"A RIGHT TO BE SPARED UNHAPPINESS":[1] IMAGES OF DEATH AND THE EXPANSION OF THE RELATIONAL RIGHT OF PRIVACY·

INTRODUCTION

Professor Solove has called loss of privacy the Internet's "dark side."[2] This statement is perfectly reflected in the suffering Nicole Catsouras' family faced after her untimely death on Halloween 2006. At age eighteen, Nicole Catsouras was decapitated in an automobile accident.[3] After losing a loved one under such horrific circumstances, the Catsouras family suffered another unimaginable horror: shortly after the accident, two members of the California Highway Patrol leaked images of the accident scene to the Internet.[4] The images spread to as

[1] Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 311 (Cal. Ct. App. 1939).

[2] DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 4 (2007).

[3] Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 863, 865 (Cal. Ct. App. 2010).

[4] *Id.* at 865. The two members of the California Highway Patrol "e-mailed or otherwise transmitted" photographs of the decedent to members of the public; thereafter, these photos were posted by more than 2,500 Internet websites. *Id.*

many as 2,500 websites in the United States and the United Kingdom.[5] The Catsouras family was subjected to hateful taunting; Christos Catsouras, Nicole's father, even received emails that contained one of the gruesome images along with the message "Hey Daddy I'm still alive."[6] Six years later, these photographs remain available on the Internet.

The Catsouras family's suffering represents the necessity of a new and developing jurisprudence referred to as the relational right of privacy.[7] Privacy law did not begin to develop in the United States until the middle of the twentieth century.[8] Since the development of privacy law, questions have arisen over whether the deceased possess privacy interests, and, if so, whether such interests are sufficient to merit suppressing the publication of words or images related to their death. Generally, the answer to that question has been no, as precedent supporting such a right is limited. In fact, precedent overwhelmingly supports the notion that the common law right of privacy does not survive an individual's death.[9] However, a relational right to privacy has developed through case law and legislative enactments in at least forty-three states.[10] Through this development, courts have considered whether relatives of the deceased have a "recognized privacy right of their own sufficient to suppress and punish the release of images that are not about themselves but about their deceased loved ones."[11] In determining whether to recognize such a right, courts have turned to our nation's cultural history and common law.[12]

Privacy law expands as the Internet and other technology continue to develop. But these technological developments simply complicate the matter. Before the advent of the Internet, the gruesome photographs of Nikki Catsouras might have appeared for one or two days in local newspapers.[13] In order to see the photographs after publication, "one

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5 *Id.*

6 *Id.*

7 Also sometimes referred to as "familial right of privacy." *Id.* at 898 (Aronson, J., concurring).

8 James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 29 (2003).

9 Clay Calvert, *The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture*, 26 LOY. L.A. ENT. L. REV. 133, 148–49 (2006).

10 David Hamill, *The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity*, 25 ST. JOHN'S J. C.R. & ECON. DEV. 833, 841–42 (2011). *See* Motion for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae Teresa Earnhardt in Support of Petitioner, at 24, Office of Indep. Counsel v. Favish, 538 U.S. 1012 (2003) (No. 02-954) (listing states that allow only limited access to autopsy records), *available at* http://www.allanfavish.com/images/PDF/earnhardt_open_brief.pdf.

11 Calvert, *supra* note 9, at 150.

12 Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 168 (2004) ("[T]his well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law.").

13 Clay Calvert, *Salvaging Privacy & Tranquility from the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet*, 2010 MICH. ST. L. REV. 311, 339–40

most likely would need to go to a library and use one of those old microfiche readers to see a scratchy image."[14] The Internet and the development of technology therefore have created unprecedented issues when it comes to privacy. These new technologies "substantially aggravate and intensify both the depth of the injury and the opportunities for causing it."[15] Unfortunately, the relatives of the deceased are often the victims of these aggravated injuries. The growing problems caused by developing technologies are simply outpacing parallel developments in privacy law.[16]

There have been some positive developments both in common law and statutory law over the past decade or so, however, that suggest that the relational right of privacy law will continue to expand to respond to the needs of modern society. Major developments have occurred where the government plays a role in either the dissemination of photographs or the decision to release images to the public. These developments are best illustrated in the landmark decisions *National Archives and Records Administration v. Favish*[17] and *Catsouras v. California Highway Patrol*.[18] These decisions established a precedent yet to be fully recognized.

While these statutory and common law developments are significant, the current state of privacy of death jurisprudence is limited. While most of the case law involves the government and its access to autopsy and crime scene photographs, neither statutes nor common law define the proper remedies for families who wish to bring a relational right of privacy claim against a private individual. As technology continues to expand, so too are the legal issues. For instance, "the ubiquity of camera phones is already transforming the nature of images that make their way into the media, as bystanders to news events . . . are encouraged to serve as freelance photojournalists."[19] Gruesome images

(2010).

14 *Id.*

15 *Id.* at 332.

16 Clay Calvert, *Victories for Privacy and Losses for Journalism? Five Privacy Controversies from 2004 and Their Policy Implications for the Future of Reportage*, 13 J.L. & POL'Y 649, 654–55 (2005).

17 *Favish*, 541 U.S. at 170–74. The Supreme Court held that family members may assert their own privacy rights against public intrusions, preventing release of their deceased loved one's autopsy photographs under the Freedom of Information Act Exemption 7(C). *Id.*

18 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856 (Cal. Ct. App. 2010). The California Court of Appeal for the Fourth District was presented with an issue California case law had never addressed before: what is the proper relief when gruesome death images that were in the control of law enforcement officers are "disseminated out of sheer morbidity or gossip, as opposed to any official law enforcement purpose or genuine public interest[?]" *Id.* at 874. A concurring opinion held that, although, "until today no California case had yet recognized a familial right to privacy in autopsy or similar photographs . . . it is no great leap to do so." *Id.* at 907. (Aronson, J., concurring).

19 Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1071–72 (2009) (citing Kevin Werbach, *Sensors and Sensibilities*,

of accident and crime scenes, taken by bystanders, frequently end up on the Internet and, as Nicole Catsouras's family knows all too well, once these images are disseminated, they will likely never disappear.[20]

This Note will explore the development of the relational right to privacy and the need for this jurisprudence to continue to develop to serve the privacy rights of the relatives of the deceased. Part I details the development of the relational right of privacy. Part II discusses statutory responses to concerns over the privacy of death in modern society. Part III explores the necessity for families to have a right to bring a relational privacy claim against private individuals who disseminate death images of their loved ones. Lastly, Part IV suggests that state courts should permit pecuniary damage awards against private individuals who disseminate crime scene or autopsy photographs. This judicial action would serve to deter private individuals from releasing death images in the future. This section will also explore the First Amendment implications of a relational right of privacy claim against a private individual.

I. THE DEVELOPMENT OF RELATIONAL RIGHT OF PRIVACY

Although a relational right of privacy has been recognized in common law for well over a century,[21] the overwhelming weight of authority suggests that a postmortem right of privacy does not exist.[22] However, the Supreme Court changed the scope of this jurisprudence when it recognized, for the first time, that surviving family members enjoy a relational right of privacy in *National Archives and Records Administration v. Favish*.[23] In *Favish*, a citizen, Allan Favish, filed a Freedom of Information Act ("FOIA") request for ten death-scene photographs of deputy counsel to President Clinton, Vincent Foster Jr.'s, body.[24] Although five prior investigations each concluded that

28 CARDOZO L. REV. 2321, 2327–28 (2007)).

20 Rick Rojas, *CHP Settles Over Leaked Photos of Woman Killed in Crash*, L.A. TIMES (Jan. 31, 2012), http://articles.latimes.com/2012/jan/31/local/la-me-chp-photos-20120131 ("'I'm determined to get [these images] off the Internet,' her father, Christos Catsouras, told The Times in 2010, 'although I've been told by every single person who's an Internet expert that we will never get them removed.'").

21 The court in *Schuyler v. Curtis*, 147 N.Y. 434, 447 (1895), held: "[i]t is the right of privacy of the living which is sought to enforce here. That right may, in some cases, be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living and not that of the dead which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased."

