 327 (holding that AOL was not liable for failing to remove libelous postings on a bulletin board).
\textsuperscript{103} See Cox Broadcasting, 420 U.S. 469, at 488 ("Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.").
\textsuperscript{104} See Shulman, 955 P.2d 469, 478-79.
\textsuperscript{105} See generally Cox Broadcasting, 420 U.S. 469 (upholding the publication of a 17-year-old rape victim's name by the press).
will be subject to a newsworthy analysis under a privacy claim.\textsuperscript{106}

Newsworthiness does not only consist of news which “sells papers or boosts ratings,” lest our privacy would be swallowed by the First Amendment.\textsuperscript{107} Since the “line between informing and . . . entertaining is too elusive,” the publisher does not need to intend to educate the public.\textsuperscript{108} Moreover, newsworthiness cannot become a pure value judgment either, or else courts could become substitute editors of the news and arbiters of public taste.\textsuperscript{109} To better evaluate and determine newsworthiness, courts have considered: (1) the medium of publication, (2) the social value of the facts published, (3) the extent of the use, (4) the public interest served by the publication, (5) the seriousness of the interference with the persons privacy and the depth of the article’s intrusion into ostensibly private affairs, and (6) the degree in which the person was voluntarily placed in a position of public notoriety.\textsuperscript{110}

\textbf{C. Death Depicted on the Internet}

The Internet is naturally structured to enable the dissemination of an unprecedented amount of information, while

\textsuperscript{107} See Shulman, 955 P.2d 469, 480 (noting the descriptive theory of newsworthiness).
\textsuperscript{108} Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, at 38 n.7.
\textsuperscript{109} See Shulman, 955 P.2d 469, 480 (noting the normative theory of newsworthiness).
\textsuperscript{110} See id. at 481.
serving an unlimited amount of personal interests.\textsuperscript{111} Given the historical intrigue with death in the media,\textsuperscript{112} it is not too surprising to conceive a web-market where users can consume death-related content. After all, the media does print obituaries and to a certain extent present death as news.\textsuperscript{113} However, the content published on the Internet does not have to adhere to the inherent restraints imposed on other forms of media.\textsuperscript{114}

The content discussed in this section includes depictions that capture images of a decedent’s autopsy, corpse, cause of death or manner by which he or she died, body parts of the deceased, or any other depiction that portrays the decedent’s actual death. To illustrate, one “sick” U.S. website graphically portrayed horrific images of twenty-year old Daniel Pollen being stabbed to death in a street attack with a rap music soundtrack

\textsuperscript{111} See, e.g., Ellen Luu, Web-Assisted Suicide and the First Amendment, 36 Hastings Const. L.Q. 307 (noting the dangerous popularity of a website devoted to suicide as a legitimate alternative to life); see also Terri Day, Bumfights and Copycat Crimes...Connecting the Dots: Negligent Publication or Protected Speech, 37 Stetson L. Rev. 825 (describing the danger behind a website devoted to the promotion of abusing bums. Often the producers would entice the bums to fist fight one another for cash or would pay them to do other harmful acts).

\textsuperscript{112} See Calvert, supra note 16, at 143 (explaining how “it’s interesting when people die”).

\textsuperscript{113} See generally id.

\textsuperscript{114} Consider whether Nicole Catsouras’ decapitated image would have received the same popular response if it were published in the New York Times or shown on NBC daytime television news. See Reno v. American Civil Liberties Union, 521 U.S. 844 (1997) (highlighting that content on the Internet is not involuntarily broadcast into our homes); see also Blumenthal v. Drudge, 992 F. Supp. 44, at 48-49 n.7 (D.D.C. 1998) (stating that the Internet “has no ‘gatekeepers’—no publishers or editors controlling the distribution of information”).
running behind the footage. Websites such as Rotten.com, DeathnDementia.com, Crimenecenephotos.com, Findadeath.com, and Everwonder.com/david/worldofdeath are all prime examples of websites that flourish from depicting similar content. Surprisingly, all of these websites are based here in the United States. In addition, interactive blogs and bulletin boards substantially contribute to the proliferation of this content being posted by third-party users.

To further explain the nature of the content depicted on the preceding websites and online bulletin boards, consider the following examples. On Everwonder.com/david/worldofdeath, the website is categorized by types of death, which includes: “squished man,” “shotgun suicide,” “hit by car,” “hit by train,” “burnt in fire,” and “split head.” As one might imagine, the content depicted under these categories is horrific, and contains nothing more than brief descriptions and the images themselves. On DeathnDementia.com, the website displays a

