

## ESSAY

# Voyeur War? The First Amendment, Privacy & Images From the War on Terrorism

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### INTRODUCTION

In his 1999 book, *War and Press Freedom*,<sup>1</sup> University of Iowa Professor Jeffery A. Smith made the following observation:

Truth 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 understandings, are more likely to emerge than in a system of authoritarian control.<sup>2</sup>

More than half a decade later, as the United States military wages a geographically diffuse war on terrorism in both Afghanistan and Iraq, Professor Smith's statement is hauntingly prophetic. The goals of this essay, then, are to:

- explore some of the recent First Amendment casualties in these current wars;

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<sup>1</sup> JEFFERY A. SMITH, *WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER* (1999).

<sup>2</sup> *Id.* at vii.

- explicate the current underlying First Amendment-related tensions when images of war that provoke deep emotions are sought or published;
- illustrate that the problems, in some instances, involve not just government censorship, but corporate self-censorship of information and images;
- critique the potentially detrimental ramifications on public access to certain images of war stemming from the United States Supreme Court's March 2004 opinion in *National Archives and Records Administration v. Favish*<sup>3</sup> ("Favish"); and
- articulate guiding First Amendment principles to govern the access to, and publication of, images relating to United States military involvement and apply those principles to two such recent images: (1) the shocking photographs of United States soldiers torturing Iraqi detainees at the Abu Ghraib prison<sup>4</sup> and (2) the disturbing videotape of Iraqis beheading Nick Berg in May 2004.<sup>5</sup>

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<sup>3</sup> 124 S. Ct. 1570 (2004).

<sup>4</sup> See, e.g., Hirschfeld Davis, *New Photos Show Abuse of Iraqi Prisoners*, BALT. SUN, May 10, 2004, at 4A (describing photographic evidence "graphically depicting U.S. soldiers abusing Iraqi detainees at Abu Ghraib prison").

<sup>5</sup> See, e.g., Vivienne Walt, *American Beheaded in Video*, BOSTON GLOBE, May 12, 2004, at A1 (relating how a militant Islamic web site showed footage from a videotape of the beheading of an American man, Nick Berg).

These two incidents and sets of images, which are used in this essay to illustrate the issues raised, clearly are not the only shockingly graphic ones to come from the war on terrorism. For instance, in November of 2004, NBC News broadcast videotape of a "marine who appears to shoot and kill an unarmed and wounded Iraqi prisoner." James Glanz & Edward Wong, *Cameraman Details Marine's Role in Mosque Shooting*, N.Y. TIMES, Nov. 22, 2004, at A13. While some criticized the media's repeated re-broadcast of this video, at least one newspaper recognized the importance of showing it. See *War's Unpleasant Truths*, HARTFORD COURANT, Nov. 22, 2004, at A10 (opining in an editorial that the video "is a reminder of the brutality of war").

## I. IMAGES OF WAR: FROM COFFINS TO PRISONS TO BATTLEFIELDS

Two background premises will guide the aforementioned analysis. First, “Western epistemology has always been ocular-centric or vision-based,”<sup>6</sup> and therefore images may exert a powerful influence on our perceptions of reality. Second, while the American public greedily devours the voyeuristic images served up by reality television,<sup>7</sup> the federal government is making aggressive efforts to divert the public’s attention away from voyeuristic images of war.

For instance, in April 2004, the Department of Defense declared that it would strengthen restrictions on the release of photographs of funerals and coffins of American soldiers slain in Iraq.<sup>8</sup> This announcement occurred after the United States Air Force granted—to the government’s chagrin<sup>9</sup>—the Freedom of Information Act<sup>10</sup> (“FOIA”) request by Russ Kick for “all photographs taken after February 2003 of caskets containing the remains of U.S. military personnel at Dover Air Force Base in Delaware.”<sup>11</sup> Kick has displayed the photographs on his website “The Memory Hole.”<sup>12</sup> When the *Washington Post*, *The New York Times*, and the *New York Daily News* placed some of the photographs on their front pages, a heated public debate on

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<sup>6</sup> Barbie Zelizer, *Introduction to VISUAL CULTURE AND THE HOLOCAUST 1* (Barbie Zelizer ed., 2001).

<sup>7</sup> Cf. Matthew Gilbert, *On TV; Reality Gets a Summer Makeover, ‘Osbournes’-Style*, BOSTON GLOBE, June 6, 2002, at D1 (writing that reality TV series “continue to thrive on a mix of real people, temporary fame, and voyeurism”); Katti Gray, *Some Prefer Reality in Televised Doses*, NEWSDAY, Sept. 16, 2003, at B2 (asserting that, “Reality TV is voyeurism, indeed,” and mentioning the “hyper-production of reality TV shows” in 2003); Karla Peterson, *We Now Return You to Our Regularly Scheduled Sleaze*, SAN DIEGO UNION-TRIB., Mar. 29, 2004, at D1 (describing “the voyeuristic realm of reality television”).

<sup>8</sup> David Perlmutter, *Technology Won’t Permit It*, NEWSDAY, Apr. 27, 2004, at A4.

<sup>9</sup> See Lynn Smith, *‘Coffins’ and Now Chaos; Unlikely Provocateur Russ Kick Ignites Controversy with Photos of U.S. Military Dead*, L.A. TIMES, Apr. 26, 2004, at E1.

<sup>10</sup> 5 U.S.C. § 552 (2002).

<sup>11</sup> Smith, *supra* note 9, at E1.

