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Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights

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SHOOTING FOR THE STARS: A CALL FOR FEDERAL LEGISLATION TO PROTECT CELEBRITIES' PRIVACY RIGHTS

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Paparazzo 1:What is the difference between paparazzi and Sammy the Bull?

Paparazzo 2:What?

Paparazzo 1:Sammy the Bull stops shooting when you're dead.[1]

"Even when you died, the press still hounded you."[2]

I.
INTRODUCTION

Spies, surveillance and high-speed chases are the story elements that make for Hollywood blockbusters. All too many public figures face these real life horror films on a daily basis, in order for paparazzi[3] to take their

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And to those of you who shared your stories with me – thank you for your candor, dedication and inspiration – I wish you peace and privacy.

[1] John H. Richardson, *I, Stalkerazzi,* ESQUIRE, Jan. 1998, at 64. (Referring to the death of Diana, Princess of Wales).

[2] Elton John, lyrics by Bernie Taupin, *Candle in the Wind*, GOODBYE YELLOW BRICK ROAD (Dick James Music Ltd. 1973)(updated 1997 to honor Diana, Princess of Wales).

[3] "*Paparazzo* (Pl. *Paparazzi*) A freelance photographer who pursues celebrities to take their pictures. 1968 *Daily Tel.* (Colour Suppl.) 29 Nov. 66/4 The anticipated horde of detested *paparazzi* – those scavenging Italian street photographers whose sole purpose appears to be to make every film celebrity's life a misery..." Definition; OXFORD ENGLISH DICTIONARY, Second Edition: Volume XI. Clarendon Press. Oxford 1989. From Federico Fellini's *La Dolce Vita*, Paparazzo was the name of the overzealous photographer. *La Dolce Vita*, Federico Fellini 1960. The motivation for Fellini's choice of the name Paparazzo is debated. It is thought to mean "buzzing insects," as the sound of the word suggests. The Sicilian word for an oversized mosquito is "papataceo." Paparazzi History, *at* http://iml.jou.ufl.edu/projects/Spring99/Johnson/page1.htm.

photos and for society to inhale the minutiae of celebrities' lives for fleeting entertainment. It is difficult to garner support for the assertion that society must stand up and find new ways to protect a privileged class. While they are neither underrepresented nor oppressed, celebrities are in need of greater protection from invasions of privacy by the paparazzi because of the significant risks of both physical harm and obliteration of any sense of privacy. Deciding to work at any lawful profession should not entail an irrevocable forfeiture of one's privacy.

Overzealous photographers chase stars on foot and in cars; follow stars blatantly and without their subjects' knowledge; use high-tech devices to take photographs when they cannot get physically close enough; lie and bribe their way into private events like hospital visits,[4] funerals,[5] children's school functions,[6] weddings[7] and doctor visits.[8] They assault, frighten and embarrass celebrities' loved ones[9] for a "money shot."[10]

The activities of the paparazzi and tabloid media have themselves made news over the past several years and in recent months. There have been many instances in which paparazzi have incited stars by following, harassing and chasing them.[11] On April 15, 2005, actress Reese Witherspoon leaves the gym and is accosted by a group of paparazzi. The photographers prevent her from reaching her vehicle. Eventually, Witherspoon's trainer comes out and helps her reach her car. Safe at last? Not for long. The paparazzi jump into their vehicles – reports say as many as five cars – and follow her. The star is outnumbered and nearly run off the road on her drive home. Reese Witherspoon's ordeal is not over when she arrives at the gate to her community. The paparazzi surround her and prevent her from accessing the security gate. Witherspoon had called the Los Angeles Police Department, but the police are not able to arrive in time to help her. While this altercation did not have Princess Diana-scale tragic

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[4] *Protection from Personal Intrusion Act and Privacy Protection Act of 1998: House Judiciary Committee Hearing on H.R. 2448 and H.R. 3224*, 105th Cong. 97, 57–340 (1999) [hereinafter Hearings] (testimony of Michael J. Fox).

[5] *Id.* at 20.

[6] *Id.* at 42 (testimony of Paul Reiser).

[7] *Id.* at 161 (testimony of Dick Guttman).

[8] *Id.* at 38 (testimony of Paul Reiser).

[9] *Id.* at 20 (testimony of Michael J. Fox); *Id.* at 37 (testimony of Paul Reiser).

[10] Richardson, *supra* note 1, at 64 (explaining that a shot of a shocked or upset celebrity brings greater monetary rewards for the photographer).

[11] Actor Tom Cruise and wife Nicole Kidman have been chased in the same tunnel where Princess Diana died. Arnold Schwarzenegger, Maria Shriver and their child were trapped in their car by paparazzi. Alec Baldwin and Kim Basinger were run off the road while bringing their newborn baby home from the hospital. Woody Harrelson, Will Smith and Robert Deniro were so incited that they punched photographers who harassed them. Siobhan Darrow, *Stars Denounce Paparazzi Fervor*, CNN, Aug. 31, 1997 at http://www.cnn.com/WORLD/9708/31/diana.paparazzi/.

results (security guards saw the event and intervened), it is the most recent in a disturbing trend of celebrity harassment.[12] Days before Reese Witherspoon's encounter, paparazzi chasing singer and actress Jennifer Lopez nearly crashed into her car in Beverly Hills.[13] By provoking a reaction from their subjects through confrontation and invasion of privacy, the paparazzi has even created a market for television shows that depict the paparazzi hounding celebrities.[14]

The tabloid media is so difficult to fight because they have the resources to create significant problems for anyone who speaks out against them. In 2001, Jennifer Aniston was photographed sunbathing topless in her own backyard in Malibu when a paparazzo trespassed on a neighbor's land and scaled an eight foot wall.[15] Since 1999, California has had a law explicitly prohibiting this conduct.[16] Rather than litigate her case – which had the elements of a winner – Aniston chose to settle.[17] Choosing to avoid litigation is not unusual in light of the power of the paparazzi and tabloid industry. Senators Diane Feinstein and Orrin Hatch had a difficult time convincing stars to testify before Congress about the necessity for a federal privacy bill. Although stars supported this bill, many refused to testify because of "fear of retribution" from the paparazzi.[18]

This fear is well warranted. When, for example, George Clooney took a public stand against the tabloid media, the press boycotted his movie premieres and disparaged Clooney to an even greater extent.[19] Sources who were willing to provide information for this Comment required anonymity for fear that participation would only add fuel to an already combustible situation in their lives and create more heartache for themselves and their loved ones. In that way, not only has a fundamental right of privacy been stripped from the subjects of these photographs, but their freedom to express their views has also been thwarted. Free speech as defined by the Constitution only protects the individual from governmental suppression of speech,[20] but the suppression of speech resulting from a fear for retribution

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[12] *Reese: Paparazzi Went Too Far*, MIAMI HERALD, April 20, 2005, at A4.

[13] *Names in the News: Lopez says close call with paparazzi was upsetting*, CHARLESTON DAILY MAIL, April 13, 2005, at 4D.

[14] *See, e.g.*, *Celebrities Uncensored* (E! television broadcast), *Caught on Tape* (VH1 television broadcast), *Paparazzi* (BBC television broadcast), *Paparazzi !* (LifeNetwork Canada television broadcast).

[15] *Aniston Settles over Topless Photos*, PHOTO DISTRICT NEWS, Sep. 2002, at 17.

[16] CAL. CIV. CODE § 1708.8 (2006), for a discussion thereof, *see* discussion *infra* Part V.C.

[17] *Aniston Settles, supra* note 15, at 17.

[18] *Hearings, supra* note 4, at 59.

[19] *See, e.g.*, Bridget Byrne, *Paparazzi Protest "Peacemaker" Clooney*, EONLINE NEWS (Sept. 23, 1997) http://www.eonline.com/News/Items/0,1,1814,00.html.

[20] U.S. CONST. amend. I; U.S. CONST. amend. XIV applies the First Amendment to State governments as well.

by the tabloids is no less real and pervasive. Standing up and speaking out against a social problem in order to evoke change is essential to democracy, but those affected by these invasions are coerced into remaining silent so as not to provoke their tormentors.

No discussion of the tabloid media's tactics is complete without acknowledging the part that the paparazzi played in the death of Diana, Princess of Wales. While many factors contributed to the car accident, and the ambiguity has led the British government to open an inquiry into the cause of the accident, [21] most would agree that the paparazzi played a role. In November of 2003, a French court ruled that paparazzi did not invade Princess Diana's privacy when they photographed the wreckage of her car and her body, as well as the body of her companion, Dodi al Fayed.[22] Accidents are newsworthy, particularly when they occur in public. But to allow a group of people to chase someone to her death and then be the first on the scene to obtain the bloody pictures hardly seems to be what French law or the Framers of the United States Constitution intended to protect. Photos of the wreckage and fallen princess were said to have sold for upwards of one million dollars.[23] While that million dollar price tag itself is appalling, it is inconsequential compared to the human life that was sacrificed for the photograph.

Why would the paparazzi knowingly make people's lives miserable? These pictures sell.[24] Gossip is a multi-billion dollar industry.[25] People revel in witnessing the suffering of others, as evidenced by the exploding Reality TV culture.[26] The difference with reality television is that the "stars" of those shows consent to the invasion.[27]

II.
A FAUSTIAN BARGAIN?

Celebrities appear at press events, on magazine covers and on television shows to promote their work. That celebrities "use" the media to promote their movies and pose for publicity photographs is argued as

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[21] *Diana Crash Investigation Ordered*, BBC NEWS (Jan. 6, 2004) http://news.bbc.co.uk/1/hi/uk/3371053.stm.

