

PAPARAZZI AND PRIVACY

I. INTRODUCTION

Imagine playing frisbee in a secluded corner of a park with your two children. You pause and enjoy the tranquility. As fate has it, you are a celebrity. You cause a stir wherever you go. People gaze and stare at you. Gawking fans ask you for autographs. Today you have found a few precious minutes of solitude.¹ Or so you thought.

Hanging like a chimpanzee from a tree branch two-hundred and fifty yards away, a furtive photographer dressed in camouflage seeks to shoot your picture for his profit.² On a normal day, your image commands a few thousand dollars; but, a coveted photograph of you playing with your children could buy the photographer a new Ferrari.³ For the photographer, shooting you is like hunting big game on an African safari. If the photographer hits his or her target, you will be framed and mounted on someone's mantle, like an elusive beast.

As you leave the park, the photographer confronts you and snaps photo after photo as the camera's flashbulbs blind you. The photographer sneers as you tell your startled children to hurry into the car.⁴ Suddenly, a

1. Celebrities have a hard time doing anything in private. *See, e.g.*, TMZ.com, Brad Flees From Paparazzi, <http://www.tMZ.com/2006/06/26/brad-flees-from-paparazzi/> (last visited Feb. 28, 2008) ("If Brad wants a photog-free meal his only option left these days may be the moon.").

2. Such extreme methods are not uncommon. *See, e.g.*, TMZ.com, Brangelina Paparazzo Arrested, <http://www.tMZ.com/2006/06/22/brangelina-paparazzo-arrested/> ("[P]aparazzi were hanging in trees."); *see also* TMZ.com, Pitt-Chasing Paparazzi Gets a Beat Down, <http://www.tMZ.com/2006/04/19/pitt-chasing-paparazzi-gets-a-beat-down/> (last visited Feb. 28, 2008) ("Paparazzi have been lurking all around the compound, peeking out from bushes and perching in trees.").

3. *See, e.g.*, CBSNews.com, Paparazzi Going Too Far?, http://www.cbsnews.com/stories/2005/06/10/earlyshow/leisure/celebspot/main700831_page2.shtml (last visited Mar. 8, 2008) ("Recent pictures of Brad Pitt and Angelina Jolie are said to have cost US weekly nearly \$500,000."); *see also* TMZ.com, New Law Hits Aggressive Paparazzi in the Pocketbook, <http://www.tMZ.com/2005/12/30/new-law-hits-aggressive-paparazzi-in-the-pocketbook/> (last visited Mar. 8, 2008) ("Shots of Ben Affleck and Jennifer Garner with their new baby . . . could be worth \$500,000.").

4. *See, e.g.*, TMZ.com, Jennifer Garner in "When Paparazzi Collide", <http://www.tMZ.com/2007/01/11/jennifer-garner-in-when-paparazzi-collide/> (last visited Mar. 8, 2008) (explaining how paparazzi swarmed Jennifer Garner, preventing her from getting in her car).

motorcade of SUVs carrying upwards of fifty more photographers screeches to a halt alongside your car.⁵ They had been “tipped off” by CB radio that you were in the park.

Hordes of ravenous photographers shout and mug photos like sharks circling chum.⁶ Your scared children start crying. You jump into the driver’s seat, shift the car into gear, and slam on the gas pedal. The smell of burnt rubber permeates the air as your car peels out.⁷ For the moment, you think you are safe.

However, as you check your rearview mirror, you notice the SUVs tailing you. You speed up to lose them, but they keep pace.⁸ Flashbulbs flicker as one SUV zooms alongside your car, well over the posted speed limit. To evade the photographers, you blow through a red light. But the photographers unwaveringly follow in their pursuit, oblivious to the cars and people nearly mangled in their wake.⁹ As you find yourself in the midst of a high-speed chase, traffic safety laws lose their force.

Thankfully, you make it home safely. However, this story does not end here. Several days later, the front pages of the nation’s leading tabloids prominently display unflattering photographs of you and your children attempting to flee your pursuers.

Scenes like this are all too common for celebrities. Despite Princess Diana’s tragic death ten years ago,¹⁰ celebrities and paparazzi continue to have dangerous encounters with each other. In one highly publicized incident, a paparazzo crashed into Lindsay Lohan’s car while attempting to obtain a “money shot.”¹¹ Another paparazzo pushed Angelina Jolie into a high-speed chase when she went to a toy store to buy something for her children.¹² In yet another incident, photographers ran Arnold

5. See, e.g., TMZ.com, Brit Leads Paps on Crazy Chase, <http://www.tMZ.com/2007/02/22/brit-leads-paps-on-crazy-chase/> (last visited Mar. 8, 2008) (explaining that fifty frenzied paparazzi chased Britney Spears in cars around Southern California).

6. See, e.g., TMZ.com, Jennifer Garner, *supra* note 4 (explaining how paparazzi swarmed Jennifer Garner, preventing her from getting in her car).

7. See, e.g., TMZ.com, Brad Flees, *supra* note 1 (describing the speed in which Brad Pitt fled the scene from swarming paparazzi).

8. See, e.g., Ann Swardson & Charles Trueheart, *Princess Diana and Boyfriend Are Killed in Paris; Car Crashes With Photographers in Pursuit*, WASH. POST, Aug. 31, 1997, at A1.

9. See, e.g., TMZ.com, Paps Run Red in Chase for Britney, <http://www.tMZ.com/2007/11/24/paps-run-red-in-chase-for-britney/> (last visited Mar. 8, 2008) (describing how paparazzi ran a red light during a high speed chase of Britney Spears, “one as much as 10 seconds late!”).

10. Swardson & Trueheart, *supra* note 8, at A1.

11. MonstersandCritics.com, Lindsay Lohan’s Paparazzi Crash, http://www.monstersandcritics.com/people/news/article_1220017.php (last visited Mar. 8, 2008).

12. Helen Eckinger, *Chasing Angelina*, CHI. TRIB., Aug. 23, 2007, at 1.

Schwarzenegger and his wife, Maria Shriver, off the road “after ‘swarming’ around [their] car . . . to take the first photographs of the actor following his hospital release after elective heart surgery.”¹³ News headlines are replete with these and similar encounters.

However, American law extensively protects paparazzi.¹⁴ Armed with the First Amendment, paparazzi consistently align themselves with “the press” and allege their “information gathering” is constitutionally protected.¹⁵ They contend that the “freedom of the press” protects their aggressive newsgathering techniques.¹⁶ However, construing the First Amendment in that fashion is much like giving a blank check to a child in a toy store—it inevitable leads to unabashed exploitation. In today’s age of techno-wizardry, paparazzi have means to invade personal privacy interests in ways the framers of the Constitution never fathomed. Accordingly, it is necessary to differentiate between First Amendment and privacy rights.

The current statutes aimed at protecting victims from paparazzi “information gathering” techniques are inadequate for their expressed purpose. They fail to effectively deter paparazzi misconduct because they do not target paparazzi’s main income source: the tabloid press. Thus, the current statutes should be amended to provide for stiffer sanctions against tabloids for publishing a celebrity’s photographs without the celebrity’s consent. Without this and other amendments, statutory privacy protection will continue to fall short.

The European approach provides a template for reforming American privacy law. In Europe, there is a demarcation between citizens’ public and private lives, including a more expansive sphere of protected privacy interests.¹⁷ This standpoint is a sensible solution. The European approach limits citizens’ “public figure” status and their resultant exposure to the tabloid media.¹⁸ This approach balances the interests of paparazzi and celebrities to a much greater degree than current American privacy law. Moreover, it is entirely possible to incorporate the European approach into American law without violating the United States Constitution.

Part II of this Comment canvasses American privacy rights law by outlining the common law doctrines and statutory schemes aimed at

13. See, e.g., Andrew D. Morton, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435, 1446 (1999).

14. See *infra* Parts II and III.

15. TMZ.com, New Law, *supra* note 3; see also *infra* Parts II and III.

16. TMZ.com, New Law, *supra* note 3.

17. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 69–73.

18. *Id.*

protecting privacy interests. Part III traces how the Europeans have addressed privacy rights as they pertain to paparazzi since Princess Diana's death. Part IV proposes curbing intrusive paparazzi "information gathering" by adopting the current European approach to protecting citizens' privacy rights. Part V addresses and ultimately refutes any constitutional arguments against a more aggressive stance toward defining a "right to privacy."