<sup>12</sup> *Photos of Military Coffins*, at [http://www.thememoryhole.org/war/coffin\\_photos-/dover](http://www.thememoryhole.org/war/coffin_photos-/dover) (last visited Oct. 16, 2004).

privacy, access, and freedom of information ensued.<sup>13</sup> In truth, “[s]ince 1991 the Pentagon has banned the media from taking pictures of caskets being returned to the United States.”<sup>14</sup> The administration of President George W. Bush, moreover, “issued a stern reminder of that policy in March 2003, shortly before the war in Iraq began.”<sup>15</sup>

Pentagon officials fought hard in May 2004 to continue the suppression of additional undisclosed photographs and videotapes of the torture of Iraqi detainees by U.S. soldiers.<sup>16</sup> Indeed, the Pentagon has championed this censorship, “pointing to the ongoing criminal investigations, and the possibility of lawsuits based on privacy issues.”<sup>17</sup> For the Pentagon, the public’s need to know about the actions of its taxpayer-supported fighting is subordinate to the government’s need to protect itself from legal liability based on privacy concerns.<sup>18</sup>

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<sup>13</sup> Jack Torry, *Reality or Dishonor*, COLUMBUS DISPATCH, Apr. 24, 2004, at 1A (describing how the “Washington Post, The New York Times and the New York Daily News were among the major newspapers that placed the photos on their front pages”).

<sup>14</sup> Hal Bernton, *Woman Loses Job over Coffins Photo*, SEATTLE TIMES, Apr. 22, 2004, at A1.

<sup>15</sup> Ray Rivera, *Images of War Dead a Sensitive Subject*, SEATTLE TIMES, Apr. 22, 2004, at A22 (recounting the history of U.S. government restrictions on images of war and discussing how these images have the potential to influence public opinion).

The government’s policy was challenged in October of 2004 when a lawsuit was filed in federal court by a journalism instructor and former CNN correspondent Ralph Begleiter, under the Freedom of Information Act, seeking “to force the Pentagon to release photographs and videotape of coffins and service members killed overseas and brought back to the United States.” George Edmonson, *Suit Seeks Military Coffin Photos*, ATLANTA J.-CONST., Oct. 5, 2004, at 7A.

Frank Harris III, chair of the Journalism Department at Southern Connecticut State University, forcefully argued in a recent newspaper commentary that the images of flag-draped coffins “should be shown – with all their splendor, with all their horror” because they are “silent testimony to war’s sacrifice.” Frank Harris III, *America’s War Dead Should Be Shown*, HARTFORD COURANT, Oct. 11, 2004, at A11.

<sup>16</sup> Wayne Washington & Bryan Bender, *Lawmakers View Images of Abuse, Express Shock*, BOSTON GLOBE, May 13, 2004, at A1 (explaining that many “images are being closely held by the Pentagon, which has refused to yield to pressure from members of both parties that they be made public”).

<sup>17</sup> Mike Allen & Bradley Graham, *Bush Lauds Rumsfeld for Doing ‘Superb Job’; President Views More Photos of Prisoner Abuse*, WASH. POST, May 11, 2004, at A15.

<sup>18</sup> See *id.*

As these two prominent examples suggest, the armed conflicts in 2003 and 2004 launched in the name of fighting terrorism have exposed the tension between the public's unenumerated First Amendment<sup>19</sup> right to know,<sup>20</sup> and the government's ability to suppress information in the ostensible interest of protecting a right to privacy. As a White House spokesperson said about the publication of the coffin photographs, the "privacy of families of the fallen must be given first priority."<sup>21</sup> Likewise, as noted above, it was an alleged fear of "lawsuits based on privacy issues"<sup>22</sup> that the government used to justify suppressing the release of further images of the torture of Iraqi prisoners.<sup>23</sup>

The right to privacy is, like the right to know, an unenumerated right derived from the U.S. Constitution, although the shifting meaning of the right to privacy does not prevent the government from asserting this right against the media.<sup>24</sup> Inherent in the tension between the right to know and the right to privacy is the issue of access. Indeed, access to information and images promotes what is arguably the central value of the First

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<sup>19</sup> The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See, e.g.,* *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>20</sup> *See* SISSELA BOK, *SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION* 254 (1983) (writing that "[i]n the United States, the notion of a public 'right to know' is closely linked with the First Amendment"); LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 256 (1991) ("Typically, the right to know is aimed at government, and it demands more of what is happening, what is to happen, and why."); C. THOMAS DIENES ET AL., *NEWSGATHERING AND THE LAW* 11 (2d ed. 1999) (observing that the "phrase 'the right to know' straddles the often fine line between governmental restriction on the right to receive information, which the freedom of expression principle typically will not tolerate, and an affirmative right to compel government to disclose that which it would prefer to hold in confidence, a right that has not traditionally been held to be secured by the First Amendment").

<sup>21</sup> Torry, *supra* note 13, at 1A.

<sup>22</sup> Allen & Graham, *supra* note 17, at A15.

<sup>23</sup> *Id.*

<sup>24</sup> *Cf.* Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 208 (2004) (observing that "there is a growing desire to create a privacy zone free of media intrusion, especially of media speech that pierces into the most personal areas of human life").

Amendment, specifically, “the public’s right to know, or society’s right to be informed.”<sup>25</sup>

Several access-related disputes have affected the public’s right to see images of war and to gain information.<sup>26</sup> In a recent case before the Court of Appeals for the D.C. Circuit, controversial publisher Larry Flynt<sup>27</sup> lost a legal fight in which he argued for a First Amendment right of news media access to United States’ troops in Middle East combat operations.<sup>28</sup> Flynt’s petition for rehearing was denied in April 2004.<sup>29</sup> The Department of Defense prevailed when the D.C. Circuit, after finding no historical basis to support a right of media access to U.S. military units in combat, held that “there is no constitutionally based right for the media to embed with U.S. military forces in combat.”<sup>30</sup> This decision will result in fewer frontline images of war reaching the American public that could affect support for the United States’ current military efforts.<sup>31</sup> Notably, it was Larry Flynt who fought this battle for access to these images of war, as he did twenty years before in Grenada,<sup>32</sup> and not the mainstream media, which apparently is afraid of compromising its relationship with government sources.<sup>33</sup>

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<sup>25</sup> DON R. PEMBER & CLAY CALVERT, *MASS MEDIA LAW 2005/2006* 42 (14th ed. 2004).