22 This fact is demonstrated by the Supreme Court's reliance on common law precedent that was over 100 years old. Calvert, *supra* note 9, at 136.

23 Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157 (2004).

24 *Id.* at 161.

Foster committed suicide, Favish remained skeptical.[25] The Office of Independent Counsel refused Favish's request, however, invoking FOIA Exemption 7(C), which prevents the disclosure of documents assembled for law enforcement purposes if their disclosure could potentially create an unwarranted invasion of privacy.[26] Foster's relatives invoked the relational right of privacy and sought to be "shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased."[27] Even in 2004, this was a remarkable plea.

The Supreme Court, relying on common law[28] and cultural traditions,[29] concluded that, in using the term "personal privacy" in FOIA Exemption 7(C), Congress "intended to permit family members to assert their own privacy rights against public intrusions."[30] The Court also warned of the consequences that would follow if these photographs were released: "Since FOIA withholding cannot be predicated on the requester's identity, violent criminals, who often make FOIA requests, would be able to obtain autopsies, photographs, and records of their deceased victims at the expense of surviving family members' personal privacy."[31] Thus, it was deemed "inconceivable" that Congress could have intended such a narrow definition of "personal privacy."[32]

The Supreme Court, mindful of the purpose underlying the Freedom of Information Act,[33] explained that, if the Court does find that a decedent's family has a privacy interest recognized in Exemption 7(C), the Court must then consider whether that relational privacy claim is outweighed by the public interest in disclosure.[34] The Court held that neither Foster's former status as a public official, nor the existence of other publicly-available photographs detracted from the privacy interests involved; therefore, the privacy interests outweighed the public interest in disclosure.[35] The Court concluded by reinforcing an

25 *Id.*
26 *Id.* at 157.
27 *Id.* at 166.
28 "[T]his well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law. Indeed, this right to privacy has much deeper roots in common law than the rap sheets held to be protected from disclosure in *Reporters Committee*." *Id.* at 168 (citation omitted).
29 The Court used burial rights, excerpts from the Encyclopedia Britannica and the Encyclopedia of Religion, as well as Sophocles' story in Antigone to demonstrate the long-standing cultural tradition of respect for the deceased and for surviving family members. *Id.* at 167–68.
30 *Id.* at 167.
31 *Id.* at 158.
32 *Id.* at 170.
33 "The Freedom of Information Act (FOIA) is a law that gives you the right to access information from the federal government. It is often described as the law that keeps citizens in the know about their government." *See, e.g.*, What is FOIA?, FOIA.GOV, http://www.foia.gov/index.html (last visited Aug. 18, 2013).
34 *Favish*, 541 U.S. at 160.
35 *Id.* at 158.

important consideration: "It must be remembered that once there is disclosure, the information belongs to the general public."[36]

But perhaps the most contentious facet of *Favish* is the question of whether the holding extends beyond the federal statute. The Court observed that "[t]he exemption protects a statutory privacy right that goes beyond the common law and the Constitution. It would be anomalous to hold in this case that the statute provides less protection than does the common law."[37] Following the decision in *Favish*, commentators questioned whether the ruling would—or even should—extend beyond the federal statute.[38] Case law has had a varied response.[39]

The next major decision to explore the possibility of the relational right of privacy was *Showler v. Harper's Magazine Foundation*.[40] In this case, a photographer from *Harper's* photographed the open casket at Sergeant Kyle Brinlee's funeral.[41] The photograph of the open casket was published in the August 2004 edition of *Harper's*.[42] There, the Tenth Circuit held that *Favish* was inapplicable because it relied on a statutory privacy right under the FOIA and not a cause of action for invasion of privacy.[43] However, the court made an important distinction between this case and other cases that have examined the issue: "[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

36 *Id.* at 174.

37 *Id*. at 158 (citation omitted).

38 *See, e.g.*, Martin E. Halstuk, *When is an Invasion of Privacy Unwarranted under the FOIA? An Analysis of the Supreme Court's "Sufficient Reason" and "Presumption of Legitimacy" Standards*, 16 U. FLA. J.L. & PUB. POL'Y 361, 400 (2005). "Unfortunately, the Court-crafted 'presumption of legitimacy' doctrine offers no salvageable promise. This doctrine limits the scope of access to public records under the FOIA and creates an obstacle that can stall journalistic efforts to expose corruption and waste, prevent historians from filling important historical gaps and correcting the historical record, and block the general public from scrutinizing and evaluating its government." *Id. See also* Lieutenant Commander Joseph Romero, National Archives & Record Administration v. Favish*: Protecting Against the Prying Eye, the Disbelievers, and the Curious*, 50 NAVAL L. REV. 70, 101 (2004) ("[T]he Court's decision in *Favish* properly strikes the difficult but necessary balance between these conflicting but essential interests of personal privacy and government accountability.").

39 *See, e.g.*, Prison Legal News v. Exec. Office for U.S. Attorneys, 628 F.3d 1243, 1251 (10th Cir. 2011) ("[A]ny additional disclosure would be an unwarranted invasion of the family's personal privacy."). *See also* Savala v. Freedom Commc'ns, Inc., No. F048090, 2006 WL 1738169, at *9 (Cal. Ct. App. June 27, 2006) ("The privacy interest recognized in *Favish* was a creature of statute not common law, and did not implicate the same counterbalancing constitutional considerations protecting the right of the press to publish newsworthy information."); The New York Times Co. v. City of New York Fire Dep't, 4 N.Y.3d 477, 485 (2005) (holding that surviving relatives of 9/11 victims "have an interest protected by FOIL in keeping private the affairs of the dead.").

40 Showler v. Harper's Magazine Found., 222 F. App'x 755 (10th Cir. 2007).

41 *Id.* at 758. Sergeant Brinlee was killed in action while serving in Iraq in May 2004. *Id.*

42 *Id.*

43 *Id.* at 761.

photographs."[44] Here, the photographs were not gruesome death-scene images, but images of Sergeant Brinlee in his military uniform as seen by those who attended his funeral.[45] By including this important distinction, "the Tenth Circuit did not completely slam the door shut on familial privacy rights in tort law over images of death—at least not when those images are 'gruesome' and involve actual 'death-scene images such as crime scene or autopsy photographs.'"[46]

The possibility of extending *Favish* to images that are "gruesome" and involve actual "death-scene images" was examined in 2010 when the California Court of Appeal, Fourth District, Division 3 reached its landmark decision in *Catsouras v. Department of California Highway Patrol*.[47] California law provided that surviving family members have no relational "right of privacy in the context of written media discussing, or pictorial media portraying, the life of a decedent" and that any cause of action for invasion of privacy expires along with the decedent.[48] However, the court held that the publication of *death* images was a different matter.[49] The court extended *Favish*, holding that *Favish* did not limit the application of relational privacy rights to the Freedom of Information Act context. The court explained, "courts in other states, having addressed factual situations much more nearly akin to the one before us, have concluded, as did the Supreme Court in [*Favish*] that family members do have their own privacy rights in death images."[50] The court recognized a relational right of privacy over death images where "'publicity ceases to be the giving of information to which the public is entitled, and becomes 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.'"[51]

Following the court's decision, the Catsouras family reached a settlement with the California Highway Patrol, receiving about 2.37 million dollars as well as an agreement to help the family remove images from the Internet.[52] The California Highway Patrol released a statement explaining that, "'No amount of money can compensate for the pain the Catsouras family has suffered[.]' . . . 'We have reached a resolution with the family to save substantial costs of continued litigation and a jury trial. It is our hope that with this legal issue

44 *Id.* at 762.
45 *Id.*
46 Calvert, *supra* note 14, at 313 (footnote omitted).
47 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856 (Cal. Ct. App. 2010).
48 *Id.* at 863.
49 *Id.*
50 *Id.* at 872–73.
51 *Id.* at 874 (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).
52 Rojas, *supra* note 20.

resolved, the Catsouras family can receive some closure.'"[53] The effects of *Catsouras* have yet to be fully realized.[54] This decision "could have enormous implications in other cases by instantiating a familial privacy right over gruesome death-scene images of loved ones."[55]