II. AMERICAN PRIVACY RIGHTS LAW

The United States Constitution does not explicitly create a "right to privacy."¹⁹ Thus, on a constitutional level, privacy rights arise via the penumbras of the Third Amendment (prohibiting the quartering of soldiers without a homeowner's consent), Fourth Amendment (barring unreasonable searches and seizures), Fifth Amendment (conferring a privilege against self-incrimination), and Ninth Amendment (reserving certain rights that the Constitution does not enumerate to the people).²⁰ Additionally, the First Amendment protects privacy interests by:

protect[ing] citizens from being forced to declare or express an abhorrent belief—whether by being required to salute the nation's flag or to display a state's motto on one's license plate. . . . [T]he sanctity of one's innermost thoughts remains beyond government compulsion. The First Amendment also implies a freedom of association . . . [which] permits us to withhold from government not only how we vote, but also to what organizations we belong and contribute.²¹

Therefore, even though constitutional law acknowledges that some privacy protections exist, they generally yield to specific constitutional provisions when conflicts arise.

Specifically, the weight of constitutional case law suggests "conflicts between privacy-based claims and other constitutional safeguards (especially freedom of the press) should be resolved in favor of the nonprivacy interests."²² Where there is a tension between the First Amendment and the right to privacy, courts routinely uphold First

19. Morton, *supra* note 13, at 1440.

20. U.S. CONST. amends. III, IV, V, IX; *see also* Robert M. O'Neil, *Privacy and Press Freedom: Paparazzi and Other Intruders*, 1999 U. ILL. L. REV. 703, 706 (1999).

21. O'Neil, *supra* note 20, at 706; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

22. O'Neil, *supra* note 20, at 706–07.

Amendment interests at the expense of privacy rights.²³

In 1890, Justices Samuel Warren and Louis Brandeis articulated the need for express legal protection of privacy interests.²⁴ They famously wrote the right to privacy is “the right to be let alone.”²⁵ In reference to the press’s willingness to meet the public’s demand for gossip, the authors noted, “[t]he press is overstepping in every direction the obvious bounds of propriety and of decency.”²⁶ This led to the birth of tort law doctrines encompassing invasion of privacy.²⁷

In expounding on the right to privacy, scholar William Prosser suggested such a right exists in four torts adopted by the Restatement (Second) of Torts:²⁸ “(1) [i]ntrusion upon seclusion or solitude, or into private affairs; (2) [p]ublic disclosure of embarrassing private facts; (3) [p]ublicity which places a person in a false light in the public eye; and (4) [a]ppropriation of name or likeness.”²⁹ The weaknesses of privacy torts in vindicating privacy rights of celebrities are well documented.³⁰ It suffices to say that “[t]ort law . . . generally supports the proposition that an individual in public implicitly has consented to being photographed, and thus legal remedies extend little protection to acts of intrusive photography, videotaping, or surveillance of subjects located in, or in plain view from, a public place.”³¹ Furthermore, New York’s highest court, a leading court in shaping American law, “has consistently reminded litigants that no so-called common law right of privacy exists in New York.”³²

In addition to the common law doctrines, some states have amended their constitutions to include an express right to privacy.³³ However, only ten states have expressly embraced a right to privacy within their constitutions.³⁴ Most notably, New York has not expressly recognized a

23. See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Taus v. Loftus*, 40 Cal. 4th 683 (2007).

24. Larysa Pyk, *Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 187, 188–89 (1998).

25. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

26. *Id.* at 196.

27. *Id.* at 214.

28. Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 852 (2002).

29. Privacilla.org, *The Privacy Torts*, <http://www.privacilla.org/business/privacytorts.html> (last visited Mar. 31, 2008).

30. See, e.g., Spencer, *supra* note 28, at 844.

31. Morton, *supra* note 13, at 1444.

32. *Hurwitz v. United States*, 884 F.2d 684, 685 (2d Cir. 1989).

33. Morton, *supra* note 13, at 1440.

34. National Conference of State Legislatures, *Privacy Protections in State Constitutions*,

right to privacy within its constitution, despite housing one of the entertainment capitals of America: New York City.³⁵ Even though the Supreme Court has recognized states' ability to "supplement the federally ensured minimums enumerated in the Bill of Rights with respect to privacy protection,"³⁶ states' general unwillingness to include any express privacy rights within their constitutions suggests that statutory remedies are necessary to ensure privacy interests.

Several states, namely California and New York, have created such statutorily recognized privacy interests.³⁷ After the death of Princess Diana, and in response to the increasingly intrusive and harassing tactics of the paparazzi toward celebrities, the California legislature adopted Civil Code section 1708.8 in 1998, which created a statutory cause of action for an invasion of privacy.³⁸ This section also distinguished between a physical invasion of privacy and a constructive invasion of privacy.³⁹ Physical invasion of privacy occurs when a defendant commits a trespass on another's land with the intent to capture a "physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person."⁴⁰ It is important to note that, like the European laws more fully discussed below,⁴¹ this portion of the California statute looks to the subject matter of a photograph to create spheres of privacy protection. Thus, it may be a prudent starting point for a movement toward incorporating a subject matter approach to United States privacy law.

The California statute also provides for constructive invasion of privacy, which increases the scope of liability for a defendant. The constructive invasion of privacy goes beyond mere physical invasion by imposing liability *without* actual entry onto the property of another, but rather for using "visual or auditory enhancing device[s]" to obtain a "physical impression."⁴² The tort occurs where a person "attempts to capture . . . any type of visual image, sound recording, or other physical

<http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm> (last visited Nov. 27, 2006) [hereinafter Privacy Protections] (noting that the states that have expressly adopted a right to privacy in their constitutions are: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington).

35. *See id.*

36. Morton, *supra* note 13, at 1442–43.

37. Privacy Protections, *supra* note 34.

38. Pyk, *supra* note 24, at 197.

39. CAL. CIV. CODE § 1708.8 (West 1998).

40. *Id.* § 1708.8(a).

41. *See infra* Part III.

42. CAL. CIV. CODE § 1708.8(b) (West 1998).

impression” of another person “engaging in a personal or familial activity” and the attempt is made “in a manner that is offensive to a reasonable person.”⁴³ Further, the person photographed, videotaped, or recorded must have “had a reasonable expectation of privacy.”⁴⁴

The constructive invasion of privacy cause of action acknowledges that technological advances may trench upon privacy rights.⁴⁵ California wisely recognizes that individual privacy interests are susceptible to assault from high-tech devices.⁴⁶

The remedy available to a plaintiff who can prove invasion of privacy for a commercial purpose is “disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation.”⁴⁷ Moreover, any “individual who ‘directs, solicits, actually induces, or actually causes another person’ to invade a plaintiff’s privacy, regardless of whether there is an employer-employee relationship, may also be liable for general, special, consequential, and in some instances, punitive damages resulting from the violation.”⁴⁸ Theoretically, the disgorgement provision should discourage paparazzi by requiring them to forfeit any income derived from selling the photograph.⁴⁹ Furthermore, in theory, the potential liability attached should compel publishers to refrain from using paparazzi at all.⁵⁰ However, the statute in its current form lacks the necessary force to effectively deter such conduct.⁵¹ An amended statute can help address the issue by preventing the use of newly created technologies from invading an individual’s privacy interests.

Despite recognizing privacy interests in statutes, these laws are largely ineffective in promoting privacy interests and deterring invasive paparazzi conduct.⁵² The continued incidents of celebrity and paparazzi clashes evidence the ineffectiveness of such statutes. If these laws worked, arguably the financial impetus for paparazzi to risk life and limb photographing celebrities would not exist.⁵³ Therefore, these laws require revisions to provide more adequate protections against intrusive paparazzi

43. *Id.*

44. *Id.*

45. *See id.*

46. *See id.*

47. *Id.* § 1708.8(d).

48. Pyk, *supra* note 24, at 198.

49. *See* CAL. CIV. CODE § 1708.8(d) (West 1998).

50. *See id.*

51. *See infra* Part II.

52. *See, e.g., supra* notes 1–11 and accompanying text.

53. *See, e.g.,* MonstersandCritics.com, *supra* note 11 (describing a paparazzo crashing into Lindsay Lohan’s car to get a money shot).

tactics. The California statute, for instance, requires a plaintiff meet a high evidentiary threshold before a court will impose liability upon a publisher of paparazzi photographs.⁵⁴ However, because the plaintiff must actually show that the publisher directed, solicited, induced, or caused someone to take such photographs, the statute implicitly provides a loophole for publishers that buy photographs from paparazzi but do not actually order the photographs taken.⁵⁵

Thus, these types of statutes do not address the typical relationships between paparazzi and the publishers who print their work because publishers typically do not directly solicit the use of paparazzi for a particular purpose.⁵⁶ Rather, paparazzi photographs are products of spontaneous occurrences. Therefore, publishers are safely removed from the threat of liability because, though they purchase the photographs, they rarely have a more active role in soliciting them.⁵⁷ Even when publishers have more control over paparazzi actions, guidance from competent attorneys can potentially steer publishers clear of liability by exploiting the freelance nature of paparazzi photographers.