[22] Philip Delves Broughton, *Diana Death Paparazzi Acquitted over Photographs*, THE DAILY TELEGRAPH, Nov. 29, 2003, at 5.

[23] Richardson, *supra* note 1, at 64.

[24] Siobhan Darrow, *Stars Denounce Paparazzi Fervor*, CNN, Aug. 31, 1997 http://www.cnn.com/WORLD/9708/31/diana.paparazzi/; Richardson; *supra* note 1, at 64.

[25] Carol Lloyd, *Gossip: The Most Dangerous Drug of All*, SALON, Jan. 28, 1998 *at* http://www.salon.com/feature/1998/01/Cov_28feature2.html.

[26] *See, e.g.*, Emily Nunn, *Reality TV is Only Fun when Somebody Gets Hurt*, KNIGHT-RIDDER/TRIBUNE NEWS SERVICE Jan. 13, 2003.

[27] *See, e.g.*, Ellen Goodman, *Like a Peeping Tom at a Strip Show*, NATIONAL POST, A15, July. 8, 2000.

evidence that they have given blanket consent to the paparazzi to photograph them wherever and whenever the paparazzi chooses.[28] Members of the tabloid media argue that stars make a "Faustian bargain"[29] when they accept the money and notoriety that comes with performing at their craft. The problem with the argument that consent at certain times gives unfettered consent at all times is the same problem as with the date rape defense. One can consent to sexual intercourse time and time again, but as soon as he or she says "no," no one has the right to force another to engage in sexual intercourse.

While snapping a photo might seem a far cry from a rape, there are traditional ideas that view a nonconsensual photograph as a violation. Photos were, and still are in some cultures, believed to steal a part of the soul.[30] Other cultures associate photographs with death.[31] Novelist Balzac believed that every time a photograph was taken, a thin layer of skin was stripped away.[32] Film theorist Christian Metz describes taking a snapshot as "an instantaneous abduction of the object of the world into another world, into another kind of time."[33] Photographs can be a substantial invasion of privacy and feel like a violation.[34] Pictures are quite personal. In fact, "[p]ossessing an image of someone – taking that image into your home, studying it at leisure – makes that person an oddly intimate part of your life."[35]

Photographers make a permanent record of an event, enable

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[28] *See, e.g.*, Aisha Labi, *Advantage: Hacks*, TIME EUROPE, Oct. 28, 2002, at 38 *available at* http://www.time.com/time/europe/magazine/article/0,13005,901021028-366269,00.html; Davos Newbies, *at* http://www.davosnewbies.com/2002/02/13, (quoting the editor of the tabloid The Mirror, "If you are going to voluntarily enter Hannibal Lecter's cage, then eventually you are going to get nibbled round the back of the neck."); David Chipp, *Privacy: Balancing Individual Rights and Freedom of Expression*, *at* http://www.presscouncil.org.au/pcsite/activities/meetings/asiapac/dav*Id*.html, (discussing the problem of celebrities "wanting to have it both ways").

[29] *Hearings, supra* note 4, at 19-20, (testimony of Michael J. Fox). *See also* Alex Beam, *Tabloid Law*, THE ATLANTIC MONTHLY, Aug. 1999, at 55.

[30] This belief is often attributed to Native Americans and Mexicans, but actually has its roots in Europe. *See generally* Marina Warner, *Stolen Shadows, Lost Souls: Body and Soul in Photography*, RARITAN: A QUARTERLY REVIEW, Fall 1995, at 35 (discussing the different perspectives on the "soul stealing" properties of photographs and photography).

[31] *See generally* Gabrielle Dean, *Portrait of the Self: Victorian Technologies of Identity Invention*, M/C: A Journal of Media and Culture 5, no. 5 (2002), http://www.media-culture.org.au/0210/Dean.html (discussing the early purposes of photography to memorialize the dead through use of "memento mori" or photos of the dead).

[32] Leah Ollman, *About Face*, ART IN AMERICA, Nov. 2002, at 140.

[33] CHRISTIAN METZ, *Photography and Fetish*, *in* THE CRITICAL IMAGE, 158 (C. Squires ed. 1990).

[34] *See* SUSAN SONTAG, ON PHOTOGRAPHY 13 (Dell 1977) (asserting that photographs "assassinate" the subject).

[35] Marianne Szegedy-Maszak, *In Love with a Famous Stranger*, U.S. NEWS AND WORLD REPORTS, Jul. 9, 2001, at 66.

widespread dissemination of this record to a larger and different audience than the subject intended and allow the viewer the opportunity to see much more than he would be able to see with his naked eye.[36] This type of intrusive photography is like pornography – the point is not to show whatever is on the frame, but instead to emphasize that the image was caught on film, turning the "subject into object"[37] and allowing the viewer to be the voyeur.[38]

III.
THE RIGHT TO PRIVACY

Culturally, fascination with celebrities is understandable. They are often beautiful, glamorous people with interesting lives. Like all human beings, however, stars have moments when they are not beautiful or glamorous, when they are engaged in the mundane, but most importantly when they need privacy to maintain their humanity. Everyone has experienced a talk with a lover, a family member or a friend that requires privacy for resolution. More than just problem-solving, joy comes from those private moments.

Federal Courts have held that the right to privacy can limit the conduct of the press, even in areas where the public may have an interest. In *Galella v. Onassis*, the court held that it is important to "shield intimate and personal characteristics and activities from public gaze; to have moments of freedom from the unremitted assault of the world and unfettered will of others in order to achieve some measure of tranquility...without which *life loses its sweetness.*"[39] Celebrity status does not make a person fair game for photographers at all times. In *Virgil v. Time*, the court explicitly held that, "[t]he fact that they 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."[40] In various instances, federal courts have

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[36] Andrew Jay McClurg, *Bring Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1041-43 (1995).

[37] ROLAND BARTHES, CAMERA LUCIDA 13 (Richard Howard trans., Hill and Wang 1981).

[38] Wayne Koestenbaum, *Shooting Stars*, ART FORUM INT'L, Nov. 1997, at 9.

[39] Galella v. Onassis, 353 F. Supp. 196, 232 (S.D.N.Y. 1972) (Emphasis added). (In this case, paparazzo Ronald Galella brought suit against Jackie Onassis and her secret service agents for false arrest, malicious prosecution and interference with his business of photography. Mrs. Onassis countersued on several claims because Galella had violated an order of protection from 1971. The court detailed several incidents wherein Galella blocked, harassed and endangered Mrs. Onassis and her children. Although Mrs. Onassis was able to obtain the restraining order against Galella, it did nothing to stop his actions. It took more than a decade for the court to find Galella guilty.).

[40] Virgil v. Time, Inc., 527 F.2d 1122, 1131 (9th Cir. 1975) (Virgil, a well known body surfer at The Wedge at Newport Beach talked to a reporter from *Sports Illustrated* about body surfing and his personal life. Virgil was under the impression that the article would be

refused the press the ability to publish whatever it sees fit. These cases arise when the court balances a competing social interest against the freedom of the press.[41] The court in *Tribune Review Publishing Co. v. Thomas* held that getting at what one wants to know "either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, [and] criticism fully protected by the First and Fourteenth Amendments."[42]

Legal theory also supports the right to privacy for everyone regardless of social status. Warren and Brandeis were the first to argue that the details of an individual's private life "belonged" to that person and cannot be "used" by another person without permission;[43] urging that privacy become a tort law in 1890.[44] Further, courts have refused to hold that the First Amendment allows the press to "engage in any sort of conduct [that it wants to], no matter how offensive."[45] Courts and scholars alike have found that speech can be limited by the fundamental need for and right to privacy,[46] demonstrating the practical and theoretical necessity of codifying privacy rights for all American citizens.

IV.
EXISTING REMEDIES

In the fight for privacy and safety from intrusive paparazzi, the law offers some remedies, none of which address the totality of the problem or

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about his body surfing. The article, instead, became about Virgil's daredevil lifestyle and unflattering past. The court held that telling one's story to an individual does not necessarily mean that it is public information, even if it something in which the public might be interested.).

[41] United States v. O'Brien, 391 U.S. 367 (1968) ("To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

[42] Tribune Review Publ'g. Co. v. Thomas, 254 F.2d 883, 886 (3d Cir. 1958) (holding that allowing cameras in the courtroom was up to the judge's discretion and denial of cameras in the courtroom is not a violation of the First Amendment.).

[43] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 199 (1890).

[44] Diane L. Zimmerman, *Requiem for a Heavyweight: A Farwell to Warren and Brandeis' Privacy Tort*, 68 CORNELL L. REV. 291, 295 (1983).

[45] *Galella*, 353 F. Supp. at 220.

[46] *See, e.g.*, Briscoe v. Reader's Digest, 483 P.2d 34, 42 (Cal. 1971) (Where a defendant has rehabilitated himself, the court ruled that news publications cannot always detail his past crimes because "great general interest in an unfettered press may at times be outweighed by other great societal interests." The court held that rights guaranteed by the First Amendment do not require a total abrogation of privacy.).

provide any real sense of protection or security for public figures. Criminal and civil remedies exist for stalking and trespass. There are also tort remedies for invasion of privacy, but, because of their constructions as well as the way that they are practically applied, these torts have been relatively weak solutions. It is important to understand the workings of these remedies as well as their limitations in order to appreciate how the law must change to provide adequate privacy protection.

