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POPPING BRITNEY'S PERSONAL SAFETY BUBBLE: WHY PROPOSED ANTI-PAPARAZZI ORDINANCES IN LOS ANGELES CANNOT WITHSTAND FIRST AMENDMENT SCRUTINY

By: Gary Wax*

"Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery."

– Samuel Warren & Louis Brandeis in *The Right to Privacy*, 1890.¹

I. INTRODUCTION

Los Angeles residents have recently "seen the rise of the 24-hour celebrity"; and—like moths attracted to a light—the 24-hour paparazzi have followed.² Although paparazzi and tabloids have been around for decades, many celebrities and local lawmakers have recently complained that paparazzi's overly aggressive picture-taking tactics are threatening "public safety and personal privacy."³ "With the boom in Internet gossip sites, tabloid television and a host of star-oriented magazines over the past five years, the number of freelance photographers has risen [in Los Angeles] from a few dozen to hundreds."⁴ In fact, paparazzi pursue celebrities to earn a potentially handsome reward,⁵ and also to freely enjoy

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

2. Posting of Joe M. to LA Criminal Defense Blog, <http://www.lacriminaldefenseblog.com/paparazzi-vs-celebrities-who-wins-the-camera-or-britney/> (Mar. 17, 2008).

3. *City Hall Abuzz with Paparazzi Aggression Hearing*, CBS2, July 31, 2008, <http://cbs2.com/local/Paparazzi.City.Hall.2.784571.html> [hereinafter *City Hall Abuzz*].

4. David Ferrell, *Building a Britney Bubble: The Paparazzi No-Spy Zone*, L.A. WKLY., Feb. 21, 2008, available at <http://www.laweekly.com/2008-02-21/news/building-a-britney-bubble/> (quoting the *Times* of London describing "Los Angeles' growing throngs of paparazzi").

5. See, e.g., Brian Dakss, *Paparazzi Going Too Far?*, CBSNEWS, June 10, 2005, <http://www.cbsnews.com/stories/2005/06/10/earlyshow/leisure/celebspot/main700831.shtml>

their First Amendment rights.⁶

Despite the overwhelming attention that Princess Diana's tragic paparazzi-related fatal car accident garnered over ten years ago,⁷ celebrities and paparazzi continue to have dangerous encounters with each other—especially in Los Angeles, the entertainment capital of the world. In one highly publicized incident, a paparazzo crashed into actress Lindsay Lohan's car while he attempted to obtain a money shot.⁸ Another paparazzo pursued Angelina Jolie in a high-speed chase when the actress went to a toy store with her children.⁹ More recently, a violent clash erupted on Malibu's Little Dume Beach between surfers and paparazzi when celebrity photographers tried to take Matthew McConaughey's picture while the actor was surfing.¹⁰

Local lawmakers have suggested a wide range of possibilities to curtail the paparazzi activity, such as “requiring all ‘celebrity photographers’ to file for a permit, . . . taxing revenues generated from the photos,” and, most controversially, creating floating “buffer zones” or “personal safety zones” around celebrities.¹¹

A year after Princess Diana's death, and then again in 2005, California enacted civil privacy torts in an attempt to deter aggressive paparazzi, but no criminal law is yet in place.¹² In February 2008, after two highly publicized incidents involving paparazzi-magnet Britney Spears,¹³ Los Angeles City Councilmember Dennis Zine proposed a new

(noting that US Weekly paid nearly \$500,000 for pictures of actors Brad Pitt and Angelina Jolie); see also *New Law Hits Aggressive Paparazzi in the Pocketbook*, TMZ, Dec. 30, 2005, <http://www.tnz.com/2005/12/30/new-law-hits-aggressive-paparazzi-in-the-pocketbook> (“Shots of Ben Affleck and Jennifer Garner with their new baby . . . could be worth \$500,000.”).

6. See U.S. CONST. amend. I (prohibiting states from passing any law that abridges “the freedom of speech, or of the press”).

7. See Mary Jordan, *Paparazzi and Driver Found Negligent in Princess Diana's Death*, WASH. POST, Apr. 8, 2008, at C1.

8. *Lindsay Lohan's Paparazzi Crash*, MONSTERS AND CRITICS, Nov. 9, 2006, http://www.monstersandcritics.com/people/news/article_1220017.php.

9. Helen Eckinger, *Chasing Angelina*, CHI. TRIB., Aug. 23, 2007, § 5 (Tempo), at 1.

10. *City Hall Abuzz*, *supra* note 3.

11. Posting of Jason Crow to Citizen Media Law Project Blog, <http://www.citimedialaw.org/blog/2008/paparazzi-need-better-manners-not-more-laws> (July 11, 2008) [hereinafter Posting of Jason Crow].

12. See CAL. CIV. CODE § 1708.8 (West 2006).

13. Councilman Zine was primarily upset because of two incidents involving Britney Spears. First, during Britney's infamous ambulance trip in January 2008, paparazzi jeopardized the celebrity's ability to enter the hospital. During a subsequent highly publicized hospital trip, the county incurred \$25,000 in costs for “motorcycle, helicopter and patrol car escorts.” *Britney Spears Inspires a New Law: L.A. City Councilman Proposes ‘Personal Safety Bubble’ for Celebrities*, MSNBC, Feb. 12, 2008, <http://www.msnbc.msn.com/id/23134171> [hereinafter *Britney*].

city ordinance to create a “personal safety zone” between paparazzi and the celebrities they photograph.¹⁴ In May 2008, the City of Malibu followed suit, approving a measure “to address creation of ‘safety buffer zones’ or other ways to protect people from endangerment or harassment.”¹⁵ Then in June 2009, Santa Monica City Councilman Richard Bloom announced his plan “to create a buffer zone around nursery schools.”¹⁶

Councilman Zine explained why he introduced the aptly dubbed “Britney Spears Law” in Los Angeles: “it’s about the paparazzi violating everybody else’s rights, freedoms and privileges. . . . If we think back a few years, Princess Diana was driving down the road, paparazzi chasing. . . . A crash occurred, Princess Diana died. I don’t want to see that happen here in Los Angeles.”¹⁷ Malibu City Councilmember Jefferson Wagner said that his city asked Kenneth Starr, Dean of Pepperdine University School of Law, “to help draft a new ordinance that would restrict the harassment” of Malibu residents.¹⁸

At first glance, the cities’ proposed anti-paparazzi regulations seem like a rational solution to the aggressive tabloid photographers.¹⁹ However, in April 2008, the Los Angeles City Police Commission called the city’s proposals “unfair, ambiguous and probably unenforceable.”²⁰ Additionally, Los Angeles Police Department (LAPD) officials told the commission that there are “numerous laws already on the books [that] enable officers to deal with unruly behavior by paparazzi.”²¹ Former

Spears Inspires a New Law].

14. Motion from Dennis P. Zine, L.A. City Councilmember, 3d Dist., Feb. 1, 2008, available at <http://extratv.warnerbros.com/images/news/0201papmotion.pdf>.

15. Anne Soble, *City May Explore ‘Outside’ Sources to Rein in Paparazzi*, MALIBU SURFSIDE NEWS, May 8, 2008, at 2.

16. Carla Hall, *Paparazzi ‘Buffer Zone’ Eyed*, L.A. TIMES, June 11, 2009, at A3.

17. *Britney Spears Inspires a New Law*, *supra* note 13.

18. Ben Marcus & Laura Tate, *Malibu to Address Paparazzi Brawl*, MALIBU TIMES, June 25, 2008, <http://www.malibutimes.com/articles/2008/06/25/news/news1 prt>.

19. Posting of Jason Crow, *supra* note 11.

20. *New Paparazzi Rules Not Needed, L.A. Police Say*, L.A. TIMES, Apr. 9, 2008, at B7.

21. *Id.* For instance, “laws that address the dangerous aspects of paparazzi frenzies, such as reckless driving, must be consistently applied.” Motion from Dennis P. Zine, *supra* note 14. Additionally, a plaintiff can hold a journalist liable for the tort of “intrusion-into-private-matters” by showing that the photographer intentionally intruded upon his solitude, seclusion or private affairs by penetrating “some zone of physical or sensory privacy” that surrounds the plaintiff. *Taus v. Loftus*, 151 P.3d 1185, 1212 (Cal. 2007) (citing *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998)). Under the intrusion tort, a plaintiff must prove that he had an objectively reasonable expectation of seclusion or solitude in the invaded place, and the intrusion was in a manner that would be “highly offensive to a reasonable person.” *Id.* (citing *Shulman*, 955 P.2d at 490). California Civil Code section 1708.8 also allows a plaintiff to sue for “constructive invasion of privacy” when a photographer uses “a visual or auditory enhancing device” to capture a plaintiff “engaging in a personal or familial activity under circumstances in

LAPD Chief William Bratton told Fox 11 News that “[h]alf of this issue—actually about 90 percent of the issue is that celebrities should keep their clothes on.”²² Furthermore, other opponents argue that “celebrities themselves want the best of both worlds, seeking out the cameras when they want to bask in the limelight, and smashing those same cameras on the ground when they find them annoying.”²³ Nevertheless, Internet blogs such as Perez Hilton²⁴ and TMZ.com continue to fuel growing consumer demand for candid celebrity images.²⁵ Therefore, Los Angeles area lawmakers will find it challenging to tame the aggressive photographers because the potential reward for capturing the most revealing photographs outweighs the sting of most available deterrents.²⁶ Furthermore, the First Amendment of the Constitution creates a substantial roadblock for lawmakers when they attempt to draft statutory language that complies with Supreme Court precedent.

The First and Fourteenth Amendments protect the press’ right to speak and publish, and also protect the public’s right to receive information.²⁷ “The constitutional guarantee of a free press ‘assures the maintenance of our political system and an open society,’ and secures ‘the paramount public interest in a free flow of information’”²⁸ Moreover, “freedom of expression upon public questions is secured by the First Amendment.”²⁹

Approximately one decade ago, leading First Amendment scholar Rodney A. Smolla argued that the First Amendment would compel courts to strike down any law in which a legislature became “suddenly galvanized

which the plaintiff had a reasonable expectation of privacy.” CAL. CIV. CODE § 1708.8(b).

22. *City Hall Abuzz*, *supra* note 3 (quoting former LAPD Chief William Bratton).

23. *Bill Analysis: Hearing on Assem. B. 524 Before the S. Comm. on the Judiciary*, 2009–2010 Reg. Sess. 2 (Cal. 2009) [hereinafter *Bill Analysis: Hearing on Assem. B. 524*], available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_cfa_20090713_124145_sen_comm.html.

24. “Perez Hilton’ . . . operates the website perezhilton.com. The website is a blog that provides a series of journal-like entries featuring celebrity gossip . . . and which allegedly generates millions of users and—consequently—thousands of dollars in advertising revenue each day. . . . The photographs [posted on the blog] are essentially paparazzi-type, candid shots that depict celebrities engaged in their typical day-to-day activities—for example, Heather Locklear leaving a lunch meeting, Nicole Richie grocery shopping, and Britney Spears exposing herself.” *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1103 (C.D. Cal. 2007).

25. Posting of Jason Crow, *supra* note 11.

26. See *supra* note 5 and accompanying text.

27. See U.S. CONST. amends. I, XIV (conferring restriction that a state “shall make no law . . . abridging the freedom of speech, or of the press”); *Pell v. Procunier*, 417 U.S. 817, 832–33 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

28. *Pell*, 417 U.S. at 832 (internal citations omitted).