A. California's Position

California amended its constitution to include a right to privacy, recognized common law rights of privacy, and enacted several statutes to protect privacy interests.⁵⁸ Because California has one of the most progressive American positions on privacy rights,⁵⁹ this Comment will use its law as a benchmark to compare to European law.⁶⁰ In a landmark decision, *Shulman v. Group W Productions, Inc.*, which fully explains the boundaries of progressive American privacy law, the California Supreme Court applied two common law torts protecting the right to privacy.⁶¹

54. CAL. CIV. CODE § 1708.8(e) (West 1998).

55. *Id.*

56. See generally Marc P. Misthal, *Reigning in the Paparazzi: The Human Rights Act, The European Convention on Human Rights and Fundamental Freedoms, and the Rights of Privacy and Publicity in England*, 10 INT'L LEGAL PERSP. 287, 340 (1998).

57. *Id.*

58. See CAL. CONST. art. I, § 1; see also CAL. CIV. CODE § 1708.8 (West 1998); *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 228 (1998).

59. See generally Pyk, *supra* note 24.

60. See *infra* Part III.

61. *Shulman*, 18 Cal. 4th 200.

1. The *Shulman* Decision

In *Shulman v. Group W Productions, Inc.*, Ruth and Wayne Shulman were involved in a car accident and needed the “jaws of life” to cut them free from the wreckage.⁶² A rescue helicopter arrived on the scene carrying a medic, a nurse wearing a wireless microphone, and a video camera operator, who was employed by the defendants, Group W Productions and 4MN Corporation.⁶³ The team on the helicopter documented the rescue for a television program called *On Scene: Emergency Response*.⁶⁴

The footage showed “brief shots of [Mrs. Shulman’s] limb or her torso, or with her features blocked by others or obscured by an oxygen mask.”⁶⁵ Additionally, the viewer can hear Mrs. Shulman telling the nurse, “I just want to die. I don’t want to go through this.”⁶⁶ Once rescued from the crash, the crew moved her to the helicopter and took her to the hospital for treatment.⁶⁷ Unfortunately, Mrs. Shulman was left a paraplegic.⁶⁸

Ruth and Wayne Shulman brought “two causes of action for invasion of privacy, one based on defendants’ unlawful intrusion by videotaping the rescue in the first instance and the other based on disclosure of private facts, i.e. the broadcast.”⁶⁹ On the unlawful intrusion issue, the California Supreme Court found that Mrs. Shulman’s privacy rights had been violated while in the helicopter, as she had an objectively reasonable expectation of privacy in those places that outweighed the First Amendment rights of the press.⁷⁰ On the private facts issue, the California Supreme Court held that the broadcast was newsworthy as a matter of law and could not be subject to tort liability on the private facts cause of action.⁷¹

The court recognized that there is increasing media pressure on privacy rights.⁷² It acknowledged that “the ‘devices’ available for recording and transmitting what would otherwise be private have

62. *Id.* at 210.

63. *Id.*

64. *Id.*

65. *Id.* at 210–11.

66. *Id.* at 211.

67. *Shulman*, 18 Cal. 4th at 211.

68. *Id.*

69. *Id.* at 212.

70. *Id.* at 232, 237–38.

71. *Id.* at 213.

72. *Id.* at 207–08.

multiplied and improved in ways the 19th century could hardly imagine.”⁷³ The court also observed that “today’s public discourse is particularly notable for its detailed and graphic discussion of intimate personal and family matters—sometimes as topics of legitimate public concern, sometimes as simple titillation.”⁷⁴

Against the backdrop of ever-increasing media intrusiveness, the court then analyzed two common law privacy torts recognized by California: (1) public disclosure of private facts, and (2) intrusion into private places, conversations, or other matters.⁷⁵

a. Public Disclosure of Private Facts

The California common law tort of public disclosure of private facts contains four elements: (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.⁷⁶

The court focused its analysis on the decisive legitimate public concern or newsworthiness element.⁷⁷ It was the plaintiffs’ burden to prove a lack of newsworthiness.⁷⁸ The court noted that it was not helpful to separate the tort and constitutional analyses of newsworthiness, and thus conflated both analyses into one discourse.⁷⁹ Furthermore, the court recognized that the newsworthiness inquiry “involve[d] accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution.”⁸⁰ According to the court, the issue was whether “the facts disclosed about a private person involuntarily caught up in events of public interest bear a logical relationship to the newsworthy subject of the broadcast and are not intrusive in great disproportion to their relevance.”⁸¹

The court analyzed federal, state, and Supreme Court cases, noting that First Amendment protections are at their zenith when truthful private facts are published, even in the context of private individuals.⁸² After canvassing case law that expounded concepts of “newsworthiness” and

73. *Shulman*, 18 Cal. 4th at 207.

74. *Id.*

75. *Id.* at 214.

76. *Id.*

77. *Id.*

78. *Id.* at 215.

79. *Shulman*, 18 Cal. 4th at 215.

80. *Id.*

81. *Id.*

82. *Id.* at 218.

recognizing the difficulty in defining it, the court articulated the interests to be balanced when making a determination on a topic's newsworthiness:

First, the analysis of newsworthiness does involve courts to some degree in a normative assessment of the "social value" of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of *legitimate* public interest. Second, the evaluation of newsworthiness depends on the degree of intrusion and the extent to which the plaintiff played an important role in public events, and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. "Some reasonable proportion is . . . to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given."⁸³

The court also noted that summary judgment in such cases is a favored remedy "[b]ecause unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights."⁸⁴

In applying this standard, the court reasoned that automobile accidents are "by their nature of interest to that great portion of the public that travels frequently by automobile. The rescue and medical treatment of accident victims is also of legitimate concern to much of the public, involving as it does a critical service that any member of the public may someday need."⁸⁵ Therefore, the accident and medical treatment were newsworthy.

The court then analyzed "whether [Mrs. Shulman]'s appearance and words as she was extricated from the overturned car, placed in the helicopter and transported to the hospital were of legitimate public concern."⁸⁶ According to the court, the issue was not whether it was necessary to show Mrs. Shulman's appearance and communications, but whether the challenged material was substantially relevant to the subject matter of the newsworthy broadcast.⁸⁷ Ultimately, the court found that Mrs. Shulman's appearance and communications were substantially relevant to the broadcast, and held the broadcast was of legitimate public concern as a matter of law.⁸⁸ Thus, the plaintiff did not present a prima

83. *Id.* at 222 (citations omitted).

84. *Id.* at 228 (citing *Good Gov't Group of Seal Beach, Inc. v. Superior Court*, 22 Cal. 3d 672, 685 (1978)).

85. *Shulman*, 18 Cal. 4th at 228.

86. *Id.*

87. *Id.* at 229.

88. *Id.*

facie private facts cause of action.⁸⁹

b. Intrusion into Private Places, Conversations, or Other Matters

The *Shulman* court also analyzed the tort of intrusion into private places, which contains two elements: “(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.”⁹⁰ A plaintiff can prove the tort only if “the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.”⁹¹

In analyzing the first prong, the court found that the plaintiffs did not have a reasonable expectation of privacy at the scene of the accident because journalists and photographers often attend and record events occurring at accident scenes.⁹² However, the court held that the plaintiffs may have had an objectively reasonable expectation of privacy in the interior of the helicopter ambulance because, absent a patient’s consent, the press is not permitted to ride in ambulances or enter hospital rooms.⁹³

“[A]ll circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element,” and are relevant to the second prong of the prima facie case.⁹⁴ Most importantly, the court observed “the First Amendment does not immunize the press from liability for torts or crimes committed in an effort to gather news.”⁹⁵ In reaching this conclusion, the court determined that the balance of First Amendment concerns weighed in favor of a free press.⁹⁶ It stated, “[i]nformation-collecting techniques that may be highly offensive when done for socially unprotected reasons—for purposes of harassment, blackmail or prurient curiosity, for example—*may not* be offensive to a reasonable person when employed by journalists in pursuit of a *socially or politically important* story.”⁹⁷ By explicitly stating the circumstances where a journalist can engage in newsgathering techniques that may not be offensive to a reasonable person and where the story is not socially or politically important, the court implied the same techniques may be highly offensive. In this case, by taking the setting of the intrusion into context,

89. *Id.* at 229–30.

90. *Id.* at 231.

91. *Shulman*, 18 Cal. 4th at 232.

92. *Id.*

93. *Id.*

94. *Id.* at 236.