<sup>26</sup> See *supra* notes 8–18 and accompanying text.

<sup>27</sup> Flynt is publisher of sexually explicit magazines such as *Hustler* and *Barely Legal*. See Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue with the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM. L. CONSPICUOUS 159 (2001) (providing a comprehensive profile and interview of Larry C. Flynt).

<sup>28</sup> *Flynt v. Rumsfeld*, 355 F.3d 697 (D.C. Cir. 2004), *pet. reh’g denied*, 2004 U.S. App. LEXIS 7005 (2004). The United States Supreme Court later denied Flynt’s petition for a writ of certiorari in October 2004, thus dealing another blow to the public’s right to know. *Flynt v. Rumsfeld*, 125 S. Ct. 313 (2004).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 706.

<sup>31</sup> See, e.g., Rivera, *supra* note 15, at A22.

<sup>32</sup> See *Flynt v. Weinberger*, 588 F. Supp. 57 (D.D.C. 1984), *aff’d in part and vacated as moot*, 762 F.2d 134 (D.C. Cir. 1985) (involving Flynt’s unsuccessful challenge to the decision to prohibit press coverage of the initial stages of the United States’ military intervention in Grenada).

<sup>33</sup> See, e.g., Micah Holmquist, *How the ‘Mainstream’ Media Enables the Bush Administration and Why They’d Be Happy to Do the Same for Kerry and Friends*, Press Action, [http://www.pressaction.com/news/weblog/full\\_article/holmquist04162004](http://www.pressaction.com/news/weblog/full_article/holmquist04162004) (last visited Oct. 16, 2004).

The press also lost an earlier battle for access to deportation hearings of individuals with knowledge of the September 11, 2001 terrorist attacks.<sup>34</sup> The Court of Appeals for the Third Circuit reasoned that “the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access,”<sup>35</sup> and therefore the “the press and public possess no First Amendment right of access.”<sup>36</sup>

In a recent case involving aural voyeurism,<sup>37</sup> tension again surfaced between the right to privacy and the public’s right to know wartime information. *The New York Times* challenged the New York City Fire Department’s denial of its request, pursuant to the Freedom of Information Law (“FOIL”),<sup>38</sup> for access to audio tapes and transcripts of 911 telephone calls made on September 11, 2001.<sup>39</sup> In February 2003, the Supreme Court of New York County had allowed the release of the dispatchers’ sides of the 911 recordings, but not the words of the victims.<sup>40</sup> In his decision Judge Richard F. Braun struck a balance between the right to privacy and the right to know:

The 911 tapes and transcripts contain communications made by people using that emergency telephone number in extreme circumstances, and for many it was the last words of their lives. Their calls for help in extremis should be protected as private utterances for the sake of both

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<sup>34</sup> North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 123 S. Ct. 2215 (2003).

<sup>35</sup> *Id.* at 211.

<sup>36</sup> *Id.* at 221.

<sup>37</sup> N.Y. Times Co. v. City of New York Fire Dep’t., 770 N.Y.S.2d 324 (App. Div. 2004).

<sup>38</sup> See N.Y. Pub. Off. Law §§ 84 et seq. (McKinney 2003).

<sup>39</sup> *N.Y. Times Co.*, 770 N.Y.S.2d 324.

<sup>40</sup> N.Y. Times Co. v. City of New York Fire Dep’t., 754 N.Y.S.2d 517, 523 (Sup. Ct. 2003). In releasing these portions of the tapes, the judge wrote:

There is no privacy exemption as to the portion of the tapes and transcripts which consist of the words of dispatchers and 911 operators, and members of respondent’s units, as they were performing their jobs at the time as public employees, and thus were not entitled to any expectation of privacy for their part of the conversations.

*Id.* at 524.

the victims who died, and their surviving family members and others who cared about them.<sup>41</sup>

The Appellate Division in January 2004 upheld that part of Judge Braun's order requiring redaction of "the words of the callers,"<sup>42</sup> reasoning that the "[d]isclosure of the highly personal expressions of persons who were facing imminent death, expressing fear and panic, would be hurtful to a reasonable person of ordinary sensibilities who is a survivor of someone who made a 911 call before dying."<sup>43</sup> It added that "[t]he anguish of these relatives, as well as the callers who survived the attack, outweighs the public interest in disclosure of these words, which would shed little light on public issues."<sup>44</sup> The court, however, directed disclosure of "the personal expressions of feelings contained in the oral histories"<sup>45</sup> of firefighters who were at the World Trade Center on September 11, 2001. The Appellate Division panel found that such material does not fall within any of the exceptions for disclosure under New York's Freedom of Information Law (FOIL).<sup>46</sup>

Another recent example in which the conflict between the right to know and the right of privacy affected what information the public could access during wartime is *National Archives and Records Administration v. Favish*.<sup>47</sup> The Supreme Court's dicta in *Favish* suggests that the right of privacy may outweigh the right to know when images of wartime dead are involved.<sup>48</sup> In that case, involving the scope of an exemption from FOIA and the dispute over death-scene photographs of Vincent Foster, an aide to former President Bill Clinton, the Court reasoned that "[b]urial rites or their counterparts have been respected in almost all civilizations

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<sup>41</sup> *Id.*

<sup>42</sup> *N.Y. Times Co. v. City of New York Fire Dep't.*, 770 N.Y.S.2d 324, 327 (App. Div. 2004).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; see N.Y. PUB. OFF. § 87 (Consol. 2003) (governing access to agency records in New York).

<sup>47</sup> 124 S. Ct. 1570 (2004).

