1-1-1999

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Recommended Citation
Available at: http://digitalcommons.lmu.edu/elr/vol19/iss2/2
THE NEWsworthiness ELEMENT: *Shulman* v. *Group W PRODS., INC.* Muddies the Waters

Gary L. Bostwick*

"Neither in what it gives, nor in what it does not give, nor in the mode of presentation, must the unclouded face of truth suffer wrong. Comment is free, but facts are sacred."1

"The business of the law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity."2

I. BACKGROUND

On June 1, 1998, the California Supreme Court decided *Shulman* v. *Group W Productions, Inc.*3 pronouncing holdings of great weight in two major areas of the law of privacy.4 Both holdings are of paramount importance to the law governing broadcast and print media. Each will stand as major determinants of media behavior and legal disputes that arise therefrom. Yet, *Shulman*'s plurality opinion regarding the tort of publication of private facts is far from clear. This Article focuses on the controversy and confusion facing publishers, broadcasters, and their lawyers after *Shulman* concerning the most slippery of that tort's four elements of proof: newsworthiness. This Article argues that while

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1. C.P. Scott, *A Hundred Years*, MANCHESTER GUARDIAN, May 6, 1921, at 359 (marking the paper's first hundred years); THE OXFORD DICTIONARY OF QUOTATIONS 415 (3d ed. 1979).


3. 955 P.2d 469 (Cal. 1998).

4. The plurality opinion first focuses on the publication of private facts. *Id.* at 478–89. Then the analysis shifts to a discussion on the privacy tort of intrusion. *Id.* at 489–87.
Shulman purports to clarify and standardize the law of what is “newsworthy,” it has merely introduced a new muddle, ignored *stare decisis*, and left practitioners and the Fourth Estate floundering.

II. THE QUESTIONSPOSED

Is the Shulman test for “newsworthiness” a radical departure from the Kapellas standards that have governed California law since 1969? The Shulman dissent says yes, but the plurality opinion denies any change in the law. The “stated test is a natural adaptation of Kapellas to a different kind of situation . . . .” Which is correct? Is either? And how does one behave now?

III. THE METHOD OF THIS ARTICLE

This Article provides a brief background on the tort of publication of private facts under California law. It then scrutinizes an unpublished appellate matter, decided before Shulman, using it as a vehicle to demonstrate typical pre-Shulman reasoning of California cases in a simple fact setting arising out of a tabloid article. This Article then analyzes the changes in the law that Shulman brought about, providing a running commentary of the several opinions on the issue of newsworthiness. Finally, it reprises the sample tabloid case, using it as a working model to theorize what the outcome would have been under the new Shulman test.

IV. PUBLIC DISCLOSURE OF PRIVATE FACTS—THE CONTEXT

Everyone who explores the waters of privacy law will find a single source bubbling at the head of that turgid stream: a law review article by Warren and Brandeis published in 1890. Most courts and commentators proclaim that the law of privacy originated with that article. Certainly, the authors transformed the phrase “the right to be let alone” into a theory

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7. See id. at 486.
8. Id. at 486 n.9.
of the law of autonomy.11 They cried out at the excesses of their day: "The press is overstepping in every direction the obvious bounds of propriety and of decency . . . . [Modern] enterprise and invention have, through invasions upon [man's] privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury."12

One of the great ironies of the Warren and Brandeis article, when read today, is that the technological advances complained about consisted of nothing more than photography published the next day in metropolitan newspapers. One can only imagine how horrified the two authors might be in this day and age when hidden cameras and world-wide publications are commonplace.

Not surprisingly, when a California court first gave birth to its common law version of the private fact tort, it harkened back to the Warren and Brandeis article published forty-one years earlier.13 "In such an action a plaintiff does not rely upon the inaccuracy of the content of an article; instead, he charges that even if accurate the publication of the facts interferes with his 'right to be let alone.'"14

Years later, Dean William L. Prosser categorized privacy invasions into four categories.15 One of the categories was the aggravation which Warren and Brandeis focused upon: public disclosure of private embarrassing facts.16 Prosser's work emphasizes a very important distinction between this tort and defamation. Public disclosure of private embarrassing facts is most striking in that it penalizes the publication of truth. The idea of doing so has made courts and commentators nervous and uncertain for years. The recent Shulman case is no exception. Moreover, it appears that Shulman exhibits the court's neurosis in its most starkly silhouetted manifestation to date.

The tort developed in a way that at least three elements were commonly thought to be required. California law outlined the elements of the tort as follows: "First, the disclosure of private fact must be a public disclosure. Second, the facts disclosed must be private facts, and not public ones. Third, the matter made public must be one which would be offensive and objectionable to a reasonable [person] of ordinary sensibilities."17

11. See Hill, 865 P.2d at 646–47.
12. See Warren & Brandeis, supra note 9, at 196.
16. Id. at 392–98.
When the tort was first made part of California's common law, case law discussed a privilege that could be raised as a defense to the tort. The privilege was for any "truthful publication of newsworthy matters." However, few could recognize "newsworthy" when they saw it. As late as 1969, the California Supreme Court noted that on a national level, courts generally had "only hesitantly sketched the boundaries of the 'newsworthy' category."

In California, courts would typically consider a variety of factors to determine whether a particular incident was newsworthy. These factors included the following:

1) The social value of the facts published;  
2) The depth of the article's intrusion into ostensibly private affairs;  
3) The extent to which the party voluntarily acceded to a position of public notoriety; and  
4) Whether the intrusion into the private life was only slight.

Very few fixed standards were ever set forth regarding how factors one, three or four could be put to use as a litmus.

By 1983, the privilege of newsworthiness had been elevated in status from a defense to an element of proof. A California appellate court included it as a fourth element in the explication of the public disclosure tort. "As discerned from the decisions of our courts, the public disclosure tort contains the following elements: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern."