A. Trespass and Stalking

Trespass is effective when a photographer physically intrudes on private property, but many intrusions occur in public. In California, for instance, most trespass violations require entrance on private property.[47] Paparazzi, aware of the parameters of the law, are careful to remain on public property. Instead of physically trespassing, a paparazzo may use surveillance to discover when his or her subject leaves the home..[48] In other instances, photographers lie or bribe neighbors or staff members in order to gain "lawful" access to adjacent land.[49] Photographers also employ the use of zoom and telephoto lenses to take pictures that they otherwise would have to physically trespass to obtain.[50] None of those methods are prohibited or even addressed by trespass law.

In California, the first state to have a stalking law,[51] to establish stalking there must be, among other elements, a "credible threat."[52] A credible threat is statutorily defined as a written or verbal threat.[53] Paparazzi can easily avoid liability by writing or saying nothing at all. Taking photos does not necessitate a prior verbal or written threat, but persistent chasing and relentless photographing does constitute a threatening situation. When one has to speed up to escape a group of vultures who are chasing her, there does not have to be a verbal or written threat in order that she fear for her safety. Quite likely Princess Diana did

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[47] CAL. PEN. CODE § 602 (2006).

[48] *See, e.g., Galella*, 353 F. Supp. 196; *Hearings, supra* note 4, at 19-20 (testimony of Michael J. Fox) and 37-38 (testimony of Paul Reiser).

[49] *Hearings, supra* note 4; *See also Aniston Settles, supra* note 15, at 17.

[50] *Hearings, supra* note 4, at 19 (testimony of Michael J. Fox).

[51] State and Federal Stalking Laws, http://cyber.law.harvard.edu/vaw00/cyberstalking_laws.html.

[52] CAL. PEN. CODE § 646.9(a) (2003).

[53] CAL. PEN. CODE § 646.9(g) (2003).

Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

not receive formal written or verbal notification from the paparazzi who chased her to her death, but her fate was sealed nonetheless.

Stalking laws have the potential to be effective if they can be changed to eliminate the need for a written or verbal threat. A totality of the circumstances standard: to be able to show that one is regularly followed, photographed, recorded or threatened, using a reasonable person standard, could facilitate individuals obtaining restraining orders. If the stalking laws were to change in that way, the laws might provide some relief to victims of the stalkerazzi.

B. Restatement (Second) of Privacy Torts

William L. Prosser defined four torts involving privacy, which were subsequently adopted in the Restatement of Torts.[54] The four privacy torts are: intrusion upon seclusion of private affairs, appropriation of name or likeness, public disclosure of private facts and false light publicity.[55] These causes of action may provide some relief for invasions of privacy, but they are largely inapplicable or unworkable when it comes to public figures.

1. Privacy Tort: False Light Publicity

False light publicity requires a publication of a false statement that portrays the subject inaccurately, in a way that would be highly offensive to a reasonable person. The false light tort is not sufficient protection in and of itself because an invasion of a private moment does not necessarily include false or unflattering information. The funeral of a family member, even in public, is a distinctly private event. But because there is nothing unflattering or false about that event, this tort would not prevent a subject from being photographed while at a private event. Documenting one's every move is similarly neither false nor unflattering, but it poses significant risks for the subjects by making their routines public knowledge and available to predators.[56] Chasing or stalking an individual to obtain a photo does not in and of itself create a false light image but does pose a threat both to safety and privacy. This tort is completely ineffective in preventing or combating these invasions.

Portraying someone in a false light, or using an image to imply information that is not true, does, however, invade upon privacy and should

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[54] RESTATEMENT (SECOND) OF TORTS §§ 652B-E American Law Institute, 1977. [hereinafter RESTATEMENT (SECOND) OF TORTS].

[55] *Id.*

[56] *See, e.g., Hearings, supra note 4*, at 18, (testimony of Michael J. Fox) (Fox recounts 24 hours per day surveillance, the publication of blueprints including the electrical wiring of his home and how a false story about a stalker planted the seeds for an insane woman to stalk his family.)

be curbed. Even if some aspects of the false light tort are useful, they need to be strengthened to provide more comprehensive protection. To make it useful in protecting privacy, the tort of false light privacy would have to be expanded to hold publishers accountable for the manner in which they make use of paparazzi photographs. For instance, a publisher or editor may imply an extramarital relationship of a famous person by placing several pictures of the same pair together in different settings. These photos in aggregate might be used to create a scandalous inference, when in fact the photos may have been taken of individuals who have been friends for several years. While this implication would undoubtedly cast the pair in a false light, there would be problems enforcing an expanding false light because determining whether or not the juxtaposition of photographs creates a false impression is subjective. This challenge would be a fatal flaw and prevent any recovery for the subjects.

2. *Privacy Tort: Appropriation of Likeness*

Appropriation of likeness usually involves the use of celebrities' images in connection with a product so as to imply an endorsement. Appropriation of likeness is not applicable to news publications.[57] This cause of action, as it exists now, cannot be effectively used to fight the dangerous and invasive techniques of the paparazzi. If news publications were subject to the provisions of this tort, appropriation of likeness might prove to be a useful tool for combating intrusions. An argument can be made for application of appropriation of likeness to news publications. The use of a photo of a celebrity in a magazine or newspaper is intended to sell the publication. The more papers or magazines that sell, the more advertisers benefit. The safe-harbor for news publications, which includes the tabloids, has prevented any such application to the press.

If applied to news publications, the text of the tort could be applied so as to protect public individuals from invasions into their private time and space. When public figures are engaged in press events, consent could be considered implicit. If the star is not engaged in a formal public appearance, photographers would have to gain explicit permission from the subjects to take photographs at other times. There are many instances when a famous people are willing to be photographed. For example, Michael J. Fox testified that he is willing to pose at "prearranged sessions and at public events."[58] When celebrities are not acting in their professional capacity and have not given consent, anyone who takes and subsequently publishes or causes that photograph of that celebrity to be published should be subject to tort liability.

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[57] Restatement (Second) of Torts § 652C.

[58] *Hearings, supra note 4*, at 18 (testimony of Michael J. Fox).

Placing part of this responsibility on the publisher would both be necessary for enforcement[59] and encourage the use of lawfully obtained photos. Instead of buying from freelance paparazzi, holding publishers liable might prompt them to use that they are certain were lawfully taken, in order to avoid liability.

Without the ability to hold tabloids, magazines and newspapers accountable for appropriation of likeness, this tort provides no relief for those suffering at the hands of the paparazzi. Without contracts or otherwise explicit consent, it would be difficult to delineate when photographs may be taken and subsequently published. It is unlikely that appropriation of likeness will ever be applied to news organizations, making it inadequate for privacy protection.

3. *Privacy Tort: Public Disclosure of Private Facts*

Public disclosure of private facts has the potential to be an effective remedy if each element of the tort can be met, but a public plaintiff would have an extraordinarily difficult time meeting each and every one of the requirements. Under the public disclosure of private facts tort, the information published must concern the plaintiff's private life, the disclosure must be highly offensive to a reasonable person and it must not be of legitimate public concern.[60]

a. Matter concerning plaintiff's private life

The first standard poses the fewest problems because virtually all of the photos sought by paparazzi are private in nature. The fact that the photos show private moments make them particularly marketable. The difficulty meeting this threshold arises when individuals leave their homes. Paparazzi are often perched to follow their subjects and take photos as soon as the stars exit private property. [61] The paparazzi's implicit contention is that if the celebrity does something in public, it is intended for public consumption. This argument appears more significantly in claims for the tort of intrusion.[62] For the tort of public disclosure of private facts to have teeth, any non-commercial and/or familial activities must be considered private even when occurring outside of the home.

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[59] When the paparazzi surreptitiously takes photos, the subject might not even be aware of the photograph's existence until publication. In that way, stars must be able to recover against the publisher, as the photographer's identity often remains unknown.

[60] RESTATEMENT (SECOND) OF TORTS § 652D.

[61] Most paparazzi photos (other than those involving electronic distance enhancing devices like telephoto lenses) are of the subject on public property, likely so that the paparazzo can avoid trespass charges.

[62] *See* discussion *infra* Part IV.B.4.a.

b. Highly offensive to a reasonable person

It is natural that people have a hard time understanding and empathizing with celebrities. Stars lead enviable lifestyles, have lots of money and nice homes. Many non-celebrities view fame as desirable. It is likely that a reasonable person would not be offended by a photo of a celebrity walking down the street, having dinner out or in a private moment with a family member. It is natural that a reasonable person would not have had the experience of being relentlessly followed, chased or watched. Most reasonable people have not been pursued to the point of being in fear for the safety of their families.[63] It would be reasonable for a person who has never experienced the paparazzi to lack appreciation for the fear a celebrity faces when she is followed, photographed and the events of her daily routine are recorded for all the world to know. The nonstop observation and attention is understandably incomprehensible to individuals who have never experienced it firsthand. The tabloids exploit this lack of understanding by positioning celebrities as "non-human others"[64] who do not deserve the respect and dignity that anyone else would not only expect, but demand.[65] Because of this dehumanization, it could be particularly difficult to convince people to be highly offended that a public figure's privacy has been invaded under any circumstance.

