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## Protection from Paparazzi: Possible or Preposterous?

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## PROTECTION FROM PAPARAZZI: POSSIBLE OR PREPOSTEROUS?

### I. INTRODUCTION

“Murderers!”<sup>1</sup>

“Bastards!”<sup>2</sup>

“Merciless!”<sup>3</sup>

“Relentless!”<sup>4</sup>

The cynics among us may think the above quotes refer to American lawyers. However, the names actually were used in reference to paparazzi after the death<sup>5</sup> of Diana, Princess of Wales.<sup>6</sup> Paparazzi is a general term used to describe certain celebrity photographers.<sup>7</sup>

Paparazzi are nothing new. In 1958, Tazio Secchiaroli,<sup>8</sup> discovered that editors paid him more money for “surprise” pictures of celebrities rather than the usual glossy, studio hand-outs.<sup>9</sup> With this incentive, Secchiaroli and his associates developed tactics, perhaps even provocations, for bringing “stars to life.”<sup>10</sup>

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1. Peter Hemon, *Beyond Photos: Paparazzi Hunt Celebrity Subjects*, ST. LOUIS POST-DISPATCH, Sept. 1, 1997, at 1A, 8A.

2. *Id.*

3. *Id.* at 1A.

4. *Id.*

5. *Camera's Flash 'Dazzled' Diana's Driver, Lawyer Says*, ST. LOUIS POST-DISPATCH, Sept. 10, 1997, at 4A. Princess Diana and two others were killed in a car accident in Paris on August 31, 1997. As of this writing, the exact cause of the accident is still under investigation. It is likely that a combination of factors lead to the accident, including an intoxicated driver and the speed at which he was driving. There is no doubt, however, that had paparazzi not been pursuing Princess Diana that night, the accident would likely not have occurred because there would have been no need for a substitute driver or for him to speed in an attempt to lose the trailing paparazzi. Further, photos taken by a paparazzo allegedly involved in the accident show the driver “dazzled” by a camera flash just prior to the accident. *Id.*

6. For an authorized biography of Princess Diana, see ANDREW MORTON, *DIANA: HER TRUE STORY* (1992).

7. See *infra* notes 30-37 and accompanying text.

8. Secchiaroli, now dubbed “Mr. Paparazzo,” was the inspiration for the photographer named Paparazzo in Federico Fellini’s 1960 movie “La Dolce Vita” which immortalized the modern genre of photographers who pursue celebrities. Hemon, *supra* note 1.

9. *Photographers Feel Backlash* (visited Sept. 12, 1997) <<http://www.msnbc.com>>.

10. *Id.*

Paparazzi have changed since their early days however. Even Secchiaroli, now retired, has indicated that there are no longer any limits on good taste in his profession.<sup>11</sup> In fact, “Scott Downie, a celebrity photographer in Los Angeles, has a simple answer when asked what differentiates acceptable paparazzi behavior from the unacceptable. ‘With royalty,’ he says, ‘there is no line.’”<sup>12</sup>

Princess Diana certainly brought the “game to a new level.”<sup>13</sup> Since marrying Prince Charles in 1981, she was “the only personality who consistently sold big in the global marketplace.”<sup>14</sup> As many as forty photographers would trail her at any given time<sup>15</sup> with the hopes of capturing a photograph worth six-figures.<sup>16</sup>

The popularity of Princess Diana has not been the only reason for the increase in paparazzi. Media outlets devoted to celebrities have increased dramatically in recent years.<sup>17</sup> Also, the scarcity of global wars and other world crises have allowed the public to focus on such celebrity diversions.<sup>18</sup> This scarcity may have lead to “skimpier budgets for covering foreign news, [forcing] many photojournalists to do celebrity work just to make a living.”<sup>19</sup> Finally, new technology has also contributed to the ease in which photographs can be taken.<sup>20</sup>

11. Herson, *supra* note 1.

12. Matthew Cooper, *Was the Press to Blame?*, NEWSWEEK, Sept. 8, 1997, at 36.

13. Jonathan Alter, *Dying For the Age of Diana*, NEWSWEEK, Sept. 8, 1997, at 39.

14. *Id.*

15. *Id.* Princess Diana’s brother, Earl Spencer, noted in his address at Diana’s funeral on Sept. 6, 1997, that she was “the most hunted person of the modern age.” *Earl Spencer Gives Thanks For ‘Irreplaceable Diana,’* ST. LOUIS POST-DISPATCH, Sept. 7, 1997, at 17A.

16. Alter, *supra* note 13. Mario Brenna, the photographer who captured Princess Diana and her last companion, Dodi Fayed, on vacation in early August, reportedly stands to receive millions of dollars for his photographs. Richard Zoglin, *Hey, Wanna Buy Some Pix?*, TIME, Sept. 15, 1997, at 56.

17. Zoglin, *supra* note 16. The three top tabloid magazines in the United States, *The National Enquirer*, *The Globe*, and *The Star*, currently have a combined weekly circulation of 7 ½ million. *Extra: Tabloid Promises* (FOX television broadcast, Oct. 1, 1997).

18. Zoglin, *supra* note 16.

19. *Id.*

20. *Id.* According to Peter Prichard, president of The Freedom Forum: “Celebrity news is nothing new. What has changed is the technology. John Quincy Adams swam naked in the Potomac River. That would be hard for President Clinton to do, now that we have helicopters.” Beverly Kees, *Celebrity News* (visited Sept. 8, 1997) <<http://www.freedomforum.org>>. Actor Brad Pitt has surmised the same conclusion: “The laws have not kept up with technology. The forefathers did not envision telephoto lens.” *Primetime Live: Interview* (ABC television broadcast, Oct. 8, 1997).

Nonetheless, the death of Princess Diana and the role paparazzi played in her death<sup>21</sup> certainly brought paparazzi into a heightened public awareness. This awareness led to an outcry against paparazzi and their tactics by the public, celebrities and the media alike. This comment addresses whether the outcry is valid and whether it will create lasting change. Section II examines the culture in which paparazzi work, including the nature of paparazzi, especially in comparison to mainstream photographers, and the nature of celebrities. Section III examines legal protections available to celebrities faced with aggressive, intrusive paparazzi. The focus is on protections relating to the methods used by paparazzi to obtain a photograph rather than the consequences after actual publication of a photograph. Section IV analyzes possible non-legal protections, including press self-regulation and codes of ethics. Section IV also includes a discussion on the nature of people and the role the public may play in protecting celebrities from paparazzi.

## II. THE TABLOID CULTURE

Paparazzi have increased in number in recent years.<sup>22</sup> Likely motivated by the potential for a huge payoff,<sup>23</sup> they have also increased their aggressive, intrusive tactics, becoming more threatening to celebrities rather than simply annoying pests.<sup>24</sup> “The more provocative the [photograph], the more money it commands.”<sup>25</sup> After all, a picture is worth a thousand words. A journalist may have a “juicy story” without a photograph, but the photograph is the clincher.<sup>26</sup> In fact, some paparazzi have trespassed or run a subject off the road simply to

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21. An initial allegation against paparazzi present at the scene of the car accident that killed Princess Diana was that when they arrived at the accident site they simply took pictures rather than assist the injured. This action, or lack thereof, would be a violation of France’s duty-to-rescue law that requires anyone at an accident scene to aid those in distress. Ritchenya A. Shephard, *Lady Diana’s Death is News, Even at the UIA Conference*, THE LEGAL INTELLIGENCER, Sept. 5, 1997, at 11. Some may say that the alleged actions are a violation of human decency as well.