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

into a mood of zealous pro-privacy protection, and . . . were to enact a [law] that made it illegal to take anyone's photograph in any public or private place without that person's consent."³⁰ On the other hand, some legal scholars have suggested that paparazzi "align themselves with 'the press'" simply to "allege [that] their 'information gathering' is constitutionally protected" by the First Amendment.³¹ Councilman Zine even believes that paparazzi do not qualify as "legitimate media" because they are not "credentialed."³² Instead, he argues they are just people with cameras.³³ Notably, while the LAPD authorizes press credentials to full-time employees of news organizations, it does not provide credentials to entertainment or sports reporters.³⁴

The cities of Los Angeles, Malibu and Santa Monica have yet to publicize the exact language of their anti-paparazzi ordinances. However, for purposes of the analysis below, this article addresses the constitutionality of five separate provisions that the cities are likely to include in their legislation: (1) a subject matter provision, which will regulate the photography of "public figures" who are engaging in personal or familial activities; (2) a provision that imposes fines on photographers who intend to sell or publish celebrity photographs; (3) a scienter requirement; (4) a floating "buffer zone" provision; and (5) a provision that provides immunity to photographers where celebrities have given their express or implied consent. For instance, the Los Angeles ordinance may read as follows:

(a)A person is guilty of a misdemeanor when he or she knowingly enters an area within eight feet of a public figure³⁵

30. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1128 (1999) (arguing that strict scrutiny should be applied to anti-paparazzi laws).

31. Patrick J. Alach, Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 207 (2008).

32. Ferrell, *supra* note 4 (quoting Councilman Dennis Zine).

33. *Id.* (quoting Councilman Dennis Zine).

34. *City Hall Abuzz*, *supra* note 3.

35. Early reports publicized Los Angeles' initial proposal of a twenty yard personal safety zone (sixty feet). *E.g.*, James L. Hirszen, "Britney Law" Proposed in L.A., FIRSTLIBERTIES, Feb. 11, 2008, http://www.firstliberties.com/britney_law.html; Lis Wiehl, Opinion, *If Passed, "Britney Law" May End Paparazzi Stalking Tactics*, FOXNEWS, Mar. 6, 2008, <http://www.foxnews.com/story/0,2933,335848,00.html>; John Harlow, "Britney Law" to Give Celebrities a Safety Bubble, TIMES ONLINE, Feb. 10, 2008, http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article3341791.ece.

However, as discussed, *infra*, a sixty-foot distance will likely not pass constitutional muster. See Schenck v. Pro-Choice Network, 519 U.S. 357, 377-78 (1997) (striking down a fifteen-foot personal safety zone). Therefore, this ordinance includes an eight-foot buffer zone, similar to the zone of privacy upheld in *Hill v. Colorado*, 530 U.S. 703, 729-30 (2000).

with the intent to capture, in a manner that is highly offensive to a reasonable person,³⁶ any type of visual image, sound recording, or other physical impression of the public figure when the public figure is engaging in a personal or familial activity in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility, courthouse or school.³⁷

(b) A person will not be guilty of a misdemeanor under subdivision (a) if the public figure gives express or implied consent.

(c) A person qualifies as a public figure under subdivisions (a) and (b) if he or she qualifies as a public figure under the laws governing defamation.³⁸

(d) A person who qualifies as a public figure under subdivision (c) and who also qualifies as a public official under the laws governing defamation does not qualify as a public figure for the purposes of subdivision (a).

(e) A finding of guilt under this section shall be punishable by a fine of not more than \$1,000.00. Additionally, if the City of Los Angeles proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the City of any proceeds or other consideration obtained as a result of violating this section.³⁹

(f) For the purposes of this section, “for a commercial purpose” shall mean any act done with the expectation of a sale, financial gain, or other consideration. A visual image, sound recording, or other physical impression shall not be found to have been, or intended to have been captured for a commercial purpose unless it is intended to be, or was in fact, sold, published, or

36. The provision that requires the defendant’s intent to capture a physical impression of the public figure be in a manner that is “highly offensive to a reasonable person” is copied from the Restatement, which lists this language as one element to the tort of “publicity given to private life.” RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977). As discussed, *infra*, the “highly offensive” provision is intended to mirror the Supreme Court’s “actual malice” requirement for defamation claims against “public figures.” See full discussion *infra* Part III.C.

37. The “personal or familial activity” provision is copied from California’s anti-paparazzi tort. See CAL. CIV. CODE § 1708.8(b). The 100-foot radius provision around health care facilities and courthouses is similar to COLO. REV. STAT. § 18-9-122(3) (1999), the provision upheld in *Hill v. Colorado*, 530 U.S. at 707.

38. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (introducing the “public figure” doctrine).

39. See CAL. CIV. CODE § 1708.8(d) (providing the text of this disgorgement provision).

transmitted.⁴⁰

(g)For the purposes of this section, “personal or familial activity” includes, but is not limited to, intimate details of the public figure’s personal life, interactions with the public figure’s family or significant others, or other aspects of the public figure’s private affairs or concerns.⁴¹

Notably, the hypothetical ordinance above includes no actual sale or publication requirement as an element of guilt (although additional damages arise out of a photographer’s intent to sell or publish).

These anti-paparazzi proposals are likely to raise two separate, but related, First Amendment issues. First, the ordinances may violate the Amendment’s freedom of press protections because important newsgathering interests far outweigh the cities’ privacy concerns.⁴² Here, the Supreme Court’s “public figure” doctrine—introduced in *Gertz v. Robert Welch, Inc.*—will clearly be at issue.⁴³ Second, the floating “buffer-zone” provisions may violate the First Amendment’s freedom of speech protections.

II. PRIVACY LAW BACKGROUND

While the California Constitution expressly provides an inalienable right of privacy to state residents,⁴⁴ the federal Constitution includes no such explicit privacy right. Nevertheless, through the years, the Supreme Court has interpreted fundamental constitutional privacy rights emanating from the “penumbras” of other specifically defined rights, including those of the First Amendment.⁴⁵ For instance, in *NAACP v. Alabama*, the Court held that the First Amendment protects ““privacy in one’s associations.””⁴⁶

Additionally, in *Katz v. United States*, the landmark Fourth Amendment right to privacy decision, the Court recognized a constitutionally protected, reasonable expectation of privacy in the context

40. *See id.* § 1708.8(k).

41. *See id.* § 1708.8(l).

42. *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 490–91, 496 (1975).

43. *See Gertz*, 418 U.S. at 345.

44. *See CAL. CONST.* art. I, § 1.

45. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”); Alach, *supra* note 31, at 208; *see also, e.g.*, U.S. CONST. amends. I (protecting freedom of association), III (prohibiting quartering of soldiers without homeowners consent), IV (prohibiting unreasonable searches and seizures), V (conferring privilege against self-incrimination), IX (reserving other unenumerated rights).

46. *Griswold*, 381 U.S. at 483 (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

of government searches.⁴⁷ There, the Court famously held that “the Fourth Amendment protects people, not places.”⁴⁸ Therefore, the government potentially violates a person’s expectation of privacy even when a person is in a public place, such as a phone booth.⁴⁹ In his concurring opinion, Justice Harlan enunciated the settled test for what constitutes a search, triggering the Fourth Amendment’s privacy protections.⁵⁰ First, a person must “have exhibited an actual (subjective) expectation of privacy”; and, second, the expectation must “be one that society is prepared to recognize as [objectively] ‘reasonable.’”⁵¹

Nevertheless, despite a long history of Fourth Amendment privacy doctrines designed to protect against illegal searches (as delineated by *Katz* and its progeny), First Amendment jurisprudence has generally protected photographers from civil invasion of privacy claims in public, assuming the photographer did not commit any independent crime or tort.⁵² Thus, photographers are generally protected because, “[o]n the public street, or in any other public place, [a] plaintiff has no right to be alone.”⁵³ Indeed, some courts have held that appearing in public “necessarily involves doffing the cloak of privacy which the law protects.”⁵⁴ Courts have applied this principle to the famous—as well as the infamous—especially where the subject matter depicted in a photograph is deemed a matter of public concern.

Through the years, several academics have noted the complexity in defining the essence and scope of the right to privacy. Some theorists define privacy as a form of control over personal information.⁵⁵ Other theorists argue that “intimacy” is the common denominator in all privacy matters.⁵⁶ Yet another group of academics contend that privacy is a puzzle of

47. *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); see also U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

48. *Katz*, 389 U.S. at 351 (majority opinion).

49. *Id.* at 351–52 (majority opinion).

50. *Id.* at 361 (Harlan, J., concurring).

51. *Id.* (Harlan, J., concurring).

52. See, e.g., *Okla. Publ’g Co. v. Okla. County Dist. Court*, 430 U.S. 308, 308–09 (1977). Of course the First Amendment does not license photographers “to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.” *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

53. *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964).

54. *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979).

55. See, e.g., Charles Fried, *Privacy*, 77 YALE L.J. 475, 482 (1968).

56. E.g., JULIE C. INNESS, *PRIVACY, INTIMACY, AND ISOLATION* 56, 58, 63, 64, 67 (Oxford University Press 1992).

three independent and irreducible elements: secrecy, anonymity, and solitude. Each is independent in the sense that a loss of privacy may occur through a change in any one of the three, without a necessary loss in either of the other two. The concept is nevertheless coherent because the three elements are all part of the same notion of accessibility⁵⁷

The concept of privacy is “entangled in competing and contradictory dimensions” and “engorged with various and distinct meanings.”⁵⁸ Additionally, because federal constitutional privacy interests are so diverse—especially in the comprehensive “penumbral” sense—the Court has not provided one coherent legal definition or standard.⁵⁹

In general, the term “right to privacy” has broadly evolved into four separate commonly known privacy torts, which the vast majority of jurisdictions now recognize, including California.⁶⁰ In 1960, Dean William Prosser defined the analytical framework for these privacy torts, and the Restatement of Torts has further expounded on Dean Prosser’s initial definitions.⁶¹ Collectively, the following four torts are known as “invasion of privacy”: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) false light; and (4) appropriation (of name or likeness).⁶² The common denominator among them is a defendant’s improper interference with personal or confidential aspects of a plaintiff’s life, and the standards are based upon widely shared social norms.⁶³ Generally, “intrusion upon seclusion” and “public disclosure of private facts” are the most applicable torts in the press context; however, California also enacted a more restrictive newsgathering privacy tort known as “constructive invasion of privacy.”⁶⁴

In 2009, the California Supreme Court in *Hernandez v. Hillsides, Inc.* conflated its analysis of the common law intrusion tort with its test for

57. Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 433–34 (1980).

58. Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087, 2087 (2001).

59. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 651 (Cal. 1994).

60. *Id.* at 647; *see also, e.g., Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 234–35 (Minn. 1998) (recognizing invasion of privacy formally in Minnesota, and noting that North Dakota and Wyoming are the only states not to have adopted some form of civil invasion of privacy remedy).

61. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960); RESTATEMENT (SECOND) OF TORTS §§ 652D (1977) (public disclosure of private facts), 652B (intrusion upon seclusion), 652E (false light), 652C (appropriation).

62. RESTATEMENT (SECOND) OF TORTS §§ 652D (public disclosure of private facts), 652B (intrusion upon seclusion), 652E (false light), 652C (appropriation).

63. *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d at 647.

64. *See* CAL. CIV. CODE § 1708.8 (West 2006).

establishing a privacy violation under the state's constitution.⁶⁵ Under the parallel elements of the two tests, the court considers: "(1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests."⁶⁶ California law does not provide a bright line rule to determine whether an alleged intrusion is offensive; "each case must be taken on its facts."⁶⁷ However, courts consider several factors, including "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."⁶⁸ The California high court based its two-part privacy test on its lengthy and comprehensive privacy discussion in *Hill v. National Collegiate Athletic Association*, where the court discussed the history of privacy rights under California law as well as the evolution of privacy rights under the federal Constitution.⁶⁹

Since Samuel Warren and Justice Louis Brandeis first recognized the right to be left alone over a century ago,⁷⁰ states have struggled to balance privacy interests without infringing on First Amendment rights. The Supreme Court has addressed this conflict between First Amendment jurisprudence and state privacy laws several times in recent years, but not exhaustively.⁷¹ On the contrary, although the Court's decisions "have without exception upheld the press' right to publish," lower courts have resolved other privacy-related conflicts only as they have arisen "in a discrete factual context" by balancing an individual's right to be left alone against fundamental First Amendment protections.⁷²

For instance, in *Galella v. Onassis*, the Court of Appeals for the Second Circuit upheld an injunction ordering a paparazzo to stay at least twenty-five feet away from President Kennedy's widow because the photographer stalked her, "insinuated himself into the very fabric of [her]

65. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1072–73 (Cal. 2009).