Photos of celebrities' premature babies,[66] unpublicized wedding pictures taken from helicopters,[67] or photographs from a celebrity's father's funeral[68] would likely meet the highly offensive standard. These invasions are prevalent because distressed images of heroes garner the most money.[69] Paparazzi often use telephoto lenses to obtain pictures, which they might not have been able to take without physical trespass or being detected.[70] These photos should also be considered offensive enough to meet the "highly offensive" standard – if not for their content, then because of the way that they were obtained. If the manner in which telephoto pictures are taken was common knowledge, the reasonable person would likely be

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[63] For instance, paparazzi ran Arnold Schwarzenegger and his wife off the road while driving their child to school, only days after Schwarzenegger's heart surgery. *See* Siobhan Darrow, *Stars Denounce Paparazzi Fervor*, CNN, Aug. 31, 1997 *at* http://www.cnn.com/WORLD/9708/31/diana.paparazzi/; see also *Reese: Paparazzi Went Too Far*, MIAMI HERALD, April 20, 2005, at A4; *Names in the News: Lopez says close call with paparazzi was upsetting*, CHARLESTON DAILY MAIL, April 13, 2005, at 4D.

[64] *Hearings, supra note 4*, at 51 (testimony of Michael J. Fox).

[65] *Id.*

[66] *Id.* at 37 (testimony of Paul Reiser).

[67] *Id.* at 51 (testimony of Michael J. Fox).

[68] *Id.*

[69] Photo dealers tell paparazzi that what sells are exclusives. Richardson, *supra* note 1, at 71. In one case there was a "market" for photos of Sharon Stone crying. *Id.*

[70] *Hearings, supra note 4*, at 51 (testimony of Richard Masur).

offended. Even if the "highly offended" standard is not met by the image itself, the reasonable person should be outraged at the concept of paparazzi lying in wait outside of someone's home, following her from morning until night, chasing her and blocking her entrance into her own home. Even more frightening and threatening to a subject's safety is the idea that one could be followed all day without knowing it.[71] If the trier of fact could empathize with the Orwellian fear[72] of being constantly watched or followed, he would find these photos highly offensive.

c. Newsworthiness and the Kapellas Test

Another hurdle in bringing a public disclosure of private facts tort action is the legitimate public concern standard. Prosser's Restatement holds that whether or not something is newsworthy is based on community mores and is left to a jury's discretion.[73] Public interest is generally defined to be anything in which the public is interested, intrigued or aroused, regardless of the value of the information[74] Most courts leave it to the fourth estate[75] itself to determine what is newsworthy, exacerbating the problem.[76] When the act of putting something into print makes it newsworthy, the expectation is that each subsequent publication will go farther than the last to keep the public interested. In other words, "the supply creates the demand."[77]

In *Kapellas v. Kofman*, City Council candidate Inez Kapellas and her children were the subjects of an editorial stating that she was not fit for the City Council seat because her children needed her in the home, based on their history of criminal offenses.[78] Although the court did not find the publication liable in this case, it determined that some situations involving public figures are not inherently newsworthy, but instead are subject to an evaluation of their newsworthiness. The court set forth the standards for

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[71] Putting home addresses, license plates and a documentary of an individual's day from morning until night into the public arena makes this information not only accessible, but irresistible to would-be stalkers.

[72] George Orwell, 1984 (Signet Books, 1990) (1949).

[73] RESTATEMENT (SECOND) OF TORTS § 652(D).

[74] *See, e.g.*, Jenkins v. Dell Pub. Co., 251 F.2d 447, 451 (3d Cir. 1958).

[75] "Fourth Estate Name sometimes given to the press. The phrase was first used by Thomas Babington Macaulay when he wrote (1828) of the House of Commons that: 'The gallery in which the reporters sit has become a fourth estate of the realm.' This was an expansion of the concept of the three estates – the lords spiritual, lords temporal, and commons.'" Definition; Oxford English Dictionary, Second Edition: Volume V. Clarendon Press. Oxford 1989.

[76] Zimmerman, *supra* note 44, at 353.

[77] Warren and Brandeis, *supra* note 43, at 196.

[78] Kapellas v. Kofman, 459 P.2d 912 (Cal. 1969).

determining newsworthiness in California.[79] The three-pronged test consists of evaluating: (1) the social value of the information published, (2) the depth of the article's intrusion into private affairs and (3) the extent to which the subject voluntarily acceded to a position of public notoriety.[80]

(1) Social Value

The social value of most photographs is subjective. It would be difficult to assert that a photograph of a celebrity drinking coffee has any social value. Intimate photos of stars nude on a beach[81] can titillate, but do not add anything to society. *Political Freedom* author Alexander Meiklejohn goes so far as to assert that for speech to be in the public interest, it must bear on the functioning of government.[82] In *Galella*, even though Mrs. Onassis was a celebrity, the court held that the minutiae of Mrs. Onassis' life (her taste in ballet, the food that she ate, the magazines that she bought) cannot be said to "bear significantly upon public questions or otherwise 'enable members of society to cope with the exigencies of their period.' It merely satisfies curiosity."[83] A California court held that details of Eddie Murphy's child support agreement were not newsworthy. The court found that, although the public had a general interest in Murphy, particulars of his financial arrangements with his child "overstepped" the newsworthy standard.[84] Courts have been reluctant, however, to hold that true details lack social value, because of its deference to the press for determining its own standard of newsworthiness.[85]

(2) Depth of intrusion

The depth of the intrusion is also subjective, however it must be emphasized that it is not always just one photograph (though often times certain photos are more incendiary than others), but the relentless pursuit of pictures that creates such a severe intrusion. It is the totality of the circumstances (which, however, must be curbed one at a time) that creates

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[79] *Id.* at 922 (holding, "Although the courts still have only hesitantly sketched the boundaries of the 'newsworthy' category, the facts published about the Kapellas children in the editorial in question clearly fall within the allowable limits evolved through the case law.").

[80] *Id.*

[81] Gary Williams, *"On the Q.T. and Very Hush Hush": A Proposal to Extend California's Constitutional Right of Privacy to Protect Public Figures from Publication of Confidential Personal Information*, 19 LOY. L.A. ENT. L. REV. 337, 351. The court ordered *Playgirl* to recall an issue in which the magazine published telephoto pictures of Brad Pitt nude on a beach without his consent.

[82] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24 (Harper & Bros. 1960).

[83] *Galella*, 353 F.Supp. at 225.

[84] *See* Beam, *supra* note 29, at 64.

[85] *See, e.g.*, Jenkins v. Dell Publ'g Co., 251 F.2d 447, 451 (1958).

so severe an invasion. Many images in tabloids are not of celebrities while they are "on the job," but instead of personal times or daily routines. To someone who is not followed by photographers, these pictures may seem like mere inconveniences rather than severe intrusions. The subjectivity of this standard may make it insurmountable for celebrities.

(3) Voluntary notoriety

The third factor is the extent to which one is voluntarily famous. This would be among the most difficult hurdles because virtually all celebrities choose to work in the media. Other public figure like Jessica Lynch[86] and Ellen Levin[87] can satisfy this standard because they are thrust into the limelight and then subjected to intense scrutiny.[88] While celebrities do agree to give up a degree of anonymity, it should not be a complete bar to privacy. Famous people may choose their craft, but do not always desire the notoriety. Volunteering to be public figures should not overtake one's life. No other lawful employment requires practitioners to subject themselves to undesirable circumstances twenty-four hours a day, seven days a week. Public officials, on the other hand, may be forced to give up more rights when their notoriety relates to matters essential to self-governance.[89]

d. Government v. Gossip

The term "public figure" was designed to encompass both politicians and celebrities.[90] While everyone is entitled to privacy,[91] a distinction should be drawn between these two groups. Politicians are not owed the same protection because their morals and character reflect that of the nation and they subject their characters to evaluation when seeking election.[92] Celebrities do not, by definition of their professions, put their characters out for public observation. In 1999, Richard Masur, then President of the Screen Actors' Guild, testified before Congress that, "a performer is not saying 'I want your support. I want your respect. I want your authority to

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[86] The female soldier received much unwanted attention after her return home from battle. *See* Edward Wilde, Jr., *Stop the Press: How Much of Jessica Lynch's Personal Life Will Remain Hers Alone?* LOS ANGELES DAILY JOURNAL, Apr. 28, 2003, at 6.

[87] After her daughter's murder, Mrs. Levin was relentlessly pursued by the media for reaction and comments. *Hearings, supra note 4*, at 28-35 (testimony of Ellen Levin).

[88] *Id.*

[89] *See generally infra* notes 164-170.

[90] William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 410 (1960).

[91] *See* discussion *supra* Part IV, specifically note 31.

[92] *See, e.g.*, Coleman v. MacLennan, 78 Kan. 711, 724 (Kan. 1908) ("[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages").

act in your interest.' They're saying 'I want you to watch my movie.'"[93]

Many actors, musicians and other artists take to their crafts not for notoriety, but as a way to express themselves.[94] The arts create a connection among people from all walks of life. Society would be poorer without the contributions of artists. From the groundbreaking endeavors in film, music and art that blur ethnic, religious, racial and gender lines to works that provide simple moments of diversion – society benefits enormously from the work of celebrities. Human beings should not be discouraged from practicing their crafts because of a culture's refusal to grant even a slight degree of privacy. This is not to say that the work of celebrities is more important than that of politicians, only that the function of celebrities is to add to culture and entertainment, not to make moral and legal choices for a constituency.

The court in *Briscoe v. Reader's Digest* made specific note of the need to treat public officials differently from other public figures.[95] The court held that those who seek the public eye but are not public officials are subject to "fair comment and criticism,"[96] but because information about these individuals is not so vital to the maintenance of self-governance and democracy, famous non-politicians should be afforded greater protection from media exposure.[97] When Kirk Douglas sued Disney for releasing film of him acting in an uncharacteristically unflattering manner at a party, the court held that "it is not enough to say that because he is a motion picture

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[93] *Hearings, supra note 4*, at 78 (testimony of Richard Masur).

