Staring Death in the Face during Times of War: When Ethics, Law, and Self-Censorship in the News Media Hide the Morbidity of Authenticity

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STARING DEATH IN THE FACE DURING TIMES OF WAR: WHEN ETHICS, LAW, AND SELF-CENSORSHIP IN THE NEWS MEDIA HIDE THE MORBIDITY OF AUTHENTICITY

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Introduction

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Photos are trickier than words, because their content is in large measure emotional, visceral, and because you can't edit their content.¹

That's how Bill Keller, executive editor of The New York Times, succinctly describes the difficulty and dilemma posed in deciding which wartime images newspapers should publish.² A recent, real-life scenario illustrates the problem: during a Taliban ambush in the Helmand province of southern Afghanistan, a U.S. Marine is fatally wounded by a rocket-propelled grenade.³ As fellow soldiers pull Lance Cpl. Joshua M. Bernard from the battlefield, an Associated Press (AP) photographer named Julie Jacobson, who is embedded⁴ with American forces, uses a long-range lens to snap a picture of him.⁵ Ten days later, after Ber-

2. Id.
5. Death of a Marine, supra note 3.
nard is buried back in his home state of Maine, the AP distributes
the photograph to its members across the United States, including
the newspaper for which you serve as editor-in-chief. The
photo is circulated over the vehement objection of the fallen
Marine’s father, who calls the AP’s action “disrespectful to his
son’s memory.” Similarly, U.S. Defense Secretary Robert Gates
lambastes the AP’s decision as “appalling.” The photographer
who captured the photo, however, counters with the sentiment
that “[d]eath is a part of life and most certainly a part of war.
Isn’t that why we’re here? To document for now and for history
the events of this war?”

The five-word question squarely facing you is remarkably
simple in its framing, but answering it may prove extraordinarily
more complex, time-consuming and, perhaps, even gut-wrench-
ing: Do you publish the photograph?

This true-to-life situation and its accompanying query fall
squarely at the intersection of news media ethics and news media
law. The question also strikes at the issue of censorship in the
news media around which this issue of the Notre Dame Journal of
Law, Ethics & Public Policy revolves.

Not to publish the image is to engage in an act of self-cen-
sorship—an act of silence, perhaps stemming from a chilling
effect imposed on speech either by a voluntary subscription to
the tenets and guidelines of journalism ethics or, alternatively,
due to the state-sanctioned dictates of media law and the fear of a
possible lawsuit filed by the late Marine’s father over familial pri-
vacy rights. Many newspapers, in fact, chose not to publish the
photo, with The New York Times observing that “[a] few newspa-

6. See id.
7. See id.
9. Id.
is not worth the effort it would take to cover it”).
11. See infra Part II, Section B (addressing issues of potential legal liability).
(reporting that “the AP distributed a photo of the mortally wounded Marine
being tended to by comrades. Many newspapers opted against using the photo,
and the distribution launched a fierce public debate, especially after Defense
Secretary Robert Gates publicly criticized the AP.”).
pers have published the picture, and many more have not." The existence of such an ethical rift or split of authority, as it were, within the journalistic community enhances the importance of this article.

In stark contrast to the decision not to disseminate the photograph, to circulate it is to embrace the First Amendment-grounded role of the press as a chronicler of the truth, especially when that truth affects both American lives and government actions. That certainly is the situation in this scenario, involving the life and death of Lance Cpl. Bernard and the adoption of a wartime government policy that ultimately led to Bernard’s demise. Indeed, as the late Supreme Court Justice Hugo Black once wrote, "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."

This article examines both the ethical and legal questions and considerations that may or may not lead to self-censorship of the publication by newspapers of images of wartime death. In particular, it articulates a set of factors or variables that newspaper editors can use in the decision-making process surrounding possible publication, with those factors encompassing concerns and interests drawn from the realms of both ethics and law. Such an interdisciplinary approach that bridges First Amendment theory and tort law with news media ethics and journalistic principles arguably makes for a comprehensive tack to the issue of publishing wartime, death-scene images. In addition and, in perhaps novel fashion, this article infuses principles from the realm of broadcasting and, in particular, the Federal Communications Commission’s (FCC) enforcement of a federal statute governing broadcast indecency, into the resulting rubric.


14. See U.S. CONST. amend. I. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Id. The Free Speech and Free Press Clauses were incorporated eighty-five years ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).


16. See 18 U.S.C. §1464 (2006) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

The issue of publication of images of death during wartime is both timely and important. The United States is fighting what amounts to an open-ended, protracted war on terrorism. In June 2010, President Barack Obama appointed General David H. Petraeus to lead the nation’s war effort in Afghanistan as part of what The New York Times called “Obama’s campaign to reverse the deteriorating situation on the ground here and regain the momentum in this nine-year-old war.” Indeed, President Obama is “defying his own party to escalate the fight in Afghanistan.” In brief, the fighting will continue, the death will continue and, in turn, the journalistic dilemma over publishing death-scene images will continue. There were nearly 100,000 American troops in harm’s way in Afghanistan during the summer of 2010 facing a “releentless pace of suicide bombings that make nearly everyone wonder, when they leave home in the morning, whether they will return safely.”

Importantly, the images of death that American news media may choose to either publish or censor do not always or necessarily involve U.S. troops and civilians. In April 2010, for instance, a controversy erupted over a leaked videotape shot from the cockpit of a U.S. Apache helicopter in Baghdad, Iraq that showed the gunning down of people American troops believed were insurgents. Why disseminate such a videotape? As The New York Times explained, “It depicts the raw reality of one deadly encounter in Iraq, chilling for many viewers both for the wrenching images of death and the dialogue of the pilots as they killed"
the men they called a threat." Yet, in October 2010, the U.S. Army pushed back in its efforts to conceal such images when, according to the Associated Press, it "updated its 17-year-old rule book on espionage to specifically require that troops alert authorities if they suspect classified leaks to the media."

Before undertaking this cross-disciplinary endeavor, some caveats and qualifications are in order. First, although there has been an "outpouring of interdisciplinary legal scholarship in recent decades," legal scholars like Stanley Fish assert that true interdisciplinary scholarship is impossible. The authors employ the concept of interdisciplinary scholarship here in the sense of working from and within a legal framework (indeed, publishing within a law journal), yet infusing it with issues, concerns and reasoning from the realm of journalism. This most approximates Professor J.M. Balkin's notion of interdisciplinary scholarship in which

one might try to solve problems determined by and through the norms of legal scholarship by means of information from other disciplines. For example, one might use information from other disciplines to determine the best rule of constitutional protection against libel or the best assignment of decisional authority between state and federal governments, and so on.

A second caveat is recognition that some journalists probably will find objectionable any legal and/or ethical framework or rubric—especially one proposed by members of academe—to guide their decision-making processes and imposed upon their perceived First Amendment freedoms. The choice to use, ignore, or borrow from the rubric proposed in this article is, of course, the prerogative of journalists. It cannot be dictated.