95. *Id.*

96. *Id.*

97. *Shulman*, 18 Cal. 4th at 237 (emphasis added).

the court found that recording dialogue between the accident victim and her rescuers and filming the victim in the helicopter were highly offensive to a reasonable person.⁹⁸

c. *Shulman's* Legacy

Shulman's importance in developing privacy rights cannot be overstated. The *Shulman* court recognized instances where an individual's right to privacy outweighs the press's First Amendment rights.⁹⁹ The result is an important step in carving out spheres of protection for individual privacy, notwithstanding the press's undeniable right to disseminate news. The court rightly acknowledged that the press affronted Ruth Shulman's personal dignity.¹⁰⁰ The countervailing policy interests of preserving the integrity of a doctor-patient relationship and not "chilling" a patient's willingness to disclose personal information to a doctor for fear of being surreptitiously videotaped or recorded further supports the court's holding.¹⁰¹

There are, however, some limitations to the *Shulman* decision that may impede its capability to protect celebrities' privacy interests.¹⁰² The court's reasoning hinged on its determination that Ruth Shulman was "an otherwise private person involuntarily involved in an event of public interest by their relevance to a newsworthy subject matter."¹⁰³ This fact may limit *Shulman's* applicability to instances involving public figures because public figures voluntarily thrust themselves into the limelight and, by doing so, may assume the risk of any resulting publicity. Furthermore, despite recognizing spheres of privacy outside of the home,¹⁰⁴ the *Shulman* court confined its determination that there was an invasion of privacy to the fact that the helicopter was an air ambulance and ambulances were traditionally off-limits to the press.¹⁰⁵ Thus, a narrow reading of *Shulman* will do little to expand public figures' privacy rights.

98. *Id.* at 237–38 (“[T]he last thing an injured accident victim should have to worry about while being pried from her wrecked car is that a television producer may be recording everything she says to medical personnel for the possible edification and entertainment of casual television viewers.”).

99. *Id.* at 237.

100. *See id.* at 238.

101. *Id.*

102. *See id.* at 224.

103. *Shulman*, 18 Cal. 4th at 224.

104. *Id.* at 236.

105. *Id.* at 232–33.

2. The *Taus* Decision

The California Supreme Court recently revisited the issue of individual privacy rights in *Taus v. Loftus*.¹⁰⁶ In *Taus*, the subject of a child abuse study sued the publishers and authors of several articles for disclosing details about the subject's history as well as unfavorable details about the subject's father and stepmother that were not disclosed in the original study.¹⁰⁷ In dismissing the plaintiff's intrusion claim, the court concluded that there was no violation of the plaintiff's privacy rights because the articles were newsworthy under the *Shulman* newsworthiness test.¹⁰⁸ According to the court, the private facts relating to the plaintiff were newsworthy because the issues described in the case study were "important and of interest from an academic standpoint" and because of the "prominence of the . . . study in the repressed memory field."¹⁰⁹ The disclosure of the private facts was, therefore, protected by the First Amendment.¹¹⁰

This case suggests that the more prominent a person becomes, even if the prominence is confined within esoteric circles and due merely to the person's affiliation with a particular subject matter (i.e., a child maltreatment article), courts are more likely to find newsworthiness, notwithstanding the private nature of any disclosures.¹¹¹ Again, the thrust of the reasoning suggests that prominent figures have little privacy protection because even mundane private facts may be considered newsworthy in some circles.

B. *American Finale*

In sum, American law affords limited protection to individual privacy. Celebrities, in particular, are afforded little reprieve from the onslaught of the press because of their public prominence, and because their daily activities are deemed "of interest" within certain circles of the American population. Indeed, there are a plethora of magazines and tabloids devoted solely to the latest celebrity gossip of who is dating whom,

106. *Taus v. Loftus*, 40 Cal. 4th 683 (2007).

107. *Id.* at 691-92 (describing that the original study concerned the unnamed subject's repressed memory of childhood abuse).

108. *Id.* at 719.

109. *Id.*

110. *Id.*

111. *See id.*

which celebrity is the sexiest, the latest late-night adventures of wayward starlets, and the personal traumas of party-animal “Hollywoodites.” Furthermore, the concept of “newsworthiness,” ill-defined and broadly applied, does little to reasonably limit the scope of press intrusions.

There is some hope for those exposed to the relentless pursuit of flashbulbs and tabloids. American law could more adequately protect celebrities’ privacy and safety simply by limiting the scope of *Shulman’s* newsworthiness standard and the definition of “public figure.”¹¹²

III. EUROPE’S STANCE

Princess Diana died tragically in 1997.¹¹³ Her car crashed while her driver was trying to evade a horde of paparazzi following the vehicle at high speeds in France.¹¹⁴ Her death served as a catalyst for change in European privacy law.¹¹⁵ The public outcry prompted England’s Prime Minister, Tony Blair, “to pass enabling legislation that would make the European Convention on Human Rights and Fundamental Freedoms (the “Convention”) part of domestic English law,” because “such enabling legislation would allow the courts to develop English privacy law binding on the press.”¹¹⁶ Thus, England publicly announced its intention to expand privacy law to combat the intrusive techniques of the paparazzi.

All member states of the European Convention have ratified Article 8 of the Convention.¹¹⁷ Article 8, titled “Right to respect for private and family life,” sets forth broad individual privacy rights.¹¹⁸ In addition to

112. The dangerous encounters between celebrities and paparazzi are evidenced by the multitude of incidents involving automobile chases. See *MonstersandCritics.com*, *supra* note 11; see also *TMZ.com*, George Clooney in a Rage After Chase, <http://www.tMZ.com/2007/11/20/george-clooney-schools-photogs-on-driving/> (last visited Mar. 8, 2008) (reporting that George Clooney and his girlfriend were involved in a motorcycle crash); *TMZ.com*, Brit Leads Paps, *supra* note 5.

113. Swardson & Trueheart, *supra* note 8, at A1.

114. *Id.*

115. Misthal, *supra* note 56, at 288.

116. *Id.* at 288–89.

117. Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N.Y.L. SCH. L. REV. 205, 207 (2006).

118. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, Nov. 1, 1998, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> [hereinafter Convention] (providing “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”).

public authorities, the interpretation of Article 8 also prohibits “interference by private persons or institutions, including the mass media.”¹¹⁹ The Convention defined privacy as not being:

limited to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within this circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings and the outside world.¹²⁰

This definition includes business and professional activities, as well as the development of relationships with other human beings “in the emotional field for the development and fulfillment of one’s own personality.”¹²¹ Examples of relationships within the emotional field may include dining with another, playing a sport with another, or going on a family vacation.¹²² The Convention’s conception of privacy did not confine privacy interests to physical zones,¹²³ but rather looked to the nature of the private activity for which protection is sought.¹²⁴ This broad view of privacy interests is more expansive than the American privacy conception and affords more protection to the individual seeking redress. Unlike American law, which subordinates privacy rights to the First Amendment, European law states privacy rights and freedom of expression “are of equal value.”¹²⁵

A. *The Von Hannover Decision*

Von Hannover v. Germany was an important decision interpreting the privacy rights guaranteed by Article 8 of the Convention.¹²⁶ In *Von Hannover*, paparazzi took pictures of Princess Caroline of Monaco, the eldest daughter of Prince Rainier III of Monaco.¹²⁷ The photographs depicted Princess Caroline horseback riding, shopping, “with Mr[.] Vincent Lindon in a restaurant; alone on a bicycle; and with her bodyguard at a

119. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 61.

120. Misthal, *supra* note 56, at 313–14.

121. *Id.* at 313–14.

122. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 69 (holding that such activities are of a private nature).

123. *Id.* at 66 (“There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of ‘private life.’”).

124. *See id.*

125. *Id.* at 61.

126. *See id.* at 66–73.

127. *Id.* at 48.

market,” skiing in Austria, leaving a Parisian residence with Prince Ernst August von Hannover, “playing tennis with Prince Ernst August von Hannover . . . [and] tripping over an obstacle at Monte Carlo Beach Club.”¹²⁸

At the outset, the court noted that the subject matter of the pictures depicted Princess Caroline “in scenes from her daily life, thus involving *activities of a purely private nature* such as engaging in sport, out walking, leaving a restaurant or on holiday.”¹²⁹ Thus, it is important to note that instead of looking to physical zones when determining privacy (i.e., a public or private place), the court determined that certain activities can be exclusively private.¹³⁰ The focus is then on the subject matter of the photographs rather than the location where they were taken.

In determining whether the pictures were actionable, the court balanced “the competing interests of the individual and of the community as a whole.”¹³¹ Specifically, Article 8 interests need to be balanced with the countervailing interests contained in Article 10 of the Convention,¹³² which parallels the United States Constitution’s First Amendment.¹³³

When balancing the competing interests of freedom of the press and the right of privacy, the court noted the importance of free expression in a democratic society and the role of the press as a government “watchdog.”¹³⁴ However, the interests of free expression are diminished when the expression does not stimulate a debate of general interest, and where the subject of the expression is private in nature.¹³⁵

Additionally, the court drew a distinction between “reporting facts—

128. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 65–66.