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115 Lad’s Murder Screened on Vile Websites, supra note 75.
116 Rotten.com provides a summary about its website, stating that “Rotten Dot Com is the Internet’s preeminent publisher of disturbing, offensive, disgusting, yet extremely compelling content. Founded in 1996 after the enactment of the Communications Decency Act, our mission is to actively demonstrate that censorship of the Internet is impractical, unethical, and wrong.” (emphasis added) See Contact Info, Rotten Dot Com, ALEXA, http://alexa.com/siteinfo/Rotten.com (last visited Apr. 16, 2009).
117 According to Alexa.com’s Web statistics for “contact info,” Rotten.com is in California; Crimenecenephotos.com is in California; Findadeath.com is in California; Everwonder.com/david/worldofdeath is in Ohio; and DeathnDementia.com is in Virginia. Contact Info, ALEXA, www.alexa.com (last visited Apr. 16, 2009).
plethora of death-images under the section “death and
disfigurement.” For example, the “bloodshow” sub-section
portrays several video clips of actual deaths caught on tape,
including one labeled “half for you and half for me” with
accompanying text describing the footage stating “here’s a flick
with some woman who was in a horrible auto accident. The
accident itself is bad enough. Added to that, the lady is cut in
half. Added to that, she’s still alive.”

Although most of these websites contain some legitimate non-
death related content in addition to these gruesome images, it
is evident that users are searching for death-images when they
access these sites. According to Statsaholic.com, a website
devoted to data collection, the top keywords driving the traffic
of DeathnDementia.com include “worse pictures of killing,” “sick
stuff,” and “gross death pictures.” The top keywords driving
the traffic of Everwonder.com/david/worldofdeath include “death
videos” and “beheading videos.” Taking this into account, it
is reasonable to infer that users visiting these websites have
done so with the intent to view content related to the keywords

119 Death and Dementia, Death and Disfigurement, http://www.deathndementia.com/
(last visited Apr. 16, 2009).
120 Bloodshow, Videos, available at http://www.bloodshows.com/videoroom1.html
(last visited Apr. 16, 2009).
121 See Site Statistics for DeathnDementia.com, STATS Aholic,
http://siteanalytics.compete.com/deathndementia.com/?metric=uv (last visited
Apr. 16, 2009).
122 See Site Statistics for Everwonder.com/david/worldofdeath, STATS Aholic,
16, 2009).
used to find them. If a user types “worse pictures of killings” in the google search engine and retrieves DeatnDementia.com,\textsuperscript{123} it is logical to assume they are interested in the specific content found under the section “death and disfigurement.”

Online bulletin boards present a greater challenge to death-images because these discussion forums are sporadically located throughout the Internet. However, using search terms keyed to death related content in any search engine will help filter through this problem. For example, using Google’s search engine keyed to “Porsche girl” will result in finding thousands of bulletin boards that have Nicole Catsouras’ gruesome images displayed.\textsuperscript{124} These forums are modestly regulated, and the content is posted at the discretion of third-party users. The sites themselves do not take part in selecting or maintaining the content, and merely provide a means in which users can dictate content. Although some sites do have content standards which provide some level of restricting offensive material. For instance, YouTube.com has a policy against death-images and other offensive content and acts diligently to maintain the

\textsuperscript{123} See Site Statistics, supra note 124 (noting that 49.63% of user traffic was referred to DeatnDementia by google.com).

\textsuperscript{124} To illustrate the influence that google and yahoo have on locating death-images see Site Statistics for Nikkicatsouervas.net, STATS Aholic, http://siteanalytics.compete.com/nikkicatsouervas.net/?metric=uv (last visited Apr. 16, 2009) (providing a profile of the website nikkicatsouervas.net which is devoted to pictures of Nicole Catsours’ corpse, noting that 64.94% of users trafficking the site were referred by searching google.com and 35.06% were referred by searching yahoo.com).
Integrity of its own standards by removing content and terminating consistent violators.\textsuperscript{125}

III. CRITICISMS OF THE CURRENT RIGHT TO PRIVACY ON THE INTERNET

There is significant doubt as to whether a decedent’s relative can effectively remove death-images of their deceased family members from the Internet. Website liability in this area is relatively new, and ISPs are disinclined to get involved because of the CDA. The Internet is certainly a socially valuable resource of information and entertainment, but should relatives be subject to torment out of respect for an unfettered World Wide Web? To this end, how much privacy are we willing to compromise in order to protect the Internet from censorship regarding images of the dead? Section A explains how the current liability regime under the CDA affects the relative’s ability to seek a remedy for user generated depictions of death, and Section B highlights the relative’s difficult task in prevailing over the First Amendment right to publish newsworthy content. Lastly, Section C distinguishes the nature of the Internet from other forms of media.