Most recently, in *Marsh v. County of San Diego*,[56] San Diego Deputy District Attorney, Jay Coulter, photocopied sixteen autopsy photographs of Phillip Buell's corpse, one of which he kept after he retired as a "memento" of the cases he handled.[57] Coulter later released the autopsy photograph to a local newspaper. Brenda L. Marsh, Buell's mother, claimed she had a federal right to control the autopsy photographs of her son as a matter of substantive due process.[58] The Ninth Circuit stated that no court has held that the right to privacy encompasses the power to control images of a deceased relative under the Constitution, but that the Supreme Court came close in *Favish*.[59] In finding that the relational right to privacy is grounded in common law, the Supreme Court in *Favish* had no reason to determine whether it is also grounded in the Constitution.[60] The Ninth Circuit also pointed to *Catsouras*, reiterating that cases that had come before establish a common law right, not a constitutional right.[61] However, as the *Marsh* court points out, these facts do not suggest that a constitutional right does not exist.[62]

Marsh was therefore the first case to consider "whether the common law right to non-interference with a family's remembrance of a decedent is so ingrained in our traditions that it is constitutionally protected."[63] The court held that it is, noting, "[a] common law right rises to the level of a constitutional right if it is 'deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty.'"[64] Under this analysis, the long-standing tradition of respecting family members' privacy in death images involves both types of privacy interests that are protected by the Fourteenth Amendment: avoiding

53 *Id.*

54 It should be noted that "'[p]rivacy law is better developed in California than in any other U.S. jurisdiction.'" Clay Calvert, *Support Our [Dead] Troops: Sacrificing Political Expression Rights for Familial Control Over Names and Likenesses*, 16 WM. & MARY BILL RTS. J. 1169, 1194 (2008) (quoting Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 939 (2005)) (alteration in original).

55 Calvert, *supra* note 14, at 316.

56 Marsh v. Cnty. of San Diego, 680 F.3d 1148 (9th Cir. 2012).

57 *Id.* at 1152.

58 *Id.* at 1152–53.

59 *Id.* at 1153.

60 *Id.*

61 *Id.* at 1154.

62 *Id.*

63 *Id.*

64 *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

disclosure of personal matters and family integrity.[65] Thus, in the end, the court held that "the Constitution protects a parent's right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government."[66]

Further, in section 129 of the California Code of Civil Procedure,[67] California deliberately gave its citizens a right not to have government officials engage in unwarranted reproduction of autopsy or death-scene photographs. Once a state law creates a right, the Constitution steps in to protect against deprivations of that right without due process of law, invoking an additional claim against Coulter in this case.[68] But because Coulter was not acting as a government official when he copied the autopsy photograph and released it to the press, he was not acting "under color of state law" and in fact gave the photograph to himself as a "private individual."[69] The *Marsh* decision therefore emphasizes that a family's right to privacy against the government goes so far as to be constitutionally protected. But this decision also highlights the limits of the relational right of privacy—once Coulter disseminated the photograph as a private citizen, these federal claims fell apart.

II. DEVELOPMENT IN LEGISLATION

Forty-three state legislatures have enacted legislation in response to the same issues that have come before the courts over the past few decades regarding advances in technology and the invasion of privacy.[70] The most notable development has been in autopsy statutes. Autopsy photographs tend to "vividly and graphically depict decedents' bodies in various positions and in various degrees of dissection."[71] Despite the graphic nature of autopsy photographs and records, up until recently, these documents were widely available to the public as part of state public records laws.[72] However, the rise of technology and the potential for abuse has caused legislatures to reconsider public access to these highly sensitive materials.[73]

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65 First, "the publication of death images interferes with 'the individual interest in avoiding disclosure of personal matters'" and second, "a parent's right to control a deceased child's remains and death images flows from the well-established substantive due process right to family integrity." *Id.* (quoting Whalen v. Roe, 429 U.S. 589, 599 (1977)).

66 *Id.*

67 CAL. CIV. PROC. CODE § 129 (West 2010).

68 *Marsh*, 680 F.3d at 1157–58.

69 *Id.* at 1158. The individual must be acting under color of state law in a section 1983 claim. 42 U.S.C. § 1983 (2006).

70 *See supra* note 10 and accompanying text.

71 Earnhardt *ex. rel.* Estate of Earnhardt v. Volusia Cnty., No. 2001-30373-CICI, 2001 WL 992068, *1, *2 (Fla. Cir. Ct. 2001).

72 Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL'Y 313, 341–42 (2005).

73 *Id.*

State responses to challenges that technology has presented to the privacy of death are best illustrated by the controversies surrounding late NASCAR driver Dale Earnhardt's autopsy photographs in Florida. Earnhardt died on February 18, 2001 as a result of an accident in a professional race held at Daytona International Speedway.[74] The *Orlando Sentinel*, among other parties, requested autopsy photographs shortly after his death.[75] The *Sentinel* wished to determine whether Dale Earnhardt died as a result of the snapping of his head, which might have been stopped by a head restraint, or as a result of seatbelt failure, or another preventable cause.[76] Under Florida law, Dale Earnhardt's autopsy photographs were considered public records and therefore no statutory exemption covered them.[77] As a result, Teresa Earnhardt, Dale's wife, brought an action for temporary and permanent injunctive relief against the Volusia County Medical Examiner, seeking to seal the autopsy photographs of her deceased husband.[78] Public outrage grew over this controversy and the "perceived or anticipated violations of privacy and decorum."[79]

The Florida Legislature's response to the controversy reflects a growing concern over what could happen to autopsy photographs once they are released to the general public. On March 29, 2001, less than six weeks after Earnhardt's death, the Florida Legislature amended the state's public records law, exempting "autopsy records from inspection and copying by anyone other than the surviving spouse (or, if no spouse survived, by a parent or adult child) and certain government officials as part of their official duties."[80] This law[81] made public disclosure of autopsy photographs by a government employee a felony in the third degree.[82] The law further requires that anyone, other than immediate

74 *Earnhardt*, 2001 WL 992068, at *1.
75 *Id.* at *2.
76 Terilli & Splichal, *supra* note 72, at 333.
77 *Id.* at 314.
78 *Earnhardt*, 2001 WL 992068, at *1.
79 Terilli & Splichal, *supra* note 72, at 333.
80 *Id.*
81 Codified as FLA. STAT. § 406.135 (2006).
82 FLA. STAT. § 406.135 (2006) ("4(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. (b) In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. (c) In all cases, the viewing, copying, listening to or other handling of a photograph or video or audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee. (5) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recoding, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the

family or certain government officials, who seeks to inspect or copy an autopsy photograph, videotape, or audio recording, must obtain a court order, show "good cause," and provide the surviving family with notice of any hearing on the matter.[83]

The validity of the statute was challenged in Florida Circuit Court in July 2001 in *Earnhardt ex. rel. Estate of Earnhardt v. Volusia County*.[84] The judge acknowledged that the new law was "quite obviously intended for application in the present case."[85] The trial court judge's evaluation of the matter echoed the public outrage that led to the enactment of the statute:

> Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. We live in a world in which the individual can anticipate that everything from one's market habits to one's personal health (and everything in-between) are known to anyone with the electronic capacity to eavesdrop. . . . Our society has tacitly accepted a standard that permits invasions of privacy of gross dimension, and we have become forgetful of some very basic concepts. Foremost among them is the simple notion that many things are nobody else's business.[86]

The trial court upheld the new legislation, affirming that autopsy photographs should be presumptively private and that they should not be shared with the public unless it can be established that good cause exists for their review. The judge stated that "[t]he publication of a person's autopsy photographs constitutes a unique, serious, and extraordinarily intrusive invasion of the personal privacy of that person's surviving family members, particularly their children, parents, and spouse."[87]

The *Orlando Sentinel* and its co-defendants failed to show "good cause" sufficient to release the autopsy photographs. The trial court therefore denied the newspapers access to Earnhardt's autopsy

matter. If there is no surviving spouse, then such notice must be given to the parents of the deceased, and if the deceased has no living parent, then to the adult children of the deceased. (6)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.").