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18. Kapellas, 459 P.2d at 921; Melvin, 297 P. at 93.  
20. Id.  
21. Diaz, 188 Cal. Rptr. at 767-68 (emphasis added). It should be noted that the Diaz court equated "newsworthy" with "of legitimate public concern." Id. This phrasing has not held constant. It is of some great moment whether the catch-phrase is "legitimate public concern" or "legitimate public interest." The Shulman plurality was not clear on this. Fifteen years before Diaz, the words "public interest" first crept into the lexicon in California in Kapellas, but then only in the context of a political campaign, a matter arguably "in the public's interest to be informed about." The term appears again in 1974 in Johnson v. Harcourt, Brace, Jovanich, Inc., 118 Cal. Rptr. 370, 376-78 (Cal. Ct. App. 1974), where a man found and returned $240,000. But here a semantic shift occurred. The public was certainly "interested," even if there was no element of "public interest" as such in the story. For the first time, the concept of someone becoming a "public personage" by force of circumstances giving the public a "legitimate interest in his activities" appeared. Id. at 379. When Diaz defined "newsworthy" as something that was of "legitimate public concern," it caused a pendulum swing toward that definition in the majority of cases following Diaz. See Diaz, 188 Cal. Rptr. at 768. The leading decision by the California Supreme Court on the constitutional right of privacy, Hill v. National Collegiate Ass'n, 865 P.2d 633 (Cal. 1994), made reference to the common law cause of action for invasion of privacy and pointed out that the tort included the possibility of a defensive justification such as "legitimate
Oakland Tribune, Inc.\textsuperscript{22} found that the superior court had improperly instructed the jury that the defendants had the burden of proof.\textsuperscript{23} This case found that the publication of Diaz’s sexual identity, as a transsexual, was not newsworthy as a matter of law. Diaz had scrupulously kept the surgery a secret from all but her immediate family and closest friends.\textsuperscript{24} She never sought to publicize the surgery.\textsuperscript{25} Although originally a male, she changed her name to Toni Ann Diaz.\textsuperscript{26} In 1997, she had been elected student body president of the College of Alameda and was also selected to be the student body representative to the Peralta Community College Board of Trustees.\textsuperscript{27}

This case is intriguing in that it decided Diaz had a right to be let alone even though the public was fascinated by her story, and her public positions made it one of public concern.\textsuperscript{28} Diaz is only one example of how matters of legitimate public interest or concern might drag individuals into the limelight who neither sought publicity nor attempted to avoid it altogether.\textsuperscript{29} But can publishers be designated to choose where to point the spotlight from their vantage point as sellers of the news? Who ultimately decides what is legitimate, what is of public concern, and what is of public interest? And how can one decide? Additionally, a pivotal question was always lurking in the background of the debate: Are courts the appropriate fora in which to decide what is or is not newsworthy?\textsuperscript{30}

\textsuperscript{22} 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).
\textsuperscript{23} Id. at 768-69.
\textsuperscript{24} Id. at 765.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Ms. Diaz was outed by a publication stating, "The students at the College of Alameda will be surprised to learn that their student body president, Toni Diaz, is no lady, but is in fact a man whose real name is Antonio. 'Now I realize, that in these times, such a matter is no big deal, but I suspect his female classmates in P.E. 97 may wish to make other showering arrangements.'" Id. at 766.
\textsuperscript{28} Consider, for example, how important the success story of Ms. Diaz might be to lowering barriers between transsexuals and the general uninformed public.
\textsuperscript{29} See Sipple v. Chronicle Publ’g Co., 201 Cal. Rptr. 665 (Cal. Ct. App. 1984) (stating that news reports about the sexual orientation of a man who saved the President’s life were newsworthy because the information was not private or offensive).
\textsuperscript{30} See Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974) ("We doubt the wisdom of committing this task [of deciding 'on an ad hoc basis which publications address issues of "general or public interest" and which do not'] to the conscience of judges.") (citations omitted); see also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 63 (1971) (Harlan, J., dissenting) ("stating that newsworthiness does not properly establish "a measure of order and predictability in the law that must govern the daily conduct of affairs" and subjects "the press to judicial second-guessing of the newsworthiness of each item they print."). In his dissent, Justice Marshall, joined by Justice Stewart stated: "[C]ourts [applying a newsworthiness standard would]
Generally speaking, at the beginning of the 1990s, such was the state of the law of newsworthiness and its inherent ambiguities in California. For a society needing clear guidelines, it left much to be desired. But the law had the virtue of a somewhat straight-line development with only a few outliers and an accepted lexicon of concepts.

V. THE TABLOID CASE: A SIMPLE CASE OF TOO MUCH TRUTH

A. The Facts

In an unpublished California appellate case, a prominent film star denied widespread rumors that he had fathered more than one illegitimate child. The denial was published in a magazine of national circulation and included the star's quote accusing a well-known tabloid of inventing stories of children other than the one daughter the film star acknowledged. "Those are just [tabloid] babies."

Three months later, the accused tabloid published an article which accurately reported that the film star, contrary to his denial, had also fathered a son out of wedlock. In addition, the tabloid reported that the celebrity, in settlement, had purchased an expensive home in the name of the two-year-old boy bearing his last name, established a million dollar trust fund for the child, and initially sent the child's mother child support payments of $2,000 per month.

B. Complaint

The mother ("Jane") of the child ("Johnny") sued the tabloid on her own behalf and on behalf of Johnny for invasion of privacy. The complaint did not dispute that the statements published in the article were true. Among the allegations, the plaintiffs complained of the public disclosure of private facts.

be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government . . . . The danger such a doctrine portends for freedom of the press seems apparent." 403 U.S. at 79 (Marshall & Stewart, JJ., dissenting) (citations omitted).

31. The facts of this example are taken from an actual case in which the author represented the plaintiffs. The names and other identifying information have been changed or withheld to protect the privacy of the parties. The California Court of Appeal opinion was unpublished. Petitions for hearing and certiorari were denied by the California and United States Supreme Courts. Neither the name of the case nor citations to the record are provided herein, also to protect the privacy of the participants.
The plaintiffs alleged in the complaint that they had sought to keep their relationship to Johnny’s father (“John”) secret and endeavored to keep the details of the financial settlement with John private. The tabloid countered that the plaintiffs’ relationship with the world-renowned movie star per se vitiated any expectations of privacy.\(^3\)

### C. Outcome

The trial court sustained the tabloid’s demurrer to all causes of action. The court of appeals reversed both the public disclosure of private facts claim and the right of privacy claim based upon the California Constitution. The court cited *Melvin v. Reid\(^3\)* and set forth four elements of proof. The last of these elements required that the private facts lack legitimate public concern. The court held that the first element of the cause of action, public disclosure, was not at issue. It then went on to reason as follows with respect to the remaining three elements.\(^3\)

1. **Private Facts**

The second element of the appellate court’s test requires a showing that publicity has been given to matters concerning the private life of the individual. Private facts have been described as the “intimate details of one’s private life . . . .”\(^3\) The Court found that the details of the plaintiffs’ financial affairs were indisputably private facts. The information was not left open to the public eye, had not previously been made public, and was not a matter of public record. Courts in California and other jurisdictions