1. Internet Service Providers are Immune Under the CDA

\textsuperscript{125} YouTube proscribes the posting of “[u]nlawful, obscene, pornographic, or racist content...as well as material that is copyrighted” or protected by trade secrets. Thus, if a user violates the terms of use, YouTube reserves the right to remove the inappropriate content or even terminate access to its website, if they are identified as a repeat infringer. See C. Breen, YouTube Or YouLose: Can YouTube Survive a Copyright Infringement Lawsuit?, 16 TEx. Intell. Prop. L.J 151, 156-60 (2006).
Interactive computer services or Internet service providers (ISPs) do not have to remove death-images from websites where third-party users post that content. As mere conduits, ISPs are not responsible for proactively policing their content and will most likely not remove death-images upon request. Even if removed, ISPs are not held to be on constructive notice to remove subsequent postings of the same content by different users or repeat postings by its original source.\textsuperscript{126} Therefore under the present liability regime for ISPs, decedents’ relatives have no course of action in preventing the private images of their deceased family members from aggressively spreading over user-generated online forums.

2. Websites Are Protected Under the First Amendment

Even though websites that constitute “information content providers” are not immune from liability under the CDA,\textsuperscript{127} they have a strong likelihood of avoiding accountability under the right to publish newsworthy content. These publishers are comprised of websites that manage, select, and exercise editorial control over the content displayed.\textsuperscript{128} Courts have been deferential to the press in publishing private facts that are

\textsuperscript{126} See Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997) (rejecting the plaintiff’s contention that ISPs should be subject to notice based liability).

\textsuperscript{127} Id. (noting that Drudge is an “‘information content provider’ because he wrote the alleged defamatory material about the Blumenthals”).

\textsuperscript{128} Defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other active computer service,” these sites will be treated as publishers for liability purposes. Id.
related to matters of legitimate concern.\textsuperscript{129} Moreover, it is the relative’s burden to prove the content depicting the deceased is not newsworthy.\textsuperscript{130} As a result, decedent’s relatives have a minimal possibility of prevailing in a private facts action.

The daunting fact remains that most state courts are unwilling to recognize a common law privacy right in the decedent’s relatives.\textsuperscript{131} If, however, the court allows the claim to proceed, the newsworthiness of the content is entirely fact sensitive and has often been weighted in favor of the First Amendment.\textsuperscript{132} Applying the sort of “logical relation test” implemented by many state courts applying the newsworthy analysis, it is difficult to conceive of a situation where publicity cannot be given to private facts.\textsuperscript{133} In both \textit{Shulman v. Group W Productions, Inc.} and \textit{Savala}, the court stated “where the facts disclosed about a private person involuntarily caught up in events of public interest bear logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance – the broadcast was of legitimate public concern, barring liability under the private facts tort.”\textsuperscript{134} In \textit{Savala}, the court found that a logical relationship existed.

\textsuperscript{129} \textit{See Savala}, 2006 WL 1738169.

\textsuperscript{130} \textit{See Shulman v. Group W Productions, Inc.}, 955 P.2d 469, 478 (Cal. 1998) (stating that the lack of newsworthiness is part of a plaintiff’s case in a private facts action).

\textsuperscript{131} \textit{See, e.g.}, all cases \textit{supra} note 26.

\textsuperscript{132} \textit{See, e.g.}, \textit{Savala}, 2006 WL 1738169.

\textsuperscript{133} \textit{See discussion infra} Part I.A and I.C.

\textsuperscript{134} \textit{See Shulman}, 955 P.2d 469, 478; \textit{see also Savala}, 2006 WL 1738169 at 7-8 (emphasis added).
between the public’s interest in the city’s murder rate and the photograph of the murdered decedent. Courts have been clear in stating that the standard is not “necessity.” That is, the fact the publication could have been edited to exclude the depictions of private facts does not mean that the publisher must in fact eliminate that content. Under these standards, it is possible that a court could find Nicole Catsouras’ accident photographs to have “some substantial relevance” to the increasing death toll from speeding-related car crashes in California, which is likely a matter of public concern.

3. The Nature of the Internet is Distinct from Other Forms of Media

The Internet is distinct from other forms of media in which courts have found newsworthy content to outweigh the individual’s right to privacy. Moreover, courts have adapted their First Amendment analysis according to the nature of the medium involved. This evolution of First Amendment scrutiny has allowed the law to keep pace with changing technology, which

\[135\] Savala, 2006 WL 1738169 at 7.
\[136\] Id.
\[137\] Id.
\[138\] Even though the photographs are not necessary to enable the public to understand the consequences of speeding car accidents, the language in Savala supports the editorial discretion of the press, stating that the standard “is not necessity.” See id.
\[139\] See Blumenthal v. Drudge, 992 F. Supp. 44, at 48 n.7.
has always been a formidable adversary of privacy.\textsuperscript{141} As technology expands, our right to privacy contracts and yesterday’s privacy laws can no longer protect us from tomorrow’s innovation.\textsuperscript{142} Our “ocular-centric” culture is dominated by visual imagery and “technology that makes it possible to capture and, in an instant, universally disseminate a picture.”\textsuperscript{143} But anonymous voyeurs should not consume images of death at the expense of grieving relatives. For this reason, traditional notions of privacy protection dealing with depictions of death need to be modified to accommodate the challenges presented by the Internet.