83 *Id.*

84 Earnhardt *ex. rel.* Estate of Earnhardt v. Volusia Cnty., No. 2001-30373-CICI, 2001 WL 992068 (Fla. Cir. Ct. 2001).

85 *Id.* at *4.

86 *Id.* at *5.

87 *Id.* at *3. The court further stated, "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. The availability of such photographs on the web makes the dissemination of the photographs very easy for anyone with access to a computer modem. That knowledge alone would cause continuous pain and anxiety to the family and prolong their suffering." *Id.*

photographs.[88] The appellate court affirmed the trial court's order.[89] After losing in both the trial and the appellate court, the *Orlando Sentinel* and *Sun-Sentinel* sued the Broward County medical examiner and state attorney in Broward Circuit Court in another attempt to obtain access to the autopsy photographs.[90] The newspapers challenged the constitutionality of the statute[91] and argued that Section 406.135 violated Article I, Section 24 of the Florida Constitution[92] as well as "the Fourteenth Amendment's Equal Protection Clause by discriminating among records requesters based on their anticipated speech."[93] The Broward County Circuit Court granted summary judgment in favor of the medical examiner and state attorney, upholding the constitutionality of the Florida autopsy statute.[94] The Florida judiciary thereby showed its support for not only the statute, but also its implications for the media against the privacy rights of family members. As Professors Samuel A. Terilli and Sigman L. Splichal pointed out, "[t]he bottom line was clear: The media and proponents of public access had lost at every turn—lost in the legislature, lost in every Florida Court to hear the issue, and lost in the court of public opinion."[95]

Since 2001, at least eleven states have amended their public records laws, following the basic policy and reasoning behind Florida's autopsy statute.[96] Each state has attempted to balance opposing interests—public interest in government transparency versus family privacy—in their autopsy statutes. Some states attain this balance by distinguishing between a right to inspect photographs and a right to obtain copies of images. For instance, North Carolina's autopsy statute states:

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88 *Id.* at *6.

89 Campus Commc'ns, Inc. v. Earnhardt, 821 So. 2d 388, 401 (Fla. Dist. Ct. App. 2002).

90 Terilli and Splichal, *supra* note 72, at 339 (citing Brief of Amici Curiae, The First Amendment Foundation, The Florida Society of Newspaper Editors, The Reporters Committee For Freedom of the Press, The Student Press Center, and The Society of Professional Journalists, In Support of Plaintiffs' Motion For Summary Judgment, at 1-5, Orlando Sentinel Commc'ns Co. and Sun-Sentinel, Inc. v. Perper, No. 01-005825 (Fla. Cir. Ct., Broward Cnty. filed Mar. 30, 2001)).

91 Terilli and Splichal, *supra* note 72, at 339.

92 FLA. CONST. art. I, § 24: "(a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution."

93 Terilli and Splichal, *supra* note 72, at 340.

94 *Id.* at 341.

95 *Id.*

96 Catherine J. Cameron, *Not Getting to Yes: Why the Media Should Avoid Negotiating Access Rights*, 24 T.M. COOLEY L. REV. 237, 255–56 (2007).

> Except as otherwise provided by law, any person may inspect and examine original photographs of an autopsy performed . . . at reasonable times and under reasonable supervision of the custodian of the photographs or recordings. Except as otherwise provided by this section, no custodian of the original recorded images shall furnish copies of photographs or video or audio recordings of an autopsy to the public.[97]

Although the statute makes it clear that public officials may not disseminate photographs, video or audio recordings, the ability of any member of the public to inspect autopsy photographs remains problematic. The court in *Earnhardt* felt strongly about this issue, finding that "examination of these autopsy photographs by any means would be an indecent, outrageous, and intolerable invasion, and would cause deep and serious emotional pain, embarrassment, humiliation and sadness to Dale Earnhardt's surviving family members."[98] Although it is important that states like North Carolina take a strong position against releasing autopsy photographs to the public, the court in *Earnhardt* is correct in its assertion that "[t]here is a substantial injury to families when strangers are permitted *carte blanche* to go through their loved ones' autopsy photographs."[99]

Other states, as in Florida, require a court order to allow a non-government official or a non-relative to examine autopsy photographs. In Indiana, for example, the coroner who has custody of "a photograph, a video, or an audio recording of an autopsy may not permit a person to: (1) view or copy the photograph or video recording; and (2) listen to or copy an audio recording; of an autopsy without a court order."[100] A court may issue an order authorizing a person to view or make copies of autopsy images only if the party shows "good cause."[101] In determining good cause, the Indiana statute states that the court shall consider:

> (1) [W]hether the disclosure is necessary for the public evaluation of governmental performance; (2) the seriousness of the intrusion into the family's right to privacy; (3) whether the disclosure of the photograph, video recording, or audio recording is by the least intrusive means available; and (4) the availability of similar information in other public records, regardless of form.[102]

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97 N.C. GEN. STAT. ANN. § 130A-389.1(a) (West 2013).

98 Earnhardt *ex. rel.* Estate of Earnhardt v. Volusia Cnty., No. 2001-30373-CICI, 2001 WL 992068, at *3 (Fla. Cir. Ct. 2001).

99 *Id.* at *5. (In response to "It is suggested by the proponents of the public records laws that a more narrow exemption could possibly have been carved to keep it within constitutional parameters."). *Id.*

100 IND. CODE ANN. § 36-2-14-10(f) (West 2013).

101 § 36-2-14-10(g).

102 § 36-2-14-10(h).

The fact that the Indiana statute directly addresses privacy concerns for the family reflects an expansion of relational privacy rights.

As states continuously try to balance the public interest against the right of privacy, amendments are still being introduced in state legislatures. Washington State, for example, has a statute that renders autopsy photographs confidential, without much more.[103] However, the Washington State Senate has proposed legislation to model the Washington statute in a way that is similar to Florida's autopsy statute.[104] For instance, the bill proposes that even a family member would have to obtain a court order to be permitted to inspect autopsy photographs,[105] affording even greater privacy rights than the Florida statute grants. Further, the proposed legislation would revoke any right to examine or obtain these reports for any person who has been adjudged guilty of a crime that caused the decedent's death.[106]

The Washington Senate's legislative purpose is interesting and highlights concerns similar to those discussed in *Favish* and *Catsouras*. The bill report states that it was created

> because a man, who plead guilty to killing his wife, requested his wife's autopsy reports once he was released from prison. Under current law, the coroner was required to provide the defendant those reports. The coroner feared that the man would use the reports for an unsavory purpose, such as disseminating them electronically or to punish his wife's family.[107]

Thus, Washington is grappling with how to protect a decedent's

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103 WASH. REV. CODE ANN. § 68.50.105 (West 2013): "Reports and records of autopsies or postmortems shall be confidential, except that the following persons may examine and obtain copies of any such report or record: The personal representative of the decedent . . ., any family member, the attending physician or advanced registered nurse practitioner, the prosecuting attorney or law enforcement agencies having jurisdiction, public health officials, the department of labor and industries in cases in which it has an interest . . ., or the secretary of the department of social and health services or his or her designee in cases being reviewed under RCW 74.13.640." (citations omitted).

104 S. No. 62-6037, Reg. Sess. (Wash. 2011).

105 *Id.* ("(2) A photograph, video, or audio recording from an autopsy or postmortem examination shall be confidential, except that the following persons must file a petition with the court in order to obtain a court order that would allow the person to examine, view, copy, listen to, or record the photograph or video or audio recording: The personal representative of the decedent as defined in RCW 11.02.005, any family member, and the attending physician or advanced registered nurse practitioner. The court shall prescribe any restrictions or stipulations it deems appropriate.").

106 S. No. 62-6037, Reg. Sess., at (3) (Wash. 2011).

107 STAFF OF S. COMM. ON THE JUDICIARY, REPORT ON S. No. 62-6037, Reg. Sess. (Wash. 2011), *available at* http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/6037%20SBA%20JUD%2012.pdf. (The report also details a major concern: "Defendants have a constitutional right to represent themselves in post-conviction proceedings. This bill would preclude them from having access to this information. A better way of approaching this issue would be to control the dissemination, publication, or distribution of the information once obtained.").

family from the suffering that would result if their daughter's autopsy photographs fell into the wrong hands.