22. See *supra* notes 17-20 and accompanying text.

23. This practice of paying for “news” has been labeled “checkbook journalism.” John Seigenthaler, *Diana is Dead. Sleaze Journalism Lives* (visited Sept. 1, 1997) <<http://www.freedomforum.org>>. Seigenthaler, founder of the Freedom Forum First Amendment Center at Vanderbilt University, believes that such a practice encourages criminal conduct. *Id.* Terry Raskyn, former vice president of Globe Communications, publisher of *The Globe*, *The National Examiner*, and *The Sun*, suggests that the tabloids use money to purchase exclusivity. *Freedom Speaks: Hard—Tabloid Methods* (visited Sept. 15, 1997) <<http://www.freedomforum.org>>.

24. Cooper, *supra* note 12. In Italian, paparazzi means “buzzing insects.” *Id.*

25. *Id.*

26. Richard Folkers, *When Our Worlds Collide*, U.S. NEWS & WORLD REP., Sept. 15, 1997, at 40.

get “the” photograph.<sup>27</sup> Some even attempt to provoke their target into retaliation for a more exciting photograph.<sup>28</sup> Further, although this comment focuses on camera-yielding paparazzi, another genre of paparazzi use video cameras to tape celebrity reactions to provocations.<sup>29</sup>

The distinction between “legitimate,” mainstream celebrity photographers and the more aggressive, intrusive paparazzi may be subtle, but it is important. The difference in methods used to obtain the photographs distinguish the two types of photographers.<sup>30</sup> The latter type trail celebrities as if on a hunt and the celebrity is the prey.<sup>31</sup> Interestingly, the terms used in photography support this metaphor: “loading,” “aiming,” “shooting.”<sup>32</sup> In the book *They Killed Her*, published in Europe shortly after the death of Princess Diana, author Madeline Chapsal compares paparazzi to a pack of hounds and their cameras to machine guns aimed at their subject.<sup>33</sup> Even individual members of paparazzi have confirmed this approach. Mark Saunders, a once dedicated Princess Diana paparazzo<sup>34</sup> and author of *Dicing With Di*, explained that the thrill is in the chase.<sup>35</sup> He has used disguises, lied, sneaked, and offered bribes just to get “the” photograph.<sup>36</sup> It is this latter type of photographers to which this comment refers when using the term “paparazzi.”<sup>37</sup>

27. Cooper, *supra* note 12. Recently, paparazzi cut off Arnold Schwarzenegger and his wife, Maria Shriver, as they were driving to their son’s school. Upon arriving at the school, paparazzi continued to take pictures, and in the process, knocked over the school’s principal. *Id.*

28. *Id.* Paparazzi have provoked Wil Smith to slap an annoying photographer, Alec Baldwin to lather an intrusive lens with shaving cream, and John F. Kennedy, Jr. to dump a bucket of water on a photographer’s head. *Id.*

29. See Robert De Niro in a Rage? *Just Bull, Says Spokesman*, NAT’L L.J., Oct. 23, 1995, at A27. In 1995, actor Robert De Niro was a “victim” of this breed of “video paparazzi.” With a deal to sell the De Niro tape to *Hard Copy*, Joseph Ligier provoked De Niro enough to receive a bloody nose from him outside a club in New York. De Niro was booked and fingerprinted on misdemeanor charges, then released pending a court hearing. *Id.*

30. See Timothy Noah et al., *All Steve Coz Wants is A Little R-E-S-P-E-C-T*, U.S. NEWS & WORLD REP., Sept. 15, 1997, at 36.

31. *Id.*

32. Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 780 (1997). See also SUSAN SONTAG, ON PHOTOGRAPHY 3, 14 (1977) (“There is something predatory in the act of taking a[n unwanted] picture. . . . It turns people into objects that can be symbolically possessed.”).

33. *Judge Rebuffs Suit Over Book on Diana’s Death*, ST. LOUIS POST-DISPATCH, Nov. 8, 1997, at 28A.

34. Recently, Saunders indicated that “[Princess] Diana’s death confirmed a decision he made six months ago - to get out of the paparazzi game altogether.” Zoglin, *supra* note 16.

35. *NBC Nightly News: Interview* (NBC television broadcast, Sept. 11, 1997).

36. *Id.*

37. This comment is not addressing the benefits of a “free press” nor attacking the many positive changes that investigative reporting has brought about in the United States. Almost by definition, journalism involves some measure of intrusion, investigation of matters that the subject would rather not be publicized. Yet the good that this type of reporting does is usually on

Even with this distinction, however, mainstream celebrity photographers, and the newspapers and magazines that publish their photographs, are not totally irresponsible for the decline in tactics used by paparazzi. Although focus is generally on the tabloids for publishing ill-gotten photographs and paying large sums for them, mainstream magazines such as *People* and *Newsweek* also rely to one extent or another on paparazzi photographs.<sup>38</sup> Even the extremely respectable *New York Times* published a photograph of Princess Diana's two sons inside a car after her death, a shot that easily could be regarded as intrusive.<sup>39</sup> In addition, the mainstream press has spent an enormous amount of time covering tabloid excess, further fueling a celebrity obsession craze.<sup>40</sup> Such coverage also encourages a public disgust with the news media generally, rather than a targeted outrage.<sup>41</sup> Thus, simple condemnation of the Tabloid Culture perhaps would be more beneficial to the idea of a "free press."<sup>42</sup>

Celebrities are not above using the press to meet their needs as well.<sup>43</sup> For example, Princess Diana courted the press for coverage of her charity work.<sup>44</sup>

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behalf of society at large, although perhaps not for the person or entity that is being investigated. This comment does suggest, however, that the methods used by paparazzi to capture their "story" and the end result which is achieved is not in the same realm as most other "moral choice" type photographs and thus should not be afforded the same level of protection. For example, "[t]wenty-five years ago, in Vietnam, it was of greater human benefit for the AP's Nick Ut to get a photo of 9-year-old Kim Phuc running naked down a highway with napalm burning her back, forever dramatizing the effects of war, than for him to have dropped his camera and rushed to her aid." James Fallows, *Are Journalists People?*, U.S. NEWS & WORLD REP., Sept. 15, 1997, at 31. Nonetheless, the motive for this decision is different than choosing to trail a celebrity in the hopes of getting a photograph in an unguarded moment worth millions. Methods for uncovering issues that affect public policy and world events, not celebrity obsession, need protection. Journalists should maintain a "hunter approach" when seeking issues but not when seeking people. Thus, photojournalists' subject matter and motives distinguish them from paparazzi, as the photojournalist "feels a powerful social responsibility to document atrocities and to give a greater understanding of our world." Miriam Horn, *Imagemakers*, U.S. NEWS & WORLD REP., Oct. 6, 1997, at 59 (from statements made by a group of photojournalists after Diana's death). One may argue that the subject of a photojournalist's photograph may be worse off than a celebrity subject at the mercy of paparazzi because the subject likely did not invite public attention. Yet, generally, photojournalists at least "struggle with their responsibility to the particular human being they capture on film" and "aspire to empathy rather than predation." *Id.* at 59-60.

