

ALL THE WORLD IS NOT A STAGE: FINDING A RIGHT TO PRIVACY IN EXISTING AND PROPOSED LEGISLATION

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“You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard, and, except in darkness, every movement scrutinized.”

George Orwell, 1984¹

INTRODUCTION

“You’re a lot of vultures! Don’t you respect anything?” yelled a visibly irritated woman at a swarm of photographers in Federico Fellini’s film *La Dolce Vita*.² Fellini’s depiction of the invasive tactics of Paparazzo—the celebrity-obsessed photographer who was based on the life of Tazio Secchiaroli—came to represent those photojournalists who hunt celebrities for their pictures.³ Even Secchiaroli, the originator of the now commonplace stalking photography, seems dismayed by the tactics of today’s photojournalists, stating that “the limits (of photographers) should be good taste. There is a limit where someone should just say ‘stop.’ You shouldn’t let it go this far.”⁴ Unfortunately for journalism, celebrities, and society as a whole, the courts have yet to say “stop.”

This Note argues that the First Amendment does not require that celebrities be hunted and fed to the salivating mouths of America’s tabloid culture. Privacy can become a reality by (1) implementing a federal regulation based on California’s anti-paparazzi statute and/or

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1. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 158 (Clarendon Press 1984) (1949).

2. Steve Wulf, *Lights, Camera, Reaction*, *TIME*, Nov. 13, 1995, at 102, 102 (quoting *LA DOLCE VITA* (Riama Film, 1961)).

3. Phillip Pulella, *Paparazzi have changed since the days of Dolce Vita*, *NANDOTIMES*, Aug. 31, 1997, at <http://archive.nandotimes.com/newsroom/nt/831changed.html> (on file with the *New York University Journal of Legislation and Public Policy*).

4. *Id.*

(2) invigorating the existing tort of intrusion⁵ and limiting the newsworthy defense. Part I briefly describes the climate of today's society with regard to celebrity privacy. Part II examines the constitutional basis for a right to privacy. Part III discusses the origins of the First Amendment and the newsworthy defense and suggests that California's newsworthy standard could potentially be an ideal model for privacy protection. This Part also sets forth the various existing torts designed to protect personal privacy, specifically the torts of public disclosure and intrusion, and suggests how these torts could be more effective in protecting privacy rights. Part IV analyzes the existing California privacy statute and a proposed federal bill. Finally, Part V asserts the need for federal standards.

I.

THE TABLOID CULTURE

By 1890, technological growth and the advent of creations such as the camera left Samuel D. Warren and Louis D. Brandeis fearing for individuals' right to privacy.⁶ Technology has developed even further beyond what the Founding Fathers had envisioned when they drafted the First Amendment, and Warren and Brandeis' fears largely have been realized. With progressively more intrusive technology, journalists have been able to uncover increasingly private stories, and antiquated laws have protected the right to publish the majority of these stories rather than the privacy of their subjects. Although journalists must abide by the same laws as ordinary citizens, they are afforded one defense not available to the rest of society. The First Amendment shields the newsgathering activities of paparazzi journalists under the all-encompassing "newsworthiness" doctrine.⁷ While journalists can be sued for the invasion of privacy torts, they are seldom found liable because of the broad interpretation of this defense.

The market for reality programming and intrusive reporting has yet to wane because Americans "consume 'celebrities' like potato

5. William L. Prosser divides the privacy tort into four distinct torts: (1) intrusion upon the plaintiff's solitude or seclusion, (2) public disclosure of embarrassing private facts, (3) publicity that places the plaintiff in a false light, and (4) commercial exploitation of the plaintiff's name or likeness. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). This division is reflected in the Second Restatement of Torts. See RESTATEMENT (SECOND) OF TORTS §§ 652A-652E (1977).

6. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195-96 (1890).

7. See RESTATEMENT (SECOND) OF TORTS § 652D cmts. d-h (1977); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 117 (5th ed. 1984).

chips.”⁸ This does not mean, however, that Americans should be fed. Rather than trying to change society, the problem can be attacked at its source. Legislative efforts could limit the supply of invasive articles and photographs, which would leave society with no choice but to adapt. Without cohesive regulation, the paparazzi will continue to flourish. Celebrity photographs can yield an income significantly greater than an average photographer’s salary.⁹ Consequently, journalists will continue to search for these shots until their monetary returns are lessened or their tactics are prohibited by federal regulation.

What should be considered “newsworthy”? Is it a standard to be determined by society? The media? The government? Society has become increasingly voyeuristic, and courts have not provided incentives to limit society’s invasive behavior.¹⁰ Our fascination with real people has dramatically escalated in proportion to developments in technology. We started with *The People’s Court* and *Oprah* and have spiraled rapidly into the depths of *The Real World*, *Road Rules*, *Survivor*, *Temptation Island*, *Big Brother*, *Jenni.com*, *Ed TV*, *15 Minutes*, *Series 7*, *Springer*, *Sally*, and *Ricki Lake*. Unless the courts begin to limit the press, *The Truman Show*—in which the title character is unknowingly the star of a live television show—will not only be a hit movie, but will become a reality.

Today, rather than leaving gossip to the tabloids, “corporate pressures are forcing more news organizations to produce entertainment-oriented reports.”¹¹ This will continue to be the case as long as courts protect these reports as newsworthy. If the newsworthy element were given some teeth, it could act as a deterrent against paparazzi tactics, forcing entertainment gossip back into the trenches of the *National Inquirer* and out of the eleven o’clock news. The lines need to be redrawn further in favor of privacy so that newscasts can return to reporting the news.

It is difficult to attempt a call to arms to help celebrities. In his testimony before Congress, actor Paul Reiser stated, “I’m sure that there are many in the American public, and perhaps even those among you here in this room who feel that the last thing this Congress needs

8. Allan R. Andrews, *We’ve Met the Dark Side of Journalism*, PACIFIC STARS AND STRIPES, Sept. 7, 1997, at <http://www.toad.net/~andrews/diana.html> (on file with the New York University Journal of Legislation and Public Policy).

9. See Jonathan Alter, *Dying for the Age of Diana*, NEWSWEEK, Sept. 8, 1997, at 39; Richard Zoglin, *Hey, Wanna Buy Some Pix?*, TIME, Sept. 15, 1997, at 56.

10. See generally Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273 (1999).

11. Jacqueline Sharkey, *The Diana Aftermath*, AM. JOURNALISM REV., NOV. 1997, at 18, 22.

to do is enact a law to help big fancy celebrities enjoy their fancy lives in their big fancy homes.”¹² Once it is accepted that the “fancy lives” of celebrities can involve heartache and pain, then it becomes easier to see why legislation to mitigate the paparazzi problem is necessary. Imagine the following wedding:

There were helicopters buzzing around . . . my moment wasn't as peaceful as I thought it would be. We had a decoy bride and groom. We tried everything . . . we did what we could with the knowledge that it still would be intruded upon, but that we did all we could and at least we could go on from there.¹³

Alternatively, imagine photographers armed with high-powered lenses aimed at a honeymoon suite, waiting to shoot a compromising picture of a new bride and groom for the cover of a newspaper or magazine.¹⁴ What if journalists pretended to be family members to get into the hospital room of a couple's premature baby?¹⁵

People often assume that since celebrities have chosen to become public figures and use the press to benefit their careers, they must deal with the paparazzi as part of their job.¹⁶ This is not and should not be the case. Privacy is not a right that should automatically and completely be sacrificed for fame—that price is too high. Actor Michael J. Fox stated:

I work very hard to entertain an audience, and when they enjoy my work, I am deeply gratified. . . . I strongly disagree with those who would argue that some sort of Faustian bargain has been struck whereby “public” figures are fair game, any time, any place, including within the confines of their own homes.¹⁷

In fact, Tom Selleck has stated, “If it came to a choice between this invasion of my privacy and the media promoting my career, I'd

12. *Protection from Personal Intrusion Act and Privacy Protection Act of 1998: Hearing on H.R. 2448 and H.R. 3224 Before the House Comm. on the Judiciary*, 105th Cong. 15 (1998) [hereinafter *Privacy Hearing*] (statement of Paul Reiser, actor).

13. Richard J. Curry, Jr., *Diana's Law, Celebrity and the Paparazzi: The Continuing Search for a Solution*, 18 J. MARSHALL J. COMPUTER & INFO. L. 945, 945 (2000) (quoting Brooke Shields, actor, May 15, 1997).

14. See *Privacy Hearing*, *supra* note 12, at 7 (statement of Michael J. Fox, actor).

15. *Privacy Hearing*, *supra* note 12, at 15 (statement of Paul Reiser, actor).

16. D. Scott Gurney, Note, *Celebrities and the First Amendment: Broader Protections Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 703 (1986); see also Richard Roeper, *Persecuted by Tabs: Don't We ALL Know Feeling*, ST. LOUIS POST-DISPATCH, Sept. 15, 1997, at 3E.

17. *Privacy Hearing*, *supra* note 12, at 6 (statement of Michael J. Fox, actor).

say, don't help me."¹⁸ As hard as it may be to sympathize with celebrities, as a society, we must try.

II.

THE CONSTITUTION AND THE RIGHT TO PRIVACY

The Constitution does not explicitly provide a right to privacy.¹⁹ However, courts and scholars alike have derived such a right from the various amendments of the Bill of Rights.²⁰ *Griswold v. Connecticut* discusses that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."²¹ There exists, then, a penumbral right to privacy implicit in the Constitution. This right, however, is implicated only by federal and state action. State action can be found "when the state affords a legal right to one private party that impinges on the Constitutional rights of another."²² In this way, one can envision a constitutionally protected right to privacy when one's privacy is impinged by another's First Amendment protections. Currently, however, these two rights, though equally important, seem to be mutually exclusive; when they clash, the courts have found in favor of the First Amendment almost without exception.²³ The First Amendment has conflicting goals: "just as the First Amendment protects the privacy of every person to think and to express thoughts freely, it also fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals."²⁴

An argument made in *Cox Broadcasting Corp. v. Cohn* illustrates a potential expansion of the constitutional "zones of privacy." The Court conceded the merit of the argument that there is a "zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity."²⁵ However, the Court nevertheless found that the press was entitled to broadcast the name of a rape/murder victim when the

18. Yahlin Chang & Gregory Beals, *Too High a Price for Fame*, NEWSWEEK, Sept. 15, 1997, at 16, 16 (quoting Tom Selleck, actor).

19. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1964); ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY*, at xiii-xvi (1995).

20. FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 52 (1997).

21. 381 U.S. at 484 (citation omitted).

22. CATE, *supra* note 20, at 51.

23. See Peter B. Edelman, *Free Press v. Privacy: Haunted by the Ghost of Justice Black*, 68 TEX. L. REV. 1195, 1198 (1990).

24. CATE, *supra* note 20, at 55.

25. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 487 (1975).

name was acquired from public judicial proceeding records.²⁶ The Court specifically relied on the fact that the information broadcast was a matter of public record.²⁷ But what if it was not? Would a constitutional “zone of privacy” then attach? The Court declined to answer this question.

The Supreme Court has recognized a Fourth Amendment right to privacy that provides an appropriate analogy for the right of celebrities to keep their personal lives private under the First Amendment.²⁸ Justice Harlan’s concurrence in *Katz v. United States* later became the test for what is considered private within the meaning of the Fourth Amendment: an actual expectation of privacy that society deems reasonable.²⁹ While the Fourth Amendment applies specifically to searches and seizures,³⁰ the Court in *Katz* found an invasion of privacy in the absence of an invasion of property, simply because an expectation of privacy was thwarted.³¹ Federal authorities attached an electronic listening device to the outside of a phone booth that the appellant was using.³² The Court found that the Constitution protects whatever one “seeks to preserve as private, even in an area accessible to the public.”³³ If this reasoning is extended into the realm of civil liability, celebrities walking hand-in-hand in a public park could preserve their privacy, even though they are in a public place.

With the proliferation of the Internet, the Clinton administration created the Information Infrastructure Task Force (IITF), and specifically the Privacy Working Group of the Information Policy Committee, to address privacy issues.³⁴ Although the Fourth Amendment right to privacy is not applied outside the realm of criminal defense, the principles of IITF assume the reasonable expectation of privacy standard.³⁵ This adoption in areas outside of criminal law is indicative

26. *See id.* at 491. “By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served.” *Id.* at 495.

27. *See id.*

28. This analogy is pertinent because constitutional and statutory interpretation strives to achieve internal consistency, and a definition or standard applicable in one section of the law might serve other areas. *See generally* Delf Buchwald, *Statutory Interpretation in the Focus of Legal Justification: An Essay in Coherentist Hermeneutics*, 25 U. TOL. L. REV. 735 (1994) (discussing desire for both internal and external consistency and coherence in interpretation).

29. *See Katz v. United States*, 389 U.S. 347, 361 (1967).

30. *Id.* at 362.

31. *Id.*

32. *Id.* at 348.

33. *Id.* at 351–52.

34. *Id.* at 91.

35. CATE, *supra* note 20, at 92.

of a willingness to utilize the “reasonableness” standard in more ways than previously recognized. An expanded use would perhaps afford celebrities more protection if adopted in federal anti-paparazzi legislation. The Working Group “appeared to adopt the Fourth Amendment reasonableness test to determine whether an expectation of privacy was subjectively held by the individual and deemed objectively reasonable by society.”³⁶ The Group also conceded that a reasonable expectation of privacy under these principles may exceed what is considered reasonable under the Fourth Amendment,³⁷ illustrating a willingness to extend traditional notions of privacy. *Shulman v. Group W Productions*³⁸ and the recent additions to California’s Civil Code³⁹ are examples of the reasonable expectation of privacy standard being applied in areas outside of the search and seizure context.

Expanding the reasonableness requirement of the Fourth Amendment is a beneficial way to keep the interpretation of the amendment contemporary, for as it stands, the requirement “diminishes the amendment’s effectiveness in keeping pace with technological change. . . . As a result, the Court evaluates privacy issues presented in the context of new technologies against measures of reasonableness that were formed without regard for those technologies.”⁴⁰ Such an approach is tautological because “this amendment applies only when society already awaits it.”⁴¹

The same anachronism applies to the “fundamental decision” right to privacy. In *Roe v. Wade*, the Supreme Court found that the constitutional guarantee of personal privacy only included “personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”⁴² This right considers “societal familiarity with and acceptance of the activity for which privacy is being sought,”⁴³ and is also tautological because “by limiting liberty to ‘traditionally pro-

36. *Id.* at 92 (quoting PRESIDENT’S INFORMATION INFRASTRUCTURE TASK FORCE, INFORMATION POLICY COMMITTEE, PRIVACY WORKING GROUP, PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE: PRINCIPLES FOR PROVIDING AND USING PERSONAL INFORMATION, I.A-I.C at ¶ 2, 4 (Washington 1995)).

37. *Id.*

38. See *Shulman v. Group W Prod., Inc.*, 955 P.2d 469 (Cal. 1998). *Shulman* is discussed *infra* in detail in Part III.A.3 and Part IV.A.

39. CAL. CIV. CODE § 1708.8 (West Supp. 2001). The code is discussed *infra* at length in Part IV.A.

40. CATE, *supra* note 20, at 59.

41. *Id.* (quoting PAUL M. SCHWARTZ & JOEL R. REIDENBERG, DATA PRIVACY LAW: A STUDY OF UNITED STATES DATA PROTECTION 63–64 (Michie 1996)).

42. 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

43. CATE, *supra* note 20, at 61.

tected' interests . . . the Constitution is rendered useless as a protective device, because it will be construed to apply only to those interests which are already protected by other traditional laws.'"⁴⁴

III.

PROTECTING THE RIGHT TO PRIVACY: THE TORTS OF INTRUSION AND PUBLIC DISCLOSURE OF PRIVATE FACT

Dean Prosser expanded the notion of the "right to privacy," coined by Justices Warren and Brandeis in 1890, by identifying four separate privacy torts: (1) intrusion upon one's solitude or seclusion or private affairs; (2) appropriation of one's name or image for financial gain; (3) public disclosure of embarrassing private fact; and (4) false light publicity.⁴⁵ The Restatement adopted Prosser's formulation in 1977.⁴⁶ Although four privacy torts have been articulated, judicial concern for First Amendment rights has reduced the enforcement of these torts to a negligible level.⁴⁷

The newsworthy defense poses the greatest obstacle to meaningful anti-paparazzi legislation because the standard is broad and elusive. Courts have had difficulty creating uniform standards for determining which information is newsworthy or of legitimate public concern.⁴⁸ Some courts follow the Restatement, acknowledging that what is newsworthy is "a matter of the community mores" and therefore defer to jury determinations on this issue.⁴⁹ Other courts define newsworthiness descriptively, "emphasiz[ing] the public's actual interest in information, not . . . what ought to interest the public,"⁵⁰ and align with media judgments about newsworthiness.⁵¹

44. Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 143-44 (1991).

45. See Prosser, *supra* note 5, at 389-406.

46. RESTATEMENT (SECOND) OF TORTS §§ 652B-E (1977).

47. See Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 200 (1998) (arguing that "an individual's right to privacy receives almost no protection from the public's insatiable demand for information" and that recent Supreme Court jurisprudence "makes it almost impossible for states to impose liability on the publication of truthful information").

48. *Id.* at 199.

49. *Id.* at 200 (quoting *Virgil v. Time*, 527 F.2d 1122, 1129 (9th Cir. 1975)).

50. Lidsky, *supra* note 47, at 200 (quoting Linda N. Woito & Patrick McNulty, *The Privacy Disclosure Tort and the First Amendment: Should the Community Decide Newsworthiness?*, 64 IOWA L. REV. 185, 196 (1979)).

51. *Id.*

Narrowing the interpretation of the newsworthy defense to the public disclosure of private facts tort is within the meaning of the First Amendment. It was neither the intent of the Framers, nor the purpose of the First Amendment, to ensure that all information, regardless of how trivial, should be free. To the contrary, not all information should be free.⁵² These rights to privacy in personal matters outweigh the public's right to know.⁵³ This statement is not a significant departure from the law as it now stands—the problem lies in the interpretation of the law.

Additionally, the intrusion tort is applicable, as it is within this framework that celebrities' right to privacy is most frequently impeded where it should be protected. Narrow interpretations of privacy and broad interpretations of newsworthiness have taken the bite out of these torts.⁵⁴ These interpretations either need to be changed, or a new line of attack needs to be adopted. California's intrusion statute and its attendant newsworthy standard are good examples of how this can be accomplished.

Included in this Part is a discussion of the First Amendment as background for the newsworthy defense to the tort of public disclosure of private facts. I also discuss the intrusion tort of the right to privacy as developed by Prosser and adopted by the Restatement.

A. *Public Disclosure of Private Facts and the Newsworthy Defense*

The tort of public disclosure of private facts shows little promise of effectively safeguarding the privacy of celebrities. The newsworthy defense is so broad that it has virtually swallowed this tort.⁵⁵

52. See generally Marci A. Hamilton, *The Constitution and Its Information Pathways* (Spring 2001) (describing in detail priority and value Constitution places on various types of public and private information) (unpublished manuscript, on file with the *New York University Journal of Legislation and Public Policy*).

53. *But cf.* *Rosemont Enter. v. Random House, Inc.*, 294 N.Y.S.2d 122, 127 (1968) (stating that law affords little protection to public figures' privacy).

54. See Lidsky, *supra* note 47, at 199–200; see also *Shulman v. Group W Prod., Inc.*, 995 P.2d 469, 496 (Cal. 1998).

55. Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?* 31 *LAW & CONTEMP. PROBS.* 326, 336 (1996) (exploring whether defense is “so overpowering as virtually to swallow the tort”).