Because familial right of privacy jurisprudence is still developing across the country, states struggle with how to protect the interests of families in modern society. There is no limit to what a person can do once he obtains an autopsy or crime scene photograph, and state legislatures are vigorously drafting legislation to prevent photographs from being released to the public. However, with every expansion to privacy rights, there is a complementary public disclosure interest that needs to be addressed. As such, it will be interesting to see how each state balances these interests as courts across the country will be required to draw boundary lines on both sides of the issue. Nonetheless, this should not diminish how important it is that states have proactively implemented protective legislation that restricts access to, or dissemination of, autopsy photographs. This state action reflects a growing concern for the well-being of relatives as technology challenges their privacy rights.

III. THE LIMITS OF RELATIONAL RIGHT OF PRIVACY

Both recent legislation and the common law demonstrate the importance of relational privacy safeguards in contemporary society. But there is a glaring deficiency in the developments as they stand: what are families supposed to do about gruesome photographs that have already been disseminated?

The distress afflicting the Catsouras family illustrates the inadequate protection that relational privacy law provides. No matter how hard they try, or whatever legal devices they use,[108] the Catsouras family will probably never be able to remove their daughter's death images from the Internet. Accordingly, the Internet poses a dangerous impediment to privacy rights for several reasons. First, Internet content virtually exists in perpetuity once archived on a website.[109] Second, the speed and quality "of communicating the image allows the content to spread over an unlimited geographical area and to a boundless audience."[110] Third, the anonymity of the Internet encourages a culture

[108] Jessica Bennett, *At Long Last, A Small Justice*, THE DAILY BEAST (Feb. 4, 2010, 7:00 PM), http://www.thedailybeast.com/newsweek/2010/02/04/at-long-last-a-small-justice.html (Several tactics were proposed: "One tactic, says privacy-law expert Daniel Solove, a professor at George Washington University, would be for the family to prove in court that the photos were not obtained via public record and were not of legitimate concern to the public. Another, says Michael Fertik of *Reputation Defender*, would be for the CHP to copyright the images, so that anyone who posts them would be liable for infringement. But perhaps most likely, says the family's lawyer, would be for the CHP to cooperate with the family and give them ownership of the images, which would allow them go [sic] after anybody who was posting them without permission.").

[109] Hamill, *supra* note 10, at 858.

[110] *Id.*

in which content is communicated without concern for third-party accountability.[111] Lastly, "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 to be recast in an extremely offensive manner."[112]

In addition to the nature of the Internet as a technology, one major reason why the Internet is particularly hostile to privacy law is that Internet Service Providers ("ISPs") are absolved from liability under the Communications Decency Act.[113] Specifically, seeking to foster the growth and value of the Internet, the Act encourages online service providers to remove unsuitable content without fear of liability.[114] ISPs are therefore not responsible for proactively regulating their content and are unlikely to remove images of death upon request. Even if an ISP does decide to remove images, they "are not held to be on constructive notice to remove subsequent postings of the same content by different users or repeat postings by the original source of the content."[115] Therefore, under the Communications Decency Act and the current state of the common law, relatives have no course of action in preventing photographs of their deceased loved ones from spreading on the Internet.

One solution to this issue would be to propose changes to either the Communications Decency Act itself,[116] or suggest new legislation that gives family members rights to remove content from the Internet.[117] However, due to the nature of the Internet and the various obstacles in place for punishing those who post inappropriate content, these measures can only go so far. Instead, a better solution would be to prevent these images from reaching the Internet in the first place.

It is a critical time for courts to consider a family's right to privacy

111 *Id.* at 859.

112 *Id.*

113 47 U.S.C. § 230 (2006).

114 *Id.* at (c)(2) ("No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]").

115 Hamill, *supra* note 10, at 855.

116 *Id.* at 861–62 (proposing that section 230(c)(1) state: "Except as provided in the amended section, no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." If an ISP fails to remove images of death upon request, or has knowledge or awareness that such content exists, the ISP should be held responsible for the harm to decedent's family.).

117 Jim Lamm, *Right of Publicity and Right of Privacy After Death*, Mar. 30, 2011, http://www.digitalpassing.com/2011/03/30/right-publicity-right-privacy-after-death (suggesting that there should be a similar method to a Digital Millennium Copyright Act takedown for copyright infringement; for copyright infringement, there is a streamlined process to enforce the copyright on the Internet by contacting online service providers with a notice and requesting that they remove infringing uses promptly).

in the death images of their loved ones. As courts consider the right of families against government officials and as states continue to expand the protections afforded to family members under autopsy statutes, the relational right of privacy will continue to develop. This jurisprudence will come to a critical point when a court is presented with a family who wants to bring a relational right of privacy claim against a private individual who disseminates a death image of their loved one. The courts should allow families to bring these claims against private individuals, and, most importantly, the courts should award monetary damages to these families.

Because there are no safeguards in place to protect families from the pain that results when private individuals disseminate these images, there is simply nothing to prevent this from happening now or in the future. As Professor Clay Calvert explains,

> Although principles of news media ethics and preservation of corporate interests may help to keep in check some of the more outrageous uses and abuses of death-scene images by mainstream news organizations and journalists, those same guidelines and concerns would seem to have very little or even no bearing whatsoever on the type of people who posted the horrific images of Nikki Catsouras on the Internet.[118]

Even landmark cases like *Favish* and *Catsouras* would have little bearing on these individuals because those cases involve government officials. This presents a very serious issue for the familial right of privacy. As the Internet continues to provide an essentially unregulated platform for deviants to abuse the deceased and their family members, and as America's voyeuristic culture continues to shock the conscience of the ordinary person, privacy rights need to expand to protect the interests of families.

Further, "[s]ome rights are simply more fragile than others; without state support, they are bound to lose ground to their hardier counterparts."[119] Therefore, state courts should allow family members to bring damage actions against private individuals in order to safeguard the privacy rights that are, indeed, fragile. The extension of relational right of privacy "can be viewed as a method not only for compensating family members for their emotional pain and anguish, but also as a legal mechanism for controlling the behavior of others in a manner that honors the dignity of the dead."[120]

Perhaps the most important rationale supporting a family's right to

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118 Calvert, *supra* note 14, at 335–36.

119 Jeffrey Shulman, *Free Speech at What Cost?: Snyder v. Phelps and Speech-Based Tort Liability*, 2010 CARDOZO L. REV. DE NOVO 313, 341.

120 Calvert, *supra* note 14, at 337.

bring actions for monetary damages before state courts is that successful suits against private individuals would deter others from posting these images on the Internet in the first place. While money can never truly compensate a family for the suffering that results from the dissemination of death images, the more damage actions that arise in state courts and are successful for families, the less likely it is that people will continue to disseminate these photographs. Moreover, if damage actions are successful, and there is a clear indication on the part of the states to expand relational right of privacy to the private realm, this could lead to legislation that ensures relational privacy rights against private individuals in the future. Since digital images present challenges to privacy law that are unlike anything our courts have faced, it is critical that courts protect the interests of families at this crucial impasse.

IV. FACTORS COURTS SHOULD CONSIDER IN DAMAGE ACTIONS AGAINST PRIVATE INDIVIDUALS

If an individual or family were to bring a relational right of privacy claim against a private individual for disseminating death images of their loved one, their cause of action would be a tort invasion of privacy claim. Invasion of privacy claims are typically divided into either an "intrusion into private places, conversations, or [other] matter[s]"[121] claim, or an invasion of privacy claim based on "the public disclosure of private facts."[122] Because "public disclosure of private facts" aligns more closely with the issue of a private individual disseminating death images, it is important to consider the elements of this tort claim.