66. *Id.* at 1074 (citing *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d at 649, 653–54).

67. *Id.* at 1073; *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 494 (Cal. 1998).

68. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d at 648 (internal quotation marks and citations omitted).

69. *See id.* at 641–67.

70. *See Warren & Brandeis, supra* note 1, at 195 ("[T]he next step . . . must be taken for the protection of the person, and for securing to the individual . . . the right 'to be let alone.'").

71. *Florida Star v. B.J.F.*, 491 U.S. 524, 530 (1989).

72. *Id.*; *see also Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d at 651 ("In privacy cases involving informational interests, the federal courts have generally applied balancing tests that avoid rigid 'compelling interest' or 'strict scrutiny' formulations.").

life,” and went “beyond the reasonable bounds of newsgathering.”⁷³ However, courts have overwhelmingly rejected invasion of privacy claims where journalists conducted lawful newsgathering activities in public.⁷⁴ Indeed, the right of reporters and photographers to take photographs in public has been a cornerstone of our democracy.

III. ANTI-PAPARAZZI ORDINANCES THAT IMPLICATE THE “PUBLIC FIGURE” DOCTRINE VIOLATE THE FIRST AMENDMENT BECAUSE FREEDOM OF PRESS PROTECTIONS OUTWEIGH PRIVACY CONCERNS

Unlike defamation law, which protects people from the publication of *false* information,⁷⁵ laws that regulate paparazzi restrict photographers’ ability to capture *truthful* information because a camera captures actual events. Courts have noted that taking a picture “amounts to nothing more than making a record, not differing essentially from a full written description of a public sight which anyone present would be free to see.”⁷⁶

In *Bartnicki v. Vopper*, the Supreme Court noted that when a law “imposes sanctions on the publication of truthful information of public concern,” enforcement of such a provision “implicates the core purposes of the First Amendment.”⁷⁷ Otherwise stated in the Restatement of Torts: “When the subject-matter of . . . publicity is of legitimate public concern, there is no invasion of privacy.”⁷⁸ This common law rule of torts has also become a rule of the federal Constitution.⁷⁹ According to the Court, a

73. *Galella v. Onassis*, 487 F.2d 986, 994–95 (2d Cir. 1973).

74. *See, e.g., Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (holding that the intrusion upon seclusion tort “does not apply to matters which occur in a public place or a place otherwise open to the public eye”); *Aisenson v. ABC, Inc.*, 269 Cal. Rptr. 379, 388 (Ct. App. 1990) (holding that there was no invasion of privacy where camera crew videotaped plaintiff in his driveway from a car parked across the street from plaintiff’s home and plaintiff was in full public view).

75. CAL. CIV. CODE §§ 45, 46 (West 2008); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing as the first of four elements required to prevail on a defamation claim, “a false and defamatory statement concerning another”); RESTATEMENT (SECOND) OF TORTS § 581(A) cmt. A (1977) (noting that “there can be no recovery in defamation for a statement of fact that is true”); *see Smith v. Maldonado*, 85 Cal. Rptr. 2d 397, 402 (Ct. App. 1999) (noting that the defamation tort “involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.”); *see also Washer v. Bank of Am. Nat. Trust & Sav. Ass’n*, 197 P.2d 202, 207–08 (Cal. Ct. App. 1948) (noting that truth is a complete defense against liability for defamation, regardless of bad faith or malicious purpose).

76. *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964).

77. *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001).

78. RESTATEMENT (SECOND) OF TORTS § 652D cmt. D (1977); *see also Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975) (“Liability may be imposed for an invasion of privacy only if ‘the matter publicized is of a kind which . . . is not of legitimate concern to the public.’”).

79. *Supple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 668 (Ct. App. 1984); *accord Cox*

matter of public concern includes “any matter of sufficient general interest [that] prompt[s] media coverage.”⁸⁰

In *Bartnicki*, the Court held that an individual could not be held liable under a federal law prohibiting intentional disclosure of contents from an illegally intercepted communication where the individual lawfully received the cellular phone conversation recording from an unknown third party, and the conversation concerned a matter of public concern.⁸¹ There, the First Amendment interest in publishing matters of public importance outweighed the plaintiffs’ privacy rights.⁸² Additionally, in *Cox Broadcasting Corp. v. Cohn*, the Court held that the First Amendment precludes recovery for disclosure of, and publicity to, facts that are a matter of public record.⁸³ However, there the Court explicitly left open the question of whether the Constitution permits liability for dissemination of other truthful facts about “very private matters unrelated to public affairs” that would be “offensive to the sensibilities of the supposed reasonable man.”⁸⁴

Importantly, in both *Bartnicki* and *Cox Broadcasting*, the Court balanced competing press and privacy concerns in cases where defendants actually *published* or *disseminated* information,⁸⁵ whereas Los Angeles area lawmakers are hoping to punish *newsgatherers* rather than publishers.⁸⁶ Courts have routinely noted that “at some point, the public interest in obtaining information becomes dominant over the individual’s desire for privacy.”⁸⁷ Although the Supreme Court has never explicitly held that the First Amendment absolutely protects newsgathering,⁸⁸ in *Branzburg v. Hayes*, its leading case on the press clause, the Court noted that “without some protection for seeking out the news, freedom of the press could be eviscerated.”⁸⁹

Leading constitutional law scholar and Dean of UC Irvine School of

Broad. Corp. v. Cohn, 420 U.S. 469, 493–94 (1975).

80. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 357 n.6 (1974); *see also* *Martin v. Comm. for Honesty and Justice at Star Valley Ranch*, 101 P.3d 123, 128 (Wyo. 2004) (noting that “a public controversy is a dispute that . . . has received public attention because its ramifications will be felt by persons who are not direct participants”).

81. *Bartnicki*, 532 U.S. at 517–18.

82. *Id.* at 534.

83. *Cox Broad. Corp.*, 420 U.S. at 496.

84. *Id.* at 490–91, 496.

85. *Bartnicki*, 532 U.S. at 528–29; *Cox Broad. Corp.*, 420 U.S. at 491.

86. *See* Motion from Dennis P. Zine, *supra* note 14; Marcus & Tate, *supra* note 18, at 1.

87. *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

88. Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL’Y 113, 121 (2008) (emphasizing the lack of a conclusive ruling from the U.S. Supreme Court as newsgathering rights vary across jurisdictions).

89. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

Law Erwin Chemerinsky acknowledges that the Court has “failed to provide any First Amendment protection for newsgathering,” but nevertheless, argues that newsgathering should be subject to intermediate scrutiny.⁹⁰ If the Constitution does in fact protect newsgatherers, courts have noted that such protection “is far narrower than the protection surrounding the publication of truthful material.”⁹¹ Consequently, “the fact that a reporter may be seeking ‘newsworthy’ material does not in itself privilege the investigatory activity.”⁹² However, news publishers would find it virtually impossible to disseminate the news without the ability to freely and lawfully gather truthful information. It is well settled that “laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State, and so are always subject to at least some degree of heightened First Amendment scrutiny.”⁹³ For instance, in 1983, the Supreme Court struck down a tax on newsprint and ink that had a disproportionate impact on newspapers, holding that laws that discriminate against the press, or against other forms of expressive activity, are presumptively unconstitutional.⁹⁴

The primary constitutional issue raised by anti-paparazzi proposals in Los Angeles, Malibu, and Santa Monica is whether the First Amendment precludes an imposition of guilt where a photographer merely captures an image of a “public figure” in a public place, without going beyond the reasonable bounds of newsgathering.⁹⁵ As the California legislature declared,

[t]he right to privacy and respect for private lives of individuals and their families must be balanced against the right of the media to gather and report the news. The right of a free press to report details of an individual’s private life must be weighed against the rights of the individual to enjoy liberty and privacy.⁹⁶

90. Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1145, 1161–62 (2000).

91. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 496 (Cal. 1998).

92. *Id.*

93. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640–41 (1994) (quoting *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987)) (internal quotation marks and citations omitted).

94. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585, 591 (1983).

95. It is important to note that Los Angeles, Malibu and Santa Monica ordinances will be sufficient “state actions” to trigger First Amendment protections. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991).

96. *Assem. B. 524*, § 1(e), 2009–10 Reg. Sess. (Cal. 2009), available at

In *Dietemann v. Time, Inc.*, the Court of Appeals for the Ninth Circuit made the seemingly obvious observation that “newsgathering is an integral part of news dissemination.”⁹⁷ In order to provide constitutionally protected news, journalists, including paparazzi, must be able to lawfully gather information in public without fear of liability.

Furthermore, First Amendment protections outweigh privacy concerns in the proposed city ordinances for the following reasons: (1) photographs taken in public places are protected assuming the pictures do not shock the ordinary sense of decency; (2) tabloid journalism qualifies as “news,” whether or not tabloid-like photographs are tied to publication or sale; (3) anti-paparazzi laws that implicate the “public figure” doctrine violate the First Amendment because photographs of public figures, which convey factual information, may be deemed “newsworthy”; and (4) in Los Angeles, Malibu and Santa Monica, photographs of celebrities engaging in private activities qualify as “newsworthy” because the customs and conventions of those communities dictate that stories about celebrities’ personal lives may be of legitimate public concern.

A. Photographs Taken in Public Places Are Protected Assuming the Pictures Do Not Shock the Ordinary Sense of Decency

Under well-established constitutional law, a photographer who takes a celebrity’s picture in public cannot be held liable for invasion of privacy where the picture conveys facts of public concern.⁹⁸ This is because a public figure has a much lower expectation of privacy when he or she is in a public place—especially in a celebrity-enclave such as Los Angeles. In the language of *Katz v. United States*, even if a celebrity has “an actual (subjective) expectation of privacy” on a Los Angeles public sidewalk, society is not prepared to recognize such an expectation as reasonable.⁹⁹ Clearly, in Los Angeles, any such privacy expectation would be manifestly *unreasonable*. Indeed, it is well-known that “in addition to being the media

http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_bill_20090916_enrolled.html.

97. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

98. See *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 445 (Cal. 1953) (finding that a photograph of plaintiff embracing his wife in a public market place “portray[ed] nothing to shock the ordinary sense of decency”); cf. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490–91 (Cal. 1998) (holding that defendant may have had a reasonable expectation of privacy once she was placed in a medical helicopter, and was entitled to a degree of privacy in conversations with medical rescuers).

99. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

capital of the world, Los Angeles is also a center for paparazzi.”¹⁰⁰ Many Hollywood publicists call ahead, alerting paparazzi to their clients’ whereabouts to generate additional publicity.¹⁰¹ Therefore, these celebrities should not be surprised when paparazzi show up to take their pictures.

Under California privacy law, a plaintiff’s reasonable expectation of privacy is based on several objective factors, including “an examination of customs, practices, and physical settings surrounding particular activities, as well as the opportunity to be notified in advance and consent to the intrusion.”¹⁰² Courts have regularly distinguished between the reasonable privacy expectation a person has in a secluded home or office, and the *unreasonable* privacy expectation a person has in a place that is “regularly open to entry or observation by the public or press,” or where a person can be “overheard or observed by others.”¹⁰³ Additionally, when a public figure reveals personal facts to a casual observer, that public figure cannot later argue that the photographer “intruded into his private sphere.”¹⁰⁴

However, the Supreme Court has noted that merely because facts are in the public view does not mean they should be subject to mass public disclosure.¹⁰⁵ Indeed, the concepts of privacy and seclusion are relative.¹⁰⁶ “The mere fact that a person can be seen by *someone* does not automatically mean that he or she can legally be forced to be subject to being seen by *everyone*.”¹⁰⁷ Moreover, several state courts have held that “[a] person does not automatically make public everything he does merely by being in a public place.”¹⁰⁸ At least in the context of “private figures,” “there may be some matters about [a person], such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be

100. See Motion from Dennis P. Zine, *supra* note 14.

101. Liz Kelly, *Meetthefamous.com—Inspired or Invasion of Privacy?*, WASH. POST, Mar. 31, 2009, http://voices.washingtonpost.com/celebrity/2009/03/meet_the_famous_and_make_a_few.html.

102. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1072–73 (Cal. 2009) (internal quotation marks and citations omitted).

103. *Id.* at 1074–75 (quoting *Sanders v. ABC, Inc.*, 978 P.2d 67, 77 (Cal. 1999)) (internal quotation marks omitted).

104. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970).

105. See, e.g., *U.S. Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 770 (1989) (noting “the fact that an event is not wholly ‘private’ does not mean that an individual has no interest in limiting disclosure or dissemination of the information”).

106. See *Sanders*, 978 P.2d at 72 (“There are degrees and nuances to societal recognition of our expectations of privacy.”).

107. *Id.* (emphasis added).

108. E.g., *Nader*, 255 N.E.2d at 771.

invasion of privacy when there is intrusion upon these matters.”¹⁰⁹

For instance, in *Daily Times Democrat v. Graham*, a private figure’s panties were exposed when her dress was blown up by air jets (à la Marilyn Monroe) as she exited a “Fun House” at a county fair with her two sons.¹¹⁰ At that moment, a newspaper photographer snapped her picture, and his employer published the embarrassing photograph on the front page of a local newspaper in connection with a write-up of the fair.¹¹¹ The newspaper argued that the photograph was an integral part of a legitimate news story.¹¹² Nevertheless, the Alabama high court disagreed and upheld the jury’s award of damages for invasion of privacy.¹¹³ The court found the photograph to be “embarrassing to one of normal sensibilities” and, moreover, believed that the photograph “could properly be classified as obscene.”¹¹⁴

In *Gill v. Hearst Publishing Co.*, the California Supreme Court used a similar standard as the *Graham* court discussed above, but arrived at a different conclusion.¹¹⁵ In *Gill*, a magazine published and distributed an allegedly unauthorized photograph of the plaintiffs while they “were seated in an affectionate pose at their place of business, a confectionery and ice cream concession in the Farmers’ Market in Los Angeles.”¹¹⁶ The court considered the nature of the picture in question and found it “significant that [the photograph] was not surreptitiously snapped on private grounds, but rather was taken of plaintiffs in a pose voluntarily assumed in a public market place.”¹¹⁷ In short, the *Gill* court found that “the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public [than] had actually witnessed it at the time of occurrence.”¹¹⁸ Additionally, unlike in *Graham*, the *Gill* court held that the photograph of the plaintiffs taken while they were romantically embracing portrayed “nothing to shock the ordinary sense of decency.”¹¹⁹ To hold otherwise, the court noted, would mean that plaintiffs under all conceivable circumstances

109. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977).

110. *Daily Times Democrat v. Graham*, 162 So. 2d 474, 476 (Ala. 1964).

111. *Id.*

112. *Id.* at 477.

113. *Id.* at 478.

114. *Id.* at 477. The First Amendment does not protect obscene expression. *See generally* *Miller v. California*, 413 U.S. 15 (1973).

115. *See Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 444–45 (Cal. 1953).

116. *Id.* at 442.

117. *Id.* at 444.

118. *Id.* at 445.

119. *Id.*

had an absolute legal right to prevent publication of any photograph of them taken without their permission. If every person has such a right, no periodical could lawfully publish a photograph of a parade or a street scene.¹²⁰

In fact, where photographers take pictures in public places, courts generally hold that unless the photograph is “offensive in the light of ‘ordinary sensibilities,’” there can be no liability for invasion of privacy.¹²¹ As shown in the hypothetical ordinance above, Los Angeles and other surrounding cities should impose liability for privacy invasions into personal or familial activities only when the manner of newsgathering is “highly offensive to a reasonable person”; otherwise, the ordinances will likely violate the First Amendment.¹²²

B. *Tabloid Journalism Qualifies as “News”*

Courts have never compelled journalists to “obtain the government’s imprimatur in order to practice their trade.”¹²³ Indeed, the Supreme Court has strenuously resisted attempts to legally define what it means to be a “bona fide” or “professional” journalist.¹²⁴ Therefore, virtually anyone who seeks out the news potentially qualifies as a “newsman”—including a celebrity photographer.¹²⁵ Furthermore, the Court held that “[f]reedom of

120. *Id.* (internal quotation marks and citation omitted).

121. *Gill*, 253 P.2d at 444 (quoting 41 AM. JUR. 2d *Privacy* § 12 (1964)). Some courts have gone further by stating that a “factually accurate public disclosure” is not an invasion of privacy “when connected with a newsworthy event even though offensive to ordinary sensibilities.” *Neff v. Time, Inc.*, 406 F. Supp 858, 861 (W.D. Pa. 1976).

122. RESTATEMENT (SECOND) OF TORTS § 652D(a) (1977).

123. Jane E. Kirtley, *Privacy and the News Media: A Question of Trust or of Control?*, 21ST INTERNATIONAL CONFERENCE ON PRIVACY AND PERSONAL DATA PROTECTION 6 (1999), available at <http://www.pcpd.org.hk/english/infocentre/files/kirtley-paper.doc>.

124. In *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972), the leading case on the press clause, the Supreme Court noted the difficult and vexing nature of defining the privileges of “newsmen.” Indeed, the Constitution protects all citizens, and there is no reason to believe that the *Branzburg* Court intended to elevate the journalistic class above the rest. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 978–79 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005).

125. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (plurality opinion) (White, J., concurring) (“Wisely, . . . Justice POWELL does not rest his application . . . on a distinction drawn between media and nonmedia defendants. On that issue, I agree with Justice BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.”); *cf. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990) (“In *Hepps* the Court reserved judgment on cases involving nonmedia defendants, . . . and accordingly we do the same.” (discussing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 779 (1986))).

the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’¹²⁶ The Court also recognized “that entertainment, as well as news, enjoys First Amendment protection,” and correctly observed “that entertainment itself can be important news.”¹²⁷ However, the dividing line between information and entertainment has become too elusive for the Court to define.¹²⁸ Even the word “[p]aparazzi’ is a bit of a misnomer now,” as the CEO of one Internet gossip blog correctly observed.¹²⁹ “Originally, paparazzi [were] a select group specializing in a specific kind of celebrity shooting. Now AP, Reuters—everybody’s doing it.”¹³⁰ Therefore, the First Amendment does not compel the courts to distinguish between celebrity photographs published in a newspaper or magazine and those posted on Internet blogs.

Moreover, any court that chooses to analyze whether photographs posted on the Internet qualify as “news” must consider the fact that, as of 2008, the Internet “surpassed all other media except television as an outlet for national and international news.”¹³¹ Indeed, forty percent of Americans “say they rely mostly on the Internet for news,” whereas only thirty-five percent now rely on newspapers.¹³² California courts have also acknowledged that websites and other digital publications are now widely recognized as “magazines.”¹³³ Therefore, Internet blogs such as Perez

126. *Branzburg*, 408 U.S. at 704 (quoting *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)).

127. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977) (citing *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

128. *Time, Inc. v. Hill*, 385 U.S. at 388.

129. Peter Gilstrap, *Paparazzi Business Being Redefined: Biz About Volume, Feeding Ever-Expanding Market*, VARIETY, July 6, 2007, at 4, 42.

130. *Id.* Other upstart players “in the photo game are the MOPS, industry jargon for Members of the Public. With cheap, user-friendly digital units and cell phone cameras, a money-making snap can potentially be captured by almost anyone.” *Id.*

131. PEW RESEARCH CENTER, INTERNET OVERTAKES NEWSPAPERS AS NEWS OUTLET (2008), <http://pewresearch.org/pubs/1066/internet-overtakes-newspapers-as-news-source>.

132. *Id.*

133. *O’Grady v. Superior Court*, 44 Cal. Rptr. 3d 72, 99–100 (Ct. App. 2006) (citing CAL. CONST. art. I, § 2, subdiv. (b); CAL. EVID. CODE § 1070(a) (2009) (reporter’s shield-law privilege)) (discussing the ambiguity of the phrase “newspaper, magazine, or other periodical publication” in the California Constitution). The state of Delaware defines “reporter” more specifically than any other state. In Delaware, a reporter “means any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or

Hilton and TMZ.com qualify as news websites, and photographs taken for eventual posting on such Internet news websites may qualify as "newsworthy."¹³⁴

Of course not all amateur newsgatherers are looking to spread gossip on the Internet or in other tabloids, nor does every person who captures a newsworthy image or video necessarily seek payment.¹³⁵ However, the proposed ordinances likely will be laws of general applicability because they will apply equally to all people. Paparazzi, tourists, and investigative reporters will all be guilty of misdemeanors if they violate the proposed ordinances. The Supreme Court held in no uncertain terms that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."¹³⁶ However, proposed ordinances in the Los Angeles area will disproportionately target newsgathering, which will render the laws unconstitutional.¹³⁷

Everyday citizens have been taking pictures of notable newsworthy events for decades in public without fear of liability. Indeed, "[t]he rise of the 'citizen journalist' is not a new phenomenon."¹³⁸ Amateur photographers have been responsible for capturing some of the most important newsworthy moments in history. For instance, Abraham Zapruder famously filmed President John F. Kennedy's assassination with his home movie camera and eventually sold the film to *Life* magazine for \$150,000 (about \$500,000 in today's dollars).¹³⁹ Additionally, during the Warren Commission's investigation of the Kennedy assassination, the Commission "made extensive use of the Zapruder film, and placed great reliance on it, as evidence in [its] Report."¹⁴⁰

Today, free-access websites such as YouTube¹⁴¹ are popular destinations for all kinds of videos, including important news clips.¹⁴² For

supervisor of an individual who qualifies as a reporter under subparagraph a." DEL. CODE ANN. tit. 10 § 4320 (2002).

134. See full discussion *infra* Part III.C–D.

135. See generally Dan Gillmor, *The Decline (and Maybe Demise) of the Professional Photojournalist*, CENTER FOR CITIZEN MEDIA, Dec. 4, 2006, <http://citmedia.org/blog/2006/12/04/the-demise-of-the-professional-photojournalist/>.

136. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991).

137. See *id.*; see also *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 704 (1986) (noting that some laws, "although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities").

138. Gillmor, *supra* note 135.

139. *Id.*; *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. 130, 133–34 (S.D.N.Y. 1968).

140. *Time Inc. v. Bernard Geis Assocs.*, 293 F. Supp. at 134.

141. YouTube, <http://www.youtube.com/> (last visited Apr. 13, 2009).

142. Gillmor, *supra* note 135.

instance, one “citizen journalist” recently captured shocking images of a security guard abusing a student with a taser at the University of California, Los Angeles, and another amateur videographer captured the now-famous racist rantings of celebrity Michael Richards (*Seinfeld*’s “Kramer”) on his mobile phone camera.¹⁴³ By restricting the activities of paparazzi, the proposed city ordinances may disproportionately target this type of important “citizen journalism,” which should render the laws unconstitutional.

At this point, it is unclear whether sale or publication provisions will be included in the cities’ anti-paparazzi ordinances. Defamation law and existing privacy law already provide several adequate remedies to potential civil plaintiffs seeking to redress their publication-related injuries. Therefore, Los Angeles, Malibu and Santa Monica probably will not include sale or publication requirements in their ordinances so that they are able to directly target the aggressive paparazzi behavior with criminal sanctions.

C. Photographs of “Public Figures” May Be Deemed “Newsworthy”

First Amendment protections generally outweigh privacy concerns where a person “has achieved, or has had thrust upon him . . . [the] status of a ‘public figure.’”¹⁴⁴ Under the Supreme Court’s jurisprudence, the “public figure” category is quite broad.¹⁴⁵ As the Court explained in the leading case, *Gertz v. Robert Welch, Inc.*, those categorized as “all-purpose public figures” “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.”¹⁴⁶ Conversely, “limited-purpose public figures” are those who “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.”¹⁴⁷ Courts also classify many types of celebrity performers as public figures, including television and movie actors, recording artists, and professional athletes.¹⁴⁸

Although such persons have not necessarily taken an active part in debates on public issues, they remain, nevertheless, persons in whom the public has continuing interest. . . . The essential

143. *Id.*

144. *See, e.g., Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940).