<sup>48</sup> 124 S. Ct. 1570, 1580–81 (2004).

from time immemorial”<sup>49</sup> and “[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.”<sup>50</sup> Justice Anthony Kennedy, writing for a unanimous court, added that a “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.”<sup>51</sup> The Court thus held “that FOIA recognizes surviving family members’ right to personal privacy with respect to their close relative’s death-scene images.”<sup>52</sup> This language from *Favish*, if extended beyond the narrow realm of FOIA Exemption 7(C)<sup>53</sup> (which was at issue in that case) does not bode well for those who seek access to information and images related to the human costs of war; in fact it is perilous precedent.

It is only on a superficial level that viewing images of the coffins of wartime casualties and listening to a public roll call of dead soldiers are acts of mediated voyeurism.<sup>54</sup> The inherent newsworthiness of a piece of information—its power to shape public opinion, and, concomitantly, public policy—distinguishes viewing images of war dead or hearing their names read aloud from acts of deviant voyeurism. If a piece of news can influence public opinion on a matter as grave as war, then the desire for this information is neither prurient nor sordid. The capacity of news to affect serious public issues distinguishes it from news that is mere entertainment, such as the broadcast of a videotape where Jack Kevorkian assisted a terminally-ill man to commit suicide,<sup>55</sup> or the publication of the infamous 1928 full-page photograph in the *New*

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<sup>49</sup> *Id.* at 1578.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1579.

<sup>53</sup> See Dep’t of Justice, *FOIA Guide 2004 Exemption 7(C)*, at <http://www.usdoj.gov/oip/exemption7c.htm> (last visited Nov. 30, 2004).

<sup>54</sup> CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE* 2–3 (2000) (defining mediated voyeurism 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”).

<sup>55</sup> *Id.* at 39.

*York Daily News* of convicted murderer Ruth Snyder's execution by electric chair.<sup>56</sup>

This quality of newsworthiness, in service of the public's right to know, militates against privacy concerns when determining access to images related to the war on terrorism. While providing a set definition for what constitutes news and newsworthiness is virtually impossible,<sup>57</sup> the Reporters Committee for Freedom of the Press notes, in the context of the tort of public disclosure of private facts, that courts "may consider several factors in determining whether information published is newsworthy, including the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety."<sup>58</sup>

The first factor, the social value of the facts published, is critical with regards to images of and information about the current battles in Afghanistan and Iraq and the war on terrorism generally. The images of coffins, caskets, torture, and decapitations (such as the gruesome murder of Pennsylvanian Nick Berg that was captured on videotape and shown on a website<sup>59</sup>) have enormous social value because those images, whether relatively pristine images of inanimate flag-draped coffins, or graphic images of death and suffering, convey the power and emotion to affect public opinion about war and, by extension, to influence the outcome of the 2004 presidential election.

These examples of battles for access to information are important because one measure of a democracy is the extent to

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<sup>56</sup> *Id.*

<sup>57</sup> See Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 289 (1999) (writing that "[n]ews is a social construction and, concomitantly, defining what constitutes news is extremely difficult and elusive").

<sup>58</sup> REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, FIRST AMENDMENT HANDBOOK (6th ed. 2003), available at <http://www.rcfp.org/handbook/c02p03.html> (last visited Oct. 16, 2004).

<sup>59</sup> See, e.g., Mary Curtius & Greg Miller, *U.S. Businessman Beheaded in Iraq as Militants' Videotape Rolls*, L.A. TIMES, May 12, 2004, at A1 (describing how "[a]n American businessmen [sic] who had been missing in Iraq since last month was beheaded by five masked Islamic militants, who posted a video of the killing on the Internet on Tuesday and called it revenge for the abuse of Iraqi prisoners in the U.S.-run Abu Ghraib prison").

which government-held information is accessible to the public.<sup>60</sup> In the United States, the public does not possess an absolute right of access to government-held information.<sup>61</sup> According to Pennsylvania State University Professor Martin E. Halstuk, the United States Supreme Court “has refused to recognize any superior constitutional rights for the press to gather news or for the public or press to gain access to government-held information or operations, regardless of public-interest value.”<sup>62</sup>

The irony in the government’s attempt to foreclose access to images and information related to the war on terrorism, ostensibly to protect privacy, is that the government has simultaneously adopted laws such as the USA PATRIOT Act,<sup>63</sup> which in the name of fighting terrorism, facilitates the government’s own invasive information gathering activities.<sup>64</sup> As Shaun B. Spencer, the Climenko/Thayer Lecturer on Law at Harvard Law School, recently wrote, the PATRIOT Act “has already expanded substantially the government’s ability to conduct surveillance on its citizens.”<sup>65</sup> At the same time, the “Critical Infrastructure Act of 2002”<sup>66</sup> (part of the Homeland Security Act of 2002) carves out a massive exemption from the Freedom of Information Act by criminalizing the disclosure of “protected infrastructure

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<sup>60</sup> Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMM. L. CONSPICUOUS 71, 80–81 (2003).

<sup>61</sup> *Id.* at 81.

<sup>62</sup> *Id.*

<sup>63</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act of 2001, PUB. L. NO. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 12, 15, 18, and 31 U.S.C.).

<sup>64</sup> See, e.g., *A Question of Freedom*, ECONOMIST, Mar. 8, 2003 (stating that “[t]he Patriot Act has given the government new powers to bug telephones, monitor e-mails and internet use and scour public databases”).

<sup>65</sup> Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 912 (2002).