Third, this article concentrates only on the decision-making processes of professional journalists in news organizations in
choosing whether or not to publish images of death. It thus does not pertain to websites such as “Best Gore” that, as it tells visitors, features gore videos and images. Due to extremely graphic nature of materials found on Best Gore, access is restricted to adults only. If you are 18 years of age or over and wish to be reminded of real life, then be my guest, but do NOT take the warning lightly. Videos and images posted on Best Gore are bloody, gut wrenching, teeth grinding, offensive and upsetting. Just as the life itself.29

With this in mind, Part I of the Article concentrates on the ethical forces and factors that may affect journalistic judgment in publishing images of death.30 Part II then turns to the realm of law to explore variables and dimensions from First Amendment theory, tort law and broadcast indecency that journalists may consider in the publication decision-making process.31 Next, Part III synthesizes the variables explored in Parts I and II by creating an assessment rubric that journalists can use to guide their actions when faced with the possibility of printing an image of death.32 Finally, Part IV concludes by contextualizing the issue in historical context and by suggesting that the Internet may provide one means for print newspapers to deal with the issue today.33

I. Ethical Forces Affecting Self-Censorship Of Death-Scene Images During Times Of War

This part of the Article focuses on a quartet of ethical forces in journalism that arguably affect determinations regarding the publication of images of death during wartime. A study of journalism ethics on this topic is important because “[j]ournalism ethics seek to promote responsible conduct in the gathering, processing and dissemination of news and information.”34 Viewed in this light, “responsible conduct” might well sometimes mean engaging in self-censorship and refraining from publishing images of death. Four ethical considerations are thus addressed below.

30. Infra notes 34–82 and accompanying text.
31. Infra notes 83–162 and accompanying text.
32. Infra notes 163–73 and accompanying text.
33. Infra notes 174–85 and accompanying text.
34. Lilian Ndangam, ‘All of Us Have Taken Gombo’ Media Pluralism and Patronage in Cameroonian Journalism, 10 JOURNALISM 819, 820 (2009).
A. Truth-telling

Journalists are truth-tellers.35

The ethical obligation of journalists in the United States to report the truth militates, at first blush, in obvious favor of publishing images of death during wartime. The commitment to disseminate truthful information is well established in journalism ethics. For instance, the ethics code of the Society of Professional Journalists admonishes that journalists should "seek truth and report it."36 Similarly, the ethics code of The New York Times dictates that "[w]hatever the medium, we tell our audiences the complete, unvarnished truth as best we can learn it."37 Likewise, the Associated Press provides, in its statement of news values and principles, that "AP pictures must always tell the truth. We do not alter or manipulate the content of a photograph in any way."38

The obligation of journalists to tell the truth arguably is heightened during times of war. As journalist William Prochnau succinctly encapsulates it, "The packaging of wars is a natural function of governments, the unpackaging of them a natural function of the media."39 Prochnau contends that the sheer frequency with which the United States is at war "raises to the very highest levels of national importance the responsibility of the American media not only to cover wars thoroughly, but as the nature of these wars change, to probe the war makers'-the civilian leadership's—reasons for waging them."40

Images of war represent only one form of thorough coverage. Specifically, the authors assert that publishing an unaltered, unstaged photograph of war as it transpires provides a quite literal snapshot of the truth, although one photo, standing alone, obviously cannot possibly capture the entirety of any war. Indeed, the preamble to the ethics code of the National Press Photographers Association provides that

visual journalists operate as trustees of the public. Our primary role is to report visually on the significant events and

40. Id. at 329.
varied viewpoints in our common world. Our primary goal is the faithful and comprehensive depiction of the subject at hand. As visual journalists, we have the responsibility to document society and to preserve its history through images.41

When viewed in this light, journalists in the United States embrace an ethical obligation to publish images of death from war because

- wars fought by the United States are “significant events,”42 as are deaths during those wars;
- photographs of death during wars “document”43 and “preserve”44 the history of those wars. Indeed, as one scholar puts it, a photograph of war “can be read as a piece of objective, factual information”45 that, in turn, “can set in motion the actual process of being an eyewitness of the distant war.”46

Similarly, the American Society of News Editors provides in its Statement of Principles that “[t]he primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time.”47 Showing images of U.S. troops dying or dead on far-away battlefields facilitates this mission by providing citizens with truthful information about the realities of war that, in turn, allow those citizens to decide for themselves whether war efforts are, in brief and common parlance, worth it. As one study recently noted, “During wartime, media coverage can have important consequences for public opinion on the conflict.”48

Nancy Conway, editor of the Salt Lake Tribune, explained her decision to publish the photograph of Lance Cpl. Joshua M. Ber-

42. Id.
43. Id.
44. Id.
46. Id.
nard described in the Introduction this way, emphasizing the truthtelling goal of journalism:

It is our job to inform—to tell the truth to the best of our ability. The photo of the wounded Lance Cpl. Josh Bernard is real. It is a powerful, painful reminder of the reality of war. You could argue it would be dishonest not to show that reality when we can. Should we censor photos like this? I don’t think so. And I believe our readers don’t think so. They deserve an accurate view—not a sanitized view.49

She suggested that one factor that might have led her to quash publication was “if the soldier were local.” In other words, geographic proximity to the victim may militate against publication because, arguably, the sting caused by it hits closer to home.

Conway is not the only journalist to defend the publication of the photograph of Bernard. Susan Nielson, associate editor of The Oregonian, asserted in a column that “the public should probably see more war photographs, assuming journalists follow ethical guidelines such as maintaining a respectful distance and letting families be notified first. Without that coverage, the public falls in danger of forgetting that each casualty represents its own universe of sorrow.”51 She makes the point that even one photograph of death from war cannot capture the true reality of combat, intimating that many more photos should be published when she writes that “[t]he true bloodiness of combat is even more awful than a single image of a young and dying Marine.”52 Ironically, she admits that the Oregonian failed to run the photo of Bernard and she omits the reasoning behind that decision to engage in self-censorship.53

There is a counter-argument here—that telling the truth about the death of an American soldier through visual images actually fuels enemies of the United States. As syndicated columnist Mona Charen writes, “Joshua Bernard would want to be remembered as he lived and served. Instead, the photo of his last moments will doubtless go viral on Islamist Web sites, where

50. Id.
52. Id.
53. Id.
his suffering will be exulted over.”

In her view, the publication of the photo is, at least to America’s enemies, “a triumph.” The journalistic norm of truthtelling thus can cut both ways—letting citizens in the United States know the realities of the war while, simultaneously, giving psychological aid and comfort to the country’s enemies. But concealment, undertaken in the name of preventing such speculative psychological aid to enemies, stands in stark contrast to the goal of disclosing the truth.

The bottom line is that, despite the ethical admonition of truthtelling that pervades journalism theory in the United States, more papers than not actually chose to conceal the truth when it came to the photograph of Lance Cpl. Joshua M. Bernard. Is there, then, a troubling disconnect between theory and practice on the principle of truthtelling, a least when it comes to the real-world context of publishing images of the dead during wartime? It is not just in the realm of the print medium where such a chasm or gulf appears to exist, but also in television. A recent study of coverage of the current war in Iraq, for instance, found that “[f]or American viewers in particular, the portrait of war offered by the networks was a sanitized one free of bloodshed.”

Ultimately, this suggests that there must be forces at work other than simply truthtelling—forces that perhaps are ethical, legal or some combination of the two—that lead to journalistic self-censorship of depictions of death during wartime. Indeed, if truthtelling were the only ethical obligation adopted by journalists, it would give them carte blanche to report the truth on any topic and any subject matter, regardless of the damage that might be wrought by such truthtelling. In other words, unbridled truthtelling—truthtelling run amok, as it were—must be kept in check by some other ethical forces. Those forces are explored in the next three sections of this part of the article.


55. Id.

56. Concealment can be defined to include “not only secrecy and deception, but also reticence and nonacknowledgment.” Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 4 (1998).

57. See Seelye, supra note 13 and accompanying text (observing that “a few newspapers have published the picture, and ‘many more have not’”) (emphasis added).