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32. The statements in the tabloid were: “And he made the boy a millionaire!”; “And when Jane found a four-bedroom, three-bath home, it was purchased on March 13, 1992, in Johnny’s name. The 2583 square-foot home has a three-car garage, a concrete driveway, a slate tile roof as well as yards in the front and back.”; “John also told her to start looking for a house and he would buy it for her and Johnny.”; “John gives her a generous allowance every month and she’s living like a queen. She did over $60,000 of remodeling in her house and bought a new Range Rover that costs about $40,000.”; “John started paying her $2,000-a-month support and he paid for the birth of Johnny.”; “He also set up a million-dollar trust fund for Johnny and bought the boy and Jane a $376,000 house . . . .”; “He did it by setting up a special trust for Johnny, said a source.”; “He paid for the birth and has supported his love child and the boy’s mom for the last two years.”; and “She believed John was just being nice to her so she wouldn’t make a big deal about his new son to the press.” A photograph of the house and Jane’s car was captioned, “‘John paid for $376,000 home and Jane’s $40,000 Range Rover, insiders say.’”

33. 297 P. 91 (1931).

34. The phrasing in the remainder of this section is in the voice of the court of appeal. The emphasized passages are holdings *Shulman* has rendered problematic.

have recognized, in a variety of contexts, that an individual’s financial affairs are normally a private matter.  

2. Highly Offensive and Objectionable to a Reasonable Person with Ordinary Sensibilities

The third element of the test requires a showing that the disclosure at issue would be highly offensive and objectionable to a reasonable person of ordinary sensibilities. The published facts included details of the plaintiffs' private financial affairs. Under the circumstances of this case, the court could not state as a matter of law that a reasonable person of ordinary sensibilities would not be highly offended by the publication of such facts.

3. Legitimate Public Concern or ‘Newsworthiness’

What is newsworthy is not always clear. The complaint alleged the plaintiffs’ desire to keep the published facts private. Therefore, at the demurrer stage, it must be assumed that the plaintiffs did not willingly enter into the public sphere. Yet, the law recognizes that individuals are sometimes unwillingly thrust into the public sphere as a result of their connection to events which engender great public interest.

In addition, the defendants published numerous details of the plaintiffs’ private financial affairs. The Plaintiffs were private citizens who never sought to publicize their relationship to the film star. They had a right “to be let alone.” They had a privacy interest in precluding dissemination of personal information about them. Furthermore, the plaintiffs had a constitutionally protected privacy interest in their personal financial affairs.


37. See Kapellas, 459 P.2d at 922–24.
As a matter of law, the loss of privacy resulting from the plaintiffs' association with a celebrity does not necessarily render their personal financial affairs newsworthy. The information about the financial support may be newsworthy, however, the details are not. A trier of fact could conclude that the amount of money the star gave to the plaintiffs, the price of their home, the amount of the monthly support payments, and the size of the child's trust fund, were private facts, the details of which were unnecessary to the story told and not newsworthy. Given the depth of the intrusion into the plaintiffs' confidential financial matters and their attempts to keep their personal affairs private, reasonable minds could differ as to its newsworthiness. Therefore, the demurrer to the plaintiffs' cause of action for public disclosure of private facts should not have been sustained.

D. Analysis of the Application of Law to the Tabloid Case

The tabloid petitioned the United States Supreme Court for a writ of certiorari based on those phrases emphasized in italics above. The question presented was whether privacy law could allow a jury to impose liability if certain true facts published in an article lacked sufficient "social value" or if there had been "feasible and effective alternatives" to including those facts.

The court in the tabloid case effectively said that the article should have been written or edited differently. It may have been permissible to write about the fact that John provided support for Jane and Johnny, but the article should not have given financial details. A trier of fact is allowed to determine whether those details are "unnecessary to the story told." The tabloid attempted to utilize this case as a platform to reach the United States Supreme Court to attack other California decisions that affirmed liability based on findings of lack of social value or social utility findings. The United States Supreme Court denied the petition for certiorari.

VI. THE SHULMAN CASE

At what point does the publishing or broadcasting of otherwise private words, expressions and emotions cease to be protected

38. Stated another way: If the report as a whole was newsworthy how could the reporting of details relating to the report be unnecessary and therefore not newsworthy?

by the press' constitutional and common law privilege—its right to report on matters of legitimate public interest—and become an unjustified, actionable invasion of the subject's private life? How can the courts fashion and administer meaningful rules for protecting privacy without unconstitutionally setting themselves up as censors or editors?  

A. The Facts

On June 24, 1990, the plaintiffs; Ruth and Wayne Shulman, mother and son, were injured when their car flew off Interstate 10 and tumbled down an embankment into a drainage ditch on state-owned property, coming to rest upside down. Ruth, who sustained serious back injuries, was pinned under the car.

A rescue helicopter operated by Mercy Air was dispatched to the scene. The flight nurse, who would perform the medical care at the scene and on the way to the hospital, was Laura Carnahan. Also on board were the pilot, a medic, and Joel Cooke, a video camera operator employed by the defendants Group W Productions, Inc. and 4MN Productions. Cooke was recording the rescue operation for later broadcast.

Cooke roamed the accident scene, videotaping the rescue. Nurse Carnahan wore a wireless microphone that picked up her conversations with both Ruth and the other rescue personnel. Cooke's tape was edited into a piece approximately nine minutes long, which, with the addition of narrative voice-over, was broadcast on September 29, 1990, as a segment of On Scene: Emergency Response.

The videotape shows only a glimpse of Wayne. His voice is never heard. Ruth is shown several times, either by brief shots of a limb or her torso, or with her features blocked by others or obscured by an oxygen mask. She is also heard speaking several times. Carnahan calls her "Ruth," but her last name is not mentioned on the broadcast.

While Ruth is still trapped under the car, Carnahan asks Ruth's age. Ruth responds, "I'm old." On further questioning, Ruth reveals she is 47, and Carnahan states "it's all relative. You're not that old." During her extrication from the car, Ruth asks at least twice if she is dreaming. At one point she asks Carnahan, who has told her she will be taken to the hospital

41. This section is a direct reproduction of the facts as they are stated by the California Supreme Court in Shulman. For the sake of reader clarity and comprehension, each reproduction is not cited. The reader should refer to Shulman, 955 P.2d at 475–77, as authority for the replication of these facts.
in a helicopter: “Are you teasing?” At another point she says: “This is terrible. Am I dreaming?” She also asks what happened and where the rest of her family is, repeating the questions even after being told she was in an accident and the other family members are being cared for. While being loaded into the helicopter on a stretcher, Ruth says: “I just want to die.” Carnahan reassures her that she is “going to do real well,” but Ruth repeats: “I just want to die. I don’t want to go through this.”