<sup>66</sup> 6 U.S.C. §§ 131 et seq. (2002).

information,”<sup>67</sup> i.e., intelligence relating to American information, communications, banking and finance sectors.<sup>68</sup>

## II. THE DANGER OF SELF-CENSORSHIP

While most of the controversies discussed above involve government action to block public access to images and information that affect the war effort, the private sector takes the same action through corporate self-censorship.<sup>69</sup> In his recent book *Censorship Inc.*, Professor Lawrence Soley posits that the greatest current threat to free speech comes from businesses and corporations, not from the government.<sup>70</sup>

A vivid example of such self-censorship arose in April 2004 when the Sinclair Broadcast Group “ordered its ABC affiliates to preempt Ted Koppel’s ‘Nightline: The Fallen’ roll call tribute to U.S. military killed in Iraq.”<sup>71</sup> Sinclair is “known for including conservative commentary in its news and for its almost exclusively Republican political contributions.”<sup>72</sup> Vietnam War veteran and U.S. Senator John McCain (R. – Ariz.) blasted Sinclair’s self-censorship, stating that “[y]our decision to deny your viewers an opportunity to be reminded of war’s terrible costs, in all their heartbreaking detail, is a gross disservice to the public, and to the men and women of the United States Armed Forces.”<sup>73</sup>

Senator McCain’s criticism targets the heart of the problem: the public, who funds the war on terrorism with its taxpayer dollars, has a right to know about the costs of war.<sup>74</sup> Those costs

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<sup>67</sup> Kristen Elizabeth Uhl, Comment, *The Freedom of Information Act Post-9/11: Balancing the Public’s Right to Know, Critical Infrastructure Protection, and Homeland Security*, 53 AM. U. L. REV. 261, 277 (2003) (discussing the impact on FOIA of the Homeland Security Act of 2002).

<sup>68</sup> *Id.* at 278.

<sup>69</sup> See, e.g., Gloria Cooper, *The Censors*, 43 COLUM. JOURNALISM REV. 58 (2004).

<sup>70</sup> LAWRENCE SOLEY, *CENSORSHIP INC.: THE CORPORATE THREAT TO FREE SPEECH IN THE UNITED STATES* ix–x (2002).

<sup>71</sup> Elizabeth Jensen, *Sinclair Broadcast Group Thrusts Itself into the News*, L.A. TIMES, May 8, 2004, at E14.

<sup>72</sup> *Id.*

<sup>73</sup> Bill Carter, *Debate over ‘Nightline’ Tribute to War Dead Grows, as McCain Weighs In*, N.Y. TIMES, May 1, 2004, at A5 (quoting McCain).

<sup>74</sup> See *id.*

are not only financial, but also include loss of human life. This human loss acquires tangible expression both in the photographs of flagged-draped caskets and coffins that Russ Kick displayed on his website<sup>75</sup> and through the public recitation of the names of the dead soldiers.<sup>76</sup> The realities of war should be made public. As opined in an April 2004 editorial in the *Seattle Times*, “News organizations have been running increasingly graphic pictures the past year because it is their job to convey what is happening. War is messy and ugly.”<sup>77</sup>

### III. A TRIO OF GUIDING PRINCIPLES

During times of war, the public’s right to know must be of paramount consideration to both the government and corporate news organizations. Both the government and private entities that engage in politically-motivated self-censorship<sup>78</sup> should adhere to a few simple principles that are grounded in First Amendment theory<sup>79</sup> and the ethical obligations and practices of the press. Specifically, they should: (1) maximize truth-telling; (2) evaluate the impact of an image or piece of information on public policy and democracy; and (3) let the marketplace of ideas function unfettered by censorship.<sup>80</sup> These three principles should be applied when the government contemplates whether to give the press access to images related to wars and when the press must decide whether to publish these images.

The first principle—maximize truth telling—is drawn directly from the ethics code of the Society of Professional Journalists.<sup>81</sup> That code provides that journalists should “seek truth and report it”<sup>82</sup> and that “[j]ournalists should be honest, fair and courageous

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<sup>75</sup> See *supra* notes 8–13 and accompanying text (discussing the photographs obtained by Kick).

<sup>76</sup> See Carter, *supra* note 73, at A5.

<sup>77</sup> Editorial, *The Photo that Stirred a Nation*, SEATTLE TIMES, Apr. 25, 2004, at D2.

<sup>78</sup> See *supra* notes 60–73 and accompanying text.

<sup>79</sup> See *supra* note 20.

<sup>80</sup> Soc’y of Prof’l Journalists, *Code of Ethics*, at [http://www.spj.org/ethics\\_code.asp](http://www.spj.org/ethics_code.asp) (last visited Oct. 16, 2004).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

in gathering, reporting and interpreting information.”<sup>83</sup> It is important to publish images of war casualties because, although the images may shock and disturb, photographs and videotape convey a literal snapshot of the truth (unless they are altered or manipulated).

The second principle—evaluate the impact of the image or information on public policy and democracy—reflects the journalistic principle that “a truthful story should promote understanding.”<sup>84</sup> In other words, even if an image of a dead soldier is accurate and unaltered, placing the image on television, the front page of a newspaper, or the cover of a magazine is not necessarily justified. The gratuitous use of such an image, stripped of context, is indefensible. Rather, to warrant publication, the image must, through its contextualization within a larger story, have the potential to impact public policy or democracy.<sup>85</sup> As Professor Louis Alvin Day of Louisiana State University observes, “[a] story should contain as much relevant information as is available and essential to afford the average reader or viewer at least an understanding of the facts and the context of the facts.”<sup>86</sup>

In addition to its emphasis on information that affects policy and democracy, the second principle also embraces the fundamental First Amendment rationale that “[f]ree speech is an indispensable tool of self-governance in a democratic society.”<sup>87</sup> The individual most often associated with this theory is philosopher-educator Alexander Meiklejohn, who “anchors the First Amendment firmly to the value of self-government[.]”<sup>88</sup> According to Meiklejohn, “[t]he principle of the freedom of speech springs from the necessities of the program of self-government.”<sup>89</sup> In a self-governing democracy where the “[r]ulers and ruled are the

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<sup>83</sup> *Id.*

<sup>84</sup> LOUIS ALVIN DAY, *ETHICS IN MEDIA COMMUNICATIONS* 84 (4th ed. 2003).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.*

<sup>87</sup> RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 12 (1992).