38. Cooper, *supra* note 12. For example, last year *Newsweek* (Rick Marin, *Crazy for Carolyn*, NEWSWEEK, Oct. 21, 1996, at 62.) ran a cover story on Carolyn Bessette, the wife of John F. Kennedy, Jr., which was filled with paparazzi photographs. *Id.*

39. Zoglin, *supra* note 16, at 57.

40. Gregg Easterbrook, *Who's to Blame for Diana's Death?*, U.S. NEWS & WORLD REP., Sept. 15, 1997, at 26.

41. See Seigenthaler, *supra* note 23.

42. *Id.*

43. This fact may cause some to conclude that celebrities are by no means "an exploited class." After all, their skillful manipulation of the press leads to success and, ultimately, wealth.

She even used the press for more personal reasons. When she wanted to get the best possible terms in a divorce settlement with Prince Charles, she gave an exclusive interview to a British television reporter.<sup>45</sup> Thus, Princess Diana did use the press when necessary to promote her own image.<sup>46</sup>

Some may object to celebrities expecting the press to respect boundaries that they forsake whenever it is convenient to do so. Yet, there is a difference between inviting photographers to a movie premiere, a necessary element of the celebrity job, or to tour a celebrity mansion, and having a photographer with camera in tow follow a celebrity into a public bathroom.<sup>47</sup> Paparazzi may provide an excuse for such intrusive behavior by harking back to the origins of the profession - celebrities and their publicists control celebrity coverage and if celebrities want to use the media to propel their careers, they cannot expect to do so completely on their own terms. But this control may be a form of protection for celebrities who must be conditioned to be on guard against real stalkers who could be posing as paparazzi.<sup>48</sup> Also, the "onslaught" that celebrities face has increased over the past decade, making it "harder to be a celebrity."<sup>49</sup>

Ironically, paparazzi have ignored several celebrities who have spoken out against them. For example, paparazzi refused to photograph actor George Clooney arriving at the New York premiere of "The Peacemaker," a film in which he stars.<sup>50</sup> A similar reaction by paparazzi greeted Sylvester Stallone at the opening of a Planet Hollywood restaurant in Rome.<sup>51</sup> Nonetheless, that reaction would not bother at least one celebrity. Actor Tom Selleck has indicated that given a choice between invasion of privacy and media promotion of his career, he would say "don't help me."<sup>52</sup>

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For example, the underlying purpose behind celebrity profiles in magazines is: "You help us sell magazines. We'll assign our best writers to tease, flatter, and aggrandize you." Joshua Wolf Shenk, *The Fame Game*, U.S. NEWS & WORLD REP., Oct. 6, 1997, at 7. Thus, by trading details of their private lives for such attention, celebrities contribute to the Tabloid Culture.

44. Cooper, *supra* note 12.

45. *Id.*

46. The Kennedy family, the royals of the United States and extremely protective of their privacy, also allow photographers a glimpse into their private lives when the need arises. After recent family troubles, they invited photographers to view a touch football game at the family compound as a show of togetherness. Zoglin, *supra* note 16.

47. Actor George Clooney experienced this intrusion. *The Today Show: Interview* (NBC television broadcast, Sept. 25, 1997).

48. Michelle Green et al., *Too Close for Comfort; Aggressive Lensmen Shadowed Di Virtually Everywhere She Went*, PEOPLE, Sept. 15, 1997, at 70.

49. Michael Higgins, *Public Relief*, A.B.A. J., Dec. 1997, at 71.

50. Ron Norton, *People*, ST. LOUIS POST-DISPATCH, Sept. 24, 1997, at 2A.

51. *Id.*

52. *Too High a Price for Fame*, NEWSWEEK, Sept. 15, 1997, at 16.

One might also ask why celebrities feel the need to avoid having their picture taken, especially when escape entails risk such as a high speed car chase? As radio show host Howard Stern explains: "If the worst thing that happens to you is people want to take your picture, you've got a pretty great life. Stand there until they get sick of taking your picture."<sup>53</sup> Stern's statement fails to recognize that celebrities are human and can lose their tempers under constant hounding by paparazzi.<sup>54</sup> Further, when celebrities object to the taking of their photographs, it is likely that their objection is an effort to protect the value which we call "privacy."<sup>55</sup>

### III. LEGAL PROTECTIONS FOR CELEBRITIES FACED WITH AGGRESSIVE, INTRUSIVE PAPARAZZI

A legal right to privacy is a concept older than paparazzi. Although the right is not enumerated in the United States Constitution, it first gained distinction over one hundred years ago in an article by Samuel Warren and Louis Brandeis.<sup>56</sup> Responding to what they viewed as the press's increasing affront to "the sacred precincts of private and domestic life,"<sup>57</sup> the authors argued for judicial recognition of a tort cause of action for invasion of one's privacy.<sup>58</sup> Warren and Brandeis concluded that the law "affords a principle which may be invoked to protect the privacy of the individual from invasion either by the too enterprising press, the photographer, or the possessor of any other modern device for recording or reproducing scenes or sounds."<sup>59</sup> Thus, from its inception, the privacy tort was a direct response to what was deemed an over-aggressive and over-intrusive press, "whose actions went beyond gathering news and stepped into the private life of the individual."<sup>60</sup>

Since its inception by Warren and Brandeis, a legal right to privacy has gradually gained acceptance in the common law. By 1960, Dean William L. Prosser developed four categories of privacy torts: (1) intrusion upon a person's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing private facts about a person; (3) publicity which places a person

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53. Richard Roeper, *Persecuted by Tabs: Don't We All Know Feeling*, ST. LOUIS POST-DISPATCH, Sept. 15, 1997, at 3E.

54. Green, *supra* note 48.

55. Malkan, *supra* note 32.

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

57. *Id.* at 195.

58. D. Scott Gurney, *Celebrities and the First Amendment: Broader Protections Against the Unauthorized Publication of Photographs*, 61 IND. L.J. 697, 699 (1986).