B. Credibility

In the pages of this same journal a half-decade ago, Blake Morant, current dean of the Wake Forest University School of Law, asserted that the fact that “[v]irtually every media source, whether it is broadcast or print, has an established code of conduct” is indicative of “the industry’s desire to exercise expressive freedom responsibly and affirms its sensitivity to the collective interests of society. Moreover, the common language of the various codes applicable to different media sources connotes the industry’s acknowledgment of credibility as a primary objective in the journalistic profession.” Indeed, this is more than academic theory. The ethics code of the Los Angeles Times, for instance, identifies credibility as “newspaper’s most precious asset” that “is arduously acquired and easily squandered. It can be maintained only if each of us accepts responsibility for it.”

Publishing images of death during wartime may increase the credibility of a newspaper in the minds of some readers because it demonstrates that a newspaper is willing to publish hard news, not simply soft features, at a time when, as Richard Cohen writes, “[n]ews values, once no-frills, no-nonsense, have been recast according to corporate perceptions of what sells.” Put differently, the publication of such photographs might enhance credibility because it demonstrates that a newspaper is not afraid to tell a difficult, hard-hitting story, no matter how unpleasant it may be to some readers.

In addition, credibility may be enhanced when readers see for themselves that a real person is dead, not simply a name listed in a newspaper. Indeed, courts have protected news media organizations from legal liability when they choose to publish the names of rape victims (rather than using pseudonyms) because using real names adds credibility to a story.

60. Id. (emphasis added).
62. Id.
64. See Ross v. Midwest Commuc’ns, Inc., 870 F.2d 271, 274 (5th Cir. 1989) (reasoning that “[c]ommunicating that this particular victim was a real person with roots in the community, and showing WCCO’s knowledge of the details of the attack upon her, were of unique importance to the credibility and persuasive force of the story”).
Conversely, some readers might find that the publication of such images actually weakens a newspaper's credibility. The theory here, the authors assert, is that some readers may consider the publication of images of the dead or dying as pandering to shock value, sensationalism, and voyeurism. These readers might believe there is no need for a newspaper to print such photographs because people already know that both soldiers and civilians die during war. In other words, that people die during wars is common knowledge; running a photograph of death thus adds no new facts, especially when words can convey them. Printing the photos thus erodes journalistic credibility, at least from this perspective.

In summary, the credibility factor cuts both ways. The authors have asserted two alternative lines of logic to illustrate these possibilities—credibility enhancement and credibility diminishment.

C. Minimizing Harm and Sensitivity to Others

Counterposed to the ethical admonition to report the truth is the ethical obligation imposed on journalists to be mindful, when deciding to report information, about the damage journalism might inflict. As Esther Thorson, Dean of Graduate Studies and Research at the University of Missouri School of Journalism, observed in 2009, the principle of "doing no harm"65 is one of two core values that "capture[s] the essence of modern journalism's code of ethics."66 The ethics code of the Society of Professional Journalists, for instance, instructs journalists to "minimize harm"67 and, in particular, to be sensitive when using "photographs of those affected by tragedy or grief."68 The same ethics code also advises journalists to "show good taste"69 and to "avoid pandering to lurid curiosity."70 In addition, the ethics code of the National Press Photographers Association instructs that photojournalists should "[g]ive special consideration to vulnerable subjects and compassion to victims of crime or tragedy."71

The ethical tenet of minimizing harm begs the following question in the context of the debate about publishing images of the dead during wartime: What harms might such publication cause?

66. Id.
67. Soc'y of Prof'l. Journalists, supra note 36.
68. Id.
69. Id.
70. Id.
71. Nat'l. Press Photographers Ass'n, supra note 41.
In a 2005 study on photographic coverage in three major newspapers during the Persian Gulf and Iraq Wars, Cynthia King and Paul Martin Lester observe that "pictures often affect a viewer emotionally more than words alone." Perhaps the emotional punch that a photograph of either a dead or dying U.S. soldier can pack is one reason justifying its self-censorship in the news media.

The chain of logic here goes something like this: the greater the potential emotional or psychological impact that a photograph carries, the greater the potential for that photograph to deeply offend readers and viewers and, in turn, the greater the impact for potentially diminishing a news media organization's readership and viewership. Perhaps this is why King and Lester found that "[c]lose-up and medium views that showed bloodied combatants were only about 5% of the total number of images for both" the Persian Gulf War and the Iraq War published in The New York Times, Los Angeles Times and Chicago Tribune. Beyond this, King and Lester found that "[f]ew images of corpses were ever shown to American newspaper readers." Ultimately, offended readers may cancel subscriptions to demonstrate their disapproval of a newspaper's photographic choices. In an era when print newspapers are in dire economic straits, maintaining what readership remains is vital. In fact, a September 2010 report released by the Pew Research Center for the People and the Press found that "[o]nly about one-in-four (26%) Americans say they read a newspaper in print yesterday, down from 30% two years ago and 38% in 2006." A 2010 report by the Pew Project for Excellence in Journalism determined that "newspapers have lost 16.9% circulation in three years and 25.6% since 2000."
The other seemingly obvious harm here is to the immediate relatives and family of the injured or deceased soldier or civilian depicted in a wartime photograph. Imagine waking up and opening the morning newspaper to find an image of one’s son, daughter, brother or sister wounded or dead on a battlefield. This scenario seems reasonably likely to cause emotional anguish and pain. Indeed, The New York Times has written about the grief and pain that the family of Hector Leija of Raymondville, Texas reportedly experienced after the newspaper published a photograph of Leija, a member of the U.S. Army, being carried on a stretcher shortly after he was shot in the head and, ultimately, shortly before he died from the injury.78

D. Independence

A fourth tenet of the Society of Professional Journalists’ ethics code instructs journalists to “act independently.”79 In particular, the SPJ code requires that journalists “be free of obligation to any interest other than the public’s right to know.”80

The ethical dilemma here for journalists is whether they begin to lose their independence and obligation to serve the public’s right to know when they take into account some readers’ potential squeamishness over viewing images of the dead when choosing whether or not to publish such images. In other words, do editors start to cede control over news judgment—lose their independence—when they worry too much about offending readers with their content? Offending readers on occasion with images of the dead may just be a good thing. Writing in Lens, the photojournalism blog of The New York Times, photographer David Dunlap supports an argument made in private by colleague Julie Jacobson of the Associated Press, who wrote:

It is necessary to be bothered from time to time. It is too easy to sit at Starbucks’s far away across the sea and read about the casualty and then move on without much of another thought about it. It’s not as easy to see an image of that casualty and not think about it. I never expect to change the world or stop war with one picture, but only hope that I make some people think beyond their comfort

79. Soc’y of Prof’l Journalists, supra note 36.
80. Id.
zones and hope that a few of them will be moved into some kind of action . . . 81

The news media should also act independently from government pressure to only show the positive or favorable images of war—something that images of death clearly contradict. There is a danger that such independence is jeopardized during wartime, with one 2008 study noting that the news media may censor themselves as a show of support for the president. Indeed the press is heavily reliant on the administration for information and may not want to risk losing access. In the time leading up to and during the Iraq War, several media outlets refused to accept anti-war advertising. Journalists with dissenting opinions were fired (Peter Arnett of NBC, Brian Walski of the Los Angeles Times, and Geraldo Rivera), or intimidated into “behaving” or denounced as on the fringe. 82

With this quartet of ethical variables from the profession of journalism in mind—truth-telling, credibility, minimizing harm, and independence—the article now turns to legal forces, ranging from First Amendment theory to tort liability to broadcast indecency, that may influence a news organization’s decision to engage in self-censorship when it comes to images of the dead during times of war.