The Court in *Catsouras* used the following elements for a public disclosure of private facts cause of action in determining whether the two members of the California Highway Patrol who disseminated Nicole Catsouras' death images had invaded the Catsouras family's privacy: "'(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.'"[123] Because these elements have been reflected in several doctrines and courts in determining what establishes an invasion of privacy cause of action,[124] they are useful for considering

121 6A ROBERT F. KOETS ET. AL., CAL. JUR. 3D ASSAULT AND OTHER WILLFUL TORTS § 148 (2012). (An invasion of privacy claim based on intrusion into private places, conversations, or other matters that "encompasses nonconsensual physical intrusion into the home, hospital room, or other private place, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying.").

122 103 RICHARD E. KAYE, AM. JUR. PROOF OF FACTS 3d §159 (2012).

123 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 868 (Cal. Ct. App. 2010) (quoting Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 214 (Cal. 1998)).

124 Most notably, a "reformed version" of Warren and Brandeis's unified tort for invasion of privacy would state that an invasion of privacy "occurs when the defendant infringes upon (1) the

the validity of a damage action against a private individual in a relational right of privacy cause of action.

A. *Public Disclosure*

Under the first element, the relative "must show that the disclosure complained of was actually public in nature."[125] To satisfy this requirement, the public disclosure may consist of a communication made to a large—or even potentially large—number of people, or a communication made to a small, particular group of people when the plaintiff has a "special relationship" with that group.[126] The right of privacy can be violated by publicly disclosing private facts by any means whatsoever. There is, however, "no magic formula or 'body count' that can be given to permit counsel to determine with certainty whether the number of persons to whom private facts have been disclosed will be sufficient in any particular case to satisfy the public disclosure requirement."[127] Given the Internet's speed and durability, one of the pressing concerns in privacy law in general, and certainly in the relational right of privacy as well, is public disclosure on the Internet. If a death image is disseminated on the Internet, as is the concern here, it is likely to satisfy the "public disclosure" element.

B. *Private Facts*

The second element, "private facts," requires that the information disclosed "actually be of a private nature."[128] There is typically no liability for publicizing facts that have already become matters of public record. Often, when an image of death is involved, there is a related news story that recounts the cause of death. While the incident itself has become a "matter of public record," there are often facts about the crime or accident scene that are not open to the public.[129] This was at issue in *Catsouras*. There, the California Highway Patrol workers who disseminated the accident scene photographs argued that the "decedent's decapitation was public knowledge as a result of news reports and, moreover, this fact was newsworthy to illustrate the severity of an automobile accident occurring on a public highway."[130]

defendant's private facts or concerns, (2) in a manner that is highly offensive to a reasonable person, and (3) engages in conduct that engenders social harms that exceed the associated social benefits." Lior Jacob Strahilevitz, *Prosser's Privacy at 50: A Symposium on Privacy in the 21st Century*, 98 CALIF. L. REV. 2007, 2033 (2010).

125 KAYE, *supra* note 122.

126 *Id.*

127 *Id.*

128 *Id.*

129 *See supra* Part I.

130 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 906 (Cal. Ct. App. 2010) (Aronson, J., concurring).

However, the court held that the fact that an accident occurs in public does not make every detail connected to the accident "public" or "of overriding public interest."[131] Therefore, no matter how publicized an accident or a crime may be, death images can certainly still be private in nature, satisfying the second element.

C. Offensive and Objectionable to the Reasonable Person

The third element, which requires that the public disclosure of a private fact "be offensive and objectionable to the reasonable person," is an interesting consideration in modern society.[132] Our culture is marked by unprecedented voyeurism. Professor Calvert has referred to this phenomenon as "mediated voyeurism," which he defined as

> the consumption of revealing images of and information about others' apparently real and unguarded lives, often yet not always for purposes of entertainment but frequently at the expense of privacy and discourse, through the means of the mass media and Internet.[133]

Unfortunately, this voyeurism has led to an intrusiveness and sensationalism with respect to the dead, which complicates today's conception of privacy of death.[134] It is important to ask, "[i]s the sensational and sometimes exploitative coverage of death and other tragedies by the media shaping the law when it comes to the publication of images of the dead?"[135] Our voyeuristic culture is precisely why the relational right of privacy has become so necessary. Despite the nature of our voyeuristic culture, courts should be able to look beyond how death is portrayed in the media and protect privacy rights when it matters the most. Therefore, "the more morbid the interest, the greater the privacy interest."[136] Under this analysis, it is important to note that the relative seeking to claim a right to privacy should actually be a close relative: a spouse, sibling, parent, or child.

D. *Not of Legitimate Public Concern*

The fourth and final element, which requires that the public disclosure of a private fact "is not of legitimate public concern," necessitates careful attention.[137] The threshold consideration in

131 *Id.* at 907 (Aronson, J., concurring).
132 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 868 (Cal. Ct. App. 2010) (quoting Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 214 (Cal. 1998)).
133 CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 123 (2004).
134 Calvert, *supra* note 9, at 168–69.
135 *Id.* at 143.
136 *Id.* at 168.
137 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 868 (Cal. Ct. App. 2010) (quoting Shulman v. Group W Prods., Inc., 18 Cal. 4th 200, 214 (Cal. 1998)).

determining whether or not a matter is of public concern should be: is this 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[?]'"[138] As the *Catsouras* court stated, "[t]he essence of privacy law is that it guards objectively reasonable expectations of privacy society recognizes as legitimate."[139] There are several factors courts should take into consideration in determining whether a claim involves an objectively reasonable expectation of privacy, including the nature of the images and whether the images have any public interest value.

The first factor that courts should consider under this analysis is "the nature of the photograph in question."[140] Precisely what the image shows and how it portrays death "may be a pivotal factor in determining the existence of a relational privacy violation."[141] As was indicated in *Showler v. Harper's Magazine Foundation*, there is an important distinction between images of death that are presented in a dignified way—as in a casket at a funeral—and images of death that are presented in autopsy, accident, or crime scene photographs.[142] The court in *Catsouras* likewise drew this important distinction "between the publication of images illustrating the life of a decedent and the publication of images illustrating the death of a decedent."[143] Therefore, autopsy, accident, and crime scene photographs require special consideration.

A court should consider more than just the context of the photograph, however. If the image only shows part of the body, and the decedent is not identifiable, the nature of the death image may be insufficient to afford the relative privacy protection. In *Waters v. Fleetwood*, for example, photographs of the deceased that were published in a local newspaper in connection with a news story "were taken from the rear of the body, and no facial features are visible. The body is wrapped in some heavy covering, fastened with chains."[144] The court indicated that a person viewing the photographs could not identify the deceased and that "[a]ny person observing the photographs could know that they are photographs of the deceased only by reason of the publicized facts relating to the recovery of the body."[145] The court

138 *Catsouras*, 181 Cal. App. 4th at 874 (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).
139 *Id.* at 907 (Aronson, J., concurring).
140 Calvert, *supra* note 9, at 160.
141 *Id.*
142 "The photographs here are not death-scene photographs, but images of Sgt. Brinlee in his military uniform that accurately depict the image seen by those who attended his funeral to pay their respects." Showler v. Harper's Magazine Found., 222 F. App'x 755, 762 (10th Cir. 2007).
143 Calvert, *supra* note 14, at 315–16.
144 Waters v. Fleetwood, 212 Ga. 161, 167 (1956).
145 *Id.*

therefore held that these facts were insufficient to state a cause of action for invasion of privacy.[146] These are important determinations that need to be left to the fact-finders to decide; "[c]ourts deciding privacy-of-death issues need to conduct a case-by-case, image-by-image examination of the precise details in each photograph and recording at issue."[147]

Some commenters have suggested that circumstances surrounding the death play a role in whether courts will recognize relational right of privacy. For example, "[t]he New York court's language, as well as that of the Rhode Island Superior Court [. . .], suggests a potential maxim: the more horrific, tragic, and unusual the circumstances surrounding the death, the more likely courts will recognize the privacy interests of relatives in the dignity of the dead."[148] While this concept certainly might have been a barometer for measuring the need for the familial right of privacy in some courts,[149] damage actions should not necessarily depend on the nature of the circumstances surrounding the decedent's death.[150] While the death of Nicole Catsouras was particularly gruesome, the death in *Favish* was less so, and both courts were equally concerned with the family's privacy interests.[151] Further, autopsy statutes and most case law do not limit privacy interests or confidentiality based on the level of repugnance.[152]

It is important to note that the image protected under a relational right of privacy claim should be a *death* image and that images that show the events leading up to a death are likely to be insufficient. On December 4, 2012, the *New York Post* released a photograph taken moments after a man was pushed onto the subway tracks and seconds before he was hit and killed by an oncoming subway.[153] The photograph

146 *Id.* at 168.