Ruth and Wayne are placed in the helicopter, and its door is closed. The narrator states, “Once airborne, Laura and [the flight medic] will update their patients’ vital signs and establish communications with the waiting trauma teams at Loma Linda.” Carnahan, speaking into what appears to be a radio microphone, transmits some of Ruth’s vital signs and states that Ruth cannot move her feet and has no sensation. The video footage during the helicopter ride includes a few seconds of Ruth’s face, covered by an oxygen mask. Wayne is neither shown nor heard.

The helicopter lands on the hospital roof. As Ruth is being taken out, she states, “My upper back hurts.” Carnahan replies: “Your upper back hurts. That’s what you were saying up there.” Ruth states, “I don’t feel that great.” Carnahan responds, “You probably don’t.”

Finally, Ruth is shown being moved from the helicopter into the hospital. The narrator concludes by stating: “Once inside both patients will be further evaluated and moved into emergency surgery if need be. Thanks to the efforts of the crew of Mercy Air, the firefighters, the medics and the police who responded, the patients’ lives were saved.” As the segment ends, a brief, written epilogue appears on the screen, stating; “Laura’s patient spent months in the hospital. She suffered severe back injuries. The others were all released much sooner.”

The accident left Ruth a paraplegic. When the segment was broadcast, Wayne phoned Ruth in her hospital room and told her to turn on the television because “Channel 4 is showing our accident now.” Shortly afterward, several hospital workers came into the room to mention that a videotaped segment of her accident was being shown. Ruth was “shocked, so to speak, that this would be run and I would be exploited, have my privacy invaded, which is what I felt had happened.” She did not know her rescue had been recorded in this manner and had never consented to its recording or broadcast. Ruth had the impression from the broadcast “that I was kind of talking nonstop, and I remember hearing some of the things I said, which were not very pleasant.” At a deposition, when she was asked what part of the broadcast material she considered private, Ruth explained:

I think the whole scene was pretty private. It was pretty gruesome, the parts that I saw, my knee sticking out of the car. I
certainly did not look my best, and I don’t feel it’s for the public
to see. I was not at my best in what I was thinking and what I
was saying and what was being shown, and it’s not for the
public to see this trauma that I was going through.

B. The Plurality Opinion on the Issue of Newsworthiness

Justice Werdegar wrote the plurality opinion with Chief Justice
George and Justice Kennard concurring. Justice Kennard concurred
separately in the judgment, however, refusing to adopt the reasoning of the
other justices. She did not believe the plurality opinion’s rule of liability
was consonant with some aspects of the United States Supreme Court’s
current First Amendment jurisprudence. Justice Mosk joined her
concurrence. Justice Chin concurred separately on the issue of private facts
without adding anything of substance to the analysis. Justice Mosk also
joined this concurrence. Tallying all the votes and concurrences, one can
see that the articulation of the law in California regarding newsworthiness
has the full approval of only three Justices of the California Supreme Court
(Werdegar, the Chief Justice and Chin).

The court itself was so divided, it is puzzling why Justice Werdegar
stated in the plurality opinion that the area regarding the private facts tort is
relatively settled. She stated, “The claim that a publication has given
unwanted publicity to allegedly private aspects of a person’s life is one of
the more commonly litigated and well-defined areas of privacy law.” That
introduction was a harbinger of more contradictions to come.

Nonetheless, some matters are clear in the opinion. First, lack of
newsworthiness is firmly ensconced as an element of the tort, not a defense
to it. Second, the newsworthiness analysis requires a balancing of the

42. Id. at 473.
43. Id. at 498.
44. Id.
45. See id. at 499.
46. “I concur in part I of the plurality opinion. The newsworthy nature of the disclosure
absolutely precludes a plaintiffs’ recovery under this theory, and summary judgment for the
defendants on this cause of action was therefore proper.” Id. at 501 (Chin, J., concurring).
47. It is unexplained how Justice Mosk could concur with one opinion that called into
question the opinion of the plurality about private facts and simultaneously concur in another
opinion that joined the plurality without reservation as to the private facts tort. Justice Mosk
apparently concurred with Justice Kennard’s reservations as to the plurality’s opinion on private
facts, but agreed with Justice Chin’s dissent regarding intrusion. Shulman, 955 P.2d at 501–02.
48. Id. at 478.
49. Id.
50. See id.
interests in personal privacy and freedom of the press. In this case, where the facts disclosed were not in great disproportion to the public’s right to know, the broadcast was found to be newsworthy, thus barring liability under the private facts tort.

However, on other issues, clarity of the opinion fades. The plurality opinion realized that to simply say that the plaintiff must establish a lack of newsworthiness or lose the case was only the beginning of the analysis. “It is in the determination of newsworthiness—in deciding whether published or broadcast material is of legitimate public concern—that courts must struggle most directly to accommodate the conflicting interests of individual privacy and press freedom.”

At this point, the plurality opinion made one conclusion relatively certain—the terms “legitimate public concern” and “legitimate public interest” are identical to the term “newsworthiness.” No distinction appears between “concern” or “interest.” The plurality treats them as interchangeable.

Next, the plurality opinion made certain that the constitutional defense of newsworthiness dictated by federal court decisions was congruent with the concept of recognizing the lack of newsworthiness as a necessary element of the California common law private facts tort. “Tort liability, obviously, can extend no further than the First Amendment allows; conversely, we see no reason or authority for fashioning the newsworthiness element of the private facts tort to preclude liability where the Constitution would allow it.”