II. FIRST AMENDMENT CONCERNS AND LEGAL FORCES AFFECTING SELF-CENSORSHIP

This part of the Article has three sections. Section A examines two First Amendment-based theories of free expression that militate in favor of the news media publishing images of the dead during wartime. Section B then addresses the potential for tort liability that news organizations may face when they publish such images. Finally, Section C examines a trio of variables the Federal Communications Commission commonly uses when it makes indecency determinations—variables that newspaper editors might consider when deciding whether or not to publish images of dead bodies during times of war.


A. First Amendment Theory

Two key theories of freedom of expression that underlie First Amendment jurisprudence seem to militate in favor of publishing images of the dead during wartime. Those theories—the marketplace of ideas and the watchdog role of the press—are analyzed below.

1. The Marketplace of Ideas

The marketplace of ideas theory of free expression represents one of the most powerful images of free speech, both for legal thinkers and for laypersons and is perhaps “the dominant First Amendment metaphor." In the ideal view of the marketplace of ideas theory, competition among ideas produces the truth or, at least, the best conception of the truth at any one time. As Professor Frederick Schauer observes, the premise of the marketplace theory is that “truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas," resting "in part on the value of an adversarial process as a means of discovering truth." In a nutshell, the marketplace of ideas theory serves what the nation’s high court calls the “truth-seeking function" of speech and, in turn, sometimes is referred to as “[t]he search for truth rationale.” The Supreme Court explained more than four decades ago that “[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which

84. MATTHEW D. BUNKER, CRITIQUING FREE SPEECH 2 (2001).
86. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”).
87. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 16 (1982).
88. Id.
truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."

Much like how the goal of truth-telling is central to the ethos of journalism, discovery of the truth is thus central to First Amendment theory. Telling the unvarnished truth about war through photographs, no matter how offensive they may be, therefore is one way in which the news media can help the public to better understand and to debate whether a particular war really should be fought. The public depends on the press for such information, in contrast to the government supplying it, because the government has a vested interest in squelching the publication of images and words that may hurt or harm the war effort in which it is engaging, as the American Civil Liberties Union's recent battle to obtain shocking photographs of the abuse of prisoners at Abu Ghraib prison in Iraq illustrates. Until February 2009, the government even banned the press from photographing the rather dignified, flag-draped coffins containing the bodies of dead American soldiers as they arrived at Delaware's Dover Air Force Base.

Courts, in turn, often afford the government deference when censoring speech during wartime. Bridging this proclivity for censorship with the marketplace theory, University of Iowa Professor Jeffery A. Smith observes that

\[ \text{[t]ruth has been said to be the first casualty in war, but perhaps it is more precise to say that the First Amendment has been the first casualty, followed closely by the marketplace of ideas where truths, or at least better understand-} \]

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92. See supra Part I.A (discussing the truth-telling goal of journalism).
94. See Elisabeth Bumiller, Defense Chief Lifts Ban on Pictures of Coffins, N.Y. Times, Feb. 26, 2009, at A13 ("In a reversal of an 18-year-old military policy that critics said was hiding the ultimate cost of the wars in Iraq and Afghanistan, the news media will now be allowed to photograph the coffins of America's war dead as their bodies are returned to the United States.").
95. E.g., Schenck v. United States, 249 U.S. 47, 52 (1919) ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").
ings, are more likely to emerge than in a system of authoritarian control.\textsuperscript{96}

The state secrets privilege, for instance, is one legal tool to which the government turns to suppress truthful information that might be disclosed, in the course of a civil lawsuit, during times of war when that information, in the government's determination, could undermine national security.\textsuperscript{97} It is an evidentiary privilege possessed by the Executive Branch of government.\textsuperscript{98} American Civil Liberties Union President Nadine Strossen recently described "the overblown use of the state secrets privilege"\textsuperscript{99} as "a serious threat to all freedoms, including First Amendment rights."\textsuperscript{100} This puts an even bigger burden on the press to disseminate information to the public that the government would prefer to squelch.

The bottom line is that the government may not want us to know the visual truth of war. As one major newspaper reported in 2006, "The Army and the other military services have limited the release of photographs and video footage showing wounded and dead troops in Iraq and Afghanistan."\textsuperscript{101} After some photojournalists have taken images of dead soldiers in Iraq, they have been removed from their embedded positions as "retribution, they say, for showing the cost of an unpopular war."\textsuperscript{102} Yet the venerable marketplace metaphor that underlines so much of First Amendment jurisprudence militates strongly in favor of the publication of such images, as they provide information that contributes to the "uninhibited, robust and wide-open"\textsuperscript{103} debate about the merits of war.


\textsuperscript{97} See In re United States, 872 F.2d 472, 474 (D.C. Cir. 1989) ("The state secrets privilege is a common law evidentiary rule that protects information from discovery when disclosure would be inimical to the national security.").

\textsuperscript{98} See In re Sealed Case, 494 F.3d 139, 150 (D.C. Cir. 2007) (writing that the Executive Branch has "the power to invoke the state secrets privilege").


\textsuperscript{100} Id.

\textsuperscript{101} Drew Brown, Film on U.S. Military Hospital 'Extremely Graphic,' Saint Paul Pioneer Press (Minn.), May 13, 2006, at 7A.

\textsuperscript{102} Kay McSpadden, War Through a Camera's Lens, Charlotte Observer (N.C.), Aug. 9, 2008, at 9A.

2. The Watchdog Role of the Press in a Self-Governing Democracy

One of the most recognizable yet arguably diminishing values of a free press in a democratic society is the power-checking function of the press against government abuse and malfeasance. Columbia School of Law Professor Vincent Blasi, writing more than thirty years ago, articulated this checking value theory in his seminal work, *The Checking Value Theory in First Amendment Theory*.\(^{104}\) Professor Blasi argued that First Amendment jurisprudence should consider the press’s role as a government watchdog in analyzing First Amendment issues.\(^{105}\) As encapsulated by University of Florida Professor Laurence Alexander, “Blasi connects the protections of press privilege to the press’ Fourth Estate role. His ‘checking value’ theory acknowledges the important role of First Amendment freedoms in checking the abuse of power by public officials.”\(^ {106}\)

The concept of the press as a watchdog, however, did not originate in Professor Blasi’s work; it dates back, according to Timothy Gleason, current dean of the University of Oregon’s School of Journalism and Communications, to the nineteenth century.\(^ {107}\) The watchdog concept, Dean Gleason proposes, arose out of the numerous libel suits that flooded the courts during the nineteenth century—initially, the watchdog concept emanated from common law defamation jurisprudence.\(^ {108}\)

Nonetheless, the concept of the press as government watchdog is well established in American democratic discourse. Watchdog journalism, according to Professors W. Lance Bennett and William Serrin, centers on “(1) independent scrutiny by the press of the activities of government, business, and other public institutions, with an aim toward (2) documenting, questioning, and investigating those activities, in order to (3) provide publics and officials with timely information on issues of public concern.”\(^ {109}\) The press’s role as watchdog, as Dean Gleason wrote, “is based on the press’s function as an institution serving [the]...
collective good."\textsuperscript{110} As the late Professor C. Edwin Baker wrote in 2007, "[T]he press receives constitutional protection to be a voice independent of the government (or, at least, independent of the other three ‘estates’) in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role."\textsuperscript{111} He adds that "[a] ubiquitous understanding of the constitutional guarantee of press freedom is that it aims to protect a Fourth Estate or, more expansively, to protect media entities because of their instrumental contribution to democracy and a free society."\textsuperscript{112}

The watchdog role of the press militates in favor of selectively publishing images of death during wartime. Why? Because the camera, quite literally, watches over the implementation of government policy in war zones. Photographs taken and published by the press provide independent, rather than government-supplied, documentation of war efforts. Such photographs can also check the abuse of government power when innocent civilians or prisoners are killed by American troops. Publishing images of dead soldiers or civilians might also counteract political propaganda of government-supplied images that fail to show such brutal realities.