1. *Origins of the First Amendment*

The concepts of freedom of thought and expression were developed in an attempt to protect people's political opinions.⁵⁶ The Founding Fathers intended to ward off an intrusive government. They created freedom of the press in furtherance of this goal:

The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.⁵⁷

According to the Supreme Court, a central tenet of the First Amendment is to protect the creation and distribution of information relating to "self governance."⁵⁸ "Expression concerning the activities of the government and elected and appointed officials is critical, and protected by the First Amendment, because it is the information that the citizens of a democratic society must have to govern."⁵⁹ The Court has considered the First Amendment to support the marketplace of ideas;⁶⁰ it was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people."⁶¹

56. See *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.").

57. Stephen M. Stern, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115, 124 (1997) (citing *Roth*, 354 U.S. at 484 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774))).

58. CATE, *supra* note 20, at 28; *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 41 (1971).

59. CATE, *supra* note 20, at 68.

60. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

61. CATE, *supra* note 20, at 69 (citing *Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484)).

Information that is unnecessary to effect change is afforded less constitutional protection.⁶² The Supreme Court has “long recognized that not all speech is of equal First Amendment importance.”⁶³ In 1927, Brandeis expressed his opinion on three purposes of the First Amendment, and the justifications he sets forth denote the following hierarchy: “enlightenment,” “self-fulfillment,” and “safety-valve.”⁶⁴ The “safety-valve” justification is similar to what the Continental Congress tried to achieve and involves “the societal need for free expression as an alternative for or sublimation of social or political violence.”⁶⁵ The “self-fulfillment” reasoning embodies the need for human self-expression.⁶⁶ The “enlightenment” explanation is most relevant to the discussion of newsworthiness as a defense to the tort of public disclosure of embarrassing private fact. The supposed purpose of this rationale—that the First Amendment protects political, social and scientific news as well as entertainment⁶⁷—is that society will form better opinions and make more informed choices if it has open access to information.⁶⁸ This supports Justice Holmes’ desire for a “free trade in ideas”⁶⁹ where the best, or most truthful, information will prevail. However, this justification assumes that the available information will be useful in making decisions. In reality, the information that the privacy laws should, but does not currently, protect, has no relevance to the free trade of ideas, except as fodder for gossip.

Judge Richard A. Posner asserts that gossip fills a social function because people can model their lives on the choices that celebrities make.⁷⁰ This may be socially beneficial in that celebrity biographical stories can build up the American dream of success. However, the sordid details of a celebrity honeymoon offer little to help citizens model their lives. This information, this gossip, should be afforded less constitutional protection than information that contributes to the public debate.⁷¹ This lesser constitutional value should be included in

62. See *Sullivan*, 376 U.S. at 269; see also *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Roth*, 354 U.S. at 484.

63. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

64. J. THOMAS MCCARTHY, 2 *THE RIGHTS OF PUBLICITY AND PRIVACY* § 8:2 (2d ed. 2000) (relying on *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. and Holmes, J., concurring)).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at § 8:3.

69. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

70. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 396 (1978).

71. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759–60 (1985) (“[S]peech on matters of purely private concern is of less First Amendment

the newsworthy analysis when weighing the value against the intrusion.

First Amendment scholar Alexander Meiklejohn states that the First Amendment protects speech “upon matters of public interest—roads, schools, poor houses, health, external defense, and the like.”⁷² Meiklejohn claims that speech must be necessary for the functioning of democracy in order to be considered in the public interest.⁷³ While this seems limiting, it conforms to the notion that the most protected speech, speech in the public interest, should relate to governance. In *New York Times Co. v. Sullivan*, the Supreme Court noted that “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁷⁴ While the First Amendment was written to protect this type of speech, it has come to protect information that in no way contributes to the public debate. This incongruity led Richard Masur, president of the Screen Actor’s Guild, to wonder, “Does what Sharon Stone is eating or wearing at any given moment or—even who’s in her swimming pool—have any relation to the public debate?”⁷⁵ The answer is obvious. Yet the Constitution is used to protect information that does not add to the debate, but actually detracts from it.⁷⁶ Meiklejohn reminds us that “what is essential is not that everyone shall speak, but that everything worth saying shall be said.”⁷⁷ The First Amendment, under current interpretation, protects the unworthy at the expense of other, arguably more important, constitutional values.

As people become more voyeuristic, they *watch and listen* more and *do and say* less⁷⁸—debate responds inversely to reclusion. As people become more addicted to voyeuristic programs and more interested in the lives of others, they interact with other people less and

concern. . . . In such a case, ‘[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government’” (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Or. 1977)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 420 (1974).

72. Calvert, *supra* note 10, at 311 (quoting ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24 (Harper & Bros. 1960)).

73. MEIKLEJOHN, *supra* note 72, at 24.

74. 376 U.S. 254, 270 (1964).

75. Michael Higgins, *Public Relief*, 83 A.B.A. J. 68, 70 (1997).

76. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 2–3 (The Free Press 1993).

77. MEIKLEJOHN, *supra* note 72, at 26.

78. See generally SUNSTEIN, *supra* note 76.

watch them more.⁷⁹ Americans are not solely responsible for their own voyeurism. The media industry maintains some level of accountability for the state of American culture by pressuring news shows to carry more entertainment programming.⁸⁰ Meiklejohn and Cass Sunstein have professed disappointment “with the performance of the mass media and popular culture in promoting democratic values.”⁸¹

But voyeurism, reclusion, and the resulting decrease in the public debate are not the only problems. Sunstein notes, “[I]f sensationalistic scandals and odd anecdotes not realistically bearing on substantive policy issues are the basic source of political judgments, the system cannot work.”⁸² As long as gossip is the most popular “news,” Sunstein asserts that democracy will face deleterious effects. If entertainment dominates the news, then items relating to self-governance and more central to democracy are left on the editing room floor (if they make it that far).

2. *Different Standards for Newsworthiness*

Personal information about celebrities is protected based on the justification that the public has a right to know.⁸³ The Restatement standard was articulated in *Virgil v. Time, Inc.*,⁸⁴ which asserts that the newsworthy standard must take into account:

[C]ustoms and conventions of the community . . . [where] what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say he had no concern.⁸⁵

The fault of this “limitation” is that our increasingly voyeuristic society will always be interested in knowing facts that it is not entitled to know. The existing standards for newsworthiness are circular. First Amendment scholar Diane Zimmerman notes that most courts

79. *Id.*

80. Sharky, *supra* note 11, at 22.

81. Jack M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 *YALE L.J.* 1935, 1956–57 (1995) (book review).

82. SUNSTEIN, *supra* note 76, at 20–21.

83. *Cf.* Rosemont Enter. v. Random House, Inc., 294 N.Y.S.2d 122, 127 (1968).

84. 527 F.2d 1122, 1128–29 (9th Cir. 1975); *see also* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

85. *Virgil*, 527 F.2d at 1129 (quoting RESTATEMENT (SECOND) OF TORTS § 652D, cmt. f (Tentative Draft No. 13, 1967)). This comment was later adopted in RESTATEMENT (SECOND) OF TORTS § 652D, cmt. h (1977)).

employ a “leave-it-to-the-press model”⁸⁶ for newsworthiness, basing the determination on the premise that “what is printed is by definition of legitimate public interest.”⁸⁷ This model relies on the market to control unchecked media discretion,⁸⁸ but it does not take into account the reality that there will *always* be a market. There is no support for the notion that the market will react poorly to the continual inundation of over-intrusive stories, and that people stop buying papers that include such stories, leading the media industry to adapt to public tastes and decrease the amount of this type of information.

Privacy concerns were first elucidated in 1890, and intrusions have grown as technology has advanced. The materials the media industry produces must be stopped at their source: our laws must limit the production of the paparazzi’s invasive materials before they reach the public. The “leave-it-to-the-press” standard and the *Virgil/Restatement* standard both rely on society to determine what constitutes newsworthiness. The fault with this reasoning is that, by extrapolating from the voyeuristic desires of society today, it is hard to imagine a time when these desires will cease. If a backlash were going to occur, leading to a decrease in the market demand, it would have occurred in the aftermath of Princess Diana’s death.⁸⁹ However, the only response was an outcry against the paparazzi with no tangible results.⁹⁰

Courts have been willing to accept newspapers’ self-imposed definition of newsworthiness,⁹¹ and they have provided circular definitions of their own. The Supreme Court stated:

One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press. “Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed to cope with the exigencies of their period.”⁹²

86. Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis’s Privacy Tort*, 68 CORNELL L. REV. 291, 353 (1983).

87. *Id.*

88. *See id.* at 354–55.

89. *See generally*, Bob Rowland, *Diana’s Law: Would It Survive Constitutional Scrutiny?*, 27 CAP. U. L. REV. 191 (1998).

90. *See id.*

91. *See* Prosser, *supra* note 5, at 410–12.

92. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (quoting, in part, *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)).

It is clear that courts have broadly interpreted “information that is needed to cope.”⁹³ Virtually any subject matter can fall within this rubric. The type of information obtained by the paparazzi and protected by the First Amendment does not help anyone “cope.”⁹⁴ It is not necessary, or even helpful to deal with the “exigencies of [the] period,”⁹⁵ to know that Meg Ryan and Russell Crowe fell in love on the set of their latest movie.

However, courts have recognized standards that protect intimate details of celebrities’ lives and that consider the actual value of the information seeking protection.⁹⁶ In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the Supreme Court affirmed a public concern analysis that considers the “content, form, and context [of the speech] . . . as revealed by the whole record.”⁹⁷ For the media industry, this would include stories that might have a substantial effect on society, such as stories about government and health and safety.⁹⁸ Such a standard protects information that has an actual societal benefit rather than information that serves primarily to feed our collective curiosity. However, this ruling approves only a state standard; there is still no federal preventative legislation.

The California standard appears to afford the most protection to private information without undermining First Amendment values. In *Kapellas v. Kofman*, a newspaper printed an editorial stating that a local politician was ignoring her children’s needs in favor of her political needs, and attacking her performance as a mother.⁹⁹ The editorial also mentioned that the politician’s children had been in trouble with the local police.¹⁰⁰ While the case ultimately turned on a question of libel, the court considered the following factors in determining whether the information was newsworthy: (1) the social value of the information; (2) the extent of the intrusion into private affairs; and (3) the extent to which the complaining party has voluntarily placed himself or herself in the public eye.¹⁰¹

There is little social value to the information that paparazzi photographers sell. As discussed, *supra* Part III.A.1, the only value this

93. *Id.* at 388–89. See *infra* Part III.B.3 for examples of private matters deemed to be of public interest.