[94] *See, e.g., 70th Annual Academy Awards* (ABC television broadcast, Mar. 23 1998) (Helen Hunt, winner for Best Actress, thanked her acting teachers "...for giving me a way to learn about myself and the world and a way to express myself. I hate to think where I'd be without that."); Jodie Foster calls acting "a way to express myself, and to be things I'm not." Richard Corliss, *A Screen Gem Turns Director*, TIME, Oct. 14 1991, at 68; When asked why people act, Meryl Streep said, "Every time I think it's a silly way to spend my life, I see a performance by another actor and think, "I couldn't live if I didn't have this in my life." I really think that. Or a piece of music. We need art. We really need art. Maybe we need to feel we count, like our existence matters. Acting can do that; it can make you feel more alive and proud to be a human being. Even seeing the worst of humanity." Ken Burns, *Meryl Streep*, USA TODAY WEEKEND MAGAZINE, Dec. 1, 2002, *available at* http://www.usaweekend.com/02_issues/021201/021201streep.html; Julia Stiles writes, "Acting has given me a way to express myself, to play pretend, to ask questions and to propose answers." Julia Stiles, *How I Learned to Stop Worrying and Start Taking Risks at* http://www.suspicious-minds.org/juliastilesarticle.html; Diane Keaton writes "Acting let me discover a new world, the world of expressed feelings.... From where I stand, after all this time, Acting -- watching it, directing it, and still doing it -- is the reason I'm now more passionately in love with the art of human expression, in all its forms, than ever before." Diane Keaton, *Learning to Trust Actions, Not Words at* http://talentdevelop.com/Page79.html.

[95] *Briscoe*, 483 P.2d 34, 38 n.5.

[96] *Id.*

[97] *Id.*

personality and a public character he has no private rights."[98] Furthermore, "all men alike are entitled to keep from popular curiosity, whether in public life or not."[99] Although it is argued that actors voluntarily give up all privacy rights, Michael J. Fox testified before Congress that he accepts that he has given up some privacy and therefore cooperates and has a good relationship with the media, but asserts no legitimate profession comes "with a waiver of basic rights of privacy."[100] It is a particularly unsettling notion that this is a sacrifice that one must make for his career. In Fox's case, for example, this choice was made as a child[101] without a full appreciation of the ramifications and lifelong significance of that decision.

Public disclosure of private facts may seem like a useful tool for fighting the paparazzi's intrusions, but the newsworthiness standard is particularly difficult to meet. Even though the *Kapellas* case laid out a test that does allow public figures a cause of action,[102] proving lack of social value and meeting the "highly offensive to a reasonable person" standard is nearly impossible for a celebrity. In that way, public disclosure of private facts does not provide an adequate remedy for the injured or deterrent for the violators.

4. *Privacy Tort: Intrusion into Seclusion*

The last of the four privacy torts which Prosser explicated in his Restatement of Torts is intrusion upon seclusion.[103]

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.[104]

Intrusion has been called the "last effective weapon in [the] fight for privacy"[105] because it is broad enough to address myriad media intrusions. Prosser noted that this tort "fill[s] the gap left by trespass, nuisance, the intentional infliction of mental distress and whatever remedies there may be

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[98] Irwin O. Spiegel, *Public Celebrity v. Scandal Magazine – The Celebrity's Right to Privacy*, 30 S. CAL. L. REV. 280, 299 (1957). There is no citation to this case, but it is discussed in Spiegel's article.

[99] *Id.* at 300.

[100] *Hearings, supra note 4*, at 17 (testimony of Michael J. Fox).

[101] Fox's first role was at age 15. *See*, Michael J. Fox, *Internet Movie Database at* http://www.imdb.com/name/nm0000150/.

[102] Kapellas v. Kofman, 459 P.2d 912 (Cal. Sup. Ct. 1969).

[103] RESTATEMENT (SECOND) OF TORTS § 652B.

[104] *Id.*

[105] Harry S. Raleigh, Jr., Case Comment, *Invasion of Privacy - Unreasonable Intrusion - A Weapon Against Intrusions upon Our Shrinking Right of Privacy*, 47 NOTRE DAME L. REV. 1067, 1077 (1972).

for the invasion of constitutional rights."[106]

The language of intrusion into seclusion, specifically the term "physically or otherwise,"[107] broadly addresses an issue that is refined in the California Anti-Paparazzi Statute[108] and proposed federal legislation:[109] the use of electronic devices to obtain recordings. Intrusion is the only privacy tort that sets forth a potential limitation on recording enhancement devices like telephoto lenses and wiretapping. In addition, the language of this tort does not specifically state that intrusions must occur in the home or on private property; instead the tort can be logically extended to include intrusions outside of the home.

Another attribute of intrusion is that it does not require publication of the recording before liability may be found. A subject may pursue litigation against even those violators who cannot sell their photos or who have not yet sold their photos. Using the intrusion tort, stars can strike preemptively and may be able to obtain an injunction before the photos are made public. In addition, subjects can sue photographers without having to engage in battle with the tabloid publishers, who have bottomless pits of money to tie up the lawsuit in court.[110]

The fact that celebrities would have the option of not involving the publishers is a significant advantage. Lawsuits against the press are extraordinarily expensive. In fact, "[v]oir dire-to-verdict litigation costs more than one million dollars in lawyers' fees. Damage awards are rare. . . . "[111] For tabloids, lawsuits are part of the normal course of business and are justified as an inevitable business expense.[112] Furthermore, states like California have fee-shifting. When the National Enquirer ran a false story about Elizabeth Taylor, she could not meet the actual malice standard of defamation.[113] Taylor was forced to pay more than $400,000 in attorneys' fees to the National Enquirer. She appealed and lost. The biggest winners in this case were the attorneys for the Enquirer.[114] Another disincentive to suing a publisher is the potential for further humiliation. When a star

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[106] Prosser, *supra* note 90, at 392.

[107] RESTATEMENT (SECOND) OF TORTS § 652B.

[108] CAL. CIV. CODE § 1708.8. *See* discussion *infra* Part V.C.

[109] *See* discussion *infra* Part V.B.

[110] When Carol Burnett successfully sued the *National Enquirer* for portraying her in a false light, the case took five years before verdict of $1.6 million for Burnett. Then there was another five years of appeals. At that time Burnett accepted a settlement of $200,000, which she donated to University of Hawaii and Berkley's Journalism Department. Manny Howard, *Stars Who Sue the Tabloids*, COSMOPOLITAN, Sep. 2001, at 283.

[111] *See* Beam, *supra* note 29, at 55.

[112] *Id.*

[113] The law of defamation requires that public figures show actual malice by the publisher. Private citizens need only show that a false story was printed. *See* New York Times v. Sullivan, 376 U.S. 254 (1964).

[114] *See* Beam, *supra* note 29, at 55.

commences a lawsuit, the opposition's lawyers engage in pretrial discovery – free reign to delve into the lives and histories of the celebrities and obtain information to which they might not otherwise have had access. The tabloids make the lives of the stars who oppose them miserable. The financial burdens, time requirement and embarrassment factor serve as significant deterrents from suing the tabloids. In this way, intrusion provides a viable alternative that might help a star retain his or her privacy while avoiding entanglement with tabloid publishers.

A lawsuit that does not implicate the tabloid publication, however, may not have a significant affect on the market in general. A paparazzo may have nothing to lose with an adverse verdict. The pay-off for an incendiary shot often outweighs a risk of judgment against the photographer. If the photographers are bearing the brunt of the adverse judgment, the press has no incentive to avoid publishing invasive materials.

a. Problems with Intrusion

One of the major hindrances of the intrusion tort is that in virtually all jurisdictions, intrusions cannot occur in public,[115] despite the fact that the original language of the tort does not limit location of the intrusion.[116] Prosser argues that individuals more or less "assume the risk"[117] of being observed and photographed whenever they leave their homes.[118] This theory, however, should fail because true assumption of the risk requires "full knowledge of the risk."[119] To have assumed the risk, the subject must have had knowledge of the nature of that risk caused by the specific defendant in question and have made the choice to remain in the situation, in disregard of the danger.[120]

Paparazzi employ many different methods in order to obtain photos. With the advent of electronic distance enhancement devices, the subject does not always know when or where a risk will arise.[121] Further, the maintenance of privacy should not require that individuals never leave their homes for fear of assuming a risk of being harassed by paparazzi. Celebrities attempt to escape the situation by leaving, hiding, traveling in groups or with bodyguards. Bodyguards might be necessary for personal safety; but, having an omnipresent companion is also a significant relinquishment of privacy. For as many solutions as the celebrity might

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[115] McClurg, *supra* note 36, at 1004.

[116] RESTATEMENT (SECOND) OF TORTS § 652B.

[117] Prosser, *supra* note 90, at 391-392.

[118] *See, e.g.*, Gill v. Hearst, 253 P.2d 441, 444 (Cal. 1953) (noting that the photo in question was not surreptitiously taken but of a pose assumed in public).

[119] McClurg, *supra* note 36, at 1039.

[120] *Id.*

[121] *Hearings, supra note 4*, at 176 (testimony of Prof. Lawrence Lessig).

find to avoid the cameras, paparazzi develop new techniques for hunting their prey.[122] Celebrities do not necessarily know that they are assuming a risk when they walk out of their door, leave their shades open or install a mere eight foot tall fence.

Modifying intrusion to apply in public places would be necessary in order to provide any relief. This alteration is supported by case law, as courts have held that simply being in public does not make people fair game for photographers.[123] The *Galella* court explicitly stated that "A person does not automatically make public everything he does in a public place. . . ."[124] Modifying this tort to apply in public places could provide some of the needed relief in this area.