Press-supplied images are important because, as the authors of a recent study observed, "[i]deally, news media act as a filter, sifting and sorting information in a manner that ensures a reliable and accurate source from which citizens can base judgments about war."\textsuperscript{113}

The government has a natural tendency to invalidate the watchdog role of the press during times of war. As Murrey Marder, a former chief diplomatic reporter with the \textit{Washington Post}, recently wrote:

\begin{quote}
The Bush administration will leave the White House with relations between the presidency and the press in shambles. No other president has set out so determinedly to discredit the role of the press as a watchdog on the transparency and accountability of government. Sadly, during the Bush presidency the American press sidestepped the administration’s hypocrisy of fighting a war to
\end{quote}

\begin{thebibliography}{9}
\bibitem{110} Gleason, supra note 107, at 7.
\bibitem{112} Id. at 956.
\bibitem{113} Johansen & Joslyn, supra note 82, at 591.
\end{thebibliography}
bring a free press to Iraq, while seeking to reduce its oxygen in the United States.\textsuperscript{114}

In 2010, Justice Anthony Kennedy wrote for the majority of the Court in \textit{Citizens United v. Federal Elections Commission}\textsuperscript{115} that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."\textsuperscript{116} The news media act in service of this bundle of citizens’ rights when, in watchdog fashion, they report on war and publish photographs of death.

\textbf{B. Familial Privacy Rights, Potential Tort Liability and Shock Value in First Amendment Jurisprudence}

Beyond First Amendment theory, another legal factor that might influence a newspaper editor’s decision to censor an image of a dead soldier or civilian during wartime is the potential for civil liability. Increasingly, courts are recognizing familial privacy rights when it comes to the publication and distribution of images of their dead loved ones, and states are starting to carve out exceptions from their open records laws when it comes to the public release of such images.\textsuperscript{117} Newspapers thus might well fear potential lawsuits, filed by family members of the deceased, based upon tort causes of action such as intentional infliction of emotional distress (IIED)\textsuperscript{118} and public

\begin{itemize}
\item \textsuperscript{114} Murrey Marder, \textit{The Press and the Presidency: Silencing the Watchdog}, \textit{Nieman Rep.}, Spring 2008, at 8.
\item \textsuperscript{115} \textit{130 S. Ct. 876} (2010).
\item \textsuperscript{116} \textit{Id. at 898}.
\item \textsuperscript{117} See generally Clay Calvert, \textit{Dying for Privacy: Pitting Public Access Against Familial Interests in the Era of the Internet}, 105 \textit{Nw. U. L. Rev.} 18 (2010) ("In 2010, multiple events magnified public focus on the escalating tension between family members’ privacy rights with respect to the death-scene images and dying words of their loved ones, on the one hand, and the public’s right to access those documents, on the other.").
\item \textsuperscript{118} E.g., Hughes v. Pair, 209 P.3d 963, 976 (Cal. 2009) ("A cause of action for intentional infliction of emotional distress exists when there is ‘(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff’s suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant’s outrageous conduct.’" (quoting \textit{Potter v. Firestone Tire \\& Rubber Co.}, 863 P.2d 795, 819 (Cal. 1993))); \textit{accord Minch v. District of Columbia}, 952 A.2d 929, 940 (D.C. 2008) ("To succeed on the claim of intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress."). \textit{But see Young v. Allstate Ins. Co.}, 198 P.3d 666, 692 (Haw. 2008) ("[T]he tort of IIED consists of four elements: ‘1) that the act allegedly\ldots")
\end{itemize}
disclosure of private facts.\textsuperscript{119}

In 2010, for instance, a California appellate court recognized what it called “a familial right to privacy in autopsy or similar photographs.”\textsuperscript{120} Three years earlier, the United States Court of Appeals for the Tenth Circuit observed that “[c]ourts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs.”\textsuperscript{121} The Tenth Circuit in that case, \textit{Showler v. Harper’s Magazine Foundation},\textsuperscript{122} rejected tort liability for the publication in a magazine of a photograph of a dead American solider, lying in an open casket and dressed in his military uniform, that was taken at a public funeral. Yet it intimated that liability may rest in cases involving “death images that are gruesome.”\textsuperscript{123}

But legal liability in tort for publishing images of death during war, no matter how gruesome they may be, seems farfetched, at least when those images accompany a newsworthy story related to either the death or to the war in question. That is because newsworthiness negates a successful cause of action for public disclosure\textsuperscript{124} and, as Professor Amy Gajda recently observed, “today, most courts continue to side with the media in determining newsworthiness, sometimes even in cases involving deeply pri-

\begin{flushleft}

\textsuperscript{119} E.g., Shulman v. Group W Prods., 955 P.2d 469, 478 (Cal. 1998) (stating that the four basic elements of the public disclosure tort include: “(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern”” (quoting Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 768 (Cal. Ct. App. 1983)). \textit{See generally} Robert Trager et al., \textit{THE LAW OF JOURNALISM \\& MASS COMMUNICATION} 247–57 (2d ed. 2010) (providing an overview of the public disclosure of private facts tort).

\textsuperscript{120} Catsouras v. Dep’t Cal. Highway Patrol, 104 Cal. Rptr. 3d 352 (Cal. Ct. App. 2010) (“The essence of privacy law is that it guards objectively reasonable expectations of privacy society recognizes as legitimate. While until today no California case had yet recognized a familial right to privacy in autopsy or similar photographs, I conclude it is no great leap to do so.”), \textit{appeal dismissed}, 2010 Cal. LEXIS 3456 (Cal.).

\textsuperscript{121} Showler v. Harper’s Magazine Found., 222 Fed. App’x 755, 762 (10th Cir. 2007).

\textsuperscript{122} 222 Fed. App’x 755.

\textsuperscript{123} \textit{Id.} at 762.

\textsuperscript{124} \textit{See} Shulman, 955 P.2d at 478 (“[L]ack of newsworthiness is an element of the ‘private facts’ tort, making newsworthiness a complete bar to common law liability.”); \textit{see also} DANIEL J. SOLOVE \& PAUL M. SCHWARTZ, \textit{PRIVACY AND THE MEDIA} 124 (2008) (“[T]he newsworthiness test is an element of the tort of public disclosure.”).
\end{flushleft}
vate disclosures."125 Such deference to journalistic judgment may reflect First Amendment concerns, as Professors Daniel Solove and Neil Richards note that "[i]n tort actions under the public disclosure of private facts tort, the First Amendment requires strict scrutiny when information of public concern is involved."126 Indeed, the Supreme Court of California observed over a decade ago that "[a]lthough we speak of the lack of newsworthiness as an element of the private facts tort, newsworthiness is at the same time a constitutional defense to, or privilege against, liability for publication of truthful information."127

For instance, the same California appellate court that recently recognized a familial right to privacy over images of the dead also acknowledged that "there are instances in which matters pertaining to the dead or dying may involve issues of public interest."128 War, obviously, is such a matter of public concern,129 and the newsworthiness element of the public disclosure tort would seem to protect the news media when they publish images of the dead in order to illustrate text-based stories about a particular battle or firefight during a war.