94. *Time*, 385 U.S. at 388 (quoting, in part, *Thornhill*, 310 U.S. at 102).

95. *Id.*

96. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

97. *Id.* at 761 (quoting *Connick v. Myers*, 461 U.S. 138, 146–48 (1983)).

98. Stern, *supra* note 57, at 149–50.

99. 459 P.2d 912 (Cal. 1969).

100. *Id.* at 918.

101. See *id.* at 922.

information has is as gossip, a category of speech that is not constitutionally protected. When considering intrusion into private affairs, the surveillance of celebrities is a factor weighing in favor of finding an intrusion.¹⁰² However, it is possible that even with this standard, courts will continue to construe private affairs very narrowly, leaving the test as meaningless as previous tests.¹⁰³ Allowing consideration of the extent to which the complaining party has placed himself or herself “in a position of public notoriety”¹⁰⁴ undermines the analysis; it encourages courts to apply the same standards that determine whether public figures have less privacy than private individuals. These previous standards have been ineffective in securing any amount of privacy for private or public citizens, and they will be discussed further in Part III.A.4.

In addition, California courts have adopted a decency limitation that is different than the *Virgil* community decency standard. To find liability, the California courts require that the publisher invade the plaintiff’s privacy with “reckless disregard for the fact that reasonable men would find the invasion highly offensive.”¹⁰⁵ This standard might prove to be more effective because it does not rely solely on society to adapt to advances in technology and to increase its own standard of decency.

In determining whether information is newsworthy, some courts require the existence of “a logical relationship or nexus . . . between the events or activities that brought the person into the public eye and the particular facts disclosed.”¹⁰⁶ There is no substantial relationship between the professional and personal lives of actors and actresses. Their movies and love interests are in no way interconnected. The court in *Virgil* recognized this disconnect and asserted that it should weigh against publicity of private information.¹⁰⁷ The court stated, “[T]he fact that people engage in an activity in which the public can be said to have a general interest does not render every aspect of their lives subject to public disclosure.”¹⁰⁸ California’s newsworthiness

102. See *Kapellas*, 459 P.2d at 922.

103. See *infra* Part III.B.3. (addressing courts’ seeming disability to find any private event “private” enough to warrant protection).

104. *Kapellas*, 459 P.2d at 922.

105. *Briscoe v. Reader’s Digest Ass’n*, 483 P.2d 34, 44 (Cal. 1969).

106. *Shulman v. Group W Prod., Inc.*, 995 P.2d 469, 485 (Cal. 1998); see, e.g., *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th 1980) (requiring, that “logical nexus exist between the complaining individual and the matter of legitimate public interest”).

107. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (1975).

108. *Id.*

standard and stringent decency limitations seem to offer the most privacy protection; both should be imputed into the public disclosure tort nationwide.

3. *The Courts' Inability to Find Any Event "Private"*

Intrusion into seemingly private events is protected under the newsworthy exception, which, as previously stated, the courts interpret broadly. The Restatement maintains that any information disseminated for "purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published," is protected.¹⁰⁹ Because "amusement" is a particularly subjective standard, courts are strongly inclined to let most information reach the public,¹¹⁰ and they have been extremely hesitant to dictate which information constitutes a legitimate public concern.¹¹¹ In *Ann-Margret v. High Society Magazine*, the New York district court noted that any trivial matter can be included within the scope of the newsworthy exception:

And while such an event may not appear overly important, the scope of what constitutes a newsworthy event has been afforded a broad definition and held to include even matters of "entertainment and amusement, concerning interesting phases of human activity in general." . . . [I]t is not for the courts to decide what matters are of interest to the general public.¹¹²

Although it is not contended that it is a primary function of the judiciary to dictate morals, some limits must be set, as discerning between right and wrong is an important judicial duty. The Founding Fathers did not seek to protect amusing anecdotes under the First Amendment.¹¹³ Yet in his treatise on privacy, J. Thomas McCarthy provides an illustrative list of cases in which people's private information was found to be lawfully disseminated under the First Amendment.¹¹⁴ Amongst these cases, romances between movie stars were deemed newsworthy,¹¹⁵ as was a celebrity's visit to a vacation re-

109. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. j (1977).

110. See generally Lidsky, *supra* note 47.

111. See, e.g., *Ann-Margret v. High Soc'y Magazine, Inc.*, 498 F.Supp. 401 (S.D.N.Y. 1980). See generally Lidsky, *supra* note 47.

112. *Ann-Margret*, 498 F.Supp. at 405 (quoting *Paulsen v. Personality Posters, Inc.*, 299 N.Y.S.2d 501, 506 (1968)).

113. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

114. MCCARTHY, *supra* note 64, at § 8:52.

115. See *id.* (discussing *Eastwood v. Superior Court for L.A. County*, 198 Cal. Rptr. 342 (1983)).

sort.¹¹⁶ Such information provides no social benefit, as discussed *supra* Part III.B.1. Liability attaches when invasions are made into matters which are extremely private.¹¹⁷ However, the line can be drawn in favor of privacy before the invasions become extremely personal.

Some examples of the invasiveness of the press in the context of private citizens illustrate the breadth of the newsworthy doctrine. As Ruth Shulman, an accident victim, pled with a nurse to let her die immediately following her car crash, a television “reporter” recorded her prayers.¹¹⁸ The contents of Ruth’s wishes were deemed newsworthy.¹¹⁹ The production company that recorded and broadcasted her pleas was not held liable for the tort of public disclosure of private fact. However, the methods by which they obtained their “story” were unusual, and the case was remanded because the judge believed that it would be possible for a jury to find the intrusion highly offensive and unreasonable.¹²⁰ Similarly, in *Miller v. NBC*, an NBC camera crew followed paramedics into Mr. Miller’s home without his consent and filmed his fatal heart attack. This case was also remanded for similar factual determinations.¹²¹ That the courts have been willing to view graphic recordings of someone’s death as offensively intrusive is a step in the right direction. However, if courts continue to determine that extremely private stories are protected by the newsworthy defense, the intrusion tort will be rendered meaningless.

4. *The Courts’ Inability to Find Any Person “Private”*

Because “criticism of government” is the type of speech most deserving of First Amendment protection,¹²² public officials are afforded fewer privacy protections under the Constitution. Under the Supreme Court’s holding in *New York Times Co. v. Sullivan*, in order to recover for libel, public officials must prove that false statements about them are published with “reckless disregard” for the truth.¹²³ In 1967, the Supreme Court extended *Sullivan*’s higher proof require-

116. *See id.* (discussing *Booth v. Curtis Publishing Co.*, 223 N.Y.S.2d 737 (1962), *aff’d* 228 N.Y.S.2d 468 (1962)).

117. *See, e.g.*, *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 478 (Cal. 1998).

118. *See id.* at 475–76.

119. *Id.* at 477.

120. *Id.* at 494.

121. *See Miller v. Nat’l Broad. Co.*, 232 Cal. Rptr. 668, 685 (1986).

122. *See Benno C. Schmidt, Jr., Libel and the First Amendment*, in 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1157 (Leonard W. Levy et al. eds., 1986).

123. 376 U.S. 254, 279–80 (1964).

ments for public officials to public figures generally.¹²⁴ The Court reasoned that public figures “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”¹²⁵ The distinction, which provides private figures with more protection, is based on the First Amendment’s heightened protection of information that may affect change.

Despite this distinction—which allows private persons to sue for the negligent, rather than malicious, publication of personal information—courts have consistently had difficulty finding any person to be “private” under the law. Once an individual has done something of import, his or her life may be opened up to scrutiny. This state of the law seems to create a disincentive for success. In *Gertz v. Robert Welch, Inc.*, the Supreme Court noted that public persons thrust themselves into the limelight through positions of power, prestige, or notoriety.¹²⁶ In *Carlisle v. Fawcett Publications, Inc.*, the Court further suggested:

[T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses, professional athletes, public officers, noted inventors, explorers, war heroes, may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons.¹²⁷

The holding in *Carlisle* effectively punishes people for being successful. While this notion is not limited to actors and actresses, it is illustrative that society probably does not want to discourage actors such as Sidney Poitier and Laurence Olivier from pursuing their chosen craft. A recent standard articulated by a California court is more reasonable because it employs a balancing test: “While public figures do not relinquish all privacy rights, the heightened public interest in their personal activities is a factor to be weighed in balancing the com-

124. DERRICK A. BELL, JR., 1 CONSTITUTIONAL CONFLICTS 392 (Anderson Publishing Co. 1997) (referring to *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967), and its companion case, *Associated Press v. Walker*).

125. *Curtis Publ’g Co.*, 388 U.S. at 164.

126. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

127. *Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 414 (1962).

peting interests.”¹²⁸ However, none of these standards takes into account the inherent difference between celebrities and public figures. The difference between the two groups is that one group—the politicians and public officials—has influence over people’s lives, and its actions affect society. Information disseminated about politicians and public officials is often relevant to society’s governance and is valuable in fostering debate. This type of information is what the First Amendment was originally designed to protect.¹²⁹ Celebrities, on the other hand, do not have a comparable effect on society.

The distinction between private and public persons seems to be irrelevant in the context of privacy law. While private individuals have a lower burden of proof in defamation cases than do public officials,¹³⁰ this difference applies only to defamation cases. Where the subject of a case is a truthful yet private matter, private persons who involuntarily become public figures often lose their constitutional rights to privacy.¹³¹ Even those who are involuntarily thrust into the limelight forfeit their privacy in favor of the public’s right to know.¹³² The Restatement affords them no protection because “[t]hese persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.”¹³³ This rationale also reduces the privacy of persons associated with public figures.¹³⁴

In addition, this justification sets up an ineffective incentive system. If one does something beneficial and helpful to society, he or she may forego privacy interests in all aspects of his or her personal life. In *Sipple v. Chronicle Publishing Co.*, the sexuality of the person who prevented a would-be assassin from shooting President Ford was deemed to be of legitimate public interest.¹³⁵ The court found that the disclosure “was not so offensive even at the time of the publication as to shock the community notions of decency [and] that the publications were not motivated by a morbid and sensational prying into appel-

128. *Gilbert v. Nat’l Enquirer*, 51 Cal. Rptr. 2d 91, 98 (1996) (citation omitted).

129. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

130. *See id.* at 279–80 (holding that public officials must prove “actual malice” to prevail in defamation action).

131. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977).

132. *See, e.g., Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665 (1984).

133. RESTATEMENT (SECOND) OF TORTS § 652D cmt. f (1977).

134. *See, e.g., Friedan v. Friedan*, 414 F.Supp. 77, 79 (S.D.N.Y. 1976) (finding that although defendant’s ex-husband did nothing to become public figure, that “role has been thrust upon him”).

135. *See Sipple*, 201 Cal. Rptr. at 670.

lant's private life but rather were prompted by legitimate political consideration."¹³⁶ The hero in this case was merely a private individual in the crowd listening to the President's speech.¹³⁷ As soon as he saved the President's life, he involuntarily became a public figure without a right of privacy regarding aspects of his life that were deemed newsworthy.¹³⁸ While this event was newsworthy and should have been publicized, the news coverage should have been limited to relevant facts. However, the court held that the information regarding Sipple's sexual orientation was not a private matter.¹³⁹ Sipple's family ultimately discovered that he was gay by reading the newspaper.¹⁴⁰

As this section illustrates, a person may not possess a right to privacy, despite personal wishes and conscious actions.¹⁴¹ As a result, the tort of public disclosure of private facts does not protect the private lives of celebrities and the privacy of individuals in general.

B. *Intrusion*

The intrusion tort can be used to protect privacy. Freedom of information and the protections of the First Amendment are not directly implicated by the intrusion tort because it specifically attacks newsgathering tactics rather than the news itself.¹⁴² The market for selling intimate details of celebrities' lives is inextricably tied to this tort because of the guerilla newsgathering tactics that are utilized in this type of photojournalism. The tort of intrusion needs to be extended in order to more thoroughly protect the public aspects of celebrities' lives. The snapping of the camera does not upset per se the celebrities' right to privacy; rather, the problem is that which comes before and after the shutter clicks. To catch a celebrity in a marketable pose, photographers place her under constant surveillance, camp outside her home, and wait to take a picture of her in a public place.

136. *Id.*

137. *See id.* at 666.

138. *See id.* at 670-71.

139. *Sipple*, 201 Cal. Rptr. at 669.

140. *Id.* at 667.

141. In *Haynes v. Alfred A. Knopf, Inc.*, Chief Judge Posner supported this conclusion:

People who do not desire the limelight and do not deliberately choose a way of life or course of conduct calculated to thrust them into it nevertheless have no legal right to extinguish it if the experiences that have befallen them are newsworthy, even if they would prefer that those experiences be kept private.

8 F.3d 1222, 1232 (7th Cir. 1993).

142. *See Prosser, supra* note 5, at 389-92; *see also* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

This compromising picture is then published in every magazine and is delivered to newsstands and supermarkets across the country.

The Restatement imposes liability for intrusion on “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person.”¹⁴³ On its face, this tort appears to quell the fears of Warren and Brandeis of an increasingly Orwellian society. However, courts have used the term “private” as a loophole, precluding much liability under this tort.¹⁴⁴ A virtual unwillingness to view any person’s affairs as private leaves celebrities (and common citizens in irregular situations) without privacy protection. In addition to this loophole, courts have expressly limited the tort’s application to intrusion upon private places, despite the lack of any such limitation in the language of the Restatement.¹⁴⁵

Although a person may be in plain view, seclusion is theoretically possible, based on the constitutional notion of one’s reasonable expectation of privacy.¹⁴⁶ In the prototypical paparazzi scenario—snapping pictures of a celebrity involved in a private activity in a public place—it is conceivable to maintain an expectation of privacy. For example, if two people are walking down the street, they may reasonably expect to be seen by people in the immediate area. However, placing the picture on the cover of a magazine without the celebrities’ consent breaches their reasonable expectation of privacy. The photographed couple expected to be seen by a few people, not thousands. For example, in *Galella v. Onassis*, one particularly insistent paparazzo trailed Jacqueline Onassis and her family constantly, took photographs of them in public places, and then sold these photographs to a magazine.¹⁴⁷ The expectation held by the Onassis family that they would only be seen by people in their surrounding area was breached. In a subsequent decision, the California Supreme Court held that “mass media videotaping may constitute an intrusion even when the events and communications recorded were visible and audi-

143. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

144. See *supra* Part III.A.3.

145. See Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1086–87 (1995).

146. See U.S. CONST. amend. IV. For a further discussion of Fourth Amendment privacy, see generally Edward Buxbaum, Note, *Florida v. Brady: Can Katz Survive in Open Fields?*, 32 AM. U. L. REV. 921 (1983); Madeline A. Herdrich, Note, *California v. Greenwood: The Trashing of Privacy*, 38 AM. U. L. REV. 993 (1989).

147. See *Galella v. Onassis*, 353 F.Supp. 196, 205, 227 (S.D.N.Y. 1972).

ble to some limited set of observers at the time they occurred.”¹⁴⁸ Logically, mass media videotaping and mass media photography are indistinguishable. Regardless of whether persons are videotaped or photographed, their expectation of privacy is the same, and the same breach occurs.

In *Wolfson v. Lewis*, a Pennsylvania district court also recognized the possibility of privacy in public places.¹⁴⁹ In *Lewis*, technology aided the constant surveillance of a family despite their objections. The court held that “the First Amendment protects the right of journalists to lawfully obtain information using ‘routine newspaper reporting techniques,’”¹⁵⁰ but found that the techniques used were neither routine nor lawful.¹⁵¹ “Conduct that amounts to a persistent course of hounding, harassment and unreasonable surveillance, even if conducted in a public or semi-public place, may nevertheless rise to the level of invasion of privacy based on intrusion upon seclusion.”¹⁵²

Prosser notes that while private events taking place in public might not be protected, it is possible that when a person is “singled out from the public scene, and undue attention is focused upon him, there is an invasion of his privacy rights.”¹⁵³ This right to privacy, even in the public scene, was implied in *Galella* when “a federal district judge and three federal appellate judges assumed that Galella [the photographer] invaded the privacy of [Jackie] Onassis and her children, even though most of his conduct occurred in public places.”¹⁵⁴ The district court determined that Galella kept Mrs. Onassis under “surveillance,”¹⁵⁵ and it issued an injunction to prevent him “from blocking [her family’s] movements in the public places and thoroughfares, invading their immediate zone of privacy by means of physical movements, gestures or with photographic equipment, and from performing any act reasonably calculated to place the lives and safety of the defendant, Jacqueline Onassis and her said children, in jeopardy.”¹⁵⁶ The court referred to Galella as “brazen,”¹⁵⁷ and it noted that his conduct was “deliberately calculated to cause immediate and irreparable

148. *Sanders v. Am. Broad. Cos.*, 85 Cal. Rptr. 2d 909, 914 (1999).

149. *See Wolfson v. Lewis*, 924 F.Supp. 1413, 1433–35 (E.D. Pa. 1996).

150. *Id.* at 1417 (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

151. *See id.* at 1433–35 (issuing injunction to prevent surveillance of plaintiffs’ family).

152. *Id.* at 1420.

153. Prosser, *supra* note 5, at 395; *see also McClurg, supra* note 145, at 1044–55.

154. McClurg, *supra* note 145, at 1048.

155. *Galella v. Onassis*, 353 F. Supp. 196, 217 (S.D.N.Y. 1972).

156. *Id.* at 200 n.6.

157. *Id.* at 206.

harm to the mental and physical well being of the defendant.”¹⁵⁸ The court also maintained that the photographer intended to induce payment from the Onassis family by continual harassment and to receive publicity and financial rewards from his behavior.¹⁵⁹

Courts have not been adamantly opposed to extending notions of privacy. Interpretation of the intrusion tort itself requires an invasion of a zone of privacy, but the tort is silent on what constitutes such a zone.¹⁶⁰ Courts have interpreted it to include public places, and more recently, semi-public places such as bathroom stalls,¹⁶¹ hospital rooms,¹⁶² and restaurants.¹⁶³ The language of the Restatement, however, simply calls for an intrusion that is “physical or otherwise.”¹⁶⁴ This can be interpreted to include mental intrusion or invasion, especially considering that this tort focuses on mental anguish and suffering.¹⁶⁵ Expanding the intrusion tort could be the courts’ method of choice to protect privacy interests. As the tort addresses conduct rather than speech,¹⁶⁶ it does not directly implicate the First Amendment.

However, there is a valid argument in opposition to enforcing regulations against the paparazzi. Freedom of speech and the press are core constitutional values.¹⁶⁷ The courts are correct in their protection of these rights, avoiding the movement toward censorship. But, by shielding everything, the courts may ultimately protect nothing and may harm the values they seek to defend. When the First Amendment and the right to privacy conflict, courts engage in a balancing test to consider the social value of the information, the extent of intrusion, and the extent to which the plaintiff plays a role in public events.¹⁶⁸ In this context, courts struggle to set standards for what is newsworthy. Although the courts note that “all material that might attract readers or viewers is not, simply by virtue of its attractiveness,

158. *Id.* at 200 n.6.

159. *Id.* at 216.

160. *See, e.g.,* Gill v. Hearst Publ’g Co., 253 P.2d 441 (Cal. 1953) (finding no liability for picture taken in public place).

161. *See* State v. Bryant, 177 N.W.2d 800, 804 (Minn. 1970).

162. *See* Green v. Chicago Tribune Co., 675 N.E.2d 249, 252 (Ill. App. Ct. 1997).

163. *See* Stressman v. Am. Black Hawk Broad. Co., 416 N.W.2d 685, 687 (Iowa 1987).

164. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

165. *See* Lidsky *supra* note 47, at 205. *See generally* McClurg, *supra* note 145.