129. *Id.* at 69 (emphasis added).

130. *See id.* at 66, 72–73 (“In the Court’s view, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance.”).

131. *Id.* at 68.

132. *Id.*

133. *See* Convention, *supra* note 118 (Article 10 provides: “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).

134. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 70.

135. *Id.*

even controversial ones—capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual, who . . . does not exercise official functions.”¹³⁶ The court opined that while the former instance pertains to the press’s vital governmental watchdog function, reporting details of an individual’s private life does not.¹³⁷ As a result, freedom of expression in the latter category calls for a narrower interpretation.¹³⁸ Because the “sole purpose of the publications was to satisfy the curiosity of a particular readership regarding details of Princess Caroline’s private life . . . [they] could not be deemed to contribute to any debate of public interest to society.”¹³⁹ The court stated that whether the photographs and articles contribute to a debate of general interest is the decisive factor in balancing privacy rights against freedom of expression.¹⁴⁰

Even though Princess Caroline “represents the ruling family at certain cultural or charitable events . . . she does not exercise any function within or on behalf of the State of Monaco or any of its institutions.”¹⁴¹ The court concluded:

[T]he publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant’s private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public.¹⁴²

Therefore, the court readily acknowledged that, despite their fame, even well known people retain privacy interests.¹⁴³

In finding that Princess Caroline’s privacy rights were violated as a result of the published photographs, the court stated:

[T]he public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

Even if such a public interest exists, as does a commercial

136. *Id.*

137. *Id.*

138. *Id.*

139. McDonald, *supra* note 117, at 221.

140. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 72.

141. *Id.* at 70.

142. *Id.*

143. *Id.* at 71.

interest of the magazines in publishing these photos and these articles, in the instant case those interests must . . . yield to the applicant's right to the effective protection of her private life.¹⁴⁴

Thus, the *Von Hannover* decision extends more privacy protection to famous persons than do United States courts in a variety of ways. First, rather than subordinating privacy interests to the freedom of the press, it places each on equal footing and balances the competing interests of individual privacy and freedom of the press.¹⁴⁵ Second, it reaffirms the press's essential role as government watchdog, but does so to draw the line where privacy interests are diminished.¹⁴⁶ Third, it declines to extend the concept of "public official" to public personalities tangentially connected with public authority. Unlike in United States courts, the legal treatment of a "public official" remains distinct from that of a "public figure."¹⁴⁷ Therefore, the diminished privacy interests are properly placed with public officials whose conduct should be exposed by the media in order to create a transparent democracy. This important interest simply does not exist with those who do not hold public official positions. Fourth, and perhaps most importantly, the court suggested not to confine privacy interests to physical zones, but to include subject matter as well.¹⁴⁸ For example, even if Princess Caroline shopped in public, shopping is conduct occurring during her daily life, and absent an overriding public interest, it would be deemed private.¹⁴⁹

In sum, the *Von Hannover* decision illustrates a more protective position toward individual privacy rights without curtailing the press's vital role as government watchdog.¹⁵⁰

B. *The Campbell Decision*

Campbell v. MGN Ltd. is another case illustrating the more expansive privacy protections Europe affords celebrities.¹⁵¹ In *Campbell*, supermodel Naomi Campbell sued Mirror Group Newspapers, Ltd. for publishing photographs of her leaving a Narcotics Anonymous meeting.¹⁵² Campbell alleged that the defendant breached her confidence and unlawfully invaded

144. *Id.* at 72.

145. *See id.* at 68.

146. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 70.

147. *See id.* at 71.

148. *See id.* at 70, 72.

149. *See id.* at 72.

150. *See id.* at 70, 72.

151. *Campbell v. MGN Ltd.*, [2004] 2 A.C. 457 (H.L.) (appeal taken from Eng.) (U.K.).

152. *Id.* at 461.

her privacy for the following reasons: “first, the fact that she was attending meetings at [Narcotics Anonymous], secondly, the published details of her attendance and what happened at the meetings and thirdly, the photographs taken in the street without her knowledge or consent.”¹⁵³

The House of Lords held that the publication of information and photographs of Campbell leaving and attending Narcotics Anonymous meetings “was here an infringement of Miss Campbell’s right to privacy that cannot be justified.”¹⁵⁴ According to the court, “a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected.”¹⁵⁵ This standard would be tested by asking whether publishing such “information would be highly offensive to a reasonable person of ordinary sensibilities if they were in the same position as the subject.”¹⁵⁶

Importantly, the House of Lords also observed that when construing Article 8 and Article 10 of the European Convention on Human Rights, neither Article has pre-eminence over the other.¹⁵⁷ Thus, unlike in American courts (which, according to one concurring judge in *Von Hannover*, have “made a fetish of the freedom of the press”¹⁵⁸), the competing interests of personal privacy and a free press are not subordinate to one or the other, but are placed on equal footing. Such recognition has broad implications for celebrities’ privacy interests in Europe. In *Campbell*, this balance allowed a celebrity to effectively vindicate her privacy rights from the intrusive media while in public.¹⁵⁹ Such a result would be unheard of in America.

C. *European Finale*

Europe protects privacy interests, especially those of public figures, more broadly than the United States does. First, the European Convention on Human Rights equally balances Article 8 and Article 10.¹⁶⁰ This fact alone may have more substantial repercussions than are apparent at first glance, as indicated by the *Campbell* decision, in which a celebrity’s

153. *Id.* at 471.

154. *Id.* at 493.

155. *Id.* at 480.

156. McDonald, *supra* note 117, at 226 (emphasis removed).

157. *Id.* at 224.

158. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 78.

159. *Campbell*, [2004] 2 A.C. at 458.

160. McDonald, *supra* note 117, at 227.

privacy right was not trumped by freedom of the press.¹⁶¹ Second, under the *Von Hannover* framework, privacy interests do not attach to physical zones, but rather to the subject matter of activities.¹⁶² This expands the scope of privacy protection to include activities of a celebrity in public places. Third, the courts draw a distinction between the press's vital role as government watchdog and their reporting private details of an individual who does not perform official duties.¹⁶³ When reporting on private details of individuals who do not perform official functions, courts are reluctant to compromise an individual's privacy right to preserve an unrestrained press.¹⁶⁴

The European position on privacy rights can be incorporated into United States law without violating the United States Constitution. Any First Amendment protections the press asserts to gather news at the expense of an individual's privacy rights may be constitutionally discarded. A more sensible privacy policy may be pursued which would more effectively protect citizens' safety and individual privacy rights.

IV. A NEW AMERICAN METHOD

The European model of privacy rights can be incorporated into the American scheme without running afoul of the United States Constitution through the use of already established American legal theories. This section will explore how the courts can broaden their current interpretations, and legislators can enact legislative amendments, to secure stronger privacy rights for individuals.

A. *European Standard as Applied to the "Offensive to a Reasonable Person" Standard*

In the two torts discussed above—(1) public disclosure of private facts, and (2) intrusion into private places, conversations, or other matters—the court in *Shulman v. Group W. Productions, Inc.* analyzed the application of the “offensive to a reasonable person” standard.¹⁶⁵ Currently under California law “all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element.”¹⁶⁶ In *Shulman*, the court took the setting of the

161. *Campbell*, [2004] 2 A.C. at 458.

162. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 72.

163. *See id.* at 70.

164. *Id.*

165. *See Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 214 (1998).

166. *Id.* at 236.

intrusion into consideration: The court found the recordings with the nurse, rescuers, and inside the helicopter were highly offensive to a reasonable person because patients have an “objectively reasonable expectation of privacy.”¹⁶⁷

Similarly, the *Campbell* court held that information gathering would be highly offensive to reasonable persons when they are in situations in which they expect their privacy to be protected.¹⁶⁸ Notably, both Europe and California are willing to look at the context surrounding a photograph. The *Shulman* court further noted that even in pursuit of a socially or politically important story, information-collecting techniques “may not be offensive to a reasonable person.”¹⁶⁹ Note the use of the word “may.” The court held open the possibility that the newsgathering techniques could still be highly offensive to a reasonable person in some socially or politically important contexts.¹⁷⁰

California law is already poised to broaden its application of the “highly offensive to a reasonable person” standard. Similar to Europe, where the competing interests of personal privacy and a free press are not subordinate to one another, this same balance could exist in California. This balance is possible for two reasons: (1) the *Shulman* court left open the door by using the word “may” for newsgathering in politically or socially important contexts; and (2) the *Shulman* court specifically outlined scenarios where newsgathering would be offensive because it sought to satisfy a purely prurient curiosity.¹⁷¹ For example, as in Europe, “highly offensive to a reasonable person” could include situations of prohibiting photographs of citizens entering or leaving rehab, or any other situation where a citizen “knew or ought to have known that the other person could reasonably expect his or her privacy to be protected.”¹⁷² This balance could readily exist where the context is inappropriate and when done for socially unprotected reasons such as prurient curiosity,¹⁷³ and perhaps even in some situations where newsgathering is socially or politically important.