59. Warren & Brandeis, *supra* note 56, at 206.

60. Eduardo W. Gonzalez, "Get That Camera Out of My Face!" *An Examination of the Viability of Suing "Tabloid Television" for Invasion of Privacy*, 51 U. MIAMI L. REV. 935, 938 (1997).



in a false light in the public eye; and (4) appropriation, for defendant's advantage, of a person's name or likeness.<sup>61</sup> The Restatement (Second) of Torts adopted these categories of privacy torts as well.<sup>62</sup> Of these categories, this comment focuses on the intrusion upon seclusion and the public disclosure privacy torts as possible legal protections for celebrities faced with aggressive, intrusive paparazzi.<sup>63</sup>

The Restatement (Second) of Torts provides that "[o]ne 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."<sup>64</sup> This privacy tort is primarily intended to compensate a person for the emotional distress caused by the intentional intrusion by another into "a private seclusion that the [person] has thrown about [himself] or [his] affairs."<sup>65</sup> When committed by physical intrusion into a private place, this tort is indistinguishable from trespass.<sup>66</sup> The tort may also be committed by intrusion through use of the senses, with or without mechanical aids.<sup>67</sup> Further, the First Amendment<sup>68</sup> does not allow the press "to trespass. . . or to intrude by electronic means into the precincts of another's home or office."<sup>69</sup> This general principle logically applies to a celebrity home as well as to the home of a private individual.<sup>70</sup> Therefore, a celebrity should be able to recover damages under the intrusion upon seclusion privacy tort.

The Restatement (Second) of Torts also provides that "one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter is of a kind that (a) would be

61. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

62. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

63. Since the focus of this comment is on publication of truthful celebrity photographs, a discussion of the false light privacy tort is inapplicable. Also, the appropriation for commercial purposes privacy tort, and as extension the "right to publicity," is appropriate for protection of celebrities' pecuniary interest in their names or likenesses once a photograph has been published. A discussion of this issue is beyond the scope of this comment because, again, the focus is on protections for celebrities relating to the methods used by paparazzi to obtain a photograph rather than the consequences after actual publication of a photograph.

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

65. *Id.* § 652B cmt. c. Liability is strictly limited, however, with respect to events occurring in public places. *Id.*

66. Gurney, *supra* note 58, at 700.

67. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977).

68. The First Amendment provides in part: "Congress shall make no law. . . abridging the freedom. . . of the press. . ." U.S. CONST. amend. I.

69. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). Here, photographers of *Life Magazine* entered the office portion of the plaintiff's house by subterfuge, and without consent, photographed, recorded and transmitted his conversations to third persons. *Id.* at 245-246. *Life Magazine* was found liable under an invasion of privacy theory. *Id.* at 250.

70. Gurney, *supra* note 58, at 700.

highly offensive to a reasonable person, and (b) is not a legitimate concern to the public.”<sup>71</sup> For example, a public disclosure privacy action may apply to publication of an unauthorized photograph depicting a nude person.<sup>72</sup>

Nonetheless, the public disclosure privacy tort is rarely applied by the courts to a celebrity plaintiff. Since its inception, the tort has been limited by the “public interest” or “newsworthiness” defense whereby a media defendant can defeat a privacy action by showing that the published material is of public interest.<sup>73</sup> Further, the term “public interest” could refer to two very different things - the public’s “curiosity” or the public’s “well-being.”<sup>74</sup> However, courts rarely make this distinction and in fact, typically emphasize the public’s curiosity in the material rather than the public’s need for it.<sup>75</sup> Even the Restatement provides that legitimate public concern extends to “giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.”<sup>76</sup> Yet, the Restatement also limits the ability to publish private facts where “the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.”<sup>77</sup>

Thus, just as the distinction between paparazzi and mainstream celebrity photographers may be subtle at times, so too is the distinction between photographs which might be of a legitimate public interest and those of a sensational nature. This difficulty of defining “public interest” combined with a fear that imposition of liability in even the most outrageous instances of press intrusiveness might inhibit legitimate press activities have lead courts to generally defer to the press to determine what is “newsworthy.”<sup>78</sup> This deference may be appropriate when given to mainstream celebrity photographers as distinguished in Section II of this comment.<sup>79</sup> It is difficult to accept, however,

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71. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

72. Gonzalez, *supra* note 60, at 940 & n.35.

73. See RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) (no actionable invasion of privacy occurs “[w]hen the subject-matter of the publicity is of legitimate public concern.”); Warren & Brandeis, *supra* note 56, at 214 (“the right to privacy does not prohibit any publication of matter which is of public or general interest.”).

74. Gurney, *supra* note 58, at 701.

75. *Id.*

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

77. *Id.* § 652D cmt. h.

78. Theodore L. Glasser, *Resolving the Press-Privacy Conflict: Approaches to the Newsworthiness Defense*, 4 COMM. & L. 23, 24-25 (1982).

79. See *supra* notes 30-37 and accompanying text.

when placed upon paparazzi who choose to follow celebrities into the bathroom for a photograph.<sup>80</sup>

A celebrity's success under an action based on either the intrusion upon seclusion or the public disclosure privacy torts may be limited in other ways as well. First, in the absence of damages, there would probably be no redress for an invasion of privacy.<sup>81</sup> Because a person's name and likeness are generally considered intimately associated with the person, he "may experience annoyance and humiliation from having [his] name or likeness widely publicized even when the [photograph] is not embarrassing."<sup>82</sup> Nonetheless, a celebrity, as one more accustomed to life in the public eye, may not suffer as much annoyance or humiliation from unwanted publicity as would a private person.<sup>83</sup>

Second, "the right to privacy ceases upon the publication of the facts by the individual, or with his consent."<sup>84</sup> Thus, it is often suggested that celebrities, as public figures, have "waived" their right to privacy.<sup>85</sup> This waiver generally has not applied to those instances in which a celebrity's "personality was used or publicized in a false, commercialized, or indecent way."<sup>86</sup> Yet, perhaps the waiver should be limited even more to provide celebrities greater protection from aggressive, intrusive paparazzi. For example, in public places, such as a park or a courthouse, a celebrity's right to privacy may be considered waived and the individual may be photographed without a privacy tort violation. On the other hand, a celebrity should not be considered to have waived a right to privacy in private places, such as a home.<sup>87</sup>

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80. See *supra* note 47. Actor Brad Pitt put the newsworthiness defense in perspective by proclaiming that "Pitt has a penis" is not news. *Primetime Live: Interview* (ABC television broadcast, Oct. 8, 1997). He was referring to unauthorized nude photographs taken of him while on vacation on St. Barthelemy with former fiancée Gwyneth Paltrow by a trespassing photographer. The photographs were published in an issue of *Playgirl* magazine. Eventually, a judge ordered *Playgirl* to recall the issue, after 300,000 copies had already been sold, because Pitt's right to privacy had been violated. Erik Meers, *Passages*, PEOPLE, Aug. 25, 1997, at 89.

81. Warren & Brandeis, *supra* note 56, at 217.

82. Theodore F. Haas, *Storehouse of Starlight: The First Amendment Privilege to Use Names and Likenesses in Commercial Advertising*, 19 U.C. DAVIS L. REV. 539, 544 (1986).

83. Gurney, *supra* note 58, at 704.

84. Warren & Brandeis, *supra* note 56, at 218. See also RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) ("There is no liability for giving further publicity to what the [individual] leaves open to the public eye.").

85. Gurney, *supra* note 58, at 703 & n.54.

86. Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R.3d 16 (1996).