145. *See James v. Gannett Co.*, 353 N.E.2d 834, 839 (N.Y. 1976) (reviewing the Court’s “public figure” case law).

146. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

147. *Id.*

148. *James*, 353 N.E.2d at 839.

element underlying the category of public figures is that the publicized person has taken *an affirmative step to attract public attention*.¹⁴⁹

In order to determine whether an individual qualifies as a “public figure”—as a matter of law—a court must look at the “nature and extent of an individual’s participation in the particular controversy giving rise to the [claim].”¹⁵⁰ Courts also “look for evidence of affirmative actions by which purported ‘public figures’ have thrust themselves into the forefront of particular public controversies” and consider “the totality of the circumstances.”¹⁵¹

In *Gertz*, the Supreme Court extended the *New York Times v. Sullivan* malice standard—originally applied to “public officials” in defamation claims—to “public figures,” while choosing not to extend the same rule to “private figures.”¹⁵² Therefore, liability for the publication of material concerning “public figures” requires proof of falsity and a showing of actual malice, while those accused of defaming “private figures” are subject to a lower negligence standard.¹⁵³

The *Gertz* Court explained why public figures are less protected than private figures under the First Amendment¹⁵⁴: Public figures are less vulnerable to injury from defamatory statements because of their unique ability to use “self-help” to correct any error and minimize a *mistake’s* adverse impact on their reputation.¹⁵⁵ Public figures usually enjoy significantly greater access to communication channels than private

149. *Id.* at 839–40 (emphasis added). “Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare.” *Gertz*, 418 U.S. at 345.

150. *Gertz*, 418 U.S. at 352; see also *Khawar v. Globe Int’l, Inc.*, 965 P.2d 696, 701 (Cal. 1998) (“[W]hether a plaintiff in a defamation action is a public figure is a question of law for the trial court.”).

151. *Reader’s Digest Ass’n v. Sup. Ct.*, 690 P.2d 610, 616 (Cal. 1984). One court enunciated a three part test for determining public figure status. See *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296–98 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980). To apply the *Waldbaum* standard, courts must: (1) determine whether the subject is part of a public controversy; (2) determine whether the subject has thrust himself to the forefront of the particular controversy; and (3) determine whether the claimed privacy violation was “germane to the plaintiff’s participation in the controversy.” *Id.*

152. *Gertz*, 418 U.S. at 342–43, 353; see *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official who sues in a defamation claim must prove that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

153. *Gertz*, 418 U.S. at 342–47, 353.

154. See *id.* at 344–45 (holding that “private figures” only need to prove negligence in a defamation action, whereas “public figures” need to prove malice).

155. *Id.* at 344.

individuals, which enables them to counter criticism.¹⁵⁶ Additionally, unlike private figures, public figures have “voluntarily exposed themselves to increased risk of injury from defamatory *falsehood[s]*.”¹⁵⁷ Under the “actual malice” standard, a plaintiff must prove the defendant acted with knowledge of *falsity* or with reckless *disregard for the truth*.¹⁵⁸

In *Hustler Magazine v. Falwell*, the Supreme Court likewise extended the *New York Times* standard to public figures who file state law claims for intentional infliction of emotional distress when media outlets publish advertisement parodies or caricatures that include *false* statements.¹⁵⁹ There, the Court highlighted the rationale for extending the “actual malice” standard to public figures: such a rule “is necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”¹⁶⁰ In fact, the entire public figure doctrine grew out of the same basic underlying assumption: First Amendment speech protections extend even to some *false* speech.¹⁶¹ Therefore, anti-paparazzi laws that implicate the public figure doctrine and specifically target *truthful* information clearly have a higher First Amendment mountain to climb.

In the seminal privacy case *Sidis v. F-R Publishing Corp.*, the Court of Appeals for the Second Circuit correctly observed “the misfortunes and frailties of . . . ‘public figures’ are subjects of considerable interest and discussion to the rest of the population.”¹⁶² Furthermore, in *Bartnicki*, the Supreme Court noted that “[o]ne of the costs associated with participation in public affairs is an attendant loss of privacy.”¹⁶³ Celebrities habitually use their carefully cultivated personas to promote not just themselves, but also personal causes ranging from AIDS research and animal rights to religious freedom overseas. Therefore, it is utter nonsense for these celebrities to argue that their lives are not of public concern. Courts have noted that once an individual “has sought publicity he cannot at his whim withdraw the events of his life from public scrutiny.”¹⁶⁴ Additionally, *Sidis* stands for the proposition that once an individual qualifies as a public figure, that person may forever qualify as a public figure.¹⁶⁵ Nevertheless,

156. *Id.*

157. *Id.* at 345 (emphasis added).

158. *New York Times*, 376 U.S. at 280.

159. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56–57 (1988).

160. *Id.* at 56.

161. *Gertz*, 418 U.S. at 341.

162. *Sidis*, 113 F.2d at 809.

163. *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001).

164. *Ann-Margret v. High Soc’y Magazine, Inc.*, 498 F. Supp. 401, 405 (S.D.N.Y. 1980) (internal citations omitted).

165. *See Sidis*, 113 F.2d at 809 (holding that a public figure who “cloaked himself in

many of the same public figures who use their status to advance their political causes are the same celebrities who testified before Congress in 1998, asking it to impose fines and prison terms on photographers who harassed them in an attempt to take their pictures.¹⁶⁶

Several public figures—most famously Arnold Schwarzenegger, Clint Eastwood, and the late Ronald Reagan and Sonny Bono—were elected to public office largely on the strength of their Hollywood images and, thereafter, carried dual roles as public figures and public officials. In California, courts have held that the First Amendment protects news coverage of both public officials and public figures “so long as the interference is no greater than that necessary to protect the overriding public interest.”¹⁶⁷ Governor Schwarzenegger himself has been a champion for anti-paparazzi laws, originally signing California’s now-famous “constructive invasion of privacy” tort in 1998,¹⁶⁸ as well as the amended, harsher version of the same tort in 2009.¹⁶⁹ It is for this reason the proposed ordinance above includes an exemption from liability for photographing a public official who also qualifies as a public figure.¹⁷⁰

obscurity” may still be “a matter of public concern” and possess “considerable popular news interest”); see also *Brewer v. Memphis Publ’g Co.*, 626 F.2d 1238, 1257 (5th Cir. 1980) (holding that an entertainer who has retreated out of the public eye for several years is still required to prove malice in a defamation claim); *Time, Inc. v. Johnston*, 448 F.2d 378, 381 (4th Cir. 1971) (noting that the “mere passage of time will not necessarily insulate from the application of *New York Times Co. v. Sullivan*”).

166. Kelvin Childs, *Actors Testify For Bills To Punish Paparazzi*, EDITOR & PUBLISHER, June 6, 1998, at 14 (detailing the actors who discussed the miserable existence celebrities lead as objects of public fascination, and who are relentlessly hounded by the press); see generally *Protection from Personal Intrusion Act and Privacy Protection Act of 1998: Hearing on H.R. 2448 and H.R. 3224 Before the H. Comm. on the Judiciary*, 105th Cong. (1998).

167. *Aisenson v. ABC, Inc.*, 269 Cal. Rptr. 379, 388 (Ct. App. 1990).

168. CAL. CIV. CODE § 1708.8(b)–(d) (West 2006) (“(b) A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.”). Notably, paparazzi also targeted the Governor and were later convicted of misdemeanor false imprisonment after they chased him and his wife, Maria Shriver, following his elective heart surgery and subsequent hospital release. See Robert W. Welkos, *Paparazzi Guilty in Schwarzenegger Case*, L.A. TIMES, Feb. 3, 1998, at B1.

169. *Schwarzenegger Signs Tougher Paparazzi Law*, MSNBC, Oct. 12, 2009, <http://www.msnbc.msn.com/id/33283165/ns/entertainment-celebrities/>; see Assem. B. 524, § 1(e), 2009–10 Reg. Sess. (Cal. 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_bill_20090916_enrolled.html.

170. After *Gertz*, public officials and public figures are treated substantially the same under defamation law. See *Gertz*, 418 U.S. at 342–47.

Without this “public official” exemption, Governor Schwarzenegger would be unconstitutionally shielded from the press because, as a former Hollywood actor, he too qualifies as a “public figure.”¹⁷¹

In *Desnick v. American Broadcasting Companies*, the Court of Appeals for the Seventh Circuit held that “[t]oday’s ‘tabloid’ style investigative television reportage . . . is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation.”¹⁷² Furthermore, other courts have held that the First Amendment protects journalists’ public access to those persons who have thrust themselves into the limelight when the community deems such public figures as “newsworthy.”¹⁷³ The Ninth Circuit and California state courts adopted the Restatement approach to determine “newsworthiness,” holding that courts must look to the “customs and conventions of the community” in order to determine if a subject is newsworthy under privacy law:¹⁷⁴

[T]he cases and authorities emphasize that the privilege to publicize newsworthy matters incorporated in [the Restatement] is . . . one of constitutional dimension based upon the First Amendment of the United States Constitution. . . . When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy. *This has now become a rule not just of common law of torts, but of the Federal Constitution as well.*¹⁷⁵

The Restatement test for newsworthiness, developed by the Ninth Circuit in *Virgil v. Time, Inc.*, is the majority approach.¹⁷⁶

In two recent California Supreme Court cases, *Shulman v. Group W Productions, Inc.* and *Taus v. Loftus*, the court discussed at great length the “newsworthiness” element as a defense to liability for invasion of privacy.¹⁷⁷ However, unlike cases involving “public figures,” both of these

171. See *James*, 353 N.E.2d at 839–40 (noting that actors qualify as “public figures”).

172. *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1355 (7th Cir. 1995).

173. See *Virgil v. Time, Inc.*, 527 F.2d 1122, 1128–29 (9th Cir. 1975) (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. e (1977)); accord *Sipple v. Chronicle Publ’g Co.*, 201 Cal. Rptr. 665, 668 (Ct. App. 1984).

174. *Virgil*, 527 F.2d at 1129 (quoting RESTATEMENT (SECOND) OF TORTS § 652D cmt. h); accord *Sipple*, 201 Cal. Rptr. at 668.

175. *Sipple*, 201 Cal. Rptr. at 668 (internal quotation marks and citations omitted) (emphasis added); accord *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 493–94 (1975).

176. *Virgil*, 527 F.2d at 1129 (quoting RESTATEMENT (SECOND) OF TORTS § 652D); Geoff Dendy, *The Newsworthiness Defense to the Public Disclosure Tort*, 85 KY. L.J. 147, 160–61 (1997). Additionally, “the majority of jurisdictions consider newsworthiness a question of fact to be decided by the jury.” *Id.* (citing *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 773 (Ct. App. 1983)).

177. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 478–79 (Cal. 1998) (concluding

cases involved “private figure” plaintiffs who were *involuntarily* thrust into matters of public concern.¹⁷⁸ According to *Shulman* and *Taus*, in order to invoke “newsworthiness” as a defense under California law: (1) the content at issue must “have ‘some substantial relevance to a matter of legitimate public interest,’” and (2) there must be “a logical nexus” between “[t]he contents of the publication or broadcast” and the matter of public interest.¹⁷⁹ Therefore, courts must assess “the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed.”¹⁸⁰ In other words, “the more prominent a figure, the more likely the court will find newsworthiness.”¹⁸¹

One legal scholar argues that the Supreme Court could incorporate this test into its analysis of anti-paparazzi laws (if the laws are challenged in court), and may do so without running afoul of the First Amendment.¹⁸² Furthermore, the commentator argues that California’s progressive “newsworthiness” test is consistent with the current European model of privacy rights, in which the focus is not on physical zones of privacy, but rather, is tied to the subject matter of the activities taking place in the photographs.¹⁸³ Mr. Alach cites two recent cases from the European Union, both involving well-known international public figures—Princess Caroline of Monaco and model/actress Naomi Campbell.¹⁸⁴ Both invasion of privacy cases involved photographs of public figures engaged in private activities while in public places, and both courts looked at the nature of the activity in the photographs rather than the location where the pictures were taken to determine whether the activity stimulated a debate of general interest.¹⁸⁵

Princess Caroline prevailed on her privacy claim because the

“that the analysis of newsworthiness inevitably involves accommodating conflicting interests in personal privacy and in press freedom as guaranteed by the First Amendment to the United States Constitution”) and *Taus v. Loftus*, 151 P.3d 1185, 1208–09 (Cal. 2007) (reviewing the court’s “newsworthiness” discussion in *Shulman*). The *Shulman* court affirmed that “the dissemination of truthful, newsworthy material is not actionable as a publication of private facts.” *Shulman*, 955 P.2d at 479.