The following disparities amongst the several forms of media highlight the inadequate protection that current privacy law affords Internet publications. First, unlike print or television, Internet content sustains unlimited duration once archived on a particular website or copied on to other websites and personal desktops.\textsuperscript{144} Decedent’s relatives may be exposed to a perpetual publication that is endless in duration and

\textsuperscript{141} See Shulman v. Group W Productions, Inc., 955 P.2d 469, at 473 (emphasizing the concern of Louis Brandeis and Samuel Warren over 100 years ago, that the invention of “instantaneous photographs” and its threat to our privacy when abused by the press).

\textsuperscript{142} Id. (noting that “numerous mechanical devices” could “threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”).

\textsuperscript{143} Calvert, supra note 78, at 149.

\textsuperscript{144} Nicole Catsouras’ death photographs are permanently available over the Internet. This sort of constant display of death-images would be unlikely in one-time newspaper publications or on television which provides limited viewing.
available indefinitely on the Web. Second, the speed and digital quality of communicating the image allows the content to spread over an unlimited geographical area and to a boundless audience. Once posted, it becomes extremely difficult to remedy. Contrast this with newspaper retractions after one-time publications. Third, anonymous posting and anonymous viewing encourages a culture of communicating content without concern for third-party accountability. Anonymity is the “salvation” for users disseminating death-images on Internet bulletin boards, and ISPs are indifferent to the content’s continued existence. Unlike other forms of media, user-generated content posted anonymously does not endure the ominous editorial concern for offending the public. This lack of editorial oversight may contribute to the publication of valuable speech that is unpopular in main stream forms of media, but it also represents the unconstrained ease with which exploitative death

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145 See Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, 40-41 (Cal. 1971) (discussing the importance of time relation when determining if the private facts disclosed are still matters of public concern. Hence, duration is an important element in considering whether content is still newsworthy).
147 Id. (noting “the only limit on the postings made by individual users is their own decency and self-restraint. And yet, many times, decency and self-restraint give way to the baser parts of human nature.”).
148 See Barret, supra note 3.
150 See Tushnet, supra note 100, at 986 (without constraints on publication, the Internet can provide “citizens greater access to conflicting viewpoints and nonmainstream subject matter”).
photos can be distributed to a world audience.\textsuperscript{151} Fourth, the ability to modify, manipulate and copy digital images displayed over the Internet enables sensitive content to be republished outside its news providing origin and recast in an extremely offensive manner.\textsuperscript{152} Without digital management protection from copying images of death, decedents are exposed to unlimited exploitation by those with morbid intentions.\textsuperscript{153} Given the potential abuse that the Internet enables, this factor should be heavily considered when allowing specific content to be published as newsworthy.\textsuperscript{154}

V. NEW PROPOSAL

The exploitation of death-images over the Internet demands a modified privacy law that applies to the nature of this new medium and provides an appropriate balance to better weigh the interests involved. Using the decision in Favish and other cases upholding privacy against public exploitation,\textsuperscript{155} and the policies underlying state statutes enacted to protect autopsy

\textsuperscript{151} ISPs are not filtering out material or exercising traditional editorial functions like deciding what to publish, withdraw, postpone or alter. See, e.g., Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).
\textsuperscript{152} This was the case for the street murder that was disseminated over a website behind a rap music soundtrack. See Lad's Murder Screened on Vile Websites, supra note 74.
\textsuperscript{153} Anything can be copied and re-displayed over the Internet. See, e.g., id. (illustrating how these images can be recast, users posted footage of a young man being stabbed to death behind a rap music soundtrack. The video itself was offensive enough, yet taken outside a news context it can be modified in such an obscene manner as to be deemed unconscionable).
\textsuperscript{154} Id.
\textsuperscript{155} See discussion infra Section I.B.
photos, this section will advocate a greater privacy right for decedent’s relatives. To combat user generated death-images, Section A proposes an amendment to the CDA that imposes liability upon ISPs who fail to remove death-images. To better regulate information content providers, Section B proposes a two-part test that effectively allocates the burden of proof in a private facts action.

A. Amending the CDA

To adequately provide decedent’s relatives protection from the dissemination of this sort of content, there must be an amended exception to the CDA. Under the current CDA, our deceased relatives remain subject to abuse by anonymous third-parties who are only bound by their own standards of decency. The amended section shall impose liability on ISPs for public disclosure of private death-images if certain preconditions are not satisfied. Specifically, to be eligible for immunity the ISP must: (1) lack actual knowledge or awareness of facts or circumstances from which the public disclosure of private death-images is apparent, (2) respond expeditiously to remove or disable allegedly private death-images upon sufficient notice from a verified relative of the deceased depicted, (3) maintain

\[156\] Id.
\[158\] Similar to the Digital Millennium Copyright Act, which provides a safe harbor under § 512(c) from copyright infringement liability. See Copyright Act of 1976, 17 U.S.C. § 512(c) (1998).
a procedure for allowing counter-notice that such content was wrongfully removed, and (4) establish a policy for terminating third-party users who repeatedly post previously removed images.