166. *See* Stern, *supra* note 57, at 133.

167. *See supra* Part III.A.1.

168. *See, e.g.,* Shulman v. Group W Prods., Inc., 955 P.2d 469, 484 (Cal. 1998); Kapellas v. Kofman, 459 P.2d 912, 922 (Cal. 1969).

of *legitimate* public interest,”¹⁶⁹ they have trouble defining exactly what constitutes a legitimate interest. This is a difficult question because the courts cannot impart their values, individual or collective, onto society, and, as a result, this analysis must be administered on a case-by-case basis, without guiding principles.¹⁷⁰ However, the Supreme Court acknowledges the need to establish standards in First Amendment legislation to better protect speech:

The articulation of standards that do not require “*ad hoc* resolution of the competing interest in each . . . case” is favored in areas affecting First Amendment rights, because the relative predictability of results reached under such standards minimizes the inadvertent chilling of protected speech, and because standards that can be applied objectively provide a stronger shield against the unconstitutional punishment of unpopular speech.¹⁷¹

Without standards in place, courts are understandably hesitant to determine what is and what is not newsworthy.¹⁷² Courts have consistently relied on the language of both precedent and the Restatement to support their decisions, holding that this kind of “entertainment” is also protected by the newsworthy defense.¹⁷³ No judge wants to be the first to find gossip worthless. No juror wants to bear the burden of affronting the First Amendment. Ultimately, it should not be the responsibility of the judges or jurors to make these decisions. Congress must pass more comprehensive and cohesive regulations.

IV.

EXISTING AND PROPOSED LEGISLATION

Although constitutional safeguards are directly applicable insofar as they shield individuals from invasions by the government,¹⁷⁴ Congress has enacted a number of laws protecting privacy within the private sphere.¹⁷⁵ These regulations affect financial transactions, telecommunications and video services, the workplace, and educational records.¹⁷⁶ Privacy provisions in the Cable Communications

169. *Shulman*, 955 P.2d at 483–84.

170. *See id.* at 485 (“Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. Our analysis thus does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts.”).

171. *Id.* at 486 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343 (1974)).

172. *See* Lidsky, *supra* note 47, at 199.

173. *See, e.g., Shulman*, 955 P.2d at 478.

174. *See, e.g., Katz v. United States*, 389 U.S. 347, 350 (1967).

175. *See* CATE, *supra* note 20, at 81.

176. *Id.*

Policy Act,¹⁷⁷ the recent Consumer Credit Reporting Reform Act,¹⁷⁸ and the Customer Proprietary Network Information provision of the Telecommunications Act¹⁷⁹ demonstrate that Congress can enact serious privacy protection, even if it is limited to specific areas.¹⁸⁰ Many doctrines allow for constitutionally permissible government suppression of information. For example, the government can set time, place, and manner restrictions on content-neutral information.¹⁸¹ In addition, governmental interests have often been compelling enough to justify suppressing certain kinds of information, “including pornography,¹⁸² false statements of fact,¹⁸³ advertising,¹⁸⁴ speech on government property not dedicated as a public forum,¹⁸⁵ and national security.”¹⁸⁶ There are also numerous state laws and branches of tort law that purport to protect privacy.¹⁸⁷ California Civil Code §1708.8 is one such example.

A. *California Civil Code § 1708.8—Invasion of Privacy to Capture Physical Impression*

Even though there is no federal constitutional right to privacy, California’s state constitution was amended in 1972 to include a privacy right: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.”¹⁸⁸ Perhaps this state recognition of privacy explains why California citizens have more success waging claims of invasion of privacy and why the California anti-paparazzi legislation seems to be the most promising legislation to protect celebrity privacy.

177. 47 U.S.C. § 551 (1994).

178. 15 U.S.C. § 1601 (1996).

179. 47 U.S.C. § 222 (1994 & Supp. V 2000).

180. CATE, *supra* note 20, at 100.

181. *See* Hamilton, *supra* note 52, at 46; *see also* United States v. O’Brien, 391 U.S. 367 (1968).

182. *See* City of Renton v. Playtime Theaters, 475 U.S. 41 (1986).

183. *See* Gentz v. Robert Welch, Inc., 418 U.S. 323 (1974).

184. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557 (1980).

185. *See* Lee v. Int’l Soc’y for Krishna Consciousness, Inc., 505 U.S. 672 (1980).

186. *See* Haig v. Agee, 453 U.S. 280 (1981); *see also* Hamilton, *supra* note 52, at 50.

187. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 652A–652I (1965); CAL. CIV. CODE § 1708.8 (West Supp. 2001).

188. CAL. CONST. art. I, § 1 (emphasis added).

The California state legislature passed Senate Bill 262, which became law in 1998.¹⁸⁹ California's desire to pass anti-paparazzi legislation stems in part from the state's high celebrity population and also from dissatisfaction with the established reliance on physical intrusion in privacy law.¹⁹⁰ Thus, California Civil Code §1708.8 imposes liability not only for invasions of privacy stemming from physical trespass, but also for "constructive invasion[s]" of privacy as well.¹⁹¹ The tort of intrusion's outdated standard does not take technological advances into account at the same pace that they are being made. The statute tries to ameliorate the anachronistic invasion of privacy intrusion tort by recognizing the technological advances that make physical trespass unnecessary.¹⁹² The Restatement imposes liability on "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns."¹⁹³ Despite the fact that the language does not require a physical trespass, courts have typically required a traditional trespass in order to find a party liable under this tort.¹⁹⁴ The intrusion tort protects against intrusions "by the use of the defendant's senses, *with or without mechanical aids*, to oversee or overhear the plaintiff's private affairs."¹⁹⁵ This language implies a willingness to be flexible and to recognize that invasions cannot be limited to traditional techniques. However, judicial interpretation of the tort ignores commonplace tactics of contemporary paparazzi journalists, who often employ high-powered telephoto lenses and similar technology.¹⁹⁶ California's intrusion statute deliberately incorporates a more modern standard. California Civil Code §1708.8 recognizes constructive invasion of privacy through enhancement devices:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or

189. Codified at CAL. CIV. CODE § 1708.8 (West Supp. 2001).

190. See Erwin Chemerinsky, *Protecting Privacy from Technological Intrusions*, 2000 ANN. SURV. AM. L. 183, 186.

191. CAL. CIV. CODE § 1708.8(b) (West Supp. 2001).

192. § 1708.8.

193. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

194. Victor A. Kovner et al., *Recent Developments in Newsgathering, Invasion of Privacy and Related Torts*, in 1 COMMUNICATIONS LAW 1996, at 507 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Course, Handbook Series No. G-460).

195. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977) (emphasis added).

196. Kovner, *supra* note 194, at 573.

auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.¹⁹⁷

Section 1708.8 does not ignore the possibility of physical invasion and deliberately lowers the bar on the offensiveness of the physical invasion.¹⁹⁸ There is a change in the language of the requirement from an intrusion that is “highly offensive to a reasonable person”¹⁹⁹ to an invasion that is “offensive to a reasonable person.”²⁰⁰ While this aspect of the statute seems promising, the formal “reasonable person” requirement will probably subject this part of the statute to the same fate as the common law tort.²⁰¹

The “constructive invasion of privacy” tort has the potential to be effective in preserving privacy, but might fall short due to its inclusion of a reasonableness standard in requiring both a “reasonable expectation of privacy”²⁰² and an intrusion that is “offensive to a reasonable person.”²⁰³ “The problem with this formulation is that it allows privacy to be diminished as new technology reduces what individuals can reasonably expect to be private, and as social attitudes become more accepting of intrusive uses of technology.”²⁰⁴ For example, the *Shulman* court relied on “law or custom” to determine whether there was a breach of a reasonable expectation of privacy.²⁰⁵ Although society does not currently expect reporters to follow victims into ambulances, one can imagine a future where this might become a common journalistic practice.

Although the incorporation of the reasonableness standard might limit the potential of the California statute with regard to invasions of privacy, there are other promising aspects of the legislation. The provisions pertaining to treble and punitive damages,²⁰⁶ profit recap-

197. CAL. CIV. CODE § 1708.8(b) (West Supp. 2001).

198. *Id.*

199. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

200. CAL. CIV. CODE § 1708.8(b) (West Supp. 2002).

201. *See* Lidsky, *supra* note 47, at 207 (“[A]s newsgathering techniques that were once considered objectionable become more common, it becomes less likely that the public will view them as highly offensive and correspondingly less likely that liability will be imposed for them.”).

202. CAL. CIV. CODE § 1708.8(b) (West Supp. 2001).

203. *Id.*

204. Note, *Privacy, Technology, and the California “Anti-Paparazzi” Statute*, 112 HARV. L. REV. 1367, 1373 (1999).

205. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998).

206. CAL. CIV. CODE § 1708.8(c) (West Supp. 2001).

ture,²⁰⁷ and vicarious liability²⁰⁸ may deter magazines from paying large amounts of money for the fruits of paparazzi attacks. These provisions of the statute attempt to alter the market. To some extent, “the supply creates the demand”²⁰⁹ for certain kinds of information. While there will always be a market for personal information, the increasing supply of gossip creates a cycle where its abundance increases demand.²¹⁰ In 1890, Warren and Brandeis determined that “[e]ach crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil.”²¹¹ If there is less commercial incentive to procure these photographs, there will be fewer of them available, and eventually the market will shrink.

On its face, one could interpret the California statute as borrowing concepts from the Fourth Amendment. When there is a Fourth Amendment violation, any fruits of an illegal search are rendered inadmissible by the exclusionary rule.²¹² Employing similar logic, the California statute prevents wrongdoers from profiting from their wrongdoing: the statute prohibits a person found liable for privacy invasion from realizing any profits from any photos or information obtained from such invasion.²¹³ Unfortunately, California courts have not provided as much protection for victims of privacy invasion as the Fourth Amendment provides for victims of unlawful searches. For example, in *Shulman v. Group W Prods., Inc.*, the defendants were found potentially liable for the tort of intrusion.²¹⁴ However, the court held that the story, while arguably illegally obtained, was protected by the newsworthy defense.²¹⁵ The exclusionary rule may be successful in deterring unconstitutional conduct of police officers.²¹⁶ Journalists should have a similar deterrent. Because paparazzi are paid handsomely for their efforts and stand to profit regardless of civil liability, they may be willing to risk costly litigation. By allowing for profit

207. *Id.*

208. § 1708.8(d).