As it stands now, ninety percent of intrusion cases against the media result in a dismissal on Summary Judgment.[125] While, in theory, the tort of intrusion could be a solid remedy for invasion of privacy, the above theoretical problems coupled with the practical results indicate that the tort of intrusion into seclusion is not functionally protecting privacy.

C. California Anti-Paparazzi Statute

In 1972, California amended its constitution to include a right to privacy.[126] In January of 1999, California enacted a statute incorporating elements of the other remedies in order to provide additional privacy protection by enacting California Civil Code § 1708.8.[127] This legislation limits the conduct of paparazzi but not speech or publication of the photographs.[128] Notably, California Civil Code § 1708.8 attempts to improve upon the tort of intrusion by changing the "highly offensive to a reasonable person"[129] standard to "offensive to a reasonable person."[130] The

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[122] Richardson, *supra* note 1, at 64. (The author details how the paparazzi followed Sharon Stone in New York City. He notes that the bodyguard's presence and attempts to block shots of Stone only served to anger the stalkerazzi and make them pursue the shot more aggressively.).

[123] *See Galella*, 487 F.2d at 995 (holding that even in public, intrusive newsgathering may be a deprivation of privacy); Kramer v. Downey, 680 S.W.2d 524, 525 (Tex. App. 1984) (holding that an invasion where the defendant remained on public property infringed on the plaintiff's right to privacy).

[124] *Galella*, 353 F.Supp. at 228.

[125] Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do about It*, 73 TUL. L. REV. 173, 207 n.178 (1998).

[126] CAL. CONST. art. I, § 1, ("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 pursing and obtaining safety, happiness, and *privacy*." Emphasis added.).

[127] Cal Civ. Code § 1708.8.

[128] *Id.*

[129] Restatement (Second) of Torts § 652E.

[130] Cal. Civ. Code § 1708.8(a).

California statute also provides protection from constructive invasion of privacy.[131] Constructive invasion of privacy involves the use of devices that allow a photographer to remain on public grounds but obtain photos of the insides of dwellings which would, without these electronics, require physical trespass.[132] Significantly, anyone who directs or induces another to physically or constructively trespass is also liable, whether or not there is an employment relationship.[133] Ideally, this should deter publishers from including paparazzi photos in their magazines.

The sale or publication of the images does not, however, violate the statute.[134] In order for a publication to be liable, there must be proof that the publishers induced the taking of the photograph. Inducement may be difficult to prove and most publications have great resources to delay the proceedings for years.[135] For the tabloids, litigating an action costs relatively little in comparison to the income made in publication sales, especially when the tabloids view the fight as a deterrent for future lawsuits.[136]

California's legislation is neither vague nor overbroad because it clearly defines all terms contained within the law.[137] Furthermore, it is clearly established that while invested with freedom, the press is subject to the same laws as everyone else, even as it relates to newsgathering.[138] The intent of the California legislation is to deter "the so-called 'stalkerazzi'...from driving their human prey to distraction – or even death."[139] Although California Civil Code § 1708.8 only begins to address the paparazzi problem and does not contain provisions for chasing and following, the attention and debate that this legislation has received is a positive force, inspiring justice. Raising the level of public debate and encouraging intelligent participation in government – a sacred function of

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[131] *Id.* § 1708.8(b).

[132] *Id.*

[133] *Id.* § 1708.8(e).

[134] *Id.* § 1708.8(f).

[135] *See* discussion *infra* Part V.B.

[136] Beam *supra* note 29, at 55.

[137] *See* Ashley C. Null, Comment, *Anti-Paparazzi Laws: Comparison of Proposed Federal Legislation and the California Law*, 22 HASTINGS COMM. & ENT. L. J. 547, 558-60 (Spring/Summer 2000).

[138] *See generally* Lidsky, *supra* note 125, at note 72. *See also Galella*, 353 F. Supp. at 223 ("There is no general constitutional right to assault, harass or unceasingly shadow or distress public figures."); Dietemann v. Time, Inc. 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office.").

[139] Press Release, Governor's Office State of California, Wilson Signs Legislation to Protect Privacy Rights (Sept. 30, 1998).

the First Amendment – helps to assure that courts will uphold the legislation's original intent: to maintain "the personal safety"[140] of California's citizens.

V.
FEDERAL LEGISLATION: A NECESSARY STEP

California's statute is certainly a step in the right direction. It is the first sign of a serious attempt to go beyond the ineffectual tort and criminal remedies in order to protect privacy. Privacy rights must be protected on a federal level in addition to state protections in order to provide a comprehensive safeguard. Americans have to recognize the necessity for privacy protection on a nationwide level. Privacy rights are being eroded for all Americans on a daily basis.[141] While privacy invasions by governmental agencies are checked by the Constitution and judiciary, the law provides no similar check for the tactics of the paparazzi. Congress must take action to rebuild a solid foundation of privacy for its citizens.

Adoption of the California law as a federal law could provide the security our society owes to every citizen's privacy, however the California law does not go far enough to protect privacy rights. California Civil Code § 1708.8 does not address the "persistent following and chasing"[142] that endangers both the celebrity's privacy and safety.

A. Federal v. State Legislation

A federal law is a necessity because harassment by paparazzi pervades this country. Invasions occur in every state. An interstate commerce issue arises because both the subjects of the photographs and the photographs themselves cross state lines. Laws relating to privacy, if they exist at all, vary from state to state. Other countries legislate privacy nationally and such legislation is a vital step for Americans.

Europeans address privacy on a nationwide level. In France, for instance, privacy law says that "each individual has the right to require respect for his private life"[143] and one cannot take another's picture, even in public, unless the subject is involved with a public event or has given consent.[144] The French theory, in opposition to the American standard, is

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[140] *Id.*

[141] *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act §§ 8 U.S.C. 1701 et. seq. (allowing law enforcement greater ability to obtain information about Americans with less evidence than historically required) [hereinafter USA PATRIOT Act].

[142] *Hearings, supra note 4.*

[143] Larysa Pyk, *Putting the Brakes on the Paparazzi*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 187, 199 (1998).

[144] Kevin Goering, *Panel One*, 1999 ANN. SURV. AM. L. 193, 198-99 (1999).

that "the more public the person, the more damaging are intrusions into that person's private life."[145] Data protection laws in Europe as a whole are national schemes that protect both public and private figures alike.[146] Beyond that, "they impose affirmative obligations (often including registration with national authorities) on anyone wishing to engage in any of these activities; and they have few, if any, sectoral limitations – they apply *without regard to the subject of the data.*"[147]

A federal cause of action is a necessary step in the United States in order to create a uniform system to address a national and interstate commerce issue.[148] Photographs taken by paparazzi end up in magazines that are nationally distributed or appear on the Internet. In addition, many paparazzi shots are sold and transported in interstate commerce. Paparazzi photos and stories appear on the Internet as well, which creates a jurisdictional challenge.[149] Invasions occur throughout the United States[150] and , some states do not have any cause of action for invasion of privacy.[151] Trespass laws are inconsistent between the states.[152] Federal judges are in the best position to objectively look at the facts of the case and protect the parties while preventing infringement of First Amendment rights. It may not be easy to provide written or clearly delineated parameters explicating what constitutes illegitimate newsgathering tactics or when a photographer has gone too far, but it is not a difficult determination for the common sense or common knowledge of a judge or jury.

B. The Personal Privacy Protection Act

A federal proposal, similar to California's statute, appeared in the House and Senate in the late 1990s.[153] The federal proposal did address chasing, but left out some of the important provisions in the California legislation that involved liability for individuals who induce the paparazzi to take the photographs.[154] The House Judiciary Committee held hearings on the Protection from Personal Intrusion Act and Privacy Protection of 1998 (The short title of which is the Personal Privacy Protection Act,

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[145] *Id.*

[146] CATE, PRIVACY IN THE INFORMATION AGE at 32-33.

[147] *Id.* (emphasis added).

[148] *Hearings, supra note 4*, at 135 (testimony of Richard Masur).

[149] *Id.*

[150] *Hearings, supra note 4*, at 49-51.

[151] *See* Robert M. O'Neil, *Privacy and Press Freedom: Paparazzi and Other Intruders*, 1999 U. ILL. L. REV. 703, 705 (1999).

[152] *Hearings, supra note 4*, at 135 (testimony of Richard Masur).

[153] Personal Privacy Protection Act of 1998, H.R. 2448 104th Cong. (1998); H.R. 3224 104th Cong. (1998).

[154] CAL. CIV. CODE § 1708.8(d).

hereinafter "PPPA") during the second session of the One Hundred Fourth Congress.[155] The proposed legislation did not become law, but it provides a well-reasoned framework for future legislation.

The PPPA addressed many of the issues that are essential to protect privacy. Drafters used the term "persistent following" to describe unlawful means of obtaining photographs. The PPPA provides a structure under which the law can combat some stalking tactics. In an effort to limit the grounds for First Amendment challenge, the proposed legislation punished only the actions of the photographers. Restricting liability to the photographers who actually engage in activities that put the celebrities in physical danger and fear for their safety limits liability to conduct and not speech. In fact, the conduct laid out in the PPPA is so clearly tailored to hold only those who persistently harass others or constructively trespass liable, that the legitimate news media will not be harmed.

A significant limitation of the PPPA is that there is no deterrent whatsoever for publishers. While exclusion of publisher liability limits grounds for First Amendment challenges, the act does not address the totality of the problem. Virtually all major magazines buy paparazzi photos.[156] How else could they compete – and what do they have to lose? In accordance with the goals of the California statute, the PPPA should also include a provision subjecting publishers to liability if they induce paparazzi to violate the law.