If an ISP fails to remove such content upon request, or has knowledge or awareness of facts and circumstances that such content exists, it should be held responsible for the resulting harm to decedent’s relatives. First, those who are eligible to request the removal of death-images shall include: the decedent’s spouse, descendants of the decedent, the decedent’s parents, descendants of the parents, and the decedent’s grandparents. Next, upon requesting removal of this content, the preceding family members must show: (1) proof of relationship, and (2) the decedent is the individual being depicted. All evidence submitted by decedent’s relatives shall be presumed valid, and any challenge to its validity must be

159 These preconditions mirror the protection afforded to copyright owners under the Digital Millennium Copyright Act (DMCA), which was enacted despite First Amendment concerns over censoring “fair use” when content is removed upon request. See Branwen Buckley, Suetube: Web 2.0 and Copyright Infringement, 31 Colum. J.L. & Arts 235, 235 (2008). Because it would be impossible for an ISP to manually review all posted videos and determine which material was not authorized, which material is actually infringing, and which material is not protected by fair use, the copyright owner is in the better position to determine which videos are infringing. Id. Amending the CDA requires similar considerations over censoring the First Amendment right to publish death-images; however, given the low value of the speech and the privacy interest at stake, relatives should be afforded deference in identifying publications of private matters for ISPs to remove.

160 See Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004).

161 See, e.g., Fla. Stat. § 406.135(1) (establishing a right for family members to keep autopsy photographs confidential. In particular, the spouse, parents and adult children of the deceased); see also Uniform Probate Code, § 2-106 (1997) (listing the family members that share in intestacy).
asserted after removal, under the procedure for counter-notification.\textsuperscript{162} The objective of this amendment is to treat ISPs as distributors of private death-images for liability purposes if the preconditions for immunity are unsatisfied.\textsuperscript{163}

Similar to the Digital Millennium Copyright Act (hereinafter DMCA),\textsuperscript{164} actual knowledge must go beyond a "general awareness" that such images exist, given the enormous amount of user generated content on many of these sites.\textsuperscript{165} Alternatively, a relative can show awareness of facts and circumstances from which a violation of privacy is apparent if the ISP deliberately proceeded in the face of blatant indications that private images were being disclosed. Analogous to the reasoning set forth in \textit{Corbis v. Amazon} when applying the DMCA,\textsuperscript{166} evidence that the online location at which the death-images were available was clearly a "death site" should be sufficient to prove apparent

\textsuperscript{162} Similar to the mechanism provided under the Digital Millennium Copyright Act. Copyright Act of 1976, 17 U.S.C. § 512(g).
\textsuperscript{163} See Hyland, supra note 77, at 97 (distributor liability would place the ISP in a position where it is only liable if it knows that such content exists or ignores a request for removal).
\textsuperscript{164} The DMCA was enacted shortly after the CDA and mirrored the CDA’s objective to limit ISP liability but applied only to intellectual property infringement. In contrast to the CDA, the DMCA does not provide blanket immunity for ISPs from infringement liability, and instead creates a safe harbor where ISPs are absolved from accountability if they satisfy certain requirements. See generally Band & Schruers, supra note 93.
\textsuperscript{165} See Corbis Corp. v. Amazon.com, Inc., 351 F. Supp.2d 1090, 1104 (W.D. Wash. 2004) (clarifying, under the DMCA, that the issue wasn’t whether Amazon had a general awareness of infringement, but whether it actually knew specific instances of infringement were occurring. Absent such evidence, actual knowledge could not be proved).
\textsuperscript{166} \textit{Id.}
knowledge.\textsuperscript{167} In other words, if a “brief and casual viewing” of the site results in obvious disclosures of private images of death, the ISP should be deemed aware of such content for liability purposes. For example, Liveleak.com, like many ISPs, uses a search engine to help navigate through its content.\textsuperscript{168} If this search function yields several results from terms keyed to death related content, the ISP should have an apparent knowledge that this content exists.\textsuperscript{169}

In order for ISPs to provide sufficient protection under this amendment, there must be an effective notice-and-takedown procedure. Although this procedure may be challenged as having a chilling effect on speech, the countervailing privacy interest at stake demands appropriate deference.\textsuperscript{170} Moreover, the death-images depicted on the Internet are “of such slight social value” that they are “deserving of only limited constitutional protection.”\textsuperscript{171} To mitigate First Amendment concerns, the third-party recipient of a notice of take down can “counter-notify” and “have the right to have the ISP return the challenged

\textsuperscript{167} The Corbis Court used “pirate site” to indicate a website devoted to content that is clearly infringing copyrights, but the same reasoning is sound when applied to “death sites” and private content. See id.