209. Warren & Brandeis, *supra* note 6, at 196.

210. *Id.*

211. *Id.*

212. *See, e.g.*, *United States v. Calandra*, 414 U.S. 338, 347 (1974).

213. *See* CAL. CIV. CODE § 1708.8(c) (West Supp. 2001).

214. 955 P.2d 469, 497 (Cal. 1998).

215. *Id.*

216. TIMOTHY LYNCH, IN DEFENSE OF THE EXCLUSIONARY RULE (CATO Inst., Briefing Paper No. 319, Oct. 1, 1998), available at <http://www.cato.org/pubs/pas/pa-319.pdf> (on file with *New York University Journal of Legislation and Public Policy*).

recapture, the California statute appears to more effectively deter intrusive behavior.

B. Senate Bill 2103—The Personal Privacy Protection Act

Senators Orrin Hatch (R-Utah) and Dianne Feinstein (D-Cal) introduced Senate Bill 2103 in 1998. The bill employed language similar to the California Civil Code and aimed at preventing the same wrongs.²¹⁷ Despite the fact that the 105th Congress did not pass the bill,²¹⁸ its introduction was an important national indicator of the growing need for a federal forum to redress privacy issues. Senate Bill 2103 cited the congressional finding that “there is no right, under the First Amendment to the Constitution of the United States, to persistently follow or chase another in a manner that creates a reasonable fear of bodily injury, to trespass, or to constructively trespass through the use of intrusive visual or auditory enhancement devices.”²¹⁹ The proposed legislation incorporated California’s creation of constructive invasion of privacy, and it recognized that technology “render[s] inadequate existing common law and state and local regulation.”²²⁰ The bill would have made it illegal to “harass” and defined harassment as “persistently physically follow[ing] or chase[ing] a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of the person for commercial purposes.”²²¹ While Senate Bill 2103 was an important step for privacy protection, it should not have required fear of bodily harm.²²² This requirement undermined its potential strength. Paparazzi activities should not have to pose an actual physical threat in order to gain national attention. There are sufficient torts available to address harassing behavior that borders on assault.²²³ The bill’s

217. Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a)(6) (1998).

218. See Paul McMasters, *California Enacts First “Paparazzi Law”*; *U.S. Congress Takes No Action on Bills*, THE FIRST AMENDMENT AND THE MEDIA (1999), at http://www.mediainstitute.org/ONLINE/FAM99/LPT_C.html (noting that “bill was referred to the Senate Judiciary Committee on May 20, but there was no action on it before the session ended”) (on file with the *New York University Journal of Legislation and Public Policy*).

219. S. 2103, § 2(a)(6).

220. *Id.* at § 2(a)(5).

221. *Id.* at § 3(a)(2).

222. *Id.*

223. See, e.g., RESTATEMENT (SECOND) OF TORTS § 21 (1934):

(1) An actor is subject to liability to another for assault if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

definition of harassment described behavior that is already illegal, and it detracted from the deterrent effects it would have otherwise had on intrusive journalism.

C. *The Constitutionality of the Legislation*

When legislation limits the freedom of expression, courts have had difficulty interpreting it to be constitutional. Such legislation must pass judicial strict scrutiny, which requires the government to prove that it has a compelling interest in limiting the speech and that the statute is narrowly tailored to protect that interest.²²⁴ Unfortunately, privacy interests have not yet met this standard. Strict scrutiny is required when the government attempts to limit information that is factually correct and lawfully obtained.²²⁵ This leaves a gap for information that is factually correct and unlawfully obtained. While the information that this Note seeks to keep private might often be factually accurate, the methods by which it is obtained should be made illegal. If such methods were illegal, statutes limiting the publication of this information would not have to satisfy the strict scrutiny requirement. Notably, the California statute and the proposed Senate bill do not limit speech directly.²²⁶ Because they only limit conduct, they are subject to a lower standard of scrutiny.²²⁷

In order to regulate expression, the government either can directly limit the speech itself or discourage the flow of the information. It is extremely difficult to limit speech on the basis of its content, and any attempt to do so must survive strict scrutiny analysis.²²⁸ A regulation is not content neutral if it, by its terms or its manifest purpose, distinguishes favored speech from disfavored speech on the basis of the ideas expressed.²²⁹ If legislation is content neutral, it must satisfy only intermediate scrutiny: the regulation must advance important interests unrelated to the suppression of the speech, and it must not burden more speech than necessary to further those interests.²³⁰ The

(b) the other is thereby put in such imminent apprehension.

224. See BELL, *supra* note 124, at 338; see also Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 286 (1999).

225. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 104 (1978).

226. CAL. CIV. CODE § 1708.8 (West Supp. 2002); S. 2103, 105th Cong. § 2 (1998).

227. See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (1999).

228. See *Simon and Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

229. *Turner Broad. System, Inc. v. FCC*, 512 U.S. 622, 642 (1994).

230. *Id.* at 662.

California statute and the proposed federal bill are content neutral in that they target conduct rather than speech.

Senate Bill 2103 contains the requisite governmental interest to survive intermediate scrutiny. The congressional findings of the bill note that there is a significant governmental interest “in preventing, and ensur[ing] a safe and secure private realm for individuals against intrusion.”²³¹ The legislation intends to protect citizens without burdening any more speech than necessary. Under the legislation, photographers would still be able to take pictures of celebrities from a safe distance.

A constitutional analysis also includes the due process tests of overbreadth and vagueness, which have the ability to render a statute void.²³² The Supreme Court set forth the constitutional test for vagueness in *Connally v. General Construction Co.*, holding that “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”²³³ This doctrine demonstrates the need for clarity when constitutional concerns are implicated. Citizens need to know the law in order to comply with it. In addition, clarity prevents the possibility of chilling permissible behavior and ensures an even application of the law.²³⁴ Not only are the statutes clear on their faces, but the congressional findings clarify the purpose of the laws.²³⁵ While critics of the California statute assert that the word “persistent” is not defined, any reasonable person should be aware of behavior that constitutes harassment.²³⁶ Considering the statutes clarity, one cannot argue that “the dividing line between what is lawful and unlawful [is] left to conjecture.”²³⁷

The rationale behind the overbreadth doctrine is to provide “breathing space” for First Amendment freedoms by disallowing laws that are so broad as to be susceptible to “sweeping and improper appli-

231. Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a)(7) (1998).

232. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

233. *Id.*

234. *See Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 486 (Cal. 1998).

235. S. 2103 § 2, 105th Cong.

236. California, for example, defines harassment as “a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses a person, and which serves no legitimate purpose.” CAL. CIV. PROC. CODE § 527.6(b) (West 1999). Alternatively, New York provides a criminal remedy for harassment when an “intent to harass, annoy, or alarm another person” and “follow a person in or about a public place” is present. N.Y. PENAL LAW § 240.26 (McKinney 1998).

237. *Connally*, 269 U.S. at 393.

caution.”²³⁸ The California statute and the Senate bill are not overbroad on their faces and would not be found overbroad pursuant to the high bar for legislation that regulates conduct with only incidental effects on speech. The Supreme Court has held that “the overbreadth of a statute must not only be real, but substantial as well.”²³⁹ If the statute limited the behavior of legitimate photojournalists, then it might be deemed overbroad. However, legitimate photojournalists do not harass or physically harm their subjects, so they will not be affected by the statute.

The intrusion tort and its progeny are generally applicable laws, which “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.”²⁴⁰ Critics of Senate Bill 2103 argue that the bill was not generally applicable because it required a commercial purpose and thus applied only to the press.²⁴¹ This argument is faulty, however, as anyone can take a picture with the intention of selling it. Notably, the commercial purpose requirement is absent from the California statute.

V.

THE ONGOING NEED FOR FEDERAL STANDARDS

The freedoms of expression, speech, and the press are fundamental to the Constitution and to society.²⁴² We guard these freedoms vehemently, relying upon journalists to expose the flaws in society and our government.²⁴³ But who oversees the media? The press will not limit itself to hard news. In the end, the press is a commercial enterprise, which, if left unregulated, is likely to print stories that will be profitable, regardless of whether or not they are newsworthy. Our society’s voyeuristic demands cause the media to continue to supply personal stories about celebrities.²⁴⁴ The proliferation of such stories in the marketplace generates more demand, forcing journalists to become progressively more intrusive to meet society’s needs. The competitive nature of journalism eliminates the possibility of self-

238. *NAACP v. Buttons*, 371 U.S. 415, 432–33 (1961).

239. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

240. *Cohen v. Cowles Media*, 501 U.S. 663, 669 (1991).

241. *See, e.g., Privacy Hearing, supra* note 12, at 82–83 (statement of Rep. Frank, Member, House Comm. on the Judiciary); Anne Hawk et al., *Paparazzi*, *QUILL*, Sept. 1998, at 19, 20; Tony Maurio, *Paparazzi and the Press*, *QUILL*, July/Aug. 1998, at 26, 27.

242. *See supra* Part III.A.1.

243. MICHAEL J. ARLEN, *THE CAMERA AGE: ESSAYS ON TELEVISION* 172–73 (1981).

244. *See generally* Calvert, *supra* note 10.

regulation. The publishing industry will not likely reach a collective decision to publish only "real news," and individual publications are not likely to forgo sensationalistic gossip, for fear of jeopardizing their market share.

Voyeurism is a nationwide affliction. A federal standard must be implemented to regulate both the country's growing curiosity and the media industry. The four torts that constitute invasion of privacy offer a potential solution.²⁴⁵ Unfortunately, judicial interpretation of these torts has rendered them practically meaningless. Either the legislature must create a new tort, or the judiciary must employ a new mode of interpretation.

