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## THE ONE-WAY MIRROR: LAW, PRIVACY, AND THE MEDIA

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On August 31, 1997, in the early hours of the morning, in Paris, France, a Mercedes Benz automobile, traveling at great speed, crashed into the wall of an underpass. There were four passengers in the car. Three of them died. One of the victims was Diana, Princess of Wales.

The news of the accident flashed around the world, with amazing speed. There followed a tremendous outpouring of grief of an almost unprecedented nature. People wept openly at the death of the woman they called the "People's Princess." The news dominated television totally, and not only in England. People heaped incredible amounts of flowers around various London palaces—one estimate is that mourners left ten to fifteen tons of flowers. In a survey conducted by the British Film Institute, 50% of the people surveyed said that Diana's death affected them "personally." Many said they were "devastated." One person, for example, was "upset, emotional and depressed from her death until days after the funeral . . . I still cannot understand why it had such an impact on me."<sup>1</sup> People expressed their grief in many ways besides the floral tributes. Tens of thousands of people, in many countries, signed books of condolence. In Argentina, a magazine showed a drawing of Santa Evita sitting next to Santa Diana in heaven. Diana's face appeared on stamps in the Republic of Togo. There were memorial murals on the walls of the Lower East Side of New York: "Diana, you will be greatly missed by all of us."<sup>2</sup> The funeral service was seen on

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1. ROBERT TURNOCK, INTERPRETING DIANA: TELEVISION AUDIENCES AND THE DEATH OF A PRINCESS 32, 34 (2000).

2. Diana Taylor, *Downloading Grief: Minority Populations Mourn Diana*, in MOURNING DIANA: NATION, CULTURE AND THE PERFORMANCE OF GRIEF 187–89 (Adrian Kear & Deborah Lynn

television by almost 32,000,000 people in the United Kingdom, and perhaps billions around the world.<sup>3</sup>

Of course, the death of Princess Diana was not the first death of a famous or royal person to touch off a wave of intense mourning. The death of Queen Victoria, in 1901, was a very special event. She had been queen for longer than the lifetime of most of her subjects. There were elaborate ceremonies of mourning, and a tremendous crowd in London watched the funeral procession.<sup>4</sup> The same could be said about the death and funeral of Abraham Lincoln. But there was a significant difference between these events and the death of Diana. One difference, perhaps, was the depth of the grief, the sheer magnitude of the emotional reaction, but this is hard to demonstrate. Queen Victoria was the symbolic head of an empire; and Lincoln was the American President, a war leader, and the Great Emancipator. But what was Diana, and why was the grief so profound? She had no power and no particular role in society; she was not even part of the royal family of England any more—she and Prince Charles, after all, were divorced. And in any event, why did she matter in Togo? or New York? or anywhere?

The difference between Diana, Princess of Wales, and Queen Victoria was simply this: Diana was a celebrity. Queen Victoria was not. Abraham Lincoln was also not a celebrity. The Queen and the President were famous; they were in fact incredibly famous. But they were not celebrities in the modern sense.

I am making a distinction here, in other words, between being famous and being a celebrity. Not every famous person is a celebrity. Daniel Boorstin, in a brilliant book written in the 1960s, defined a celebrity as someone who is famous for being famous—“well-known for his well-knownness.”<sup>5</sup> I think Boorstin recognized something important here, but he did not spell it out in full detail. As I see it, a celebrity is a famous and *familiar* person. It is the illusion of familiarity that makes a celebrity a celebrity.<sup>6</sup> Celebrities, in some ways, live in a different world from the rest of us: a world that is, to many of us, wondrous, magical, and awesome. They are always famous and usually quite rich. Yet they also live in a familiar world, and they are familiar people. Because they are so familiar, they are also in many ways quite ordinary. A

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Steinberg eds., 1999).

3. See Matthew Taylor, *Injury Time England Drama Seen by 20m*, GUARDIAN, June 15, 2004, LEXIS, News Library, Major World Publications File.