\textsuperscript{168} Liveleak.com, an ISP, is similar to YouTube.com in providing a means for users to upload content. See home page, www.liveleak.com (last visited Apr. 18, 2009).

\textsuperscript{169} See, e.g., A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (highlighting Napster’s failure to use its search indices to locate infringing content on its website).


\textsuperscript{171} See Constitutional Law, supra note 80, at 1243.
material unless the sender files suit within a short period."

Like the DMCA, the exception under the CDA can require that removal be made in “good faith.” This would force ISPs to have sufficient information to form a “good faith belief” that the material publicized private images depicting the decedent’s death. In addition, anyone that makes a knowing material misrepresentation to an ISP that resulted in the removal of content shall be subject to liability. With these protection mechanisms in place, decedent’s relatives will be afforded meaningful protection without offending the First Amendment rights of third-party users.

B. New Test for Striking an Appropriate Balance in the Privacy Analysis

With the proposed amendment in place, ISPs would be able to effectively mitigate this “disgusting trade in human misery,” but “information content providers” could still escape liability in a private facts action if the death-images are found

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172 See Tushnet, supra note 100, at 1014.
173 See, e.g., Rossi v. Motion Picture Ass’n of America, 391 F.3d 1000 (9th Cir. 2004).
174 Id. (noting that the standard is subjective).
newsworthy and protected under the First Amendment. This section offers a two-part test for courts to employ when determining the newsworthiness of death related content created and published by information content providers on the Internet. The test itself is a hybrid and incorporates: (1) the factors enumerated in section II.B that courts have considered when identifying newsworthiness, (2) the low-value nature of death-images as speech deserving less protection under the First Amendment, (3) the tradition of adjusting the First Amendment to adapt to new forms of media, and (4) the privacy protection afforded in *Favish* and state statutes protecting autopsy photos. Using these factors, the test establishes a method for shifting the burden of persuasion in a newsworthy analysis.

The common law cannot continue to deny relief for relatives who wish to preserve the memory of their deceased family members. Implicit in the right to prevent disclosure of

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177 See discussion *infra* Section III.A.2 (explaining that information content providers are outside the scope of the CDA and therefore require separate treatment).
179 See *Constitutional Law*, supra note 80, at 1243.
181 See discussion *infra* Section I.B.
183 See all cases *supra* note 14 (denying decedent’s relatives privacy protection). *But see* Reid v. Pierce County, 136 Wash.2d 195 (1998) (the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of decedent); *McCormack v. City of Little Rock*, 298 Ark. 219 (1989) (upholding privacy interest of the murder victim’s mother in crime scene photos); *Bazemore v. Savannah Hospital*, 171 Ga. 257 (1930) (recognizing parent’s right of privacy in photos of their deceased child’s body).
private facts is the right to "[d]efine one’s circle of intimacy" and avoid being "humiliate[ed] beneath the gaze of those whose curiosity treats a human being as an object."\textsuperscript{184}

Since the deceased can no longer object to such publicity, courts must allow relatives to contest the disclosure of death-images. If courts fail to recognize the privacy claims of relatives, technology and the Internet will consume the privacy of death and all such content becomes de facto newsworthy.\textsuperscript{185}

The test implements a two-step inquiry into the nature of the website and the context in which the content is presented. Essentially the underlying goal is to create a spectrum of protection that affords greater First Amendment rights for newsworthy content and provides less deference to sites that appeal to morbid curiosities. Although entertainment has been found to equally serve the public’s interest,\textsuperscript{186} invading the privacy of death demands a stronger justification for disclosure.\textsuperscript{187} The fact that users are curious enough to view this content and perpetuate a demand for this market does not

\textsuperscript{184} Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, 37 (Cal. 1971).
\textsuperscript{185} If relatives are precluded as a threshold matter from initiating a private facts action, courts would never have to go into a newsworthy analysis to determine the legitimacy of the publication of allegedly private death-images.
\textsuperscript{186} See Briscoe v. Reader’s Digest Ass’n, 483 P.2d 34, note 6, at 38.
\textsuperscript{187} See Favish, 541 U.S. 157 (2004) (demanding a stronger justification for releasing suicide images of the deceased); see also Earnhardt v. Volusia County, 2001 WL 992068, at 3 (Fla. Cir. Ct., 2001) (”The wide viewing of such personal and painful photographs by people all over the world who are strangers to the family will cause serious pain, anxiety, worry, and discomfort to the family members.”).
alone mean that it is of legitimate public interest.\textsuperscript{188} The Court in \textit{Favish}, noting the concern over post-mortem images spreading to the Internet, established a privacy right that takes into account the dangers of modern technology.\textsuperscript{189}