147 Calvert, *supra* note 9, at 161.

148 *Id.*

149 Calvert points to *Tyne v. Time Warner Entertainment Co.*, 336 F.3d 1286, 1292–93 (11th Cir. 2003), which states that "the defendant's treatment of the decedent must be 'egregious.'" Calvert, *supra* note 9, at 161 n.190. However, this case refers to a portrayal of a death in a movie, not the death scene images themselves.

150 Earnhardt *ex. rel.* Estate of Earnhardt v. Volusia Cnty., No. 2001-30373-CICI, 2001 WL 992068, at *5 (Fla. Cir. Ct. 2001). In explaining that there is a significant injury to families when strangers have full freedom to view their loved ones' photographs, the court states "[i]n a decent society, that should be recognized *per se*." *Id.*

151 Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 161 (2004). No description is made of the photographs beyond the following: "The United States Park Police conducted the initial investigation and took color photographs of the death scene, including 10 pictures of Foster's body." *Id.* There is no mention of the pictures as being particularly grisly or gruesome in the opinion.

152 *Earnhardt*, 2001 WL 992068, at *5. ("In adopting the new law the legislature was wise in recognizing that autopsy photographs, of all things, should be presumptively private.").

153 Kirstan Conley, et al., *Suspect Confesses in Pushing Death of Queens Dad in Times Square Subway Station*, N.Y.POST.COM (Dec. 5, 2012, 1:21 PM), http://www.nypost.com/p/news/local/manhattan/nightmare_on_subway_tracks_GgvCtkeJj6cTeyxHns2VNP.

led to a public discourse about ethical photojournalism[154] and reinforced concerns about privacy rights in this era. Similar images were run both in papers and on television news reports in February 2010 when Nodar Kumaritashvili died in a crash at a luge practice run at the Winter Olympics.[155] Images showed the accident and his near-lifeless body; questions arose over whether Kumaritashvili's family could claim privacy rights against these images, but this inquiry was never resolved because the family never sought to enforce relational privacy rights.[156] Because before-death images may not be considered "undignified per se,"[157] they may not pass muster. Further, courts might be unwilling to allow a relational right of privacy claim involving near-death images for fear of a slippery slope.

Courts should, however, give close consideration to why the image was released and where the image was disseminated. As autopsy statutes and case law address, "there are instances in which matters pertaining to the dead or dying may involve issues of public interest."[158] The *Catsouras* court offers a helpful distinction: "'In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores.'"[159] A distinction must therefore be made between that which the public has a right to know and that which is of little concern to the public. Thus, "morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection.'"[160]

The tension between privacy of death and issues involving the public interest in death images is often resolved by analyzing whether the image is deemed "newsworthy." In *Miller v. National Broadcasting Co.*,[161] for example, an NBC television crew entered the apartment of Dave and Brownie Miller, without their consent, to film the activities of the Los Angeles Fire Department paramedics called to their home to administer medical attention to Dave Miller after he suffered a heart attack.[162] The paramedics were unable to successfully resuscitate Miller and he passed away that evening; his wife and daughter brought suit against NBC for invasion of privacy.[163] The court held that "public

154 *See, e.g.*, Jeff Bercovici, *New York Post's Subway Death Photo: Was it Ethical Photojournalism?*, FORBES.COM (Dec. 4, 2012, 2:42 PM), http://www.forbes.com/sites/jeffbercovici/2012/12/04/new-york-posts-subway-death-photo-was-it-ethical.

155 Calvert, *supra* note 14, at 316, 335.

156 *Id.*

157 *See* Cox Tex. Newspapers, L.P. v. Wootten, 59 S.W.3d 717, 722 (Tex. Ct. App. 2001).

158 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 874 (Cal. Ct. App. 2010).

159 *Id.* (quoting Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975)).

160 *Id.* (quoting Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 126 (Cal. Ct. App. 1983)).

161 Miller v. Nat'l Broad. Co., 187 Cal. App. 3d 1463 (Cal. Ct. App. 1986).

162 *Id.* at 1469.

163 *Id.*

education about paramedics, as well as about the use of cardio-pulmonary resuscitation (CPR) as a life-saving technique almost anyone might either need or be called upon to administer to another, qualifies as 'news.'"[164]

E. *First Amendment Considerations*

The "newsworthy" consideration reflects an even bigger obstacle for relational right of privacy claims: the public may have a legitimate interest in viewing and releasing death images because the "issue raises First Amendment concerns of free press and expression."[165] Now that the public at large has camera phones and high-speed Internet at its disposal, the average person has become a "citizen-journalist;" the line between members of the public and members of the press has been blurred.[166] There are important First Amendment considerations regardless of whether the private individual who disseminates a photograph is viewed as a "citizen-journalist," or as just a private citizen. This is a particularly important issue for state courts deciding a relational right of privacy damage action against a private individual because decisions that restrict what content a private individual can disseminate could be viewed as "state action" within the meaning of the Fourteenth Amendment.[167] It is therefore necessary to conduct a First Amendment[168] analysis since "[t]he right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[169]

Just as the Internet is changing the nature of privacy rights, it is also altering the scope of the First Amendment. First Amendment rights have been far-reaching: "[u]npopular ideas, offensive images, and even most mistakes by the press are not only tolerated, but are celebrated as evidence of our free society."[170] However, with the rise of the Internet, the ability to communicate changed dramatically; this "resulted in the publication and easy accessibility of unpopular messages and unseemly

164 *Id.* at 1491.

165 Calvert, *supra* note 9, at 164.

166 Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 44 (2007).

167 In *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948), the Supreme Court concluded "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment[.]" Further, under *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), "[i]t matters not that that law has been applied in a civil action and that it is common law only . . . . The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."

168 "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

169 Shulman, *supra* note 119, at 341 (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970)).

170 Christopher Wolf, *A Comment on Private Harms in the Cyber-World*, 62 WASH. & LEE L. REV. 355, 356 (2005).

images."[171] Commentators and courts alike grapple with First Amendment rights in this age.

Some argue that, since First Amendment protection extends only to freedom of "speech" and "the press," that images do not qualify for this protection.[172] The argument is that images "'must communicate some idea in order to be protected under the First Amendment'" and that images record data rather than communicate ideas.[173] The Supreme Court in *City of Dallas v. Stanglin*[174] stated, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[175] However, this argument is very weak as applied to images; the Court "has treated images as media of communication without inquiring into an illusively specific message."[176] Therefore, images of death can fall under First Amendment protection under freedom of speech or freedom of the press.

However, constitutionally recognized freedom of expression does not necessarily supersede privacy rights. The Court has not adhered to a broad resolution of the balance between claims of privacy and the freedom of speech, "[n]or has the Court directly addressed the more precise First Amendment status of image capture."[177] The Court has upheld rules that restrict expression under doctrines of copyright, defamation and obscenity, although it has imposed clear limits on each.[178] Further, "[t]he Supreme Court has suggested that the goal of protecting dignity and autonomy interests against intrusion justifies some limits on free expression."[179] In fact, "[i]n the years ahead, the [Supreme] Court likely often will have to return to the tension between freedom of the press and the right of privacy. The proliferation of media, especially the Internet, and a constant obsession with celebrity make this inevitable."[180] It is therefore worthwhile to balance the interests of private individuals against families with an understanding that both privacy law and First Amendment rights will continue to develop.