87. However, celebrities may be expected to take reasonable "self-help" measures, i.e. closing drapes or building walls around swimming pools, to prevent unwanted intrusions by photographers. Gurney, *supra* note 58, at 711. Yet, the new technology used by paparazzi may make these self-help measures unsuccessful. Additionally, new self-help measures for celebrities to use while in public are being developed. For example, Joseph Carvalko has invented the "Eagle Eye," a device that wraps the wearer in laser beams, flashing whenever a camera's strobe goes off

In addition, perhaps the waiver should not apply to semi-private locations, such as a restaurant or an exclusive resort,<sup>88</sup> where a celebrity “ha[s] a reasonable expectation of privacy.”<sup>89</sup> Determining this expectation should be governed by the facts under which a particular photograph was taken.<sup>90</sup> For example, a celebrity may reasonably expect to be photographed while walking on a public street, but may reasonably expect not to be photographed while sunbathing on a private beach.<sup>91</sup>

The privacy torts are also greatly limited by the First Amendment.<sup>92</sup> The Supreme Court has interpreted the First Amendment as not protecting the news media from liability for untruthful speech concerning public figures which is made with a knowing or reckless disregard for the truth.<sup>93</sup> This degree of constitutional protection accorded to untruthful speech suggests that the publication of truthful speech has overriding First Amendment protection.<sup>94</sup> Thus, truth could be considered a defense in a celebrity invasion of privacy action.<sup>95</sup> Given the focus of this comment on truthful photographs, this conclusion would nullify any protections a celebrity might have under an intrusion upon seclusion or a public disclosure privacy tort action.

On the other hand, if one views a purpose of the First Amendment as fostering democratic self-government, the Supreme Court decision in *New York Times v. Sullivan* and subsequent decisions actually would favor broadening certain privacy tort protections for celebrities.<sup>96</sup> Under this view, there is a distinction between public speech and private speech.<sup>97</sup> Public speech related to the process of self-government warrants greater protection than private speech.<sup>98</sup> Thus, the First Amendment would not protect photographs depicting

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and causing the photograph to be overexposed. Also being developed are devices that put a red squiggle on every photograph or that detect the clicking of a camera's shutter to block photographers who do not use a flash. See *Photographers Feel Backlash*, *supra* note 9.

88. See *infra* note 144.

89. Gurney, *supra* note 58, at 711.

90. *Id.*

91. For example, a photographer recently captured President Bill Clinton and his wife Hillary in their bathing suits on a Caribbean beach while on vacation. Although he liked the photograph, the president still thought it was an invasion of privacy, even though the idea of “privacy in the White House” is limited. *Photo Op Caught Clintons Unaware*, ST. LOUIS POST-DISPATCH, Jan. 6, 1998, at 5A.

92. See *supra* note 68.

93. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

94. Gonzalez, *supra* note 60, at 945.

95. *Id.* at 947.

96. Gurney, *supra* note 58, at 713-715. See also *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

97. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 94 (1948).

98. Gurney, *supra* note 58, at 713.

celebrities in their day-to-day activities which have no political significance. As Richard Masur, president of the Screen Actors Guild, explains: "Does what Sharon Stone is eating or wearing at any given moment - or even who's in her swimming pool - have any relation to the public debate?"<sup>99</sup> Therefore, not extending the waiver of a right to privacy to the day-to-day activities of a celebrity would not conflict with the First Amendment. Those activities that relate to the public persona of a celebrity or which have political significance would still be subject to photographs.

Another view of a purpose of the First Amendment that would favor broadening certain privacy tort protections for celebrities is protecting the expression of ideas.<sup>100</sup> Under this "marketplace of ideas" view, the amount of First Amendment protection afforded a celebrity photograph would depend on its content and purpose.<sup>101</sup> For example, a celebrity photograph presenting information with socio-political significance, i.e. a celebrity at an abortion protest, contributes to the marketplace of ideas and publication would thus be afforded greater First Amendment protection.<sup>102</sup> Conversely, a celebrity photograph accompanied by little creative effort whose primary purpose is entertainment should be afforded less First Amendment protection.<sup>103</sup> Thus, broadening the privacy torts to better protect celebrities from aggressive, intrusive paparazzi should not conflict with First Amendment principles because the publication of celebrity photographs rarely contributes to the marketplace of ideas.<sup>104</sup>

Because of these First Amendment limitations and the broad definition of "newsworthiness," celebrities faced with aggressive, intrusive paparazzi may have to resort to other theories of liability, including trespass, intentional infliction of emotional distress, nuisance, or assault.<sup>105</sup> After all, when paparazzi endanger public safety or the life of another person, they "are subject to the same laws and penalties as other citizens."<sup>106</sup>

Another possible theory of liability which may be even more applicable to celebrities against aggressive, intrusive paparazzi is a cause of action under an

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99. Higgins, *supra* note 49, at 70.

100. Gurney, *supra* note 58, at 716.

101. *Id.* at 717.

102. *Id.*

103. *Id.* at 718.

104. *Id.* at 719.

105. Ghent, *supra* note 86.

106. Deborah Kalb, *Cry From Celebrities, Others: There Has To Be a Law To Stop Media Hounding*, GANNETT NEWS SERVICE, Sept. 2, 1997. Further, although multiple theories of liability are currently available to celebrities faced with aggressive, intrusive paparazzi, celebrities rarely pursue such public avenues because to do so would likely increase the value of the photographs or bring more attention to the areas of their lives for which they seek privacy. Matt Krasnowski, *Celebrities Complain About Paparazzi, But They Don't Do Much About Them*, COPLEY NEWS SERVICE, Sept. 5, 1997.

anti-stalking statute.<sup>107</sup> Such statutes have developed over the last few years,<sup>108</sup> and now all fifty states have enacted anti-stalking statutes.<sup>109</sup> Many arose after well-publicized cases in which celebrities were being followed, harassed, and threatened by an individual.<sup>110</sup> Anti-stalking statutes make the act of stalking itself illegal.<sup>111</sup> The methods used by paparazzi could easily fall into this category.<sup>112</sup>

In addition to anti-stalking statutes, celebrities may attempt to obtain an injunction or restraining order against the most abusive photographers.<sup>113</sup> Perhaps the most famous case of a "celebrity" obtaining injunctive relief against a photographer is *Galella v. Onassis*.<sup>114</sup> There, the court found that although Jacqueline Kennedy Onassis, widow of President John F. Kennedy, was a public figure and thus subject to news coverage, photographer Ronald Galella "went far beyond the reasonable bounds of news gathering . . . [by his] constant surveillance, his obtrusive and intruding presence."<sup>115</sup> The court ordered Galella to stay twenty-five feet away from Onassis and to refrain from blocking her movement in public places or from jeopardizing her safety.<sup>116</sup> Further, the court concluded that the public interest in the daily activities of Onassis and her minor children was minimal compared to Galella's interference in their lives.<sup>117</sup>

107. It is likely not a coincidence that the most egregious paparazzi are called "stalkerazzi."

108. Suzanne L. Karbarz, *The First Amendment Implications of Antistalking Statutes*, 21 J. LEGIS. 333, 334 (1995).

109. Jennifer Joyce, *Lost Photo Opportunities: First Amendment Experts Question Constitutionality of Proposals to Prevent Harassment by Paparazzi*, A.B.A. J., Nov. 1997, at 37.