178. *Taus*, 151 P.3d at 1208; *Shulman*, 955 P.2d at 478.

179. *Taus*, 151 P.3d at 1208 (internal citations omitted).

180. *Id.*

181. Alach, *supra* note 31, at 227.

182. *See id.* at 225–27.

183. *Id.* at 228.

184. *See id.* at 220–25 (citing *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41; *Campbell v. MGN Ltd.* [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.) (U.K.)).

185. *See id.* (citing *Von Hannover*, 2004-VI Eur. Ct. H.R. at 61; *Campbell*, [2004] 2 A.C. 457).

photographs depicted “scenes from her daily life, thus involving activities of a purely private nature.”¹⁸⁶ The court held that the sole purpose of the publication of the photographs showing Princess Caroline horseback riding, playing tennis, shopping, and riding a bicycle “was to satisfy the curiosity of a particular readership regarding the details of [Princess Caroline’s] private life,” and therefore failed “to contribute to any debate of general interest to society,” despite that the Princess was well-known to the public.¹⁸⁷

Similarly, international supermodel and actress Naomi Campbell was photographed leaving a Narcotics Anonymous meeting, and she sued the newspaper that published the photographs in Europe.¹⁸⁸ The court held that the newspaper unjustifiably infringed on Miss Campbell’s right to privacy and breached a duty of confidence because the newspaper knew, or should have known, that the information would be highly offensive to a reasonable person of ordinary sensibilities.¹⁸⁹

Nevertheless, what clearly distinguishes these European Union cases from the paparazzi-related conflicts in the Los Angeles area is that both European plaintiffs sued the publisher, whereas Councilman Zine proposes to directly target the paparazzi for simply gathering the news.¹⁹⁰ Furthermore, both European plaintiffs were in Europe when their pictures were taken; therefore, they may have had a higher expectation of privacy than they reasonably could have expected on a Los Angeles public sidewalk.¹⁹¹ Moreover, as Mr. Alach correctly notes, European law states that “privacy rights and freedom of expression ‘are of equal value,’” whereas American law “subordinates privacy rights to the First Amendment.”¹⁹² Therefore, these European cases are inapposite because, in the United States, the First Amendment protects the press more than the right to privacy protects “public figures.”¹⁹³ In fact, the Supreme Court stressed that because American society “places a primary value on freedom of speech and of press,” the risk of exposure to others “is an essential incident of life.”¹⁹⁴

Arguably, celebrities in the Los Angeles area should expect their

186. *Von Hannover*, 2004-VI Eur. Ct. H.R. at 69.

187. *Id.* at 70.

188. *Campbell*, [2004] 2 A.C. at 460–61.

189. *Id.* at 480, 492–93.

190. See Motion from Dennis P. Zine, *supra* note 14.

191. Alach, *supra* note 31, at 223–24.

192. *Id.* at 220 (quoting *Von Hannover*, 2004-VI Eur. Ct. H.R. at 61).

193. *Id.* at 224.

194. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

pictures to be taken while they are in public.¹⁹⁵ In fact, many of these celebrities owe much of their success to the publicity that their personal lives generate in the press.¹⁹⁶ Therefore, the proposed ordinance above includes requirements that (1) the photographer “knowingly enters” the area within eight feet of a public figure, (2) the photographer must have “the intent to capture any type of . . . physical impression of a public figure when he or she is engaging in a personal or familial activity,” and (3) the physical invasion must occur in a manner that is “highly offensive to a reasonable person.”¹⁹⁷ By including these additional provisions, a court may find that the cities successfully emulated the “actual malice” requirements set forth in *New York Times* and *Gertz*, and therefore, the ordinances may survive constitutional scrutiny under the “public figure” doctrine.¹⁹⁸ However, as discussed below, other First Amendment considerations will likely render the ordinances unconstitutionally invalid.

D. Customs and Conventions in Los Angeles Dictate that Stories About Celebrities' Personal Lives May Be of Legitimate Public Concern

Under established privacy laws, the “customs and conventions of the community” dictate that celebrity photographs taken in public places may qualify as newsworthy, even if the public figure is engaged in personal or familial activities.¹⁹⁹ Importantly, the Restatement notes that “the home life and daily habits of a motion picture actress may be of legitimate and reasonable interest to the public that sees her on the screen.”²⁰⁰

Gossip is no longer limited to publications like the *National Enquirer* and *Star Magazine*. In fact, tabloid stories about celebrities often headline the evening news in Los Angeles, replete with video-clips and photographs. Additionally, the public’s appetite for celebrity gossip is insatiable. “[T]he problem is not the paparazzi, but rather the public’s appetite to learn about even the most mundane details of the celebrities’ lives.”²⁰¹ Even enquiring

195. See Ellen Feig, *Paparazzi: Photographers Who Stalk Celebrities*, ASSOCIATED CONTENT, Apr. 9, 2006, http://www.associatedcontent.com/article/26100/paparazzi_photographers_who_stalk_celebrities.html.

196. *Id.*

197. See *supra* Part I.

198. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

199. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 (9th Cir. 1975).

200. RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

201. *Bill Analysis: Hearing on Assem. B. 524*, *supra* note 23 (statement of Assem. Speaker Karen Bass).

judges like Ninth Circuit Chief Judge Kozinski “want to know.”²⁰²

Some people blame celebrities for attracting the paparazzi by purposefully courting the press and manufacturing scandals to achieve greater notoriety.²⁰³ Furthermore, without paparazzi, “many stars would have no public exposure—a necessary element of any stardom.”²⁰⁴ The California Supreme Court noted that “consent to an impending intrusion can ‘inhibit reasonable expectations of privacy.’”²⁰⁵ Thus, a court will rarely hold a defendant liable for photographing someone who is walking in public because appearance in public is viewed as a form of voluntarily consent.²⁰⁶ In many ways, celebrities impliedly consent to be photographed in public when they hire publicists because a publicist’s primary job is to generate press for the client.²⁰⁷ These publicists often call ahead to alert the press of their clients’ whereabouts to increase their clients’ exposure and marketability.²⁰⁸ Therefore, when a paparazzo captures a public figure engaging in an otherwise personal activity after the public figure *voluntarily sought personal publicity*, the paparazzo should be able to exercise his or her First Amendment right to capture tabloid-like information about the public figure’s personal life, free from the fear of criminal liability. The ordinance proposed above includes a provision that exempts a photographer from guilt if the photographed “public figure” gives express or implied consent.²⁰⁹

The First Amendment precludes limitations on speech where newsworthiness and public interest are attached to the events captured in a photograph and the activity captured in the photograph relates to the past public conduct.²¹⁰ If public figures affirmatively thrust their *personal* lives into the public eye and use their personas to further their *personal* causes, these same celebrities cannot later argue that their personal lives deserve to be private, especially while they are in public.²¹¹ Moreover, as discussed

202. *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 1250 (9th Cir. 1997).

203. Kelly, *supra* note 101.

204. Feig, *supra* note 195.

205. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1077 (Cal. 2009) (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d 633, 655 (Cal. 1994)).

206. *See Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.2d at 648 (“If voluntary consent is present, a defendant’s conduct will rarely be deemed ‘highly offensive to a reasonable person’ so as to justify tort liability.”).

207. Kelly, *supra* note 101.

208. *See id.*; *see also* Feig, *supra* note 195.

209. *See supra* Part I.

210. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 346 (1974); *see* *Virgil v. Time, Inc.*, 527 F.2d 1122, 1129–30 (9th Cir. 1975) (adopting “the Restatement’s standard for newsworthiness”).

211. *See Gertz*, 418 U.S. at 351.

above, “newsworthiness” is a complete defense under California law—a total bar to liability.²¹² In the communities of Los Angeles, Malibu and Santa Monica, the customs and conventions dictate that celebrity photographs are generally newsworthy.²¹³

Here, First Amendment protections afforded to the press outweigh state privacy concerns, such as maintaining public safety and protecting residential privacy. In *Smith v. Daily Mail Publishing Co.*, the Supreme Court held that if the press “lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”²¹⁴ Therefore, it logically follows that municipalities—such as Los Angeles, Malibu and Santa Monica—cannot punish those who lawfully photograph celebrities in public without proving an overriding compelling government interest (i.e., strict scrutiny).²¹⁵

Additionally, the *Smith* Court noted in dicta that when journalists are relying upon “routine newspaper reporting techniques,” such as picture-taking, a government cannot constitutionally punish the media if a court deems the privacy interests advanced are less substantial than the competing First Amendment rights.²¹⁶ Photography is, indisputably, a journalist’s most routine technique for capturing valuable information to deliver timely and accurate news to the public. Likewise, as the California Supreme Court noted in *Shulman*, a camera is an “indispensable tool” for newsgathering.²¹⁷ Therefore, on a Los Angeles public sidewalk where celebrities have no reasonable expectation of privacy, a photograph of a public figure is protected by the First Amendment as newsworthy.

212. *Taus v. Loftus*, 151 P.3d 1185, 1208 (Cal. 2007). *But see* *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157, 167–68 (1979) (“A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.”).

213. *But see* *Michaels v. Internet Entm’t Group, Inc.*, 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (upholding injunction to prevent dissemination of Pamela Anderson Lee’s famous sex tape, holding that the fact that Lee played roles in film and television involving sex and sexual appeal “does not . . . make her real sex life open to the public”).

214. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979).

215. *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009) (noting that “in the rare case in which a ‘fundamental’ right of personal autonomy is involved,” a defendant must “present a ‘compelling’ countervailing interest”); *see also* full discussion on the applicable level of First Amendment scrutiny *infra* Part IV.

216. *Smith*, 443 U.S. at 103–04 (noting that the newspaper “relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. . . . If [such] information is lawfully obtained . . . the state may not punish its publication except when necessary to further an interest [that is] more substantial”); *cf.* *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (upholding an intrusion claim against reporters who used a *hidden* camera and *hidden* recording devices, because such devices were not “‘indispensable tools’ of newsgathering”).

217. *See* *Shulman v. Group W Prods., Inc.* 955 P.2d 469, 496 (Cal. 1998).

IV. THE PROPOSED ANTI-PAPARAZZI ORDINANCES IN THE LOS ANGELES AREA REGULATE CONSTITUTIONALLY PROTECTED CONTENT-BASED EXPRESSION

Even if Los Angeles area anti-paparazzi ordinances do not violate the First Amendment on freedom of press grounds, the laws are likely to be impermissible content-based regulations. As a threshold matter, it is clear that the First Amendment protects photography as a form of expression, assuming the photographs do not include unprotected forms of speech.²¹⁸ Furthermore, while state or local governments may regulate certain areas of unprotected speech,²¹⁹ it is axiomatic that "content-based regulations are presumptively invalid."²²⁰ A long line of precedent has applied "the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."²²¹

A. Regulations that Require Examination of a Photograph to Determine Guilt or Innocence Are Inherently Content-Based

The principal inquiry for a court to determine if a regulation is content-based is whether the government adopted a regulation based on hostility or favoritism towards the underlying message expressed.²²² Here, all available evidence suggests that the City of Los Angeles is considering the anti-paparazzi law in order to curb the serious hazard to public safety caused by increasingly aggressive paparazzi.²²³ Thus, Councilman Zine does not appear to have any specific hostility towards the message expressed in the celebrity photographs. However, as the Supreme Court noted in *Arcara v. Cloud Books, Inc.*, even if the proposed ordinances are not directed at activity with an expressive component, and if, instead, they "impose a disproportionate burden upon those engaged in protected First Amendment activities," the laws should nonetheless be treated as presumptively unconstitutional.²²⁴ Therefore, if a law targets a substantial

218. See *Kaplan v. California*, 413 U.S. 115, 119–20 (1973) (noting that the First Amendment protects pictures, films, paintings, drawings and engravings, assuming they are not obscene).