Newsworthiness is not easy to define.130 In deciding what is newsworthy under the public disclosure tort, however, courts often consider several factors, "including the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily

127. Shulman, 955 P.2d at 479.
129. Although no case is directly on point in holding that war is newsworthy, courts have held that "[t]ruthful reports of recent crimes are of public interest and generally protected by the First Amendment." Times-Mirror Co. v. Superior Court, 244 Cal. Rptr. 556, 561 (Cal. Ct. App. 1988). If crime is newsworthy, then it seems logical that war is newsworthy. In addition, a federal court held in 2005 that "the public has demonstrated an intense interest in, and concern about, Iraqi prisoner abuse scandals involving the American military," thus making newsworthy a "story about potential mistreatment of captives." Four Navy Seals v. Assoc. Press, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005).
130. See Randall P. Bezanson, The Developing Law of Editorial Judgment, 78 NEB. L. REV. 754, 778 (1999) ("Newsworthiness . . . is extremely difficult to define, especially when such constitutional significance hangs upon its definition. Courts have long struggled to accommodate the conflicting interests of individual privacy and press freedom in attempting to define newsworthiness.").
assumed a position of public notoriety." The social value of learning about the realities of government-sponsored war, including the lives lost during war, seems unquestionable. Furthermore, even if the deceased soldier or civilian in the photograph is a private person who has not voluntarily risen to a position of public notoriety or fame, courts may still consider the image newsworthy if there is what the Supreme Court of California calls a "logical relationship or nexus . . . between the events or activities that brought the person into the public eye and the particular facts disclosed." Such an approach, the high court of California wrote, "balances the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report." A substantial connection between images of the dead and the realities of war likely exists unless one of two things about death-scene images during wartime holds true:

- "the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger," or
- the publication of the images constitutes "a morbid and sensational prying into private lives for its own sake."

Assuming a news organization lawfully obtained an image of a dead soldier or civilian during wartime, the First Amendment would shield the news organization from civil liability for publishing it unless there was proof of a compelling interest that would override the public's right to know. As the United States Supreme Court wrote more than three decades ago in Smith v. Daily Mail Publishing Co., "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."

As for IIED, the Tenth Circuit in Showler suggested that the publication of a photograph of "a deceased's body is not, stand-
ing alone, outrageous." Other courts are in accord. The bottom line, as one Texas court put it, is that "[t]aking pictures of a dead body is not intolerable; in fact, such pictures are frequently taken in a variety of situations."

While liability has been found under IIED based upon the publication of images of the dead or dying, there typically has been some additional egregious conduct engaged in by the defendant—conduct beyond the mere publication or broadcast of the image. For instance, in Armstrong v. H & C Communications, Inc., a Florida appellate court found liability where the media defendant intentionally staged a close-up photograph of a dead girl's skull in order "to create sensationalism." As it was broadcast, a cameraperson not only videotaped a local police chief removing the girl's skull from a box, but he "zoomed in for a frontal close-up of the tilted skull facing directly at the camera." In Miller v. National Broadcasting Co., liability for IIED based upon the television broadcast of the plaintiff's husband while he was dying included the critical additional fact that, in order to obtain the footage, the news media defendants entered inside the plaintiff's apartment without her consent. Similarly, an Illinois appellate court ruled in 1996 that the mother of the deceased had stated a cause of action for intentional infliction of emotional distress caused by the Chicago Tribune when Tribune staffers entered the private hospital room where the deceased was located and took unauthorized photographs of him that were later published. As with Miller, there was additional conduct—namely, a trespass into a private area—that helped to create liability for IIED surrounding the publication of the image of a dead person.

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139. See Barger v. Courier-Journal, 20 Med. L. Rptr. 1189, 1191 (Ky. Ct. App. 1991) (affirming the dismissal of an outrageous conduct claim brought by members of a murder victim's family against a newspaper for publishing photograph of the victim as he lay dead).
142. Id. at 281.
143. Id.
145. Id. at 681–82.
147. As the appellate court wrote, [P]laintiff pleaded that the Tribune entered [the deceased's] room on December 31 without plaintiff's consent in order to photograph him as he lay dying, and even prevented plaintiff from entering until
Finally, the fact that speech, such as the image of a bloody body, may shock or offend some readers does not remove it from under the blanket of First Amendment protection. Forty years ago, the United States Supreme Court in *Cohen v. California*\(^{148}\) underscored the synergistic relationship between meaning and emotion when it comes to the utterance of offensive words. In protecting Paul Robert Cohen's right to wear a jacket emblazoned with the provocative message "Fuck the Draft" in a courthouse corridor as "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft,"\(^{149}\) the high court observed that much linguistic expression serves a *dual communicative function*: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their *emotive* as their *cognitive* force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.\(^{150}\)

In light of such cases, Professor Lili Levi wrote more than one dozen years ago that "[f]rom flag burning to wearing expletives on one's jacket in a courtroom, the law has taken cognizance of the role of passion, shock, and confrontation in the context of political speech. *Shock value* may be an important way to begin a process of informing and mobilizing the public."\(^{151}\) The reference to flag burning, of course, pertains to the United

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they had finished. Although plaintiff told the Tribune reporter in the hospital that she wanted to make no public statement about [the deceased's] death, the Tribune published a story on January 1 co-authored by that same reporter featuring plaintiff's comments to [the deceased] and a photograph of his dead body. Reasonable people could find that like NBC's actions in *Miller*, the Tribune's actions on December 31 and January 1 suggest an alarming lack of sensitivity and civility, and reasonable people, in essence, a jury, could find the Tribune's behavior extended beyond mere indignities, annoyances, or petty oppressions and constituted extreme and outrageous conduct.

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149. *Id.* at 16 (quoting California v. Cohen, 81 Cal. Rptr. 503, 505 (Cal. Ct. App. 1969)).

150. *Id.* at 26 (emphasis added).

States Supreme Court’s 1989 opinion in *Texas v. Johnson.*

Justice William Brennan wrote for the majority that Gregory Lee Johnson’s “politically charged expression” of burning the American flag deserved protection, in large part because of “the uniquely persuasive power of the flag itself.”

A photograph of a dead soldier or innocent civilian killed during wartime is imbued with what the high court in *Cohen* called “a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.” At the purely cognitive or factual level, such a photograph conveys the fact that someone—a soldier or a civilian—has died. The words in the text of an accompanying article, of course, could do this just as easily as a photograph. The photograph, however, is critical because it plays an emotive role that words, standing alone, simply cannot deliver to readers.

In July 2010, the United States Court of Appeals for the Fourth Circuit recognized in *Ostergren v. Cuccinelli* that protection for shocking speech extends to images that shock, not just to words. In particular, it protected the ability of a privacy rights activist to post on her website images of certain land records that contained the Social Security numbers of individuals.

In ruling for Betty Ostergren, the Fourth Circuit rejected Virginia’s argument that requiring fractional redaction of SSNs by Ostergren before she posted the land records was the appropriate way to strike a balance between free speech and informational privacy concerns. The appellate court reasoned that “partial redaction would diminish the documents’ shock value and make Ostergren less credible because people could not tell whether she or Virginia did the partial redaction.” It added that “the unredacted SSNs on Virginia land records that Ostergren has posted online are integral to her message. Indeed, they are her message. Displaying them proves Virginia’s failure to safeguard private information and powerfully demonstrates why Virginia citizens should be concerned.”