110. Karbarz, *supra* note 108, at 334 & n.9. For example, actress Rebecca Shaeffer was shot and killed by an obsessed fan. Ice skater Katerina Witt was followed by a man who tossed obscene letters onto the ice. A David Letterman fan, pretending to be his wife, repeatedly trespassed near his home. *Id.* at n.9.

111. Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993).

112. *See supra* notes 30-37 and accompanying text.

113. Princess Diana obtained a restraining order against photographer Martin Stenning a year to the day before she died. Stenning often chased Princess Diana on a motorbike, twice crashing into her car. In an affidavit, Princess Diana said his actions were calculated to cause her harm and caused her to cancel social engagements because she felt too distraught to leave home. The court agreed and ordered Stenning to stay 300 meters away from Princess Diana. Cooper, *supra* note 12.

114. 487 F.2d 986 (2d Cir. 1973).

115. *Id.* at 995.

116. *Id.* at 998.

117. *Id.* at 995. The court cited examples of Galella's "obnoxious" behavior as including trailing and scaring the children by leaping into their path at school or at a park or coming dangerously close to Onassis in a power boat while she was swimming. *Id.* at 992. Ironically, "JFK Jr.'s magazine *George* recently contracted with Galella for some of his celebrity party photos." Krasnowski, *supra* note 106.

Nonetheless, the injunctive relief granted Onassis is rare.<sup>118</sup> Further, this method of relief may not provide any meaningful protection, especially given the new technology available to paparazzi,<sup>119</sup> and is difficult to implement successfully.<sup>120</sup> Also, it is often difficult to obtain a restraining order.<sup>121</sup> Thus, injunctive relief as a means for celebrity protection against aggressive, intrusive paparazzi likely is limited.

Finally, since the death of Princess Diana, “anti-paparazzi” legislation has been proposed in Congress.<sup>122</sup> The late U.S. Rep. Sonny Bono (R-Cal.) introduced the “Protection from Personal Intrusion Act” (“Act”) which makes harassment by overly intrusive paparazzi a federal criminal offense.<sup>123</sup> The Act defines “harass” as “persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure that privacy, for the purpose of capturing by a camera . . . a visual image . . . of the victim for [interstate] profit . . .”<sup>124</sup> An individual found guilty under the Act may be sentenced to a minimum of twenty years in jail if the harassment resulted in death.<sup>125</sup>

Bono designed the legislation to address the “intrusive type of conduct that transcends decency and respect . . . [and] has no role in a civilized society or as part of legitimate news gathering.”<sup>126</sup> Bono further proclaimed that “the bounty-hunting paparazzi go beyond the robust public discourse envisioned by the Founders.”<sup>127</sup>

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118. Lawyers involved in the *Galella* case are unaware of any other public figure who has successfully used the precedent to secure protection against aggressive, intrusive paparazzi. Also, Onassis’ situation may be different from the “average” celebrity in that her claims were bolstered by the Secret Service whose agents claimed that without an injunction they would be hampered from fulfilling their legal duty of protecting the late president’s minor children. Deborah Pines, *Few Remedies Here Against Paparazzi; Civil Liability Imposed Rarely in New York*, N.Y.L.J., Sept. 4, 1997, at 1.

119. Even *Galella* could still sell photographs of Onassis for news coverage if taken outside of the protected zone. 487 F.2d at 998.

120. Karbarz, *supra* note 108, at 335.

121. *Id.*

122. Similar legislation is also being drafted at the state level, specifically California. Joyce, *supra* note 109, at 36.

123. H.R. 2448, 105th Cong. (1997). As of this writing, the Act is still in committee. Also, Great Britain already has a similar, albeit more detailed, statute entitled the “Protection from Harassment Act 1997.” Protection from Harassment Act, 1997, No. 1418. It has yet to be tested in court however. Green, *supra* note 48.

124. H.R. 2448, 105th Cong. § 2 (1997). Restricting liability to those situations where the photograph was intended for interstate profit allows Grandma to snap a photograph of a celebrity in a restaurant without fear of doing time.

125. *Id.*

126. 143 CONG. REC. E1709 (Sept. 10, 1997) (statement of Rep. Bono).

127. *Id.*

Nonetheless, the Act was met with criticism by First Amendment scholars. According to attorney Bruce Sanford, the paparazzi issue is about money,<sup>128</sup> and therefore the punishment should be a civil action not criminal.<sup>129</sup> Sanford also cautioned that initiatives such as the Act must be scrutinized carefully because, by following in the wake of tragedy, they are emotionally driven.<sup>130</sup> Also, the Act's definition of "harass" is sufficiently ambiguous to make it difficult to distinguish between paparazzi and mainstream photographers.<sup>131</sup> This vagueness may violate an individual's due process since such protections "require that a person be able to predict what it is that violates the law."<sup>132</sup>

Thus, it remains to be seen whether the proposed legislation will become a successful legal remedy for celebrities. The other current legal remedies, including invasion of privacy and anti-stalking actions, also likely remain insufficient in scope for celebrity protection. Finally, given the subtle distinction between protected and non-protected paparazzi actions, non-legal solutions may provide more effective protections for celebrities faced with aggressive, intrusive paparazzi.

#### IV. NON-LEGAL PROTECTIONS FOR CELEBRITIES FACED WITH AGGRESSIVE, INTRUSIVE PAPARAZZI

Walter Cronkite, the retired television news anchor, has warned that if the tabloid press is censored, "you can then limit the photographers from *New York Times* and the *Washington Post*. . . ."<sup>133</sup> Consequently, although greater legal protections for celebrities faced with aggressive, intrusive paparazzi may be necessary, it is unlikely that the "slippery slope" will allow implementation of such protections. Thus, although paparazzi can be "obnoxious" and "obscene," legal restraints likely cannot control them.<sup>134</sup> Faced with this uphill battle for greater legal protections for celebrities who encounter aggressive,

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128. See *supra* note 23 and accompanying text.

129. *Sonny Bono to Paparazzi: We'll Get You, Babe* (visited Sept. 11, 1997) <<http://www.freedomforum.org>>. Nonetheless, a fine of \$1,000, for example, likely will not deter paparazzi when \$25,000 will be paid for the photograph. Krasnowski, *supra* note 106.

130. *Tragic Accident Prompts Anti-Paparazzi Legislation* (visited Sept. 3, 1997) <<http://www.freedomforum.org>>.

131. For example, had the Act been law at the time of the O.J. Simpson criminal trial, he probably could have used it against most journalists covering his trial. Jim Specht, *Bono Introduces Bill That Would Make Overly Intrusive News-gathering a Crime*, GANETT NEWS SERVICE, Sept. 10, 1997.