The plurality then complained that the United States Supreme Court had not given “extensive attention” to the constitutional privilege. After

51. See id.
52. Id.
53. Shulman, 955 P.2d at 479 (emphasis added).
54. It became apparent later in the plurality opinion, when the court applied the facts of the Shulman accident to its new-found test, that the reason the plurality drew no distinction was because they saw no distinction between the words “concern” and “interest.” The plurality stated that the broadcast was of public concern because automobile accidents are of interest, because rescue and medical treatment is a critical service that any member of the public may someday need and because the broadcast highlighted some of the challenges facing emergency workers. Id. at 488.
56. Shulman, 955 P.2d at 479 (emphasis added).
57. Id.
discussing the Supreme Court cases of *Cox Broadcasting Corp. v. Cohn*[^58] and *Florida Star v. B.J.F.*,[^59] the plurality concluded that neither case provides,

general guidance as to what is, and is not, 'a matter of public significance'[^60]—what is newsworthy, in other words—or as to when, if ever, the protection of private facts against public disclosure should be considered a sufficiently important state interest to justify civil liability pursuant to the common law tort.[^61]

The plurality even voiced an ominous suggestion that the tort of public disclosure of private facts may not even exist.[^62]

The plurality ultimately concluded that the Supreme Court had left California and the other states at sea, stating, "[t]he decisions do not, however, enunciate a general test of newsworthiness applicable to other factual circumstances or provide a broad theoretical basis for discovery of such a general constitutional standard."[^63]

The plurality then launched upon ruminations in the realm of sociological decision theory, stating:

newsworthiness—constitutional or common law—is . . . difficult to define because it may be used as either a descriptive or a normative term. "Is the term ‘newsworthy’ a descriptive predicate, intended to refer to the fact there is widespread public interest? Or is it a value predicate, intended to indicate that the publication is a meritorious contribution and that the public’s interest is praiseworthy?"[^64]

Either extreme has undesirable consequences. If the definition is descriptive—"if all coverage that sells papers or boosts ratings is deemed

[^58]: 420 U.S. 469 (1975).
[^60]: It is worth noting that a third synonym for newsworthiness entered the plurality’s lexicon in this comment: “public significance.” *Shulman*, 74 Cal. Rptr. 2d at 480.
[^61]: *Id.*
[^62]: *See id.* at 481.
[^63]: *Id.*
[^64]: *Id.* (citations omitted). The plurality may be faulted for not deciding about whether “newsworthiness” is properly used only as a descriptive term or only as a normative term. The plurality points to the "difficulty of finding a workable standard in the middle ground" that has led to considerable variation in past judicial descriptions of the newsworthiness concept. This may allow the inference that the plurality’s holding is that the middle ground is where the workable standard *must* be. This inference is borne out by the manner in which the plurality later applied the facts of the case to the law it had developed.* Id.* at 488–89.
newsworthy”—the private facts tort would be swallowed up. On the other hand, if the definition is normative, courts could become editors and guardians of public taste. "The difficulty of finding a workable standard in the middle ground between the extremes of normative and descriptive analysis, and the variety of factual circumstances in which the issue has been presented, have led to considerable variation in judicial descriptions of the newsworthiness concept.”

One commentator noted that this test "bears an enormous social pressure, and it is not surprising to find that the common law is deeply confused and ambivalent about its application.

The plurality then attempted to find a path of safety in the struggle between morals and public appetites.

First, the analysis of newsworthiness does involve courts to some degree in a normative assessment of the “social value” of a publication. All material that might attract readers or viewers is not, simply by virtue of its attractiveness, of legitimate public interest. Second, the evaluation of newsworthiness depends on the degree of intrusion and the extent to which the plaintiff played an important role in public events, and thus on a comparison between the information revealed and the nature of the activity or event that brought the plaintiff to public attention. “Some reasonable proportion is . . . to be maintained between the events or activity that makes the individual a public figure and the private facts to which publicity is given. Revelations that may properly be made concerning a murderer or the President of the United States would not be privileged if they were to be made concerning one who is merely injured in an automobile accident.”

There are apparently still limits, even if an item is newsworthy. The plurality conceded that a person who is involuntarily involved in a

65. Id. at 481.
66. Shulman, 955 P.2d at 481.
67. Id.
68. Id. (citing to Robert C. Post, The Social Foundations of Privacy: Community and Self in the Common Law Tort, 77 COL. L. REV. 957, 1007 (1989)).
69. It should be noted that although the plurality earlier referred to the tort as one of the more well-defined areas of privacy law, in the discussion of normative standards versus descriptive standards, it recognized the difficulty of finding a workable standard between the extremes had led to considerable variation in judicial descriptions of the newsworthiness concept, this left the common law deeply confused and ambivalent,” which is a far cry from “well-defined.” Id. at 478.
70. Id. at 483–84 (citations omitted); see RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1976).
newsworthy incident does not give up all rights to privacy, and not everything that the person says or does is newsworthy.

Most persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.\textsuperscript{71}

The plurality lists with seeming approval earlier decisions holding that certain publications about persons involuntarily involved in a newsworthy incident were an unnecessary invasion of privacy only when they added nothing of significance to the story.\textsuperscript{72} The opinion then implicitly endorses the concept of judges and juries acting as editors. No other conclusion is possible.

After setting forth the historical path that brought the law to its current state, the plurality opinion moved into uncharted territory, inviting alarm and scorn in the dissenting opinion by Justice Brown. For the first time under California law, and relying principally on federal cases, the plurality introduced the concept of requiring a "logical nexus" between the plaintiff and the subject matter of the publication.

The contents of the publication or broadcast are protected only if they have "some substantial relevance to a matter of legitimate public interest." Thus, recent decisions have generally tested newsworthiness with regard to [limited public figures] by assessing 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.\textsuperscript{73}

The plurality explained that privacy is to be protected whenever the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report.\textsuperscript{74} Furthermore, it believed that this is in accordance with the widely-held view that a legitimate public interest does not include "a morbid and sensational prying into private lives for its own

\textsuperscript{71} Shulman, 955 P.2d at 484.

\textsuperscript{72} Id.; see Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 773 (Cal. Ct. App. 1983) (holding that revealing that a candidate for the office of student body president was transsexual, had "little if any connection between the information disclosed and [the student's] fitness for office"); Green v. Chicago Tribune Co., 675 N.E.2d 249 (Ill. App. 3d 1996) (holding that "a mother's private words over the body of her slain son as it lay in a hospital room were held nonnewsworthy despite undisputed legitimate public interest in the subjects of gang violence and murder.").

\textsuperscript{73} Shulman, 955 P.2d at 484–85 (citations omitted).

\textsuperscript{74} Id.
sake" nor the mere "voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger."\textsuperscript{75} The plurality opined that its new rule measuring newsworthiness about a person involuntarily drawn into a matter of public interest by determining the relevance of the facts to the newsworthy subject avoided the undesirable balancing of interests in an "ad hoc fashion in each case."\textsuperscript{76} Finally, it warned that there are always exceptions to the rule that newsworthiness exists when a logical nexus exists between the event and the facts revealed. In spite of the existence of a logical nexus, courts and juries would be allowed to find that the intrusiveness of the revelation was greatly disproportionate to its relevance.