Furthermore, as one scholar noted, reasonable social expectations of privacy can fluctuate based on circumstances, for example, commonplace use of telephoto lenses or more technologically advanced surveillance

167. *See id.* at 232.

168. McDonald, *supra* note 117, at 226.

169. *Shulman*, 18 Cal. 4th at 237.

170. *See generally id.*

171. *See id.*

172. McDonald, *supra* note 117, at 226.

173. *Shulman*, 18 Cal. 4th at 237.

devices.¹⁷⁴ Therefore, if a law is enacted to broaden the scope of privacy protection, the reasonable expectation of privacy will resultantly be broader. Citizens will be able to reasonably rely on laws to protect their interests, and if a law is enacted to protect privacy interests more expansively than any currently in force, such an enactment may justify a more broadly construed reasonable expectation. For example, if a law protects a citizen's privacy interest for a familial activity, such as spending time with his or her children in public, then a reasonable expectation would arise that such conduct is private.

B. European Standard as Applied to "Legitimate Public Concern"

The bigger hurdle to get over in adapting European law to American jurisprudence is the newsworthiness element. As the *Shulman* decision articulates, newsworthiness can be a focal issue in determining whether an invasion of privacy is justified and defensible.¹⁷⁵ Thus, molding the definition of "newsworthiness" to exclude the daily lives of celebrities can effectively shatter the newsworthiness shield that defendants hide behind when obtaining intrusive celebrity photographs.

There are two main components to newsworthiness: (1) the facts disclosed must bear a logical relationship to the subject and must be proportional to the relevance;¹⁷⁶ and (2) the more prominent a figure, the more likely the court will find newsworthiness.¹⁷⁷ Addressing the first component, the standard articulated in *Shulman* suggests that the newsworthiness of a given issue is tempered by the activity that made the individual a public figure.¹⁷⁸ For example, if a celebrity is a public figure due to screen acting, it is hard to see a connection between screen acting and shopping for food. Therefore, the latter is not newsworthy.

European law analyzes the issue in an entirely different, and perhaps more pragmatic, fashion. In determining the proportion between the newsworthiness and the activity, European law looks at the subject matter of the pictures.¹⁷⁹ Thus, a photograph is less likely to be newsworthy if it depicts the person engaging in purely private matters.¹⁸⁰

However, Europe goes a step further. It requires that the expression

174. Spencer, *supra* note 28, at 844.

175. See *Shulman*, 18 Cal. 4th at 214.

176. *Id.* at 215.

177. See *Taus v. Loftus*, 40 Cal. 4th 683, 719 (2007).

178. See *Shulman*, 18 Cal. 4th at 215.

179. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 60-62.

180. See *id.* at 70.

stimulate a debate of general interest.¹⁸¹ Reporting details of an individual's private life does not add to the public debate.¹⁸² For example, even a member of a ruling family can retain privacy interests if the purpose of the pictures is only to satisfy the curiosity of a particular readership.¹⁸³ This interpretation does not stray far from current California law. California courts in other privacy cases have articulated a very similar standard: public interest is measured by its ability to contribute to widespread public debate.¹⁸⁴ Similarly, just as European law posits that a reader's interest in private details alone does not make subject matter newsworthy, American courts could examine whether the topic is based on mere curiosity.¹⁸⁵

The second component considers the prominence of the figure. Under current California law, the more prominent a figure, the more likely the court will find newsworthiness.¹⁸⁶ In contrast, European law does not diminish the privacy rights of public figures; it only limits the privacy interests of official persons connected with public authority.¹⁸⁷ Yet, in the United States, it is arguable that celebrities are public figures and they therefore invite public comment about their daily lives and have reduced privacy interests. This is a *gross* perversion of the constitutional standard set forth regarding defamation and libel law.¹⁸⁸

Additionally, United States legislatures could adopt the European view that when the press is not exercising its vital role as government watchdog, its ability to interfere with the rights of others through intrusive newsgathering is lessened.¹⁸⁹ Like the Princess of Monaco, celebrities could veil themselves from the prying public eye precisely because there is no compelling need for transparency in their daily lives as there is for

181. *See id.* at 72.

182. *See id.*

183. *See id.*

184. *See e.g.*, *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898 (2004); *see also Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980).

185. *See Santini v. Am. Media Inc.*, No. BC 300801, 2005 WL 459195, at *5 (Cal. Ct. App. Feb. 28, 2005) (holding that "mere curiosity" did not equate to "public interest").

186. *See Taus v. Loftus*, 40 Cal. 4th 683, 719 (2007).

187. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 70.

188. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (establishing defamation and libel standards as applied to public officials and figures).

189. Indeed, the United States Supreme Court has recognized thresholds of lesser speech protection in various contexts. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement to illegal activity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Feiner v. New York*, 340 U.S. 315 (1951) (hostile audience); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

public officials.¹⁹⁰ By adopting the European standard of a citizen's private versus public life, as in the *Von Hannover* case, courts can effectively limit a citizen's exposure to the widespread public gaze, and, thus, limit privacy intrusions.¹⁹¹

In addition to modifying the current newsworthiness standard to preclude the intrusive prying into citizen's lives, sanctions should be placed on media defendants that knowingly use paparazzi photographs that were taken illegally. Since the paparazzi's primary motivation to conduct intrusive newsgathering is the high price they receive for those services, eliminating their source of income will deter their conduct. Targeting the source is more important than attacking each paparazzo individually; if one paparazzo is sued and eliminated from the game, another will replace him.

Finally, if the United States adopted these methods, the media would still be left with the option of attempting to obtain citizens' consent to photograph them doing private activities. This option is the most respectful of a citizen's privacy because it allows the citizen discretion over his or her public image.

V. THE CONSTITUTIONALITY OF THE PROPOSED CHANGES

The press clings to the First Amendment to justify its intrusions, and occasional flagrant affronts, into individual privacy rights. The First Amendment famously provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁹² The Supreme Court applies the First Amendment to the states by incorporation through the Fourteenth Amendment, making state law subject to the strictures of the First Amendment.¹⁹³

The freedom of the press is not an absolute right. For example, the press may be held liable for publishing defamatory or libelous material.¹⁹⁴ Furthermore, as noted in *Cohen v. Cowles Media Co.*,¹⁹⁵ the Court has held that there is no general rule of protection for newsgathering.¹⁹⁶ In particular, "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."¹⁹⁷ "[T]he truthful information

190. See *Von Hannover*, 2004-VI Eur. Ct. H.R. at 70.

191. See *id.* at 72.

192. U.S. CONST. amend. I.

193. See *Near v. Minnesota*, 283 U.S. 697 (1931).

194. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

195. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

196. *Id.* at 669.

197. *Id.*

sought to be published must have been lawfully acquired.”¹⁹⁸ Thus, any issue of the presumptive invalidity of prior restraints on media publications does not arise in the context of information gathering which is curtailed by generally applicable laws. In essence, if a law impedes the press’s ability to gather news, but is generally applicable to the public at large, then there is no First Amendment infringement. Additionally, the *Shulman* court upheld the constitutional validity of the California intrusion tort against the media stating: “otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.”¹⁹⁹

Under this rubric, it is constitutional to impose liability on publishers and the paparazzi for violating a generally applicable law that prohibits the invasion of a citizen’s privacy interest.²⁰⁰ As a result, if a legislature enacts a generally applicable statute that makes it unlawful to take intrusive photographs and those illegally obtained photographs are subsequently published, under the logic of *Cohen*, the publisher could be held liable without running afoul of the Constitution.

Critics may argue that any attempt to impose liability on publishers for the conduct of third parties violates the standard the Supreme Court set forth in *Bartnicki v. Vopper*.²⁰¹ In *Bartnicki*, the Court held that the First Amendment protected a broadcaster who disclosed an intercepted conversation which was unlawfully obtained by a third party, but lawfully obtained by the broadcaster.²⁰² The petitioners were the president of a local teachers union and a chief union negotiator.²⁰³ During heavily publicized negotiations between the teachers union and school board, an unidentified person intercepted a cell phone call between the petitioners.²⁰⁴ The contents of the intercepted phone call intimated, even if facetiously, a violent response to a deteriorating negotiation situation.²⁰⁵ Various radio stations and newspapers broadcast and published the contents of the intercepted phone call, the tape of which was allegedly found in a mailbox.²⁰⁶ The petitioners sued under a statute that prohibited publishers from disclosing information that they knew or had reason to know was

198. *Id.*

199. *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 239 (1998).