132. Joyce, *supra* note 109 (quoting Floyd Abrams, a media lawyer and a partner with Cahill, Gordon and Reindell).

133. *Paparazzi 'Getting Bum Rap,' Ex-Anchorman Cronkite Says*, ST. LOUIS POST-DISPATCH, Sept. 4, 1997, at 7A.

134. *Id.*



intrusive paparazzi, other possible non-legal solutions for deterring this trend must be examined.

One possibility, and perhaps the most obvious, is self-regulation by the press.<sup>135</sup> Obviously, the First Amendment provides the press with great latitude in carrying out their professional responsibilities. Thus, the press often takes the attitude that what is legally permissible is also ethically permissible.<sup>136</sup> The question often asked is “May we do this?” rather than “Should we do this?”<sup>137</sup> In fact, even more than one hundred years ago, Warren and Brandeis declared that “the press is overstepping in every direction the obvious bounds of propriety and decency.”<sup>138</sup> Perhaps, then, the right to privacy refers “to the forms of respect that [individuals] owe to each other as members of a common community.”<sup>139</sup> An inner incentive to “do the right thing” should then replace the hunter mentality.

In addition to the First Amendment shield, the press may justify certain actions with the defense of “the public’s right to know.” Nonetheless, this defense begs several questions: “The public’s right to know what? Under what circumstances? By what means? At what cost?”<sup>140</sup> If the answers to these questions are to be decided by the press, it needs to weigh the damage that might be caused by certain actions against the value of the information that is being provided. If hurting people is inevitable, then “the hurt ought to have some countervailing value other than profit by entertainment.”<sup>141</sup>

*People* editor, Carol Wallace, has indicated that the magazine applies “rigorous standards to its journalism.”<sup>142</sup> One of these standards is to make decisions on the use of paparazzi photographs on a case-by-case basis, “weighing the news value of a picture against a story subject’s right to peace and privacy.”<sup>143</sup> Although this approach is admirable, there is limited accountability or incentive to make the “right” decision. Most editors and publishers are likely

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135. Here, the term “press” is used inclusively because, as noted earlier, mainstream media outlets often utilize paparazzi photographs as well. See *supra* notes 38-42 and accompanying text.

136. Steven Brill, *A New Code For Journalists; A Challenge to the Press to Live by the Code*, CONN. L. TRIB., Dec. 19, 1994, at 17.

137. Jeff Greenfield, *The Zealous Pursuit of What?; Is the License Granted by the Bill of Rights to Lawyers and Journalists to Practice Their Crafts Unhinged From Any Connection to Social Reality?*, THE RECORDER, Nov. 30, 1994, at 7.

138. Warren & Brandeis, *supra* note 56, at 196.

139. Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991).

140. Greenfield, *supra* note 137. “The public’s right to know now means the public’s right to see a picture of [actor] Michael [J.] Fox’s baby, captured by a paparazz[o] who literally stalked him for months from his apartment to the park to his car.” *Id.*

141. Brill, *supra* note 136.

142. Carol Wallace, *Letter From the Editor*, PEOPLE, Sept. 15, 1997, at 8.

143. *Id.*

to make the best business decision, regardless of the manner in which particular photographs were obtained.

In the United States, the Society of Professional Journalists has a "Code of Ethics."<sup>144</sup> One tenant of that Code is for journalists to "treat sources, subjects and colleagues as human beings deserving of respect."<sup>145</sup> This tenant stands in stark contrast to the prey-like attitude of paparazzi. Further, although the Code does have a section on accountability, indicating that journalists should "expose unethical practices of journalists and the news media,"<sup>146</sup> little economic incentive exists to do so.

In response to some of these concerns, and to the media circus at the O.J. Simpson criminal trial, Steven Brill, chairman and chief executive officer of American Lawyer Media, L.P., developed a draft "Journalists' Code of Professional Responsibility."<sup>147</sup> A major difference between this Code and others that are already in place is a stronger accountability structure. Again, due to First Amendment limitations, the Code would be purely voluntary and privately enforced.<sup>148</sup> Journalists and journalism organizations would join a new American Journalism Association ("AJA") by adopting the Code and pledging to adhere to it.<sup>149</sup> Members would also "pledge to report other members' violations of [the Code], including confidential reports of violations by their own employer."<sup>150</sup> Each member would pay dues to "fund a professional organization that would enforce [the Code] and certify as members in good standing those that adhere to it."<sup>151</sup> "The AJA would also conduct public disciplinary

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144. *Code of Ethics* (visited Sept. 17, 1997) <<http://spj.org/ethics/index.htm>>. In response to the circumstances surrounding Princess Diana's death, Great Britain's Press Complaints Commission proposed new, more stringent, regulations for the voluntary press code. When the updated code is finished, Lord John Wakeham, Chairman of the Press Complaints Commission, indicated that editors would have to refuse paparazzi photographs obtained through harassment, stalking, motorbike chases, or unlawful means without an "overriding" public interest. The new code would also extend the definition of privacy for public figures to places like restaurants and churches, where people have "a legitimate expectation of privacy." Louise Robson, *UK: Aust to Advise on Press Code Following Diana's Death*, AAP NEWSFEED, Sept. 25, 1997. In response to the new proposals, Andrew Neil, editor of *The Scotsman*, indicated that the self-regulatory code contains ambiguous terms that can only be decided on a case by case basis. He also indicated that, depending on how they work out in practice, the proposed regulations could "shackle the press." *The Today Show: Interview* (NBC television broadcast, Sept. 25, 1997).

145. *Code of Ethics*, *supra* note 144. Founded in 1909, the Society of Professional Journalists is the nation's largest and most broad-based journalism organization.

146. *Id.*

147. Brill, *supra* note 136. Brill modeled this name after the "Lawyers' Code of Professional Responsibility." *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

proceedings for members' alleged violations of the Code."<sup>152</sup> Complaints could come not only from members but from the public as well.<sup>153</sup> Member discipline would range from public reprimands and censures to suspensions or expulsions.<sup>154</sup> Each member would also pledge "only to employ journalists who are members in good standing" of the AJA.<sup>155</sup>

A final element of Brill's Code would also assist in another possible solution to deter the trend of aggressive, intrusive paparazzi. An AJA seal would identify each member to the public.<sup>156</sup> In so doing, other members and the public could distinguish between legitimate photographers and media outlets and those that participate in or support the Tabloid Culture. This distinction would also allow the public to boycott those media outlets that do not uphold the standards of the Code.<sup>157</sup>

In fact, public purchasing power could have the greatest impact on changing the Tabloid Culture. Greater self-regulation by the press is certainly a step in the right direction,<sup>158</sup> but with no legal means of enforcing such ethics codes,<sup>159</sup> market pressure applied by the public may have a greater influence. For "as long as there are millions to be made, there'll be a market for [paparazzi photos]."<sup>160</sup> On the other hand, if the public does not buy the publications, then the publications cannot pay paparazzi huge sums for photographs, and paparazzi likely will not take such extreme measures to capture the photograph. Public opinion is also important because the privacy torts are limited by a "reasonable person" standard.<sup>161</sup>

Further, the Tabloid Culture is another example of "which came first, the chicken or the egg?" Gossip has been a main source of "news" since the turn

152. *Id.*

153. *Id.* Brill suggests that allowing members of the public to complain may temper libel suits because most are brought by an aggrieved party more angry about "the arrogant response he got when he complained about a mistake than about the original mistake." Brill also adds that libel suit damages may be cut if "the law developed in a way that required [plaintiffs] to mitigate damages by first seeking redress through this complaint process." *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. For this element to be successful, it must be well-publicized.