<sup>88</sup> ROBERT C. POST, *CONSTITUTIONAL DOMAIN: DEMOCRACY, COMMUNITY, MANAGEMENT* 270 (1995).

<sup>89</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948).

same individuals,”<sup>90</sup> wise decisions about public policy require that “all facts and interests relevant . . . shall be fully and fairly presented.”<sup>91</sup> He contends that “self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.”<sup>92</sup> Meiklejohn privileges political speech “upon matters of the public interest”<sup>93</sup> above other types of expression.<sup>94</sup>

The second principle, in conjunction with Meiklejohn’s theory, dictates that the government has an obligation to provide access to images from wars that might affect how voters cast their ballots, and the press has a corresponding obligation to publish and broadcast these images. Images of torture conducted by U.S. soldiers might cause some voters who support President Bush to change their opinion of his leadership as Commander in Chief. War is clearly a matter of public interest and citizens must have as much information on the subject as possible.<sup>95</sup>

Meiklejohnian theory is particularly relevant in the context of wartime photographs. Professor David Perlmutter, in his book on the photographs and pictures of war,<sup>96</sup> writes that one of the three “power[s] of pictures” is “political power, that of driving policy and publics.”<sup>97</sup> He argues that, regardless of their actual impact on public opinion, the perception that wartime photographs transmit powerful effects is crucial: “if leaders believe that opinion is driven

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<sup>90</sup> *Id.* at 12.

<sup>91</sup> *Id.* at 26; POWE, JR., *supra* note 20, at 238 (“Only if citizens are free to discuss everything that relates to public policy can a democracy thrive.”).

<sup>92</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255.

<sup>93</sup> MEIKLEJOHN, *supra* note 89, at 24.

<sup>94</sup> The theory is criticized for the difficulties in defining political speech. See RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 15 (1992) (observing that “the self-governance theory proves incapable of supporting a principled limitation to conventional ‘political’ speech, because in modern life it is virtually impossible to identify any topic that might not bear some relation to self-governance”).

<sup>95</sup> FIRST AMENDMENT HANDBOOK, *supra* note 76 and accompanying text.

<sup>96</sup> DAVID D. PERLMUTTER, *VISIONS OF WAR: PICTURING WARFARE FROM THE STONE AGE TO THE CYBER AGE* (1999).

<sup>97</sup> *Id.* at 207.

by images, they will act accordingly to encourage or forestall the opinion.”<sup>98</sup>

The third principle—let the marketplace of ideas function unfettered by censorship—is clarified by the statement of Professor Smith with which this essay begins.<sup>99</sup> He contends that the First Amendment is often one of the casualties of war, “followed closely by the marketplace of ideas[,] where truths, or at least better understandings, are more likely to emerge than in a system of authoritarian control.”<sup>100</sup> Smith’s invocation of the marketplace metaphor is not without precedent. Eighty-five years ago, United States Supreme Court Justice Oliver Wendell Holmes, Jr. introduced the marketplace rationale for protecting speech into First Amendment jurisprudence.<sup>101</sup> In his dissenting opinion in *Abrams v. United States*,<sup>102</sup> one of the Court’s earliest attempts to articulate the ambit of free expression,<sup>103</sup> Holmes wrote:

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.<sup>104</sup>

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<sup>98</sup> *Id.* at 208.

<sup>99</sup> SMITH, *supra* note 1, at vi.

<sup>100</sup> *Id.*

<sup>101</sup> POWE, JR., *supra* note 20, at 237 (writing that Holmes “introduced” the marketplace of ideas into First Amendment jurisprudence). Although Holmes introduced the metaphor into First Amendment jurisprudence, the theory has “its roots in John Milton and John Stuart Mill.” *Id.*

<sup>102</sup> 250 U.S. 616 (1919).

<sup>103</sup> See, e.g., U.S. Dep’t. of State, *Introduction to Justice Holmes’ Dissenting Opinion on the Abrams v. United States Case*, International Information Programs, at <http://usinfo.state.gov/usa/infousa/facts/democrac/43.htm> (last visited Oct. 7, 2004).

<sup>104</sup> *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Holmes’s dissent in *Abrams* “marked a transformation in First Amendment jurisprudence.” Joseph A. Russomanno, “The Firebrand of My Youth”: Holmes, Emerson and Freedom of Expression, 5 COMM. L. & POL’Y 33, 34 (2000). In particular, it marked a more expansive and libertarian interpretation of the First Amendment. *Id.* at 40, 45; see LEE C. BOLLINGER, THE TOLERANT SOCIETY 18 (1986) (observing that “within the legal community today, the

Today, the economic-based marketplace metaphor<sup>105</sup> “consistently dominates the Supreme Court’s discussion of freedom of speech.”<sup>106</sup> Despite academic criticism of the metaphor,<sup>107</sup> “over the years, it has not been uncommon for scholars or jurists to analogize the right of free expression to a marketplace in which contrasting ideas compete for acceptance among a consuming public.”<sup>108</sup> The premise behind the “marketplace of ideas” ideal is that competition will uncover the truth or at the least challenge accepted truths.<sup>109</sup>

Consequently, the first and third principles set forth above are directly related. The government must maximize truth-telling by providing as many photographs of the war as possible, and those photographs, in turn, must be disseminated by the press so that they may circulate in the marketplace of ideas where the public may debate their meaning in the context of the war effort and American foreign policy.

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*Abrams* dissent of Holmes stands as one of the central organizing pronouncements for our contemporary vision of free speech”).