Betty Ostergren, of course, could have made her cognitive point through an emotion-free statement such as, “The government of Virginia is posting land records on the Internet that...”
include Social Security numbers. People can lawfully access this information, find your Social Security number and, in turn, possibly misuse it to invade your privacy, misappropriate your identity and cause you long-term headaches and worries." But this message would lack the same impact as merely publishing the name of a deceased soldier, rather than including an image of the soldier. In brief, the First Amendment protects the emotional power of speech to shock, thus adding another factor that militates in favor of the publication of images of wartime casualties.

C. The Indecency Analogy

Although the Federal Communications Commission definition of indecency has nothing to do with violence and everything to do with sexual and excretory organs and activities, how the Commission applies its definition of indecency to broadcasters provides a useful analogy for the central issue of this article. In particular, the FCC defines indecency as material that "in context, depicts or describes sexual or excretory organs or activities in terms patently offensive as measured by contemporary community standards for the broadcast medium." In determining the "patently offensive" part of this equation, the FCC looks at three primary factors when analyzing broadcast material: (1) whether the description or depiction is explicit or graphic; (2) whether the material dwells on or repeats at length descriptions or depictions of sexual or excretory organs; and (3) whether the material appears to pander or is used to titillate or shock. No single factor is determinative. The FCC weighs and balances these factors because each case presents its own mix of these, and possibly other, factors. "

Journalists may find the application of these three factors useful when considering whether or not to publish images of the dead or dying during wartime. For instance, on the first factor, the more graphic and explicit the photograph—the more blood and guts, in common parlance, it features—the greater the potential it has to offend some readers. There is, of course, no magic threshold or line at which something becomes too

160. Id.
161. Id.
graphic, as it were, to publish. This factor simply amounts to one that editors should account for in their decision-making calculus.

Likewise, the third factor—whether the material is intended to shock, pander or titillate—forces journalists to step back. It mandates that they themselves ask precisely the value or purpose behind running any specific photograph of the dead or dying during wartime. In a fast-paced Twitter world, stepping back in time is not always easy to do, but it is necessary. Why? Because, on the one hand, an image of a dying soldier certainly may shock a newspaper reader, but the intent behind publishing such a photograph actually may be noble (to illustrate the steep price, for instance, that America and its families are paying and to send a visual wake-up call to the public about a war) rather than pandering to lurid tastes and titillating readers' voyeuristic curiosities.

If the image used appears to pander or titillate or appeal to morbid tastes, then perhaps a newspaper takes on an additional duty or ethical obligation on its editorial pages to explain its decision-making process in choosing to run the image. Such transparency to readers would, in turn, potentially enhance credibility.

The second factor also is important. It forces journalists to reflect upon how often or frequently they should, if ever, run images of the dead or dying. They arguably should ask themselves: 1) Is there a sound journalistic reason to repeatedly run images of death during wartime?; and 2) Will the use of a single image of a dead or dying soldier suffice to convey the reality or truth of war?

With the consideration of both ethical principles and legal concepts in mind, the article now turns to the creation and description of a rubric that blends these factors in order to provide a framework to help guide journalistic decision-making about publishing images of death during wartime.

162. See Lori Robertson, Images of War, Am. JOURNALISM REV., Oct./Nov. 2004, available at http://www.ajr.org/Article.asp?id=3759 (writing that, when it comes to the choice about whether or not to publish a wartime image, “[i]t’s difficult to get a consensus on such subjective issues: What’s too graphic? What’s too conservative?”) (emphasis added).
III. A Censorship Rubric for Editors When Considering Whether to Publish Images of the Dead During Wartime

At this stage, several points regarding the choice about whether to censor or to publish images of the dead during wartime should be clear. First, the likelihood of a newspaper facing tort liability for such publication seems to be exceedingly slim, unless the publication of a photograph is devoid of any newsworthiness—a quality whose nonexistence appears difficult to imagine if one assumes that war inherently is a newsworthy event and that, in turn, there is a logical nexus between war and those who fight and die during it. Second, First Amendment theory grounded in the goals of both discovering truth (the marketplace of ideas) and maintaining a check on government conduct (the watchdog role of the press) militate in favor of publishing death-scene images during wartime. Viewed collectively, then, these two points suggest that newspaper editors have very little legal pushback to fear when it comes to publishing images of the dead during wartime.

The forces putting the brakes on publication, in contrast, appear to come from the realm of news media ethics and, perhaps, economic concerns about offending readers who may, in turn, cancel subscriptions. As Ralph Begleiter, a journalism professor at the University of Delaware, recently explained, “[P]utting pictures of dead soldiers on the front page doesn’t sell newspapers.” Sensitivity to the concerns of relatives and family members of dead soldiers also may play a role in choosing not to publish photographs.

Ultimately, it is likely that many newspaper editors will make decisions about whether to publish images of death or dying during wartime on a case-by-case basis. To facilitate a clear and consistent decision-making process, the authors propose the use

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163. See supra Part II.B and accompanying text (describing the potential for tort liability and the concept of newsworthiness).
164. See supra Part II.A and accompanying text (describing these First Amendment theories).
165. See supra Part I.C and accompanying text (discussing the ethical principle of minimizing harm to others and addressing the declining economic state of print newspapers).
167. See Margaret Sullivan, Wartime Photos: Too Awful to Publish, or Too True to Ignore?, Buffalo News, Mar. 30, 2003, at B1 (providing every time the paper considers publishing photographs of dead soldiers, “several editors are likely to confer and make case-by-case decisions”) (emphasis added).
of the rubric below that takes into account variables and factors addressed earlier in this article.

**The Censorship Rubric for Wartime Images of Death**

<table>
<thead>
<tr>
<th>Variable</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
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</thead>
<tbody>
<tr>
<td>Logical Nexus Between The Photo And The Article It Would Accompany In The Newspaper</td>
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<tr>
<td>Newsworthiness Of The Article Were It To Be Published Without The Photo</td>
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<tr>
<td>Additional Facts, Information, Or Context Provided By The Photo To Explain The Article</td>
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<tr>
<td>Additional Emotional Value Provided By The Photo That The Article Fails to Capture/Provide</td>
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<tr>
<td>Graphicness, Explicitness, And Sensational Nature Of The Photo Under Consideration</td>
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</tbody>
</table>

1 = Lowest Value  5 = Highest Value

This rubric identifies five variables or components to which newspaper editors can assign numeric values, with a ranking of “1” indicating the lowest value and a ranking of “5” indicating the highest value. The open boxes allow editors to place check marks within them indicating the ranking for each of the five variables. Starting with the variables at the top of the left-hand column and working downward, the variables require newspaper editors to:

1. Consider the closeness of the connection or the proximity of the relationship between two separate items—the photograph they are considering publishing and the text-based article that it would accompany. As noted earlier, courts that evaluate newsworthiness in the public disclosure of private facts tort examine whether there is a logical nexus “between the events or activities that brought the person into the public eye and the par-
ticular facts disclosed."\textsuperscript{168} If the photograph of death is only tangentially or weakly related to the text-based article it would accompany, then this would militate against its inclusion. Conversely, the stronger the relationship between the photo and the text, the more justification there would seem to be for running the photograph.