158. Adherence to self-regulation was seen recently at a university publication. Carolyn Sleeth, editor of the *Stanford Daily*, instituted a policy for staff members of not writing any articles about Chelsea Clinton, daughter of President Bill Clinton and a freshman at the University, unless the same type of article would be written about another student. When Jesse Oxfield, a senior columnist for the *Stanford Daily*, wrote about Chelsea in his column, Sleeth determined the column to be in violation of the guidelines for covering Chelsea. Oxfield refused to revise the column and thus was dismissed as a columnist for the newspaper. *Student Fired Over Column on Chelsea*, CHICAGO TRIBUNE, Oct. 1, 1997, at 11.

159. Similar to recent legislation, the codes also tend to be subjective and ambiguous.

160. Kees, *supra* note 20 (quoting Peter Prichard, president of The Freedom Forum).

161. *See supra* notes 64, 71 and accompanying text.

of the century with “the mass movement of Americans from rural areas to more impersonal urban centers.”<sup>162</sup> Yet, at that time, gossip was limited to stories about friends and relatives.<sup>163</sup> Now, as indicated by the success of media outlets devoted to celebrity “news,”<sup>164</sup> celebrity gossip, or perhaps more accurately celebrity obsession, is in vogue for at least two reasons. First, the day-to-day activities of those to whom we are attracted are intriguing, perhaps because the intrigue provides escape from our own lives.<sup>165</sup> Second, by seeing a celebrity “take out his trash,” we feel a connection to this other human being.<sup>166</sup> Nonetheless, it is difficult to determine if this increased public hunger for celebrity information came first and then was fed by the Tabloid Culture, or, if knowing this part of human nature, the Tabloid Culture took this intrigue and fueled an addiction for which it was more than happy to provide the substance in exchange for all the money before it.

#### V. CONCLUSION

Ironically, though, it will probably be the same people who are complaining about paparazzi who will be the first to buy special issues about Princess Diana - full of photographs taken by paparazzi.<sup>167</sup> The public cannot blame the press and then beg for more. It is only if we can overcome this hypocrisy by respecting a celebrity’s right to privacy that lasting change will occur. Nonetheless, it is difficult to imagine that the human nature that has contributed to the current demand for celebrity “news” will disappear for good, even with the Princess Diana tragedy. Just as people now watch the film of President John F. Kennedy’s assassination with open eyes, brain matter splattering onto his wife’s dress, people will desire to see the photographs of Princess Diana at the scene of the tragic car accident. Our connection to Princess Diana will then be complete, as we will better understand the tragedy.<sup>168</sup> When the

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162. Gary Stern, *What is Our Fascination With Celebrity Dirt?*, GANNETT NEWS SERVICE, Sept. 5, 1997.

163. *Id.*

164. *See supra* note 17 and accompanying text.

165. Easterbrook, *supra* note 40.

166. Telephone Interview with Kim Dressel, M.ED., L.C.S.W., E.C.S.A.C.2, Psychiatric Social Worker, St. John’s Mercy Hospital (Oct. 27, 1997).

167. Jonathan Alter, *Diana’s Real Legacy*, NEWSWEEK, Sept. 15, 1997, at 59. Interestingly, a survey by the Newseum in Arlington, VA, concluded with 78% of 1320 respondents answering “No” to the following question: “Do you feel freelance news photographers should follow celebrities around to bring you as much news as possible on their activities?” *A ‘No’ Vote for Paparazzi*, PARADE MAGAZINE, Dec. 14, 1997, at 21. Nonetheless, although this question may indicate that people generally disagree with paparazzi tactics, it does not indicate that those same people will not buy the end result of such actions.

168. Dressel, *supra* note 166.

emotional uproar, shock, and anger subside, someone, somewhere will find the photographs fit to print.

Further, after a respectable amount of time and effort, politicians in the United States are not likely to change the law,<sup>169</sup> except perhaps to have the existing laws more strictly enforced. Already, only two months after the sudden death of Princess Diana, coverage of paparazzi-related material has decreased dramatically compared to the weeks immediately following her death.<sup>170</sup> Also, although the mainstream press may take action to distinguish themselves from the tabloids, it is unlikely that many in the Tabloid Culture will implement lasting change, although for now some may be indicating a new found sensitivity.<sup>171</sup>

Finally, in this effort for change, we cannot forget the other major players in the Tabloid Culture - celebrities themselves.<sup>172</sup> Their contribution to celebrity obsession<sup>173</sup> places some responsibility on their shoulders too. Of course, deciding not to offer interviews or to do photo spreads likely will decrease their fame and perhaps publicity for whatever form of entertainment or product they are selling. But perhaps these actions "would be a lot more credible when they ask the tabloids and paparazzi to stop violating people's privacy out of greed."<sup>174</sup>

Time will tell if a new era has begun or if market demand will continue to supplement the pursuit of the celebrity. In the meantime, the latest issue of *People* just arrived in the mail. Excuse me while I go peruse the "Star Tracks" photographs.

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169. This lack of change may not bother some people. After all, "[p]ersecution from the tabloid press. . . is a problem for. . . [at most] 200 people in the entire world[.] . . . And at least 190 of them would be absolutely miserable if they weren't the subject of such intense scrutiny." Roeper, *supra* note 53. But is not the law supposed to protect the minority?

170. For example, the term "paparazzi" appeared approximately three to four times less in *Newsweek*, *People*, *TIME*, and *U.S. News & World Report* combined the second month after Princess Diana's death as compared to the first.

171. About a year ago, *The National Enquirer* instituted an anti- "stalkerazzi" policy forbidding the purchase of photographs taken by means of extreme physical harassment. *The National Enquirer* Editor Steve Coz has said, "there's a difference between observing celebrities and hunting them down." Noah, *supra* note 30.

172. There is one additional player not yet mentioned - retail stores that sell tabloid magazines. After the death of Princess Diana, Amarraca, a store in Pittsburgh, PA, announced that it would no longer sell tabloid magazines, not in an effort to censor free speech but as an exercise of its right to remove itself from the chain of players that support paparazzi "stalking" celebrities. *Amarraca to Discontinue Sales of Tabloid Magazines*, PR NEWSWIRE, Sept. 4, 1997. This action, although admirable and a step in the direction of positive change, may not be feasible from a business perspective as it is often difficult to distinguish between the tabloid and the mainstream press. See *supra* notes 38-42 and accompanying text.

173. See *supra* notes 43-46 and accompanying text.

174. Shenk, *supra* note 43.

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*PROTECTION FROM PAPARAZZI*

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LENA REED VANHOORNBECK