The first inquiry courts need to make is whether the website’s content serves the primary objective of displaying depictions of death with news reporting serving a secondary role.\textsuperscript{190} To extract the website’s primary objective, courts should consider the percentage of content that is devoted to depicting images of death and the keywords driving the website’s traffic.\textsuperscript{191} The second inquiry is whether the manner in which the image is presented exploits the decedent. In order to draw out the exploitative manner of publication, courts should ask: (i) whether the death depictions accompany a comprehensive story or explanation that factually highlights the purpose of the image,\textsuperscript{192} and (ii) will excluding the image deprive the public of the article’s informative value or substantially impair the website’s intended message being presented by the work as a

\textsuperscript{188} \textit{Shluman}, 955 P.2d 469, 484 (noting that matters of public concern are not solely determined by the popularity of the published content).
\textsuperscript{189} \textit{Favish}, 541 U.S. 157, 167 (expressing concern over death-images published on the Internet).
\textsuperscript{190} See discussion \textit{infra} Part II.C (describing the type of Web sites that are comprised of death-images, and how they fundamentally fail convey any message outside the death images themselves).
\textsuperscript{191} See \textit{id}.
\textsuperscript{192} Death-images published alone outside any context should be considered low value speech. See \textit{Constitutional Law, supra} note 80.
Generally, if the answer to (i) and (ii) are negative, than the website’s presentation of the image is exploitative. However, if the answer to (i) is negative and the answer to (ii) is affirmative, greater weight should be given to the former question which establishes that the images are being published solely for presenting death itself. If this is the case, the public’s interest in the decedent’s death-image, and the website’s intended message, would have to substantially outweigh the privacy interest at stake.

To illustrate the purpose of the two-part test, consider the following scenarios. Where a website is comprised predominantly of depictions of gruesome death-images for the sake of promoting death, publicity of such content should be presumed a “morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.” Moreover, if the decedent’s post-mortem image is displayed alone without an informative or educational context, and if the website’s informative message can survive without violating the privacy of the decedent, the court shall presume that the decedent’s relatives’ privacy interest outweighs the website’s interest in disclosure. As a

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193 If the death-image is published alone, courts should demand that the image communicate more than just the depiction of death itself. The publisher would have to assert a strong justification for disclosure to outweigh the privacy right at stake.

194 See Restatement Second of Torts, § 652D, at comment h (1977).
result, the website shall carry the burden of proof in establishing the image’s newsworthiness. This outcome affords less deference to non-newsgathering websites that simply appeal to morbid curiosities.

If, however, the answer to the first question is in the negative, and the answer to the second question is in the negative, the result is different. Here, the content accompanies a legitimate news story on a website primarily committed to publishing non-death related content, and removing the image will substantially impair the website’s publication of public concern. In this situation, the court shall presume that the image is necessary to convey the matter of public concern, and the decedent’s family shall carry the burden of proof in establishing the images lack of newsworthiness. This result affords greater deference to websites that genuinely distribute news and matters of public interest.

Shifting the burden serves an important purpose as a preliminary step in addressing the newsworthiness of death-images. Taking into consideration the exploitative potential of the Internet, these presumptions are intended to sufficiently allocate the burden of proof. Courts need to filter out the websites that abuse the deceased in the name of the First

\[195\] See Charles M. Yablon, supra note 200, at 232 (commenting that the “correct allocation of the burden of persuasion is viewed as an important part of the substantive law.”).
Amendment from the websites that use the deceased to publish matters of public interest. Once the burden is assigned, the party with the arduous task of overcoming the presumption must show: (1) that the death-images being published contain or do not contain social value, (2) that the public’s interest is or is not being served by the publication, and (3) that the publication does or does not unnecessarily invade the privacy of the decedent’s relatives, and is or is not proportionate to the essential goal of publishing a matter of legitimate concern.  

B. Application of the Two-Part Test and the Amendment to the CDA

The following examples illustrate the result that this two-step inquiry will yield. Whether the parties can meet their burden of proof is uncertain and will have to been done on a case by case basis. The following hypothetical cases will demonstrate how the test will be applied to three different sources of content on the Internet. Section 1 details a hypothetical involving an information content provider that is not immune under the CDA and subject to a newsworthy analysis. Similarly, Section 2 uses a different information content provider but under like circumstances, and demonstrates how the test can yield a different result that adjusts to the nature of the website involved. Lastly, Section 3 presents a hypothetical

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196 See discussion infra Part II.B (extracting the elements from factors that courts have considered in identifying the newsworthiness of content).
197 The Communications Decency Act, § 230 (1997) (information content providers are not within the scope of protection provided under the CDA).
involving an online bulletin board where users generate the content and ISPs are subject to the amended CDA.