<sup>105</sup> See Clay Calvert, *Regulating Cyberspace: Metaphor, Rhetoric, Reality and the Framing of Legal Options*, 20 HASTINGS COMM. & ENT. L.J. 541, 542 (1998) (observing that the marketplace metaphor “suggests a hands-off approach to speech regulation. Economic marketplace forces, not legislators, should guide and control the distribution of messages.”).

<sup>106</sup> C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989); see also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (providing a rather recent review of the Court’s use of the marketplace of ideas metaphor).

<sup>107</sup> See, e.g., Robert Jensen, *First Amendment Potluck*, 3 COMM. L. & POL’Y 563, 573–76 (1998) (setting forth various critiques of the marketplace of ideas metaphor).

<sup>108</sup> Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083, 1083 (1999).

<sup>109</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 753 (1st ed. 1997). But see Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1352 (1998) (revealing that some scholars attack this theory as “unpersuasive as an account of the search for social and political truth”).

## IV. APPLYING THE GUIDING PRINCIPLES

This Essay will now apply these three guiding principles to two events that resulted in governmental and corporate suppression of images. First, it will examine how these principles relate to the photographs of prisoner abuse at Abu Ghraib prison that were released in April and May of 2004 (hundreds more were still suppressed by the government when this essay was written). These photographs show “an inmate draped in a black robe and hood and hooked to electrodes, naked inmates piled on top of one another, and naked male detainees forced to wear women’s underwear on their heads.”<sup>110</sup> Second, the Essay will apply the principles to the suppression of the images of the decapitation of an American, Nick Berg. This suppression was the product of self-censorship, as “most news outlets found the videotaped beheading too gruesome to broadcast. Several networks showed still photos of Berg surrounded by the men. None aired the beheading.”<sup>111</sup>

Although the dissemination of the detainee photographs clearly violates the privacy and human dignity of the Iraqis depicted therein, the photographs nonetheless tell the truth. The photographs are accurate representations of what transpired in a prison controlled by the United States military, and they spark discussion in the marketplace of ideas about a wide range of issues, such as whether the soldiers involved were carrying out official orders and what kind of training they had received.

Journalists have a duty to relate the truth. This is especially important in this case, where the shocking images caused many respected journalists, scholars, and politicians to call for the resignation of Defense Secretary Donald Rumsfeld.<sup>112</sup> As Paul Levinson, chair of the Mass Communication and Media Studies Department at Fordham University observes regarding war time pictures, “[p]hotographs have an impact that goes beyond what

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<sup>110</sup> Peter Hermann, *Army Sets 1st Court-Martial in Abuses*, BALT. SUN, May 10, 2004, at 1A.

<sup>111</sup> Mike Williams, *American Beheaded in Revenge for Abuses*, ATLANTA J.-CONST., May 12, 2004, at 1A.

<sup>112</sup> See, e.g., *Resign Rumsfeld*, ECONOMIST, May 8, 2004.

words and descriptions can convey.”<sup>113</sup> David Sanger of *The New York Times* described the potential of the prison images:

It will be months, maybe years, before anyone will know for certain whether the image of a hooded Iraqi prisoner connected to electrical wires that was splashed across the world’s magazine covers last week will become the symbolic image of the American occupation – the way the photograph of a naked Vietnamese girl running from an American attack helped turn opinion against American action in Southeast Asia.<sup>114</sup>

The television news program *60 Minutes II*, which received the initial round of photos,<sup>115</sup> had an ethical obligation to release the photos.<sup>116</sup> A free press that serves democracy under the aegis of the First Amendment to the United States Constitution must not partake in secrecy and suppression of information.<sup>117</sup> The journalist’s role is to release the most accurate information possible into the marketplace of ideas for discussion and debate.<sup>118</sup> That discourse will promote a clearer picture of the truth about the conduct of the American soldiers and the chain of command.<sup>119</sup> Furthermore, since there were widespread rumors of abuse of Iraqi detainees by U.S. soldiers prior to the *60 Minutes II* broadcast, the dissemination and publication of photographs provides a key piece of evidence to resolve these rumors.<sup>120</sup>

The publication of photographs already has caused one small but important result. The United States Army announced on May

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<sup>113</sup> Richard J. Dalton, *Media Firestorm; Photos Ignited ‘A Powder Keg,’* NEWSDAY, May 9, 2004, at A29.

<sup>114</sup> David E. Sanger, *U.S. Must Find a Way to Move Past the Images*, N.Y. TIMES, May 10, 2004, at A9.

<sup>115</sup> See James Dao & Eric Lichtblau, *Soldier’s Family Set in Motion Chain of Events on Disclosure*, N.Y. TIMES, May 8, 2004, at A10 (describing how the images first became public on *60 Minutes II* and noting that it “[i]t is still not entirely clear who leaked the photos and how they got into the hands” of producers at the news program).

<sup>116</sup> The photographs were first shown to a national television audience on *60 Minutes II* on April 28, 2004 in a segment hosted by Dan Rather. *60 Minutes II: Court Martial in Iraq* (CBS television broadcast, Apr. 28, 2004).

<sup>117</sup> See *supra* notes 19–20 and accompanying text.

<sup>118</sup> See Soc’y of Prof’l Journalists, *supra* note 80.

<sup>119</sup> *Id.*

<sup>120</sup> See Rivera, *supra* note 15, at A22.