219. For instance, the Court has held that the following forms of expression receive no First Amendment protection: obscenity, *Miller v. California*, 413 U.S. 15 (1973); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); and child pornography, *New York v. Ferber*, 458 U.S. 747 (1982).

220. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

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

222. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

223. *E.g.*, Motion from Dennis P. Zine, *supra* note 14.

224. *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703–04 (1986).

amount of protected activity—here, newsgathering and photography—a court should subject the law to heightened First Amendment scrutiny.²²⁵

The proposed ordinance discussed above includes a subject matter provision that is likely to mirror the actual city proposals. Therefore, a court would be required to determine first, as a matter of law, whether a photographed person qualified as a “public figure” under defamation law. To make such a determination, a court would consider whether the person captured in the photograph affirmatively thrust himself into the limelight, and is therefore deemed “newsworthy.”²²⁶ Then it would be up to the factfinder to decide whether the public figure was engaged in a “personal or familial activity” when the photograph was taken. In each case, the judge and jury will have to examine the content of the photograph in order to determine whether the defendant is guilty. Thus, an ordinance that imposes criminal liability on a person who photographs a public figure engaged in personal activities and does not impose liability on a person who photographs a private figure is inherently content-based. As the Supreme Court noted in *Regan v. Time, Inc.*, a regulation that purports to determine the newsworthiness of a photograph “cannot help but be based on the content of the photograph.”²²⁷

Photographs have unparalleled “expressive, communicative, and informative value.”²²⁸ Moreover, “[a] photographer’s ability to take a picture depends upon freedom of access to the place where the subject is located, as well as the freedom to capture an image at the right time.”²²⁹ Therefore, “[r]egulations that target photography directly curtail the ability of photographers to communicate their messages to others.”²³⁰ The First Amendment neither permits the government to restrict private individuals’ expressive activity based upon the idea the activity expresses, nor does it allow the government to discriminate based on the expressions’ content.²³¹

225. See *Minneapolis Star & Tribune Co v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592–93 (1983) (holding that “[a] tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action”); see also *Hernandez v. Hillside, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009) (noting that “in the rare case in which a ‘fundamental’ right of personal autonomy is involved,” a defendant must “present a ‘compelling’ countervailing interest”); see also *supra* Part.III.B.

226. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see also *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); cf. *Dendy*, *supra* note 176, at 160–61 (noting that the majority of jurisdictions consider newsworthiness a question of fact to be decided by the jury).

227. *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

228. Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1095 (1998).

229. *Id.* at 1096.

230. *Id.*

231. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385 (1992); *Turner Broad. Sys., Inc.*,

Such restrictions “rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.”²³²

While not every law that interferes with speech triggers the same degree of First Amendment scrutiny, a state’s right to limit expression is “sharply circumscribed” in traditional public forums such as public sidewalks.²³³ In such cases, a court must strictly scrutinize the law to determine whether it violates the First Amendment.²³⁴ Thus, a municipality such as Los Angeles may not enforce a content-based exclusion unless it shows that “its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”²³⁵

B. Los Angeles Has Compelling Interests, but Anti-Paparazzi Ordinances Must Be Narrowly Tailored and Clearly Defined

Here, Councilman Zine described the City’s interests in passing an anti-paparazzi ordinance. “What the paparazzi have done,” according to Zine, “is develop[] a lawless society where the rules don’t apply.”²³⁶ Zine argued that paparazzi pose “a clear danger not only to the people they are trying to photograph, but to the general public around them.”²³⁷ Additionally, he noted that “[p]aparazzi swarms are more than a simple inconvenience to celebrities. On the contrary, these hoards of photographers many times block entrances to vital public service centers such as hospitals and courthouses. Private enterprise also suffers when paparazzi impede access to offices, shops, and restaurants.”²³⁸

In late 2008, Councilman Zine led a three-and-a-half-hour hearing at Los Angeles City Hall with an ad hoc panel of elected officials from Los Angeles and surrounding areas to discuss problems associated with the paparazzi.²³⁹ Those who spoke to the panel—including Grammy Award-winning singer-songwriter John Mayer—requested additional paparazzi

v. FCC, 512 U.S. 622, 641 (1994).

232. *Turner*, 512 U.S. at 641 (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

233. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); see *Turner*, 512 U.S. at 642.

234. *Perry*, 460 U.S. at 45.

235. *Id.*

236. *Britney Spears Inspires a New Law*, *supra* note 13 (quoting Councilman Dennis Zine).

237. Motion from Dennis P. Zine, *supra* note 14.

238. *Id.*

239. *Curb Paparazzi? No, Insists L.A.’s Top Cop*, CBSNEWS, Aug. 1, 2008, <http://www.cbsnews.com/stories/2008/08/01/earlyshow/leisure/celebspot/main4312875.shtml> [hereinafter *Curb Paparazzi*].

regulation.²⁴⁰ Other speakers “complained of ‘swarms’ and ‘herds’ of paparazzi pursuing celebrities at high speeds along winding, secluded roads, paying scant regard to road signs.”²⁴¹ One Beverly Hills police lieutenant complained that some photographers abandon their cars in the middle of streets to pursue their subjects.²⁴² Other officials argued that “existing fines were not steep enough to deter photographers who can make six-figure amounts on a single picture and see the penalties as a cost of doing business.”²⁴³ However, it was Councilman Zine’s remarks to the press that best summed up his personal motivation for introducing the anti-paparazzi regulation. “[It cost] \$25,000 dollars to take an ambulance with Britney Spears to the hospital,” said Councilman Dennis Zine.²⁴⁴ “Tax payers paid for that.”²⁴⁵

In June 2009, Santa Monica City Councilman Richard Bloom visited the preschool where actors Ben Affleck and Jennifer Garner brought their three-year-old daughter.²⁴⁶ He was disturbed by the chaotic paparazzi situation that he witnessed, noting that “preschoolers are just a little too vulnerable to be collateral damage in the world of paparazzi.”²⁴⁷ One non-celebrity parent who had to drop off her four-year old amidst the paparazzi frenzy caused by the presence of the celebrities’ daughter said, “I understand [the paparazzi] have to make a living, . . . and I understand this is what the public wants—to see these pictures—but I think there should be certain parameters when it comes to kids.”²⁴⁸

Any court will likely consider all of these concerns to be compelling government interests. However, the more serious hurdle in creating an anti-paparazzi law that passes constitutional muster relates to three separate, but related, speech doctrines: (1) overbreadth; (2) vagueness; and (3) narrow tailoring.

1. Overbreadth

In the area of First Amendment rights, “[p]recision of regulation must be the touchstone” because the amendment “so closely touch[es] our most

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Britney Spears Inspires a New Law*, *supra* note 13 (quoting Councilman Dennis Zine).

245. *Id.* (quoting Councilman Dennis Zine).

246. Hall, *supra* note 16, at A3.

247. *Id.* (quoting Councilman Richard Bloom).

248. *Id.*

precious freedoms.”²⁴⁹ The overbreadth doctrine is based upon the supposition that over-sweeping laws that regulate speech may violate the First Amendment when they “chill” speakers who have a legitimate right to speak but are afraid that the law would be used against them.²⁵⁰ When a party challenges a statute on facial overbreadth grounds, a court must first “determine whether the enactment reaches a substantial amount of constitutionally protected conduct.”²⁵¹

Early reports indicate that the City of Los Angeles “is considering an ordinance that would impose a 20-yard ‘personal safety bubble’ around . . . ‘public figures.’”²⁵² Councilman Zine said that the “buffer space must be large enough to allow for safe vehicle and pedestrian traffic flow.”²⁵³ As discussed above, the proposed city ordinances will prevent *all* people, not just paparazzi, from capturing celebrity photographs in public, and will target a substantial amount of news photography.²⁵⁴ Based on the Supreme Court’s holdings,²⁵⁵ an anti-paparazzi ordinance that creates a personal safety zone greater than eight feet likely will be deemed substantially overbroad on its face because those individuals who want to exercise their constitutionally protected First Amendment rights may refrain from doing so rather than run the risk of liability.²⁵⁶

In fact, the Supreme Court invalidated similar floating buffer zone regulations for violating the First Amendment.²⁵⁷ Although the Court decided most of those cases in the context of abortion protest regulations, the holdings also apply here because the asserted government interests were substantially the same: “ensuring the public safety and order,” “promoting the free flow of traffic on public streets and sidewalks,” and protecting “residential privacy.”²⁵⁸ Furthermore, while the Court has upheld some “fixed” buffer zone regulations around establishments, it has been less deferential when the government has tried to create “floating”

249. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

250. *See Dombrowski v. Pfister*, 380 U.S. 479, 486–87 (1965).

251. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

252. *E.g.*, Hirsén, *supra* note 35; Wiehl, *supra* note 35; Harlow, *supra* note 35.

253. Motion from Dennis P. Zine, *supra* note 14.

254. *See supra* Part III.A–B.

255. *Compare Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753 (1994) (invalidating a three hundred-foot floating buffer zone), *and Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997) (invalidating a fifteen-foot buffer zone), *with Hill v. Colorado*, 530 U.S. 703 (2000) (upholding an eight-foot buffer zone).

256. *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971).

257. *E.g.*, *Madsen*, 512 U.S. at 776.

258. *E.g.*, *id.* at 768; *see also* Motion from Dennis P. Zine, *supra* note 14.

buffer zones around individuals.²⁵⁹

For instance, in *Schenck v. Pro-Choice Network*, the Court struck down a fifteen-foot buffer zone, observing that such a broad “floating” speech prohibition rendered the court order unsustainable.²⁶⁰ Under the buffer zone regulations proposed by Los Angeles and surrounding cities, a member of the press who wishes to photograph a public figure in public would have to “move as the individual moves,” maintaining a specific distance of separation.²⁶¹ In *Schenck*, the Court observed how difficult that task is to accomplish and struck down a fifteen-foot floating buffer zone as overbroad.²⁶² Therefore, because Los Angeles area lawmakers are restricted by the *Schenck* holding, they clearly cannot create floating personal safety zones that measure fifteen or more feet in distance.

However, in *Hill v. Colorado*, the Supreme Court ruled six to three that a Colorado law limiting protest, education, and distribution of literature or counseling within *eight* feet of a person entering a health care facility did not violate the First Amendment right to free speech.²⁶³ Therefore, if the cities include floating buffer zone provisions in their anti-paparazzi ordinances, Supreme Court precedent permits them to establish eight-foot zones.²⁶⁴ However, any distance greater than eight feet must still be less than fifteen feet, or the provision will clearly violate the First Amendment on grounds of overbreadth.

2. Vagueness

A law is unconstitutionally vague if it subjects the exercise of First Amendment rights to an unascertainable standard such that a person “of common intelligence must necessarily guess at its meaning.”²⁶⁵ Under the proposed ordinance above, newsgatherers and tourists will have to guess who qualifies as a public figure under the laws governing defamation.²⁶⁶ Tourists may be liable without fair notice that the law even exists and likely will be ignorant as to who legally qualifies as a “public figure.” A vague,

259. See *Madsen*, 512 U.S. at 768–70.

260. *Schenck*, 519 U.S. at 377.

261. See *id.* at 377–78.

262. *Id.*

263. *Hill v. Colorado*, 530 U.S. at 707, 734–35 (citing COLO. REV. STAT. § 18-9-122(3) (2000)).