To many this seems to be "balancing interests in ad hoc fashion," precisely what the plurality wished to avoid.

In general, it is not for a court or jury to say how a particular story is best covered. The constitutional privilege to publish truthful material "ceases to operate only when an editor abuses his broad discretion to publish matters that are of legitimate public interest." By confining our interference to extreme cases, the courts "avoid . . . unduly limiting . . . the exercise of effective editorial judgment." Nor is newsworthiness governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it.\textsuperscript{77}

On the other hand, no mode of analyzing newsworthiness can be applied mechanically or without consideration of its proper boundaries. To observe that the newsworthiness of private facts about a person involuntarily thrust into the public eye depends, in the ordinary case, on the existence of a logical nexus between the newsworthy event or activity and the facts revealed is not to deny that the balance of free press and privacy interests may require a different conclusion when the intrusiveness of the revelation is greatly disproportionate to its relevance. Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where

\textsuperscript{75} Id. at 485, 488.

\textsuperscript{76} Id. at 483 (Kennard, J., concurring). Justice Kennard, of course, in her concurring opinion disagreed that this objective had been achieved while suggesting that the only constitutional way to judge these kinds of cases was on a "case-by-case adjudication method." Id. at 500.

\textsuperscript{77} Id. at 485 (citations omitted).
they bear only slight relevance to a topic of legitimate public concern.\textsuperscript{78}

The plurality then applied the facts of this case to the law it had just announced. As in so many cases, it is from this application that the true meaning of the new law is to be derived. The court began by agreeing with the defendants that the broadcast's subject matter was of legitimate public concern. The auto accident as well as the rescue and medical treatment of the victims were of legitimate public concern. Ruth's story, in particular, was of interest because of the difficult extrication from her car, the medical attention she received at the scene, and her helicopter evacuation which highlighted the challenges that emergency workers face when dealing with serious accidents.\textsuperscript{79}

The more difficult question is whether Ruth's appearance and words as she was extricated from the overturned car, placed in the helicopter and transported to the hospital were of legitimate public concern. Pursuant to the analysis outlined earlier, we conclude the disputed material was newsworthy as a matter of law. One of the dramatic and interesting aspects of the story as a whole is its focus on flight nurse Carnahan, who appears to be in charge of communications with other emergency workers, the hospital base and Ruth, and who leads the medical assistance to Ruth at the scene. Her work is portrayed as demanding and important and as involving a measure of personal risk (e.g., in crawling under the car to aid Ruth despite warnings that gasoline may be dripping from the car). The broadcast segment makes apparent that this type of emergency care requires not only medical knowledge, concentration and courage, but an ability to talk and listen to severely traumatized patients. One of the challenges Carnahan faces in assisting Ruth is the confusion, pain and fear that Ruth understandably feels in the aftermath of the accident. For that reason the broadcast video depicting Ruth's injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter.

The plaintiffs argue that showing Ruth's "intimate private, medical facts and her suffering was not necessary to enable the public to understand the significance of the accident or the rescue as a public event." The standard, however, is not

\textsuperscript{78} Id. at 486 (citations omitted).

\textsuperscript{79} Shulman, 955 P.2d at 488.
necessity. That the broadcast could have been edited to exclude some of Ruth's words and images and still excite a minimum degree of viewer interest is not determinative. Nor is the possibility that the members of this or another court, or a jury, might find a differently edited broadcast more to their taste or even more interesting. The courts do not, and constitutionally could not, sit as superior editors of the press.

The challenged material was thus substantially relevant to the newsworthy subject matter of the broadcast and did not constitute a "morbid and sensational prying into private lives for its own sake." Nor can we say the broadcast material was so lurid and sensational in emotional tone, or so intensely personal in content, as to make its intrusiveness disproportionate to its relevance. Under these circumstances, the material was, as a matter of law, of legitimate public concern.

The plurality further explained that while the broadcast was of legitimate interest, Ruth's images and sounds were not. Although Ruth was identified by her first name, voice and general appearance, her face was never directly displayed. Nevertheless, without her image and voice, the video documentary of the rescue and medical treatment would have lost its legitimate descriptive and narrative impact. The plurality disagreed with Justice Brown's characterization of its test as being a "radical departure" from the former law. Instead, the test is "a natural adaptation of Kapellas to a different kind of situation, one involving a private figure involuntarily caught up in a newsworthy event." Although the plurality felt its analysis was a natural adaptation of former law, clearly a new standard of newsworthiness had been forged. Thus the event was not an occasion for celebration by all members of the court.

C. The Dissent of Justice Brown, Joined by Justice Baxter

Justice Brown dissented, stating she would have remanded the private facts case to the trial court. Her reputation as a trenchant critic was not stained by her dissent. She accused the plurality of making new law, then failing to follow it.

80. Id. at 488 (emphasis added) (citations omitted).
81. Id. at 489.
82. Id.
83. Id. at 486 n.9 (emphasis added) (citation omitted).
84. Id. at 502–04.
Ironically, the plurality begins its discussion of the publication of private facts cause of action by describing it as "one of the more... well-defined areas of privacy law." While that may have been an accurate description before today's extended exegesis, it is certainly no longer the case. After paying lip service to this court's well-established, scholarly precedents, the plurality proceeds to ignore their test for assessing newsworthiness. Worse yet, the new test adopted in the plurality opinion seriously compromises personal privacy by rendering otherwise private facts newsworthy whenever they bear a "logical relationship" to a matter of legitimate public concern, even in situations where the news media obtains the private facts by deceptive and unlawful means.85

Justice Brown agreed with the plurality on the historical development of the newsworthy element, accepting the Diaz court's characterization and ignoring the idea that the concept was once considered as a defense. However, Justice Brown was convinced that "a straightforward application of the Kapellas newsworthiness test leads to one inescapable conclusion—that, at the very least, there are triable issues of material fact on the question of newsworthiness."86 There was no legitimate public interest in Ruth's disorientation, despair, and innermost thoughts.87 The broadcast substantially intruded into Ruth's private affairs.88

The dissent not only accused the plurality of deviating from established law to adopt their own test, but also of misapplying their own test.89 This misapplication led to the erroneous conclusion that there are no triable issues of material fact.90