200. *See Cohen*, 501 U.S. at 669.

201. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001).

202. *See id.* at 535.

203. *See id.* at 518.

204. *See id.*

205. *See id.* at 518–19.

206. *See id.* at 519.

illegally obtained.²⁰⁷

The Court emphasized that “respondents played no part in the illegal interception.”²⁰⁸ To support its conclusion that the First Amendment protected the publisher, the Court cited precedent that focused on disclosure of information that was of “great public concern.”²⁰⁹ Furthermore, the Court rejected the petitioners’ argument that the statute served a compelling interest—to deter criminal conduct by third parties.²¹⁰ Responding to this argument, the Court stated, “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”²¹¹

Any reliance on *Bartnicki* to prohibit imposing liability on publishers for publishing illegally obtained photographs taken in violation of invasion of privacy statutes is misplaced. First, the Court stressed that its holding was limited to the particular factual context of the case.²¹² Thus, the case may only be read to create First Amendment protection for publishers who disclose illegally intercepted third-party cell phone conversations and only in instances where the publisher had no involvement in procuring the illegal interception.²¹³ It is important to note that there was no exchange of money in *Bartnicki* for the audiotape of the conversation. In fact, the defendant found the tape in his mailbox without any indication as to its source.²¹⁴

Bartnicki’s logic also fails to extend to publishers who *purchase* illegally obtained photographs.²¹⁵ The purchase alone may create a tortious aiding and abetting relationship between the third party and the publisher. In addition, the amount of the purchase may serve as an incentive to violate the law.

Second, the Court, in its analysis of precedent and in its holding, focused on the disclosed material being of “great public concern.”²¹⁶ It is hard to grasp how a celebrity going shopping is a matter of “great public

207. See *Bartnicki*, 532 U.S. at 520.

208. *Id.* at 525.

209. *Id.* at 527–28 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam)).

210. See *id.* at 530.

211. *Id.* at 529–30.

212. See *id.* at 529 (noting the Court’s repeated refusal “to answer categorically whether truthful publication may ever be punished consistent with the First Amendment”).

213. See *Bartnicki*, 532 U.S. at 525.

214. See *id.* at 518–19.

215. See *id.* at 532 n.19.

216. *Id.* at 528.

concern.”²¹⁷ If a more sensible and not utterly capacious concept of “newsworthiness” is adopted, then *Bartnicki*’s holding will be removed entirely from the present discussion.

Third, the Court in *Bartnicki* found the statute’s ability to deter illegal interceptions as speculative.²¹⁸ In the present discussion, removing the high price tags associated with celebrity photographs will deter photographers from violating the law in pursuit of such photos. *Bartnicki*’s deterrence speculation position rests on the fact that the illegal interception occurred without the publisher giving any financial incentive to the interceptor.²¹⁹ Photographers use costly materials such as film, cameras, and gas to obtain their “money shots.” Without a financial reward, there would be no incentive to violate the law or use dangerous tactics to obtain celebrity photographs.

Critics may also argue that imposing liability on publishers will have a chilling effect on “speech.”²²⁰ Publishers fearful of liability for publishing illegal photographs may err on the side of caution and not publish constitutionally protected photographs. Thus, contrary to the First Amendment,²²¹ free press would be abridged. However, this “chilling effect” argument fails for several reasons.

First, a crucial issue is citizen *safety*. As addressed above, paparazzi tactics to get “money shots” have become increasingly desperate and dangerous.²²² Publishers and courts both could discern which photographs were taken in hot pursuit,²²³ and which were taken in a civilized manner.²²⁴

Second, although the Constitution protects the dissemination of information into the marketplace of ideas, the protection does not extend to

217. For example, America’s fascination with watching others in reality television shows should not elevate the reality show participants’ mundane rituals of daily life into the realm of “great public importance.” The voyeuristic fetish of watching “Dane vomiting on Krystal” should not equate to “the intricacies of . . . running [a] platform for a D.C. mayoral candidate.” Alexis Miller, Comment, *Reality Check for Production Companies: Why Writers on Reality Television are Entitled to Overtime Pay*, 27 LOY. L.A. ENT. L. REV. 185, 208 (2007).

218. *Bartnicki*, 532 U.S. at 531–32.

219. *Id.* at 530 (stating that most violations of the statute at issue in *Bartnicki* were “motivated by either financial gain or domestic disputes”).

220. *See id.* at 533.

221. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of . . . the press.”).

222. *See supra* Part I.

223. For example, a court could determine which photographs were taken in hot pursuit by examining perspective, photo content, and vantage point.

224. For example, a court could determine which photographs were taken in a civilized manner by examining whether the subject posed for the picture, whether the picture was taken at a celebrity event, or whether the celebrity gave *consent*.

illegal newsgathering techniques.²²⁵ Thus, any liability imposed on photographers for taking illegal photos is not within the purview of the First Amendment. Furthermore, the First Amendment's protection does not reach publishers who disseminate such illegal photographs.²²⁶

Finally, any chilling of "speech" that might occur²²⁷ will not limit the press's ability to *write* about the photographed incident. As the Supreme Court has intimated, the availability of alternate forums to disseminate the speech may lessen the friction between a regulation and the First Amendment.²²⁸ A photograph and a written article should not be considered the same speech. A photograph depicts an image, whereas the written word relies on language to create an impression. If the image conveys a message (i.e., the identity of a celebrity's dinner date), then speech is not chilled if a sufficient alternate forum remains available to disseminate the underlying message.

Arguably, because celebrities are public figures, they invite public comment about their daily lives and have reduced privacy interests. However, this argument is a *gross* perversion of a constitutional standard set forth regarding defamation and libel law.²²⁹ "Public figure" status for purposes of defamation and libel law is premised on the rationale that public figures have access to media channels to counteract any false speech, and thus defend themselves publicly.²³⁰ However, in the context of photographs, the *raison d'être* of the "public figure" doctrine does not apply because there is no falsity that needs to be defended against publicly—a photograph (absent doctoring) is a truthful depiction of its underlying content.

Proponents of the press's right to hound celebrities will undoubtedly rely on the "public official" or "public figure" concepts articulated in *New York Times Co. v. Sullivan*²³¹ and *Gertz v. Robert Welch, Inc.*²³² to justify intrusions into celebrities' lives. In *Sullivan*, a police commissioner sought damages for an advertisement in the *New York Times* describing police activities against civil rights protesters that contained certain

225. See, e.g., *Cohen*, 501 U.S. at 669.

226. See *Bartnicki*, 532 U.S. at 530.

227. For instance, speech might be considered chilled if illegally obtained celebrity photographs are not published.

228. See *FCC v. Pacifica Found.*, 438 U.S. 726, 732–33 (1978).

229. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (establishing defamation and libel standards as applied to public officials and figures).

230. See *Sullivan*, 376 U.S. at 304–05 (Goldberg, J., concurring).

231. See, e.g., *id.* at 280.

232. See, e.g., *Gertz*, 418 U.S. at 335–37.

inaccuracies.²³³ In *Gertz*, an attorney brought a libel action against the publisher of a monthly publication for the John Birch Society, which had asserted that the attorney was a “Leninist” and a “Communist-fronter.”²³⁴

In discussing the applicable intent standard needed to hold the publisher liable, the Supreme Court in *Gertz* articulated a “public figure” standard which supplemented the previous “public official” standard from *Sullivan*.²³⁵ There are three types of public figures: all-purpose public figures, limited public figures, and involuntary public figures.²³⁶ The Court in *Gertz* stated that “[a]bsent clear evidence of general fame or notoriety in the community, and *pervasive involvement* in the affairs of society, an individual *should not be deemed a public personality for all aspects of his life*.”²³⁷ The Court then stated that for limited public figures, it is “preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy.”²³⁸ Finally, the Court stated that, in rare instances, a person may be labeled an involuntary public figure when he or she “become[s] a public figure through no purposeful action of his own.”²³⁹

Assuming that importing these definitions of “public figure” into invasion of privacy actions is not misplaced, it is hard to see how a celebrity meets the “all-purpose” or “limited public figure” definitions. The “all-purpose public figure” standard as articulated in *Gertz* requires clear evidence of: (1) “general fame or notoriety in the community” and (2) “pervasive involvement in the affairs of society.”²⁴⁰ The dictionary defines “pervasive” as becoming “diffused throughout every part of.”²⁴¹ Granted, a celebrity may have general fame in the community due solely to the fact that his or her appearance is used in mass marketing. However, unless the celebrity involves himself or herself *pervasively* in the *affairs* of society, a celebrity screen actor or musician should not be deemed an all-purpose public figure for the sole reason that he or she acts or plays a musical instrument. To reach such a result would require an expansive reading of *Gertz*.