264. See *id.* at 735.

265. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

266. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974); see also text accompanying note 38.

content-based regulation “raises special First Amendment concerns because of its obvious chilling effect on free speech.”²⁶⁷ Additionally, where, as here, First Amendment rights are implicated, the Court is compelled to “look even more closely” at a statute to ensure that freedom of speech or press do not suffer, and strike down any law that is too general or undefined.²⁶⁸

Former LAPD Chief William Bratton best illustrated the vagueness doctrine when he commented on Councilman Zine’s proposal: “The idea of trying to create a secure space around a celebrity—who’s a celebrity? You? Me? By some definition we all fit. . . . What is this protected space that they are entitled to that the rest of us are not entitled to?”²⁶⁹ Members of the press and tourists may refrain from exercising their First Amendment rights if they cannot ascertain how to comply with the cities’ proposed ordinances. This potential chilling effect will require the courts to strike down any such law under the First Amendment.

However, the Supreme Court’s holding in *Hill* suggests that a personal buffer zone might survive a vagueness challenge if the law includes a scienter requirement, thus only applying “to a person who ‘knowingly’ approaches within eight feet of another” with the *intent* to capture a photograph.²⁷⁰ Therefore, the proposed ordinance above includes scienter provisions similar to the statute upheld in *Hill*.²⁷¹

Nevertheless, a law also may be unconstitutionally vague when it “authorizes or even encourages arbitrary and discriminatory enforcement.”²⁷² If the Malibu ordinance passes, how would a police officer “distinguish between a local news reporter for the Malibu Times who was [assigned to capture] a photo of the local surfing conditions for the weather section of the newspaper and a paparazzo shooting Matthew McConaughey surfing?”²⁷³ Furthermore, would a public figure who has a good relationship with the police receive greater enforcement protection under the new laws than other celebrities? These are questions that Los Angeles area cities must answer in order to draft a constitutional ordinance that courts would not strike down as unconstitutionally vague. Experts have noted that floating buffer zones, such as those proposed by Los Angeles, Malibu and Santa Monica “could be difficult to enforce, but fixed

267. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997).

268. *Ashton v. Kentucky*, 384 U.S. 195, 200–01 (1966).

269. *City Hall Abuzz*, *supra* note 3.

270. *See Hill v. Colorado*, 530 U.S. at 732 (emphasis added).

271. *See supra* Part I.

272. *Hill v. Colorado*, 530 U.S. at 732.

273. Posting of Jason Crow, *supra* note 11.

buffers around an individual's house or their child's school may be more workable."²⁷⁴

3. Narrow Tailoring

Depending on the exact language of the cities' ordinances, a court may analyze the laws as regulating content-based speech, expressive conduct, or the time, place, or manner of speech.²⁷⁵ Even if a court applies only intermediate scrutiny, the *O'Brien* test, which courts apply to expressive conduct regulations, "should be understood as a restraint on the degree of seclusion the law may provide persons who are themselves newsworthy, or who are involved in newsworthy events or issues."²⁷⁶ Additionally, the Supreme Court noted in *Clark v. Community for Creative Non-Violence* that the intermediate scrutiny test applied to time, place, and manner restrictions differs little from the *O'Brien* test applied to expressive conduct restrictions.²⁷⁷

Several legal scholars have argued that anti-paparazzi laws should be subject to strict scrutiny review because such laws "significantly and disproportionately" burden "media speech-related activity."²⁷⁸ This much is clear: no matter which level of heightened scrutiny a court applies, the cities will be required to show that the laws are narrowly tailored to the cities' asserted interests.²⁷⁹

Councilman Zine specifically notes that chief among the city's compelling interests is to prevent "hoards of photographers [from] block[ing] entrances to vital public service centers such as hospitals and

274. *Curb Paparazzi*, *supra* note 239; *see also supra* notes 259–64 and accompanying text.

275. *United States v. O'Brien*, 391 U.S. 367, 376–77 (1968) (laying down the test for expressive conduct); *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 798–99 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (describing the time, place, or manner regulation test); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (discussing narrow tailoring as an element in the public forum doctrine for content-based exclusions, expressive conduct regulations, and regulations of the time, place, or manner of speech) (citing *Widmar v. Vincent*, 454 U.S. 263, 269–70 (1981)).

276. 3 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 24:6 (2009) (discussing *United States v. O'Brien*, 391 U.S. 367 (1968)).

277. *Clark*, 468 U.S. at 298.

278. *E.g.*, C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139, 1146 (1999) (citing *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 703–04 (1986)); *see also Smolla*, *supra* note 30, at 1113 ("The anti-paparazzi laws are manifestly content-based laws, because they contain as a predicate element the perpetrator's intent to sell or transfer communicative material. As content-based laws, they are presumptively unconstitutional.").

279. *See supra* notes 90–91, 93–94, 126, 214–15, 218–21, 224–25, 227, 233–35, 275, 278 and accompanying text.

courthouses.”²⁸⁰ Therefore, in order for Los Angeles to narrowly tailor its anti-paparazzi ordinance and comply with the fixed one hundred-foot radius provision in *Hill*, the city’s ordinance should only apply “in the public way or sidewalk area within a radius of one hundred feet from any entrance door to a health care facility,” courthouse (or school).²⁸¹

Imagine for a moment what a celebrity photographer will have to do to comply with the proposal above, and then ask whether the law will remedy the cities’ asserted interests. A personal safety zone that complies with Supreme Court precedent will be somewhere between one and fourteen feet, and only will apply within one hundred feet of essential public facilities such as hospitals or schools. Unfortunately, a fourteen-foot distance will not significantly deter the paparazzi from following celebrities, nor will the law prevent paparazzi-related accidents. In fact, crowds may spill out on the street as photographers struggle to maintain and measure a lawful distance. In *Schenck*, the Court struck down a floating buffer zone under the First Amendment, noting how difficult it would be for protesters trying to communicate with individuals to “move as the individual moves,” maintaining several feet of separation.²⁸² Therefore, if Los Angeles, Malibu or Santa Monica successfully enact anti-paparazzi ordinances with similar floating buffer zone provisions, the press will be similarly challenged, compelling any court to strike down the laws for the same reasons.

V. CONCLUSION

“Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part.”²⁸³ This truism is quoted from the Restatement’s commentary on the privacy tort known as “publicity given to private life.”²⁸⁴ Most Americans today have a lower expectation of privacy in public now that there are security cameras in stores, subway stations, schools, parks and ordinary street corners in cities all over the country.²⁸⁵ Thus, an ordinary reasonable person must expect the “casual observation of his neighbors . . . and that his comings and goings and his

280. Motion from Dennis P. Zine, *supra* note 14.

281. See *Hill v. Colorado*, 530 U.S. 703, 707 n.1 (2000).

282. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377–78 (1997).

283. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c (1977).

284. *Id.* § 652D.

285. See Adam Goodheart, Op-Ed., *Public Cameras Accost Privacy*, USA TODAY, July 22, 2002, at 11A (describing the increasing use of video surveillance in Washington, D.C. and worldwide).

ordinary daily activities, will be described in the press as a matter of casual interest to others.”²⁸⁶

California's anti-paparazzi tort, Civil Code Section 1708.8, has been on the books for ten years, but has not formed the basis for many legitimate claims. In 2009, state Assembly Speaker Karen Bass (D-Los Angeles) introduced an amendment to the statute because of “the increasing tension between celebrities and photographers, which at times have escalated to the point of physical confrontations.”²⁸⁷ The amendments to Section 1708.8, signed into law in October 2009, seek “to increase privacy protections for individuals by broadening [the law's] reach.”²⁸⁸ Effective, January 1, 2010, any person in California who sells, transmits, publishes, or broadcasts a photograph with actual knowledge that the photograph was sold, or otherwise unlawfully obtained, will also be liable under Section 1708.8.²⁸⁹ The new amendments also allow prosecutors to bring civil actions in the name of the individual whose privacy rights have been allegedly violated.²⁹⁰ Furthermore, the amended tort now authorizes any California city or county to levy “civil fines” up to \$50,000 against those who violate the law.²⁹¹

Even before the 2009 amendments, critics argued that California Civil Code Section 1708.8 was “legislative overkill” and violated the First Amendment.²⁹² Several groups, including the American Civil Liberties Union, California Broadcasters Association, and California Newspaper Publishers Association, were among those who opposed the new measure on First Amendment grounds.²⁹³ The press, however, has never challenged the law in court. Nevertheless, the City of Los Angeles and the surrounding cities of Malibu and Santa Monica are seeking to enact additional criminal ordinances that run a greater risk of infringing on First Amendment rights. As discussed above, although the First Amendment

286. RESTATEMENT (SECOND) OF TORTS § 652D cmt. c; *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) (“Exposure of the self to others in varying degrees is a concomitant of life in a civilized community.”).

287. *Bill Analysis: Hearing on Assem. B. 524*, *supra* note 23 (statement of Assem. Speaker Karen Bass); *see* Assem. B. 524, 2009–10 Reg. Sess. (Cal. 2009), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_bill_20090916_enrolled.html.

288. *Bill Analysis: Hearing on Assem. B. 524*, *supra* note 23 (statement of Assem. Speaker Karen Bass); *Schwarzenegger Signs Tougher Paparazzi Law*, *supra* note 169.

289. Cal. Assem. B. 524.

290. *Id.*

291. *Id.*

292. Dienes, *supra* note 278, at 1140; *see also* Smolla, *supra* note 30, at 1110.

293. Patrick McGreevy, *Bill Aims to Curb Paparazzi Activity*, L.A. TIMES, July, 15, 2009, at

narrowly permits state defamation laws to regulate *false* malicious speech published about public figures, well-established jurisprudence simply does not authorize regulations that target those who lawfully gather truthful, public information.²⁹⁴

Councilman Zine admitted that “the City of Los Angeles must respect the First Amendment rights of the press.”²⁹⁵ Nevertheless, he incorrectly believes that “the interests of public safety must remain paramount.”²⁹⁶ As explained above, Los Angeles, Malibu and Santa Monica will find it very difficult to draft ordinances that do not violate the First Amendment. How can photographers possibly know where cities want them to draw the line between public and private activities when celebrities themselves do not know where to draw the line? In order to illustrate this problem, this author attempts to draft an ordinance based on existing jurisprudence, and concludes that an ordinance that is narrowly tailored to comply with the Constitution invariably will not remedy the cities’ alleged paparazzi problems.

Unfortunately, Los Angeles Councilman Zine is not interested in hearing any opposing views on the matter: “I’m not here to debate the issue . . . !” yelled Zine.²⁹⁷ “If someone wants to challenge it in court, they can challenge it in court. We’re not going to be intimidated by someone who doesn’t like it.”²⁹⁸

Former LAPD Chief Bratton said in retort: “What we need is Britney Spears to stay home instead of traipsing all over town. That would solve the problem. We don’t need additional laws. . . . I’ve got laws coming out my ears to deal with this issue.”²⁹⁹ Even Councilman Zine recognized that there are multiple laws on the books that already address the issue of paparazzi harassment; he provided the solution in his own motion: “[A]ny existing laws that address the dangerous aspects of paparazzi frenzies, such as reckless driving, must be consistently applied so there is a clear message that the law applies to everyone.”³⁰⁰ Los Angeles and Malibu do not need additional laws; the police simply need to write the paparazzi the tickets

294. See *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *Sidis v. F-R Publ’g Corp.*, 113 F.2d 806, 809 (2d Cir. 1940); *Gill v. Hearst Publ’g Co.*, 253 P.2d 441, 444 (Cal. 1953).

295. Motion from Dennis P. Zine, *supra* note 14.

296. *Id.*

297. Ferrell, *supra* note 4 (quoting Councilman Dennis Zine).

298. *Id.* (quoting Councilman Dennis Zine).

299. *LAPD Chief: “What We Need Is Britney Spears To Stay Home,”* HUFFINGTON POST, Feb. 21, 2008, http://www.huffingtonpost.com/2008/02/21/lapd-chief-what-we-need_n_87828.html (quoting former LAPD Chief William Bratton).

300. Motion from Dennis P. Zine, *supra* note 14.

they deserve. Frankly, the First Amendment does not countenance any further government action.