The freedom of the press and the right to privacy will perpetually be in tension with one another. Stories that the press wants to publish will often be about those individuals who most want to retain their privacy. There must be a national attempt to strike a balance between these two conflicting goals. Any regulations addressing this issue may potentially have a chilling effect on free speech. However, courts could interpret such regulations so as to limit the potential chilling effect, and individuals suffering from invasions of privacy would still benefit from having a federal forum in which to redress their claims. This is more desirable than having to rely on scattered state courts or regulations. The haphazard regulatory systems that exist throughout the country are not subject to the same rigorous review that they would be if they were integrated in uniform federal legislation.

The lack of clear federal standards has left the lower courts confused as to how to balance the First Amendment against privacy concerns. For example, the tort of intrusion does not directly affect the First Amendment because it addresses newsgathering.²⁴⁶ In this context, some courts do not consider the First Amendment at all because it is irrelevant to conduct.²⁴⁷ Other courts maintain that newsgathering mandates the same level of First Amendment protection as does publishing.²⁴⁸ Clear standards, to which courts can uniformly adhere, must be created.

The current Restatement was formulated with the intention of protecting personal privacy.²⁴⁹ It broadly defines privacy in order to

245. See Prosser, *supra* note 5, at 389–406; see also RESTATEMENT (SECOND) OF TORTS § 652A (1977).

246. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

247. See Lidsky, *supra* note 47, at 190–91.

248. *Id.* at 192 (discussing *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345 (7th Cir. 1995)).

249. Lidsky, *supra* note 47, at 204.

“fill in the gaps left by trespass, nuisance, the intentional infliction of emotional distress, and whatever remedies there may be for the invasion of constitutional rights.”²⁵⁰ While the language of the Restatement provides a strong foundation on which to build a right to privacy, judicial interpretation of the Restatement does not take advantage of this possibility. The newsworthy defense to the tort of public disclosure of private facts is so broad that practically anything can fall within its scope. The doctrine is rooted in the First Amendment,²⁵¹ yet it covers much more activity than is necessary to support the “profound national commitment to the principle that debate on public issues” that the Founding Fathers wanted to protect.²⁵² The defense must be narrowed, and the doctrine must be reinterpreted in order to include only the intended values of the amendment. Currently, the intrusion tort could protect individual privacy against invasive newsgathering techniques, but courts have interpreted “private affairs” too narrowly. This term must be construed more broadly, in order to protect intrusions into public-private²⁵³ realms as well. The Restatement also seems equipped to deal with advances in technology, as it covers invasions “physical[] or otherwise.”²⁵⁴ Yet, the judiciary’s insistence on finding physical trespass has narrowed the potential scope of this tort.

There is the possibility that, even with a new federal standard, courts would continue to construe the language in a manner inconsistent with the purpose of the legislation, thus limiting privacy protection. However, federal legislation would indicate that the government is taking the issue seriously. With such a signal from Congress, courts would not have the authority to decide cases based only on their intuition. Without any direction from the government, courts are taking their cues from the publications themselves.²⁵⁵ This allows newspapers and magazines to self-regulate.

The California standards have a greater potential to protect privacy. For example, the newsworthy standard and the constructive invasion of privacy tort are more promising than the ways that other courts have interpreted the Restatement. As it was passed only four years ago, it is too early to tell whether California’s new statutory tort will be effective.

250. *Id.* at 205 (quoting Prosser, *supra* note 5, at 392).

251. RESTATEMENT (SECOND) OF TORTS § 652D special note (1977).

252. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

253. *See generally* McClurg, *supra* note 145 (arguing for extension of tort liability to intrusions into “public privacy”).

254. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

255. *See* Zimmerman, *supra* note 86, at 302–03.

One problem present in both the Restatement privacy torts and the new California tort is that they rely on society to set the standards for determining what is reasonable and offensive.²⁵⁶ While reasonableness and offensiveness are normative concepts that are best defined by society, these conceptions constantly change and leave the courts with even less ability to act. As long as society is willing to forego privacy in favor of voyeuristic tendencies, definitions of offensiveness and reasonableness will not accurately reflect a collective morality. Voyeurism takes precedence over other people's privacy, but not over our own. We cannot rely on society to set the standards for what is acceptable because its own conceptions vary. The legislature and judiciary are incapable of dealing with these kinds of inconsistencies without uniform federal regulations.

There are ways to decrease society's hunger for personal information about others. For example, limiting the supply will change the market. If there were less material in existence, society would have to adapt to a limited availability of intrusive information. The California statute seeks to change the market, as it provides for treble and punitive damages,²⁵⁷ profit recapture,²⁵⁸ and vicarious liability.²⁵⁹ If there is less commercial incentive to take pictures, there will be fewer photographs available in the market. While damages and profit recapture offer financial disincentives for paparazzi, they are *ex post* remedies. A better approach would be to provide a legal remedy *before* the invasive materials ever reach the market. An exclusionary rule for tort violations would prevent situations, such as the one in *Shulman*, in which a successful intrusion claim is rendered meaningless in light of the newsworthy defense.²⁶⁰

New federal standards can fit within the framework of the Restatement. The foundation is already in place; it simply requires new legislation or new interpretations of existing standards. The California courts have employed a balancing test to determine newsworthiness, considering, among other factors, the social value of the information and the amount of intrusion into private affairs.²⁶¹ This analysis does not rely on society to set its own standards and, if followed, can protect more privacy.²⁶² Courts can determine the value of information and the level of intrusion without resorting to vague community stan-

256. See CAL. CIV. CODE § 1708.8(a)–(b) (West Supp. 2001).

257. § 1708.8(c).

258. *Id.*

259. § 1708.8(d).

260. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469 (Cal. 1998).

261. See, e.g., *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969).

262. *Id.* at 924.

dards. Also, the nexus requirement, which assesses the relationship between “the events or activities that brought the person into the public eye and the particular facts disclosed,”²⁶³ can help to protect privacy. Lastly, the judiciary should more carefully distinguish between celebrities and other public figures. This would afford celebrities more privacy.

Fostering enlightened debate on public issues is the original purpose of the First Amendment.²⁶⁴ Privacy promotes this value in that “[p]rotecting privacy allows the individual to establish boundaries between himself and his community, and, in doing so, allows him to establish his individuality. It is his individuality, in turn, that enables him to offer unique and meaningful contributions to the public dialogue.”²⁶⁵ A federal standard is the most appropriate way to preserve privacy and encourage debate in accordance with the First Amendment. Unfortunately, no federal privacy legislation has been introduced since the failure of Senate Bill 2103.

CONCLUSION

In the 1968 movie *Medium Cool*,²⁶⁶ a television crew stumbles upon an accident scene. Instead of helping the victims, the crew is more concerned with recording the misfortunes on tape. The crew walks around the crash site with microphones and cameras, viewing the carnage, without attempting to intercede, and recording the scene for others to watch. Prioritizing voyeuristic tendencies over safety and privacy makes this scene especially poignant and makes the paparazzi problem seem especially disturbing.

A similar situation could feasibly occur in reality. Some paparazzi photographers appear completely oblivious to the potential harm they might cause. An incident involving Arnold Schwarzenegger and his wife Maria Shriver is illustrative of paparazzi insensitivity. Schwarzenegger, who was recovering from heart surgery, and Shriver, who was five months pregnant and recovering from complications herself, were driving their son to preschool when they were chased by paparazzi, forced off the road, and trapped.²⁶⁷ Although this offensive behavior would seemingly fall within the invasion of privacy tort, the photographers were instead convicted of false imprisonment. This

263. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 485 (Cal. 1998).

264. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

265. Lidsky, *supra* note 47, at 228 (citation omitted).

266. *MEDIUM COOL* (Paramount Pictures 1969).

267. Robert W. Welkos, *Paparazzi Guilty in Schwarzenegger Case*, L.A. TIMES, Feb. 3, 1998, at B1.

was a backhanded victory because the courts relied on an established tort rather than breaking new substantive ground for invasions of privacy. However, it remains a positive victory nonetheless because the paparazzi actions were chastised as “morally wrong.”²⁶⁸

Traditionally, “freedom of the press [was] guaranteed only to those who own one.”²⁶⁹ This is no longer true. Today, constitutional privileges protect anyone using a camera. The Internet can make anyone a journalist. Should these rights be extended so far that we can no longer see what we were trying to protect? The Supreme Court has held that simply using a camera does not make an individual a member of the press.²⁷⁰ Rather, the Court has described the press as an institution that “serves as a powerful antidote to any abuses of power by government officials” and that provides the public with information regarding society’s governance.²⁷¹ Since the paparazzi does not satisfy these standards, they should not be considered a part of the press, and are therefore unworthy of First Amendment protections.

Collectively, the paparazzi do not adhere to *any* standards. “Somewhere along the way, a line has been crossed. The code of civility and common decency we all aspire to seems to be vanishing. We live in a climate in which people’s lives are regularly served up as mass entertainment, and the acquisition of this entertainment has become a perverse sport.”²⁷² Our gossip-minded society has fueled these practices, the frenetic pace of which has directly and negatively affected our conceptions of privacy. “There is something wrong when a person cannot visit a loved one in the hospital, walk their child to school, or be secure in the privacy of their own home without being chased, provoked, or intruded upon by photographers trying to capture pictures of [that person] to sell to the tabloids.”²⁷³ Clearly, regulatory changes are needed to ensure that invasive paparazzi behaviors are eliminated.

268. Nevill L. Johnson et al., *There Ought to Be a Law*, L.A. LAWYER, Apr. 1998, at 36.

269. RICHARD KLUGER & PHYLLIS KLUGER, *THE PAPER: THE LIFE AND DEATH OF THE NEW YORK HERALD TRIBUNE* 341 (1986) (quoting A.J. Leibling, press critic).

270. Sharon A. Madere, Comment, *Policy Arguments and Legal Analysis in Support of Their Constitutionality*, 46 UCLA L. REV. 1633, 1654 (1999) (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966) and citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975)).

271. *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966) and citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975)).

272. *Privacy Hearing*, *supra* note 12, at 16 (statement of Paul Reiser, actor).

273. Johnson et al., *supra* note 268, at 36 (quoting Senator Diane Feinstein).