14, 2004 that it had “overhauled interrogation procedures used for Iraqi detainees and banned the use of techniques such as placing hoods over the heads of prisoners or forcing them to stand naked.”<sup>121</sup> The *Los Angeles Times* noted the connection between the publication of the photographs and the policy shift, observing that “the sudden change in the Army’s interrogation techniques follows worldwide outrage over photos that captured treatment of Iraqi prisoners at the U.S.-run Abu Ghraib prison near Baghdad.”<sup>122</sup>

If the federal government, to prevent public opinion from turning against the war effort, seeks to stop the release and publication of photographs of closed coffins and caskets,<sup>123</sup> then it may also attempt to prevent the release of images of its soldiers torturing prisoners of war for the same reason. In May 2004, before Congressional hearings concerning the Abu Ghraib photos, Defense Secretary Donald Rumsfeld stated, “There are a lot more photographs and videos that exist. If they are released, obviously it’s going to make matters worse.”<sup>124</sup> Indeed, officials at the Department of Defense “have not released the images to the public, arguing that they don’t want those [soldiers] alleged to have carried out the abuses to be tried in the media.”<sup>125</sup>

This last argument reveals the power of the images in question because it acknowledges that the photographs can sway public opinion on matters that affect governmental policy and U.S. military operations. Moreover, it is arguable that the Department of Defense’s policies with regards to the Abu Ghraib photographs are influenced by concerns that the dissemination of more photographs will erode public support for the President and the war in Iraq.<sup>126</sup> The First Amendment must be wielded as a tool to

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<sup>121</sup> John Hendren, *Army Limits Methods Used on Detainees*, L.A. TIMES, May 15, 2004, at A1.

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* notes 8–13 and accompanying text.

<sup>124</sup> Edward Epstein, *Rumsfeld Warns of Photos Depicting Worse Abuses*, S.F. CHRON., May 8, 2004, at A1.

<sup>125</sup> Washington & Bender, *supra* note 16, at A1.

<sup>126</sup> Erosion of support for President George W. Bush caused by the photographs was already apparent by mid-May 2004. Peter Wallsten, *The Race to the White House; Bush Points Out Lesson in Prisoner Abuse Scandal*, L.A. TIMES, May 15, 2004, at A21

secure access to those photographs, and the press, as the only private entity explicitly protected by the Bill of Rights, must uphold its obligations to publish them.<sup>127</sup> As Jimmy Breslin forcefully opined in his May 13, 2004 column for *Newsday*, the photographs from the prison in Iraq “belong to the public whose taxes pay for this war. These utter fools in suits and uniforms, some smooth-faced liar from the Pentagon, or a general who should be in a grand jury himself, try to control the free speech of the nation and commit a war crime.”<sup>128</sup>

Concealing information regarding the conduct of American soldiers will be very difficult.<sup>129</sup> As columnist Matthew Franklin observed on May 19, 2004, the same day that Specialist Jeremy Sivits pleaded guilty to three criminal charges stemming from the Iraqi prisoner abuse scandal:

Everyone carries a camera these days, even idiot U.S. soldiers dumb enough to photograph their own war crimes. This is a good thing. It weakens the power of propaganda as a means for politicians to attempt to win public approval for wars. They might actually have to start arguing on the basis of facts, knowing that spin stands a good chance of being exposed.<sup>130</sup>

With regards to the videotape of the beheading of Nick Berg, the gruesome nature of the footage seems responsible for the media self-censorship.<sup>131</sup> While it is laudable that the media has respected the family of the deceased in this way, the three principles identified in this Essay insist that the images of the decapitation be shown. First, if the videotape is authenticated, then it purports to reveal the truth about what happened to an American civilian involuntary injected into an armed conflict. Second,

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(writing that “several new polls suggest the abuse scandal at the Abu Ghraib prison near Baghdad has fueled a sense that Bush is not in firm control of matters in Iraq”).

<sup>127</sup> U.S. CONST. amend. I.

<sup>128</sup> Jimmy Breslin, *The Ultimate Reality Show*, NEWSDAY, May 13, 2004, at A4.

<sup>129</sup> Matthew Franklin, *War Truths Hard to Hide with Front-Row Seats*, COURIER MAIL (Queensland, Australia), May 19, 2004, at 23.

<sup>130</sup> *Id.*

<sup>131</sup> See Williams, *supra* note 111, at 1A (describing how the mainstream media would not air the videotape).

viewing the videotape may influence members of the public to support or condemn the war in Iraq. The importance of the videotape lies in its potential to promote understanding, regardless of the public's actual opinion of the tape.<sup>132</sup> Third, broadcasting the videotape on the news in the United States would provoke discussion in the marketplace of ideas about U.S. involvement in Iraq. Workplace "water cooler conversation" would shift focus from the latest reality television show to a reality television experience of an incomparably grimmer and more immediate nature. This fundamental shift in the public's attention from entertainment to politics alone warrants dissemination of the Nick Berg videotape by news programs in the United States. The Ninth Circuit has already held that "the public enjoys a First Amendment right to view executions from the moment the condemned is escorted into the execution chamber,"<sup>133</sup> and this First Amendment standard for public executions should apply to the Berg videotape.

In summary, this Essay has examined a number of First Amendment casualties sustained in the war on terrorism and considered the public's right to know, the right to privacy, questions of public access to images and information, and what constitutes newsworthiness. The essay has also discussed the dangerous implications for the public's ability to view photographs of war dead derived from the precedent set by *National Archives and Records Administration v. Favish*.<sup>134</sup> Finally, the essay has proposed a three-pronged approach, grounded in First Amendment theory and principles of journalistic obligations, to guide decisions on access to images of war and their publication.<sup>135</sup> Without adoption of such a policy, public ignorance with respect to U.S. military conflicts will result. Today's media images depicting the loss of life, through their power to galvanize public opinion against war, may save lives tomorrow.

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<sup>132</sup> See DAY, *supra* note 84, at 84.

<sup>133</sup> Cal. First Amendment Coalition v. Woodford, 299 F.3d 868, 877 (9th Cir. 2002).

<sup>134</sup> 124 S. Ct. 1570 (2004).

<sup>135</sup> See Soc'y of Prof'l Journalists, *supra* notes 80–81, and accompanying text.