2. Examine the newsworthiness of the text-based article, standing alone and independent from the photograph that would accompany it. This provides what might be called a \textit{newsworthiness baseline} for the written component—as compared to the visual aspect—of a story. Although courts consider the social value of information in evaluating newsworthiness in the context of public disclosure of private facts disputes,\textsuperscript{169} the overall newsworthiness determination here as to the text-based article should be left in the hands of editors to apply their own journalistic judgment because, as one court put it, "[e]xuberant judicial blue-penciling after-the-fact would blunt the quills of even the most honorable journalists."\textsuperscript{170}

3. Confront the issue of what value, if any, the photograph under consideration would add to the written article. Would, for instance, the inclusion of a photograph accompanying the article provide readers with new information or fresh facts that help to explain the article? Would the photo help to add context that readers need to gain a better understanding? This factor thus may be thought of as a value-added component in the decision-making process.

4. Examine the emotional impact that the photograph might have on readers and, in particular, whether the emotional component supplied by the photograph adds something positive that enhances the overall quality and impact of the story. While the previous variable (the amount of new information or context that is added by inclusion of a photo) is more easily quantifiable, the emotional variable reflects a more intangible consideration that acknowledges what the Supreme Court in \textit{Cohen} might have called the emotive force\textsuperscript{171} that photos can carry.\textsuperscript{172}

5. Consider some of the factors that the FCC deems relevant in its indecency determinations,\textsuperscript{173} as a high rating or value for
graphicness and explicitness of the image in question may mili-
tate against its publication due to the possible offense it might
cause to either readers or the family members of the deceased
individual depicted in the photograph.

The rubric itself, of course, provides no cure-all formula to
resolve the question about publishing death-scene images of war.
What's more, no single variable should trump or be given more
weight than another by newspaper editors. Rather, the variables
should be considered in a holistic, totality-of-the-circumstances
approach.

IV.  CONCLUSION

There is a long history of newspapers in the United States
publishing compelling images of the dead in connection with
newsworthy events. In 1928, for instance, the New York Daily News
ran a front-page photograph of Ruth Snyder—a photo was cap-
tured precisely at the moment of her death in an electric chair at
Sing Sing prison. The event was particularly newsworthy
because Snyder was the first woman in the country to die in an
electric chair. It was taken by a journalist named Tom Howard
who dressed up like a priest, taped a hidden camera to his ankle
and then snapped the famous photograph.

This lengthy history also includes images of death during
wartime. Particularly memorable is Associated Press photogra-
pher Eddie Adams’ Pulitzer Prize-winning picture depicting what
the Chicago Tribune recently described as “the chilling execution
of a handcuffed prisoner on a Saigon street caught in a split-
second just as the bullet slammed against the helpless man’s
head.”

174. See Alice Reid, Ad for News Media Museum Dismays Death Penalty Oppo-
nents, WASH. POST, May 29, 1997, at D1 ("New Yorker Ruth Snyder was executed
for murder in 1928. Her death was captured by a reporter for the Daily News
wearing a concealed ankle camera. The paper published the photo on its front
page.").

175. John G. Leyden, Death in the Hot Seat: A Century of Executions, WASH.

176. Christine Badowski, George Wendt, Actor—Not the Norm, CHI. TRIB.,
Oct. 6, 2002, at Magazine 9; see also Kevin Lynch, When the Lens Pulled No
Punches, CAPITAL TIMES (Madison, Wis.), July 25, 2001, at 1B (describing the
event: “[t]he scene is Sing Sing Prison, Jan. 12, 1928. After a messy court case,
murderess Ruth Snyder is the first woman to get the electric chair in America.
Tom Howard, a Daily News shutterbug, has secretly taped a camera to his ankle.
Ruth is fried. Everybody's brain goes vegetarian – nobody notices the clicking
of Howard’s camera.").

177. Betsy Sharkey, Documentary About Eddie Adams is as Moving as His Pho-
tographs, CHI. TRIB., July 17, 2009, § 3, at 6.
Saigon's police chief, executing a Vietcong terrorist.\textsuperscript{178} While Adams may be correct that, in his words, "[a]ny idiot who was there could have taken that picture,"\textsuperscript{179} the picture nonetheless packed a powerful emotional wallop.

This is important because images of death during wartime can elicit emotions far greater than any words printed in the pages of a newspaper. As Professor Michael Pfau and his colleagues observed in a 2006 study, "Reading reports of a battle or military operation is informative, but viewing graphic images of war dead draws the news consumer to the action and elicits affective responses."\textsuperscript{180} They add that "[t]ext consists of claims, warrants, and evidence, which people are trained to resist. By contrast, photographs provide 'irrefutable' evidence for a claim."\textsuperscript{181}

Despite the power of photographs, it is clear that not all images—particularly images of the dead during wartime—will be published.\textsuperscript{182} As Lori Robertson wrote for the American Journalism Review, "If anything's a given in photojournalism, it's that there are restrictions and limitations—both in what journalists can capture with a camera and what editors will show to the public."\textsuperscript{183} Indeed, during the war in Iraq, self-censorship by the news media of images of death of American soldiers often has been profound. As David Carr wrote for The New York Times in 2006:

> While pictures of Iraqi dead are ubiquitous on television and in print, there are very few images of dead American soldiers. (We are offered pictures of the grievously wounded, but those are depictions of hope and sacrifice in equal measure.) A comprehensive survey done last year by James Rainey of the Los Angeles Times found that in a six-month period in which 559 Americans and Western allies died, almost no pictures were published of the American dead in the mainstream print media.\textsuperscript{184}

\begin{thebibliography}{99}
\bibitem{178} Ten Years Later a Photo Haunts Men and Nation, WASH. POST MAG., Dec. 17, 1978, at 5.
\bibitem{179} Liz Nakahara, Pulitzer: The Power & The Pressure, WASH. POST, Sept. 12, 1982, at G1.
\bibitem{180} Michael Pfau et al., The Effects of Print News Photographs of the Casualties of War, 83 JOURNALISM & MASS COMM. Q. 150, 150–51 (2006).
\bibitem{181} Id. at 161.
\bibitem{182} See Julia Baird, The Moral Weight of War, NEWSWEEK, Mar. 26, 2010, at 26 (asserting that “[n]or do we too often see graphic images of dead, bloodied U.S. soldiers, or the brains of a young Iraqi girl lying on the road after her father did not obey a signal to stop his car.”) (emphasis added).
\bibitem{183} Robertson, supra note 162.
\bibitem{184} David Carr, Show Me the Bodies, N.Y. TIMES, June 5, 2006, at Cl.
\end{thebibliography}
This Article has attempted to provide editors with a multi-factor framework for helping to make the decision about what, to borrow Lori Robertson's fine phrase, they "will show to the public." This framework takes into account variables from the realms of both ethics and the law.

This brings the Article back to where it started and the opening query: Would you publish the image of Lance Cpl. Joshua M. Bernard or would you engage in censorship? Although the rubric created in Part III does not provide a magic answer to this question, it nonetheless provides a structure for logical reasoning to reach a conclusion.

One possible, albeit imperfect, solution to the problem may involve the Internet. In particular, newspaper editors who find certain photographs too explicit to publish in the print edition of their papers may choose, instead, to post the photographs on their websites. The story in the print edition that the photograph otherwise would have accompanied would, instead, include a small boxed item that alerts readers to the fact that certain photographs related to the story are posted on the website because the editors considered them too graphic or explicit for inclusion in the print edition. In other words, the boxed item would tell readers about the online content, yet provide a warning about the explicit nature of the photographs.

185. Robertson, supra note 162.