1. NYTimes.com

The New York Times website publishes a news article about the murder rate in New York, which contains a crime-scene photograph of the decedent’s corpse within the article. The decedent’s relative has sought the removal of the image. The New York Times website serves a primary function of distributing news, and images depicting death are derivative to the website’s newsgathering function. The image is accompanied by an article of public concern, that is, the murder rate in New York. Although the article might not lose its informative value if the image is removed, this factor is only one in a sliding scale of deferential treatment toward the website, and it should not be dispositive in proving its validity. Accordingly, there should be a presumption that the image concerns a legitimate matter of public interest that deserves publication, and the relative should carry the burden of proving that the image lacks newsworthy value.

2. Everwonder.com/david/worldofdeath

This website publishes a photograph of the decedent’s corpse under a section on the website entitled “stabbed to death.” The decedent’s relative has sought the removal of the photo from the website. The website is comprised exclusively of images
capturing the deaths of individuals, autopsy photos, and gruesome accidents, often celebrating the horrific manner in which the deceased has died. The website serves to shock the conscience with grisly images, and news gathering and reporting legitimate matters of public concern serve a secondary role. The image only accompanies a description of how the decedent was murdered, with little informative value aside from the actual picture itself. Here, there should be a presumption that the public does not have a legitimate interest in the image because it represents “a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”

As a consequence, the website should carry the burden of proving that the image is newsworthy and deserves publication.

3. User Generated Posting on Bulletin Board Website

An Emergency Medical Technician has decided to upload a photograph of a woman fatally dismembered in a train accident on a social networking blog’s bulletin board with a subsequent discussion regarding the decedent’s gruesome death. The decedent’s husband under the old CDA would have no recourse to have the image removed because ISPs are not liable for content posted by third-persons. Alternatively, with the amended

privacy of death provision under the CDA, the decedent’s spouse can notify the ISP of the content and request removal. Upon doing so, the husband would show proof of relationship and that the female depicted is his wife.\textsuperscript{199} If the EMT wishes to contest the removal, he or she can counter-notify the ISP, and risk exposure to litigation if the relative elects to pursue a cause of action for invasion of privacy. The relative’s right of privacy is substantially at risk if the image remains on the Internet until a court determines that it is not newsworthy.\textsuperscript{200} As a matter of caution, the decedent’s family can have the content timely removed until a court makes its decision. Ultimately this provides the decedent’s relatives some measure of accountability, and affords less deference to users that communicate this sensitive content over the Internet. If the third-party wishes to contest the removal, and demand republication, the burden should fall on the publisher of death-images to defend its public importance.

VI. CONCLUSION

In our culture today there are few matters more private than the death of a family member and the memories that resonate after he or she is gone. This is exactly what the Supreme Court and state legislatures sought to preserve when they bolstered

\textsuperscript{199} Note that under the amended CDA, the ISP shall presume that the relative’s proof is valid.

\textsuperscript{200} See discussion \textit{infra} Section III.3 (emphasizing the dangerous aspects of the Internet in comparison to other forms of media).
the right of privacy and prevented the unwarranted exploitation of death-images.\(^{201}\) Unfortunately though, our privacy laws are still insufficient to meet the unique challenges posed by the Internet, and the progress made so far has only provided pre-disclosure remedies.\(^{202}\) Adopting the proposals in Section IV would provide a progressive solution to a problem that demands closer attention. Amending the CDA would not substantially diminish Congress’s overall plan to maintain the benefits of intermediaries, and would simply create a very narrow exception that protects our privacy interest in death at least to the same degree that the DMCA protects a copyright holder’s interest in their works of authorship.\(^{203}\) Without this amendment relatives are left to rely on the decency of anonymous users who are restrained only by their own discretion.\(^{204}\) Websites, on the other hand, require a different standard that better addresses the nature of the Internet and the interests involved. The test is meant to dissect the website’s use of private death-images and effectively draw out what content is being presented as news and what content is “macabre voyeurism-masquerading-as-news.”\(^{205}\)

Depicting death for death’s sake equates to speech that is of

\(^{201}\) See discussion infra Part I.B.
\(^{203}\) See comparison of the DMCA to the CDA supra note 180.
\(^{204}\) See Barret, supra note 3 (noting the callous behavior of anonymous users posting remarks about Nicole Catsouras and her tragic death).
\(^{205}\) Calvert, supra note 16, at 145.
such slight social value that it cannot be afforded the complete protection of the First Amendment. Moreover, the privacy interest at stake is too compelling to be outweighed by low value speech appealing to nothing other than morbid curiosities. To respond to this matter effectively, the presumption based test appropriately shifts the burden of proof on the party deserving of greater deference, and protects our right of privacy while preserving the public’s right to know matters of legitimate concern.

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206 See generally Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (noting that the freedom of speech is not absolute).
207 See, e.g., Miller v. National Broadcasting Co., 187 Cal.App.3d 1463 (1986) (holding that decedent’s wife’s right to privacy prevailed over the First Amendment where an NBC news crew broadcast the decedent’s heart attack on the 6 p.m. and 11 p.m. news on channel 4 as part of a documentary on paramedics).