Justice Brown pointed to the fundamental shift of the law of newsworthiness in California. In her view, privacy has lost ground to the First Amendment.91

Under the plurality's new test, personal privacy must yield whenever the overall subject matter of a broadcast is newsworthy and the private facts disclosed bear a "logical relationship" to that subject matter. Thus, to "[t]he more difficult question [of] whether Ruth's appearance and words as

85. Shulman, 955 P.2d at 502 (emphasis added) (citations omitted).
86. Id. at 502–03 (citations omitted).
87. Id. at 503.
88. Id.
89. Id. (citations omitted).
90. Id. (citations omitted).
91. Shulman, 955 P.2d at 503.
she was extricated from the overturned car, placed in the helicopter and transported to the hospital were of legitimate public concern," the plurality offers the facile answer that they were because "her disorientation and despair were substantially relevant to the segment’s newsworthy subject matter." 92

While the disagreement between the plurality and the dissent was significant, criticism was harsh from the other end of the spectrum as well. Justice Kennard's concurrence, joined by Justice Mosk, sounded very much like a dissent.93

D. The Concurrence of Justice Kennard, Joined by Justice Mosk

While Justice Kennard agreed that the summary judgment was properly entered against plaintiffs, she felt that the plurality should have examined the potential conflict between personal privacy interests and the freedoms of speech and press, in light of the chilling effect its test may have on First Amendment speech.

The plurality opinion tries to balance these two values by using the concept of newsworthiness to define a general limit on the scope of tort liability for disclosure of private facts; it acknowledges only a "theoretical risk" that the tort would intrude on expression protected by the First Amendment. I am not so sanguine.94

The concurring opinion expresses a concern that the subjective thinking engaged in by courts and juries will lead inevitably to content-based restrictions on speech. "[T]he point of all speech protection is ... to shield just those choices of content that in someone’s eyes are misguided, or even hurtful." 95 While content-based restrictions are permitted, they must be "justified by a ‘compelling’ state interest and be the least restrictive means of achieving that interest." 96 The United States Supreme Court, without ever determining if the publication of lawfully obtained, truthful private facts may ever be punished, has held that punishment must be narrowly tailored to a state interest of the highest order.97

Justice Kennard then suggested that the newsworthiness test adopted by the plurality might make the entire tort of publication of private facts

92. Id. (citations omitted).
93. Id. at 498–501.
94. Id. at 498–99 (citations omitted).
95. Id. at 499 (citations omitted).
96. Id.
unconstitutional. She noted that “the individual or social harmfulness of speech with a particular content is rarely a justification for suppressing it.”

Justice Kennard thereafter heaped scorn upon two sacred tenets of California jurisprudence in the field of publication of private facts, *Melvin* and *Briscoe*. Both *Melvin* and *Briscoe* “permitted the plaintiffs to bring claims for the publication of the fact that, as shown in official public records, they had been tried for (and, in *Briscoe*, convicted of) crimes many years before.” Justice Kennard doubts that these holdings would survive *Cox Broadcasting Corp. v. Cohn*, which held that “the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.”

Certainly, a widespread application of *Briscoe* could significantly alter the practice of biography and history, for even in the case of notable figures much of what occurs in their private lives may have faded from the public mind and, under the plurality opinion’s test, may no longer be newsworthy by the time the biographer or historian arrives on the scene.

Justice Kennard speculated that the United States Supreme Court might someday decide that private facts, like obscenity or advertisements, should have less constitutional protections than other types of speech. “In particular, the ‘newsworthiness’ standard makes liability turn on the sort of content-based subjective value judgments that have long been anathema in the United States Supreme Court’s First Amendment jurisprudence.”

Finally, Justice Kennard suggested that the *Shulman* plurality should not have attempted to make new law and that courts should proceed

98. *Id.*
100. *Briscoe v. Reader’s Digest Ass’n, Inc.*, 483 P.2d 34 (Cal. 1971). This statement in the concurrence is a significant red flag raised for all practitioners who may place reliance upon the two opinions.
103. *Shulman*, 955 P.2d at 500 (citing *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975)); see *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (holding that “once the truthful information was ‘publicly revealed’ or ‘in the public domain’ the court could not constitutionally restrain its dissemination”).
105. See *id.*
106. *Id.*
carefully and on a case by case basis, restricting every holding to discrete factual contexts.\textsuperscript{107} She referred again to the United States Supreme Court: The tension between the right which the First Amendment accords to a free press, on the one hand, and the protections which various statutes and common-law doctrines accord to personal privacy against the publication of truthful information, on the other, is a subject we have addressed several times in recent years... [A]lthough our decisions have without exception upheld the press' right to publish, we have emphasized each time that we were resolving this conflict only as it arose in a discrete factual context.\textsuperscript{108}

Justice Kennard prophesied that the plurality’s newsworthiness rule might require retooling if a case arose with different facts that called out for affirming liability.\textsuperscript{109} Of course, this hardly adds to the sense of confidence of those hoping to rely on the solidity of this newsworthiness rule.

At the end of the fray, California was left with an opinion that was eagerly expected and widely read across the nation.\textsuperscript{110} While the waiting suspense had ended, a new kind of suspense ensued. It is helpful to review the results.

\textbf{E. A List of Standards and Touchstones for Newsworthiness in Shulman}

1. Courts as Editors

"The courts do not . . . sit as superior editors of the press."\textsuperscript{111} It is difficult to see how the broadcast could have completely avoided any possible identification without undercutting its legitimate descriptive and narrative impact.\textsuperscript{112} A degree of truthful detail in the \textit{Shulman} video was not only relevant but seemed essential to the narrative.\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{107} Id.
  \item \textsuperscript{108} Id. at 500 (citing Florida Star v. B.J.F., 491 U.S. 524, 530 (1988)).
  \item \textsuperscript{109} Id. at 500–01.
  \item \textsuperscript{110} See, e.g., Max Frankel, \textit{When is Private Pain a Public Good}, \textsc{N.Y. Times}, July 5, 1998, § 6, at 12; \textit{Suit Against TV Show Proceeds}, \textsc{The Daily Record}, June 3, 1998, at 3C.
  \item \textsuperscript{111} \textit{Shulman}, 955 P.2d at 488.
  \item \textsuperscript{112} Id. at 489.
  \item \textsuperscript{113} Id.
\end{itemize}
2. What Is Newsworthy?

Newsworthiness is identical to "legitimate public interest," "legitimate public concern," or "a matter of public significance." A publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. For example, automobile accidents are of interest to the traveling public. The rescue and medical treatment of accident victims is of legitimate concern, because many people may someday need the service.