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171 *Id.* at 357.
172 Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 370 (2011).
173 *Id.* (quoting Montefusco v. Nassau County, 39 F. Supp. 2d 231, 241 (E.D.N.Y. 1999)).
174 City of Dallas v. Stanglin, 490 U.S. 19 (1989).
175 *Id.* at 25.
176 Kreimer, *supra* note 172, at 373.
177 *Id.* at 392.
178 *Id.* at 392–93.
179 *Id.* at 397.
180 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1095 (4th ed. 2011).

It is useful to consider some factors that may be important in balancing these competing interests. The Indiana autopsy statute provides some helpful considerations for determining "good cause" for allowing a private individual to view autopsy photographs,[181] which may be extended to determining whether an image is in the public interest:

> (1) [W]hether the disclosure is necessary for the public evaluation of governmental performance; (2) the seriousness of the intrusion into the family's right to privacy; (3) whether the disclosure of the photograph, video recording, or audio recording is by the least intrusive means available; and (4) the availability of similar information in other public records, regardless of form.[182]

While these are considerations that take place before an image enters the public sphere, it may be worthwhile for a state court to look to its autopsy statute for the legislature's guidance in balancing these conflicting concerns. Some additional considerations may be necessary in instances where an individual has already disseminated images of death; it may be important to consider the private individual's motives for disseminating the photograph, for example. If the image was released to a website that sensationalizes death, it would be difficult to argue that the image is necessary for the public interest and it would appear that the image was instead meant for "morbid and sensational eavesdropping or gossip."[183] Each image should be viewed on a case-by-case basis, considering every aspect of the claim from the nature of the photograph to the reason why the image was disseminated. As courts consider each of these factors, a common law relational right of privacy will develop and a clearer test may result.

One recurring issue under this analysis, however, is that the courts generally preclude images captured in the public realm, "so long as the subjects of the images are 'exhibited to the public gaze.'"[184] This could certainly be an issue in a relational right of privacy damage action against a private individual since a private individual generally would not be at the scene of an accident or a crime unless the incident occurred in a public space. The nature of public spaces has changed drastically, as "[t]echnology is altering the fundamental character of public places."[185] One argument for a relational right of privacy claim for images captured in the public realm is that, if the conduct is

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181 IND. CODE ANN. § 36-2-14-10 (West 2013).
182 IND. CODE ANN. § 36-2-14-10(h) (West 2013).
183 Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 874 (Cal. Ct. App. 2010).
184 Kreimer, *supra* note 172, at 398 (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977)).
185 Zick, *supra* note 166, at 3.

"outrageous," as the case may be for an accident or crime scene, the capturing of a death image "may in turn be held to impinge on 'interests of the highest order.'"[186] This is a high standard, though, as conduct must be outrageous to a degree that goes beyond the bounds of decency.[187]

Because of the changing nature of the public realm, some commentators have suggested that privacy law change as a response. Professor McClurg, for example, has proposed that privacy torts be expanded to include a right to "public privacy," arguing that a tort action is needed for "public intrusions."[188] If courts, too, can acknowledge that there is not only a right of privacy in public places, but a relational right of privacy, there can be an appropriate balance between First Amendment rights and privacy interests. Under this analysis, citizen-journalists who gather and disseminate images that are matters of legitimate public interest will be protected. When the image is one that is wholly private, on the other hand, there will be protection against the invasion of privacy as well.

Finally, although many argue that free speech should trump privacy interests,[189] there are strong reasons for why privacy interests often do not conflict with the First Amendment. For instance, not all speech is of equal value. The Supreme Court in *Chaplinksy v. New Hampshire*[190] established a basis for identifying categories of unprotected speech.[191] The Court allowed content-based restrictions on categories of speech that are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[192]

Professor Daniel J. Solove, following this line of reasoning, argues that "speech of private concern should be accorded less protection than speech of public concern."[193] He cites *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[194] in which the Supreme Court concluded that "not all speech is of equal First Amendment importance. It is speech on 'matters of public concern' that is 'at the heart of the First

186 Kreimer, *supra* note 172, at 400 (quoting Bartnicki v. Vopper, 532 U.S. 514, 518 (2001)).
187 W. Wat Hopkins, *Snyder v. Phelps, Private Persons and Intentional Infliction of Emotional Distress: A Chance for the Supreme Court to Set Things Right*, 9 FIRST AMEND. L. REV. 149, 177 (2010).
188 Zick, *supra* note 166, at 46 (citing Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1010–25, 1055 (1995)).
189 *See* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049 (2000).
190 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
191 *Id.* at 571–72.
192 *Id.* at 572.
193 Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 987 (2003).
194 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

Amendment's protection' . . . . In contrast, speech on matters of purely private concern is of less First Amendment concern."[195] In fact, maintaining privacy rights would actually promote the values associated with free speech. Professor Solove identifies individual autonomy, democratic self-governance, and the marketplace of ideas as the most popular theories for why free speech is valuable.[196] For individual autonomy, the right to privacy and the First Amendment serve the same interest because "[t]he disclosure of personal information can severely inhibit a person's autonomy and self-development."[197] As for self-government, "'[p]rivacy seems vital to a democratic society [because] it underwrites the freedom to vote, to hold political discussions, and to associate freely away from the glare of the public eye and without fear of reprisal.'"[198] The marketplace of ideas theory assumes that the value of truth is nearly absolute, but the disclosure of private information can actually inhibit this pursuit toward truth.[199] Therefore, privacy can actually enhance free speech.

Reflecting back to the elements of a public disclosure of private facts invasion of privacy claim, the ultimate consideration for whether a damage action against a private individual will succeed—whether the private individual is acting as a "citizen-journalist" or not—comes down to whether the image has any public interest value or if the image is purely private.[200] Courts have struggled to distinguish public from private concerns and courts will continue to struggle in this endeavor.[201] Part of the reason it is so difficult to draw the line between public and private concerns is that there is great difficulty in articulating a "social consensus on privacy: 'It is difficult to achieve stable and serious agreement on the sort of personal information that can readily be foregone, and which disclosures are therefore 'unreasonable.'"[202] This is part of the reason why it is so important that the relational right of privacy take shape in state courts. In fact, "the law does not simply reflect social values; it also shapes them, and over time it can help build some degree of social consensus."[203]

195 *Id.* at 758–59 (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).
196 Solove, *supra* note 193, at 990.
197 *Id.* at 991.
198 *Id.* at 993 (alteration in original) (quoting C. Keith Boone, *Privacy and Community*, 9 SOC. THEORY & PRAC. 1, 8 (1983)).
199 *Id.* at 999.
200 Zick, *supra* note 166, at 46–47.
201 CHEMERINSKY, *supra* note 180, at 1095.
202 Solove, *supra* note 193, at 1026 (quoting Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article: The Shadow of Substance*, 41 CASE W. RES. L. REV. 823, 826 (1991)).
203 *Id.* at 1026.

CONCLUSION

As the Internet and technology continue to expand, the right to privacy needs to develop to protect the interests of families who have suffered a loss. In order to deter private individuals from disseminating images of death at the expense of the deceased's relatives, state courts should allow damage actions against private individuals. Because of the permanency of the Internet and the laws in place to protect ISPs, it is necessary to deter individuals from disseminating images on the Internet in the first place. State courts should balance the public interest in freedom of expression and freedom of the press against a relative's right to privacy and this must happen on a case-by-case basis to ensure that First Amendment rights are not infringed upon. While the Internet has greatly fostered the public's ability to communicate, it has also, unfortunately, proven how people can abuse the Internet for depraved reasons. The Catsouras family is just one example. It is critical that the courts find a balance, allowing some relatives to succeed in a damage action against a private individual not only for their own sake, but for the sake of other families who suffer from these unimaginable harms. In the end, "[t]he deceased have a right to their dignity and loved ones have a right to be free from exploitation[.]' . . . 'This right is more important than the desire to exploit a tragic situation—especially when no public good is being served.'"[204]

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[204] Stephen Thomas, *Wanting Answers: Earnhardt Autopsy Photos Could End Controversy*, CNNSI.COM (Mar. 5, 2001, 11:33 AM), http://sportsillustrated.cnn.com/inside_game/news/2001/03/05/photos_thomas_viewpoint/.

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