C. New Legislation

New legislation aimed at curbing the stalkerazzi should not be a restriction on the right of free expression. Instead, it should punish the conduct of any person who threatens the safety or invades the privacy of any other person's life.[157] In accord with the PPPA and the tort of intrusion[158] and to avoid limitations of free speech, publication of the pictures would not be the standard. The pictures need not be published for liability to exist. If the intruder violates a provision in obtaining the photographs, and regardless of whether he is a paparazzo, an overzealous fan or a stalker, whether he intends to publish the images or hold them private, he will be subject to the remedies provided for in this proposed law.

New federal legislation must punish the *tactics* used to obtain photographs of people in the course of their personal lives. The legislation

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[155] H.R. 2448 104th Cong. (1998); H.R. 3224 104th Cong. (1998).

[156] Katherine Bruce, *Paparazzi 'R' Us*, FORBES, Oct. 6, 1997, at 39.

[157] While celebrities would be the most likely group of plaintiffs, and paparazzi the most frequent defendants, this law would protect all citizens from acts by anyone who chases, stalks or constructively invades privacy.

[158] *See* discussion *supra* Part V.B.

should incorporate the most effective portions of the existing state laws and torts as well as the provisions of the proposed PPPA. Specifically, chasing someone – on foot or in a vehicle – must be prohibited. Following an individual for an unreasonable amount of time, to be determined by the standard of the reasonable person in the position of the subject, should be likewise proscribed.

Federal legislation should include provisions expanding the public disclosure of private fact tort to prohibit the dissemination of details that could put the subject in danger. Publishing information like blueprints or diagrams of a celebrity's home, significant amounts of information about her routine and descriptive details about her vehicle should be prohibited. This would align public disclosure of private facts with provisions for a criminal and civil expansion of stalking laws. This prohibition should include information about which the subject has made some attempt keep private, including addresses, license plates and routines. When an individual is constantly photographed so that the details of her life are documented and subsequently disseminated, she must have some remedy. While to some this may seem like a mere annoyance, when a crazed individual wants to hurt or kill another, putting this information at his fingertips can only serve to incite him and facilitate a stalking or violent crime.

New legislation would not have to thwart investigative journalism in order to be effective. Instead, the provision would apply when details of a law-abiding individual's personal or familial life was captured on a regular basis, so as to provide information that could pose a threat. The law already limits the methods by which information is obtained.[159] An expansion would provide more adequate protection for safety and privacy while maintaining consideration of free expression.

Publishers and those who induce the violation of this law must also be held liable. While a provision subjecting publishers to liability might be seen as a limitation on speech, legislation could be crafted to avoid interference with free speech while still being an effective deterrent. Holding publishers accountable would not be an affront to the freedom of the press because liability would result when publishers induce or direct proscribed conduct, not expression. If the pay-off for selling a photo is greater than the consequences of violating the law, the law is useless. Holding publishers liable would serve as a disincentive to publishing the photos and knowing that there is no market for the photographs would discourage paparazzi from taking the photos.

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[159] *See generally,* Zemel v. Rusk, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information."); Houchins v. KQED, Inc., 438 U.S. 1 (1978) (The guarantee of freedom to publish did not create a special access privilege).

Constructive invasions of privacy must also be explicitly prohibited. Constructive trespass becomes easier and less expensive everyday. Telephoto and zoom lenses are increasingly powerful and accurate. When an intruder can use technology to invade, his physical location on public grounds should not insulate him from liability. Harvard professor Lawrence Lessig stated before Congress that the free speech clause does not mandate giving free reign to the press. Lessig testified:

> [The free speech clause] does not disable you, as representatives of the people, from responding to these changes, through laws that aim to recreate the privacy that technology has removed. Indeed, other values-themselves as essential to our democracy as free speech-should push you to take steps to protect the privacy, and dignity, that changing technology may take away." In accord with the California Anti-Paparazzi statute and proposed PPPA, Constructive Invasion of Privacy must constitute a violation of a federal law.[160]

In keeping with the provisions of the PPPA, if it can be shown that the subject reasonably feared for her safety, both civil and criminal charges would result. If an injury or death occurs, increasingly more severe criminal and civil charges apply.[161]

While expectations of privacy in the United States may be narrowing based upon the ease with which information can be and is obtained[162] and the fact that invasions are legitimized as necessary safety measures,[163] Congress must send a message that unscrupulous methods of obtaining photographs are not permissible in a country so fundamentally committed to privacy. It is not unreasonable for a law-abiding citizen to expect privacy in his home or yard, even though he knows telephoto lenses exist. It is not unreasonable for an individual to expect freedom from being pursued by a person or group of people. It is not unreasonable to expect that one could carry out the details of her other non-illegal activities without a photographer following her and recording every move that she makes. While some celebrities may feel forced to throw up their hands and accept living in the reality show of their own lives, it is *reasonable* that they should expect better. Celebrities do not use society; the do not ask society to entrust them with the nation's political or economic power. They entertain. It is not, however, unreasonable for them to want – and need – a reprieve from entertaining.

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[160] *Hearings, supra note 4*, at 178 (testimony of Prof. Lawrence Lessig).

[161] PPPA H.R. 2448 104th Cong. (1998); H.R. 3224 104th Cong. (1998).

[162] *See generally* Freedom of Information Act, 5 U.S.C. § 552 (2003).

[163] *See, e.g.*, USA PATRIOT Act §§ 8 U.S.C. 1701 et. seq.

D. Federal Legislation Would Not Offend the First Amendment

The First Amendment's preservation of the freedoms of speech and the press is essential to a free society. Protecting law-abiding individuals' freedom from invasion of privacy, however, is also vital. Protecting law-abiding citizens from intrusions into their lives would not offend the Framers of the Constitution. Privacy is Constitutional.[164] The First Amendment itself ensures the protection of privacy.[165] The First Amendment protects the freedom to refrain from speaking,[166] to keep thoughts private.

The First Amendment was not written to be perverted to protect voyeurs and harassers. The founding fathers included the amendment to "ward off an intrusive *government*"[167], to promote the "advancement of truth, science, morality and arts in general"[168] and so that "oppressive officers are shamed or intimidated into more honorable and just modes of

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[164] *See* Afro-American Publishing Co. v. Jaffe, 366 F.2d 649, 654 n.8 (1966) (en banc) (holding "The right of privacy stands on high ground, cognate to the values and concerns protected by constitutional guarantees." And citing "In Tehan v. United States ex rel. Shott, 382 U.S. 406, 416, 86 S. Ct. 459, 465, 15 L. Ed. 2d 453 (1966), the Supreme Court pointed out that both the Fourth and Fifth Amendments are concerned with 'constitutional values * * * reflecting the concern of our society for the right of each individual to be let alone.' The Court also spoke in terms of "the Constitution's concern for the essential values represented by 'our respect for the inviolability of the human personality' and of the right of each individual 'to a private enclave where he may lead a private life * * *.'" Ib*Id.* For other references to the existence and importance of a zone of privacy established by constitutional guarantees, *see* Mapp v. Ohio, 367 U.S. 643, 656, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); Griswold v. Connecticut, 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); DeGregory v. Attorney General of State of New Hampshire, 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966)."); *See also* Galella v. Onassis 353 F. Supp. 196, 231 (D.C.N.Y. 1972), *aff'd* 487 F.2d 986 (1973); Nader v. Gen. Motors Corp, 292 N.Y.S.2d 514 (Sup. Ct. 1968) (holding "the right of privacy on high ground, cognate to the values and concerns protected by Constitutional guarantees.") *aff'd* 25 N.Y.2d 560 (Ct. App. 1970); *Hearings, supra note 4*, at 224 (testimony of Prof. Lawrence Lessig); O'Neil, *supra* note 151, at 706.

[165] *See* O'Neil, *supra* note 151, at 706 ("For over a half century [the First Amendment] has protected citizens from being forced to declare or express an abhorrent belief - whether by being required to salute the nation's flag or to display a state's motto on one's license plate. To that degree, the sanctity of one's innermost thoughts remains beyond government compulsion. The First Amendment also implies a freedom of association. This relatively recently declared liberty permits us to withhold from government not only how we vote, but also to what organizations we belong and contribute.").

[166] Estate of Ernest Hemingway v. Random House, Inc., 23 N.Y.2d 341, 348 (N.Y. 1968) ("The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.").

[167] Carmin L. Crisci, *All the World is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 207, 216 (2002-2003) (Emphasis added).

[168] *Id.*

conducting affairs."[169] The Supreme Court held that the central tenet of the First Amendment is to protect the "creation and distribution of information relating to 'self-governance.'"[170] Furthermore, the press should "'serve[] as a powerful antidote to any abuses of power by *government officials*' and"[171] to provide the "public with information regarding society's about *governance*"[172] and that "debate on public issues should be uninhibited, robust and wide-open and that may well include vehement, caustic, and sometimes unpleasantly sharp attacks on *government* and public *officials*."[173] None of these goals are furthered or even remotely supported by sharing private details, moments and images of movie stars' lives.[174]

In *Gertz v. Welch*, the Court put forth the definition of a public figure: an individual achieving fame or notoriety in the community.[175] In actions for defamation and invasion of privacy, the public figure must reach heightened standards in order to obtain relief. In many cases, this standard makes recovery nearly impossible. The heightened standard that comes with being a public figure is applied when suing news institutions.[176] When the term "public official" was used as the first heightened standard in *New York Times v. Sullivan*, and later expanded to all public figures in *Gertz v. Welch*, speech was the only issue addressed, not the conduct of the news gatherers. The court was not evaluating an individual or group that followed, harassed or annoyed its subjects. Public figures will always face a heightened standard in bringing suit against a news organization when the lawsuit relates solely to content. There should, however, be a more attainable threshold for public figures to obtain recovery against individuals who engage in dangerous conduct and are unreasonably persistent.