The story of Ruth Shulman's situation was of particular interest because it highlighted some of the challenges facing emergency workers dealing with serious accidents. The video depicting Ruth's state of injury, disorientation, and despair was substantially relevant to the newsworthy. One of the most dramatic and interesting aspects of the story was flight nurse Carnahan's behavior due to the challenges she faced on account of the confusion, pain and fear that Ruth Shulman understandably felt. The Shulman video was not lurid.

In the case of facts disclosed about a person involuntarily drawn into an event, something is newsworthy if it bears a logical relationship to the subject of the broadcast and is not intrusive in great disproportion to its relevance. In essence, a logical nexus has to exist between the plaintiff and the newsworthy event.

3. Balancing Is Inevitable

The court must to some degree consider the "social value" of a publication. Whether something is newsworthy depends on the degree of intrusion and the extent to which the plaintiff played an important role in the public events in general.

114. Id. at 478-81, 483-84, 486.
115. Id. at 485.
116. Id. at 488.
117. Shulman, 955 P.2d at 488.
118. Id.
119. Id.
120. Id. at 478.
121. Id. at 484-86.
122. Id. at 483.
123. Shulman, 955 P.2d at 484.
If the intrusiveness of the revelation is greatly disproportionate to its relevance, a publication cannot be newsworthy.\textsuperscript{124} Something that is newsworthy cannot be "a morbid and sensational prying into private lives for its own sake."\textsuperscript{125}

Intensely personal or intimate revelations might not, in a given case, be considered newsworthy, especially where they bear only slight relevance to the newsworthy topic.\textsuperscript{126} The broadcast material was not so lurid and sensational as to make its intrusiveness disproportionate to its relevance.\textsuperscript{127}

When a person is involuntarily involved in a newsworthy incident, not all aspects of the person's life and not everything the person says or does is newsworthy. If the facts published add nothing of significance to the story, the facts are unnecessary.\textsuperscript{128} You cannot say that a fact does not have a logical nexus simply because it was not necessary to the publication.\textsuperscript{129}

VII. The Tabloid Case Revisited Using Shulman Standards

The tabloid case discussed above is a paradigm and a simple test case with controlled variables. All of the matters were true. The tabloid simply published too much. The question essentially was whether the editor should have excluded those portions of the article that published the details of the plaintiffs' financial affairs. How would the tabloid case fare under the new Shulman rules?

A. Shulman Mandates Liability

Jane was involuntarily drawn into the controversy. Thus, not all aspects of her and her son's life are rendered newsworthy. Arguably, the amount of money in the trust fund and the price of the house added nothing of significance to the story. Their publication was therefore unnecessarily invasive. Further, one could argue that the intrusiveness of the revelation is greatly disproportionate to its relevance. The publication of financial details is traditionally considered very intrusive by courts.\textsuperscript{130} Given the tradition of protection of financial privacy in California, the tabloid article

\textsuperscript{124} Id. at 486.  
\textsuperscript{125} Id. at 485, 488 (emphasis added).  
\textsuperscript{126} Id. at 486.  
\textsuperscript{127} Id. at 488.  
\textsuperscript{128} Id. at 484.  
\textsuperscript{129} Shulman, 955 P.2d at 488.  
\textsuperscript{130} See note 36 and accompanying text.
appears to be a publication of intimate revelations. The actual details seem to bear only a slight relevance to the topic that is of legitimate public concern. Thus, the new Shulman test as applied above would not change the outcome at all and the plaintiffs would win. However, there is a different way of looking at the tabloid paradigm through the Shulman lens.

B. Shulman Mandates No Liability

Under Shulman, the publication as a whole would be found newsworthy because reasonable members of the community "could entertain a legitimate interest in it."131 Certainly celebrities and their illegitimate children, by their nature, are of interest to a great portion of the public. The issue of celebrities telling lies about their lives may be of legitimate concern to much of the public. There is an obvious logical nexus between the plaintiffs and the matter of legitimate public interest. It is not considered a morbid and sensational prying into private lives for its own sake to publish the amounts and details of the financial arrangements. The issue of deadbeat dads and the support of their children in general is probably of legitimate concern. The mere fact that it wasn’t “necessary” to put in all the details is not important. The financial details appear substantially relevant to the entire subject in the same way that Ruth Shulman’s injuries related to that broadcast. The use of the truthful detail would seems to be both relevant and essential to the narrative.

Justice Kennard’s concurrence suggested that no fixed rules can or should be set forth in this area. Yet, the plurality was insistent upon setting forth rules that could be used as guidelines for the media, writers, publishers, editors, broadcasters, producers and counsel. Using the example tabloid scenario to test the efficiency of Shulman in that regard, Shulman is a failure. The case could come out either way using the Shulman analysis.

VIII. CONCLUSION

In the tension between privacy and liberty, safeguards devised for privacy generally damage freedom of the press, and vice versa. The tug-of-war comprises what is known as a “zero-sum game,” any gain in favor of one concept causes a concomitant loss of equal value to the other. It may be a widely accepted tenet in American law and journalism that facts are sacred, but it is not nearly so clear in the law or in the world at large that

131. Shulman, 955 P.2d at 485.
the unfettered expression of all facts about anyone and everyone is tolerable to society.

The Shulman opinion was eagerly awaited by counsel, news editors, reporters and scholars in the hopes that the California Supreme Court would develop—or at least clarify—the rules of engagement between the two sacred concepts. The decision, with its resulting variation of concepts, left almost everyone disappointed. The contradictions among the opinions of the shifting pluralities of the court left one wishing that one strong editor had taken the whole thing into hand. The most egregious example of blatant contradictions occurred when the court warned that judges must not play editor, but elsewhere concluded that whether the published material had social value must always be an important consideration in finding the balance between privacy and liberty.

If the business of the law is to make sense of the confusion of human life, Shulman falls far short. Although attempting to bring aid to a society hungry for a rule of what is and what is not “newsworthy,” it instead added another hurdle of confusion and contradiction on the path to understanding. The opinion is a strong argument that generalization in this charged field is simply impossible. A better course, it appears, is to proceed as before, case by case, carefully picking our way among the facts with no grand motto as a guide. Perhaps, the disappointment caused by Shulman is not the fault of the law or even the California Supreme Court, but merely the inevitable result of expectations of the law that are too high.

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132. Id. at 487.
133. Id. at 482.