233. *Sullivan*, 376 U.S. 254.

234. *Gertz*, 418 U.S. at 326.

235. *Id.* at 335–37.

236. *Id.* at 343–45.

237. *Id.* at 352 (emphasis added).

238. *Id.*

239. *Id.* at 345.

240. *Gertz*, 418 U.S. at 352.

241. Merriam-Webster Online, Definition of Pervade, <http://www.webster.com/dictionary/pervading> (last visited Mar. 8, 2008).

Even if a celebrity is pervasively involved in the affairs of society, current concepts of “newsworthiness” should limit intrusions into the public figure’s affairs to those which are proportional to relaying the newsworthy subject matter of the article, broadcast, or photograph.²⁴² For instance, built into the *Shulman* “newsworthy” definition is the recognition that intrusions or disclosures of material that fall outside of the scope of the newsworthy material are not protected.²⁴³ Therefore, the requirement of proportionality between the newsworthy subject matter and the facts relevant to the newsworthy subject matter²⁴⁴ may also serve as a shield for those who are deemed public figures from media encroachments.

Furthermore, even if a celebrity is a limited public figure, the scope of their public figure status must be limited to the extent of their participation in a particular controversy.²⁴⁵ Thus, a celebrity could be classified as a limited public figure for anything specifically relating to his or her celebrity status (i.e., screen acting, musicianship, etc.). For example, a screen actor may be open to the public’s gaze at awards ceremonies, movie premier nights, and other activities related to screen acting. However, this does not mean, as *Gertz* expressly indicated, that a celebrity is a public figure by virtue of his or her celebrity status when walking down the street, going to a party, or venturing to a toy store to buy toys for a child.²⁴⁶

The determination of acceptable encroachment turns largely on the nature of a celebrity’s fame, and there is room for argument in determining what in fact makes a particular celebrity famous.²⁴⁷ For instance, one could argue that pop singer Britney Spears became famous due to her performing and singing ability, and, therefore, all intrusions not relating to her performing or singing would be improper. However, if one claims her fame stems from her sex appeal, then arguably her various pregnancies, dating preferences, and party lifestyle may be subject to public gaze.²⁴⁸ In determining the scope of what makes a citizen a public figure, courts should look to the occupation that made the person a public figure and not to speculative conjectures about market behavior. Otherwise, the

242. See *Shulman*, 18 Cal.4th at 215 (discussing analysis of newsworthiness).

243. See *id.* at 222 (1998).

244. See *id.*

245. *Gertz*, 418 U.S. at 351.

246. See *id.* at 352 (stating that unless there is “clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society,” a person is not a public figure for all aspects of life).

247. *Id.* at 351.

248. See <http://uk.movies.yahoo.com/artists/s/Britney-Spears/biography-133791.html> (last visited Apr. 8, 2008) (biography of Spears discussing her musical accomplishments and personal setbacks).

marketability of sex appeal in pop-stars such as Britney Spears could be used as a reason for fame which could justify broad invasions of privacy. If limited in this way, any reliance by the press on general public figure status to invade privacy would be misplaced.

In sum, generally applicable laws that curtail the “newsgathering,”²⁴⁹ of paparazzi and impose liability on publishers for printing illegal photographs will not contravene the United States Constitution. Even if generally applicable laws do run afoul of the First Amendment, the laws can pass constitutional muster if they meet the strict scrutiny test.²⁵⁰ Under this test, a law is constitutional if it serves a compelling government interest and if it is narrowly tailored “such that there are no less restrictive means available to effectuate the desired end.”²⁵¹ There is no more compelling government interest than protecting the immediate safety of citizens. Paparazzi tactics not only endanger the physical safety of any given celebrity, but also jeopardize the safety of countless other pedestrians and automobile drivers who may be ensnared in a high speed paparazzi chase. Furthermore, a law restricting the ability of paparazzi to take photographs of a celebrity engaging in private activities is narrowly tailored to achieve this interest by the least restrictive means because it only targets illegally taken photographs and not the written word, which results in only a de minimis effect on a free press. Therefore, even if the Constitution itself does not support regulating paparazzi tactics, a generally applicable law targeting this conduct will likely meet a strict scrutiny standard and thus would be constitutional.

Arguably, laws that were designed to discourage paparazzi privacy intrusions would not meet strict scrutiny because they are overbroad—they regulate more conduct than is necessary to achieve their purpose. For example, the press may argue that if the concern is pedestrian safety, then traffic laws should be enforced. However, enforcement of the traffic laws can only protect pedestrians after a traffic violation has occurred, rather than removing the impetus for causing the traffic violation in the first place. Given the paparazzi’s regular pattern of violating traffic laws,²⁵² regulating paparazzi in an attempt to prevent violations is appropriate. Therefore, preventative measures could be narrowly tailored to regulate such conduct so that those measures are not deemed overly broad.

249. TMZ.com, *New Law*, *supra* note 3 (discussing a California law aimed at curtailing aggressive paparazzi conduct; using “newsgathering” loosely).

250. *See* 16B AM. JUR. 2D *Constitutional Law* § 815 (2007).

251. *Id.*

252. *See, e.g.*, *MonstersandCritics.com*, *supra* note 11; *Morton*, *supra* note 13, at 1446.

VI. CONCLUSION

Clearly there are not only problems between the unrestrained paparazzi and celebrities' right to privacy, but also between the unrestrained paparazzi and celebrities' physical safety.²⁵³ Clashes between the paparazzi and celebrities continue to this day.²⁵⁴ The violent nature of these interactions is apparent when observing the drastic lengths paparazzi are willing to go to obtain a "money shot."²⁵⁵ This author addressed several ways to strengthen celebrities' privacy rights.²⁵⁶

In particular, intrusive paparazzi tactics can be curbed by eliminating the daily existence of American celebrities from a definition of "newsworthiness"²⁵⁷ unless they are filling a public role which has made them famous. Additionally, laws prohibiting the photography of celebrities in their daily lives and placing sanctions on the indirect employers of the paparazzi—the tabloid media—will effectively deter future dangerous paparazzi conduct.

Moreover, courts could focus more on the relationship between the newsworthiness of a given issue and the activity that made "the individual a public figure."²⁵⁸ If "social value" is what constitutes newsworthiness,²⁵⁹ it is hard to imagine a more perverse concept of social value that incorporates as "valuable" Paris Hilton's late-night dining preferences or Lindsay Lohan's driving habits. This is precisely the prurient gossip that Warren and Brandeis decried in their seminal article.²⁶⁰ This "social value,"²⁶¹ for whatever readership it may entice, should not be sufficient to outweigh a person's right to privacy and safety.

In addition to modifying newsworthiness to preclude the intrusive prying into celebrity lives, sanctions should be placed on media defendants who knowingly use paparazzi photographs that were taken illegally. Given the high prices paid to paparazzi photographers, it is important to eliminate the source of their wealth in order to deter their conduct. Targeting the source is more effective than attacking a many-headed paparazzi hydra

253. See, e.g., *MonstersandCritics.com*, *supra* note 11; Morton, *supra* note 13, at 1446.

254. See, e.g., *MonstersandCritics.com*, *supra* note 11; Morton, *supra* note 13, at 1446.

255. See, e.g., Eckinger, *supra* note 12.

256. See *supra* Parts IV–V.

257. See *Shulman v. Group W Prods., Inc.*, 18 Cal. 4th 200, 222 (1998) (determining limitations on privacy based on "newsworthy" content).

258. See *id.* at 222.

259. See *id.*

260. See Warren & Brandeis, *supra* note 25, at 214–15 (stating that "[T]he law must . . . protect those persons with whose affairs the community has no legitimate concern.").

261. See *Shulman*, 18 Cal. 4th at 222.

because even if one paparazzo is sued and eliminated from the game, there is another one to replace him.

Finally, the media has the option of getting the consent of celebrities to photograph them doing private activities. This option should be the one most encouraged because it respects privacy interests and eliminates potential lawsuits.

It is easy to slough off the plight of celebrities by saying “they are rich and famous, and this is just a cost of doing business.” However, celebrities are American citizens who deserve the protection of the law for their privacy rights and safety. Protecting their privacy is protecting *our* privacy. It will be a sad day when the antics of a group of fiendish photographers recreate the nightmare of Princess Diana’s death²⁶² on our own soil. Action must be taken now.

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262. See Swardson & Trueheart, *supra* note 8, at A1.

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