In 1890, Samuel D. Warren and Louis D. Brandeis identified reporting on the private lives of public figures as idle gossip[177] - and it has only become worse. In decrying its social value, they wrote, "Gossip is no longer the resource of the idle and of the vicious, but has become a

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[169] *Id.*

[170] *Id.*

[171] *Id.* at 244. (Emphasis added).

[172] Crisci, *supra* note 167 (Emphasis added).

[173] New York Times v. Sullivan, 376 U.S. 254, 270 (1964) (Emphasis added).

[174] See, e.g., Kerby v. Hal Roach Studios, Inc., 53 Cal. App. 2d 207 (1942) (holding that publicity arising from Kerby's status as an actress did not justify invasion into her private life). See also Diaz v. Oakland Tribune, 188 Cal. Rptr. 762, 773 (Cal. App. 1983) ("Public figures . . . are entitled to keep some information of their domestic activities and sexual relations private.").

[175] Gertz v. Welch, 418 U.S. 323 (1974).

[176] *See generally*, New York Times v. Sullivan, 376 U.S. 254, 270 (1964), Gertz v. Welch, 418 U.S. 323 (1974).

[177] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

trade,"[178] serving only "to occupy the indolent."[179] Warren and Brandeis identified another serious problem: gossip "invert[s the] relative importance of things"[180] and "destroys at once robustness of thought and delicacy of feeling."[181] Privacy, on the other hand, inspires speech.[182] Privacy allows for personal boundaries which foster individuality and thus encourage the development of unique contributions to the public dialogue.[183]

Courts have, accordingly, held that privacy must be balance against the freedom of the press. The Court in *Dun and Bradstreet* held that it has "long recognized that not all speech is of equal First Amendment importance."[184] The Court in *Chaplinsky v. State of New Hampshire*, when evaluating fighting words, held that "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[185] Courts traditionally take part in evaluating these conflicting needs.[186] The press can inform the public and still respect private moments in the individual's life. A balancing of interests, including an appreciation of human safety and privacy, is not only appropriate, it is necessary.

Federal legislation should adopt the structure of the PPPA, which constitutional scholars assisted in drafting in order that the proposal would not violate First Amendment rights. Erwin Chemerinsky, classifying himself as "about as close to a First Amendment absolutist"[187] as there is, helped Senator Diane Feinstein draft the Bill.[188] Another of Feinstein's drafters, Harvard professor Lawrence Lessig, noted that "The Free Speech clause does not render us hostage to invasions of new technologies."[189]

At the Congressional hearings, Lessig went on to explain that this legislation does not offend the Constitution, but instead it furthers the values of the Framers by adapting traditional Constitutional tenets.[190]

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[178] *Id.* at 196.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *See* Crisci, *supra* note 167, at 242.

[183] *Id.*

[184] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

[185] Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572 (1942).

[186] *See Id.*; *Galella* 487 F.2d. at 995-96 (weighing Galella's presence, surveillance against the de minimus public importance of the daily activities of Mrs. Onassis); United States v. O'Brien, 391 U.S. 367 (1968).

[187] Tony Mauro, *Paparazzi and the Press*, THE QUILL, Jul. – Aug. 1998 at 26.

[188] *Id.*

[189] *Id.*

[190] *Hearings, supra note 4*, at 178 (testimony of Prof. Lawrence Lessig).

Lessig finds accepting invasions of privacy is itself an affront to liberties. "For most of our history, most of us had a space into which others were not to pry. For most of our history, this space was protected by the law of property, by trespass laws that made it difficult or impossible for those who would invade this private space to get in."[191] With the latest technology, Congress must "translate our Constitutional values into a new age."[192]

The Framers of the Constitution could not possibly have conceived of the tactics of the paparazzi or the technology that they have at their disposal. Drafters of civil and criminal remedies that ought to be strong enough could not have imagined how far out of control this situation has become. The law must evolve with the times and respond to arising dangers.

E. Federal Legislation Would Benefit Legitimate Media

While most press associations are opposed to any legislation limiting newsgathering techniques,[193] new legislation could actually help the legitimate news media. Many news organizations are openly opposed to the tactics of the stalkerazzi. When recounting the altercation between the paparazzi and Reese Witherspoon, MSN News & Gossip wrote that, although they enjoy candid shots of Witherspoon, "boy, are we feeling guilty right about now."[194] Even the editor of the *National Enquirer* publicly denounced the tactics of the paparazzi after the death of Diana, Princess of Wales.[195] In the "Question and Answer" section of Parade magazine, a reader asked the magazine's opinion of the paparazzi, in response, Walter Scott wrote:

> In this column's 45-year existence, we have abstained from the kind of physical harassment often practiced by tabloid reporters and photographers. We believe in reporting the facts (and, when appropriate, expressing our opinions) about well-known personalities, and we use unposed photos if no others are available. But we disapprove of staking out stars' homes and pestering them as they go about their daily routines. Even celebrities deserve a zone of privacy.[196]

In addition, major news sources have a code of ethics that binds the conduct of its employees. For instance, *Newsweek* passed up on running a story because it required its writers to check its sources. The *Drudge*

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[191] *Id.*

[192] *Id.*

[193] *See, generally*, *Hearings, supra note 4*, at 92-133.

[194] *Reese's Scary Paparazzi Pursuit*, MSN – News – Gossip, April 18, 2005, http://entertainment.msn.com/movies/hotgossip?GTI=6428.

[195] Steve Coz, *Can the* National Enquirer's *editor sell respectability – and papers?*, MSN – Slate, October 12, 1997, http://slate.msn.com/toolbar.aspx?action=print&id=1835.

[196] Walter Scott, *Personality Parade*, Parade Magazine, April 4, 2004, at 2.

Report, an Internet tabloid, ran the piece with no intent to fact-check. *Newsweek* was punished for being careful not to print potentially false information in the way that really mattered: losing a novel, timely story.[197] Similarly, legitimate media would not have to lose out on big selling stories because they would not push the boundaries of the law – or of human decency – to get a photo.

F. Balancing Interests

Like the current California legislation and proposed PPPA, any new proposal will have its challengers. Many press associations opposed the PPPA because they oppose any and all limitations on the press, regardless of its reason, logic or practicality. Opposition by a powerful constituency should not, however, preclude attempts at regulating dangerous activities. Paparazzi intrusions, chasing, following and stalking are different from other intrusions into privacy from which other laws may provide adequate protection. Although the rich and famous may not be a popular class for whom to advocate, public policy dictates that all Americans, regardless of social, economic or political power, be afforded safety and privacy protection. People should be able to have moments of privacy, to feel safe, to be assured that others cannot legally follow or chase them.

Existing remedies simply are not working to protect celebrities from harassment, privacy invasions and threats to personal safety and the safety of their families. Invasions into privacy are exploding. There is a multibillion dollar market[198] for these unnecessary and unacceptable invasions. The difficulty in crafting legislation to prevent these wrongs may be a result of the nature of the intrusions. Celebrity stalking is a relatively new phenomenon. Paparazzi activity is not within the normal experience of the vast majority of citizens and there are no other areas of law which are comparable. There will be challenges to federal legislation. The Constitutionality of limiting activities of the paparazzi will certainly be questioned. The idea of a challenge, however, should not be a reason to abandon the effort. Instead, it should be embraced, discussed and used to create the most effective law that balances the interests of the press and society, as well as individual safety and privacy.

A federal law based upon the California Anti-Paparazzi Statute, which has been on the books since 1999 and never held to be a Constitutional violation, and the proposed Personal Privacy Protection Act, drafted by

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[197] *Newsweek* was the first publication to have the story about Monica Lewinsky's relationship with President Clinton, but insisted on assuring the accuracy of its sources before subjecting the parties to an invasion of privacy. *The Drudge Report* immediately printed the story without checking the sources. Lidsky, *supra* note 125, at 181.

[198] *See* Lloyd, *supra* note 25.

experts who went to great lengths to assure its Constitutionality, would provide the best protection of privacy while assuring preservation of First Amendment rights.

VI.
CONCLUSION

The right to expression and that of privacy are not mutually exclusive. These two essential rights can coexist in harmony, protecting society's right to know as well as the individual's right to be left alone. They exist in a gray area that requires significant effort and intellect to maintain. The fact that crafting legislation presents a Herculean challenge of finding a balance between freedom of the press and the right to privacy is not a valid reason to abandon the effort. Instead, it is all the more important for Congress to say that it will not back down from this issue.

It is difficult to explore solutions to this problem and fight the desire to state the obvious solution: that the problem be resolved in the market. If people refused to buy the tabloids, to look at the images and desire more scandalous images, legislation would not be necessary. No legislation can make people stop wishing bad things for others or enjoying voyeuristic photographs.

Legislation must be enacted to deny paparazzi free reign to chase, frighten, and endanger law-abiding Americans for nothing more than financial gain. The only laws that are currently available are so inadequate that they do not provide any protection whatsoever for the essential right to privacy. Federal legislation that encompasses the most important aspects of both California law and the Personal Privacy Protection Act is a necessary step. Ideally the low supply of intrusive photographs will lead publishers to put out other stories – maybe even stories with greater social value – and prove that readers will not miss the sensationalized garbage that now passes as news.