4. See TONY RENNEL, *LAST DAYS OF GLORY: THE DEATH OF QUEEN VICTORIA* 247–68 (2000).

5. DANIEL BOORSTIN, *THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA* 57 (1961).

6. See IRVING J. REIN, PHILIP KOTLER & MARTIN R. STOLLER, *HIGH VISIBILITY* 111 (1987); RICHARD SCHICKEL, *INTIMATE STRANGERS: THE CULTURE OF CELEBRITY* 4 (1985); LAWRENCE M. FRIEDMAN, *THE HORIZONTAL SOCIETY* 27–49 (1999).

celebrity is a person who exists as a heightened or exaggerated or special form of the ordinary. This sounds paradoxical and calls for some explanation.

Let us go back to Queen Victoria, for a moment. Everybody in Great Britain knew who Queen Victoria was. Her face was on postage stamps and coins. She had very little actual power, politically speaking; but the empire and the kingdom were governed in her name. On the other hand, very few people actually knew her or saw her. For many years, in fact, she made almost no public appearances. After her husband died, at a fairly young age, Victoria went into a kind of seclusion. People called her the “Widow of Windsor.” Even after she emerged from this seclusion, she remained a stranger to almost everybody in her kingdom and her empire. Nobody outside of court circles had any idea what she sounded like or had ever heard her voice.

The present Queen of England is in an entirely different situation, and conducts herself in an entirely different manner. She was brought up in a world in which the monarchy had been totally redefined. It was no longer remote from the public. It was constantly in the public eye. The public came to know many things about Elizabeth. She is the mother of four children, most of whom seem to be constantly in some sort of trouble. She has numerous grandchildren. We know she is a woman who likes dogs and horses. Everyone in England and millions of people in other places have heard her voice. Her face, like the face of her great-great-grandmother, is on coins and stamps; however, it is also on TV and in the newsreels. In fact, her face is everywhere on television. She is constantly visible in public, at ceremonies and gatherings, and these are faithfully recorded on TV. She delivers messages to the public. She dresses in ordinary though expensive clothing, and what she wears is the subject of considerable discussion. Because of all this exposure the Queen is a totally familiar presence. She is, in short, a celebrity.

The Queen is only one celebrity out of many. There are literally hundreds, perhaps thousands, of celebrities. Basketball stars and rock stars are also celebrities. They are also familiar and are, in most ways, very ordinary people. They have a talent, of course; but in most regards they are just like you and me. And their talent is also a variation of quite ordinary activities. They sing, they dance, they throw a ball—activities that all of us or most of us do. Of course, they do it much better. But there is nothing magical or other-worldly about their talents. There have been a few celebrities whose talent was strange, mysterious, or extraordinary: the classic case may have been Albert Einstein. Nobody could understand his theories, and in fact this is one reason why he was so famous. But people knew what he looked like. They knew he had fuzzy hair, played the violin, and had trouble with math in

school. Some people become celebrities because good or bad fortune strikes them; they win a lottery, or give birth to sextuplets, or are born attached to a Siamese twin. But what they all have in common in the modern world is their familiarity—the fact that we see them, hear them, read about them. Celebrities are not “austere, private, far-off, godlike, or arcane.”<sup>7</sup>

In every complex society, there have been famous people. But only in modern times do we have celebrities. Only in modern times do we have mass media; and it is the mass media that make it possible for us to be so familiar with famous people. This familiarity, as I have argued, is the essence of the celebrity. The Emperor of Japan, the Pope, the Dalai Lama—today all of these are true celebrities. But the men who held these offices in the past were decidedly not celebrities. They were remote, mysterious, and semi-divine figures that were totally beyond the realm of the ordinary. The Pope was once known as the Prisoner of the Vatican. He almost never traveled. The Emperor of Japan was an even more extreme case. It was part of his mystique that one never saw him; he lived in his palace in central Tokyo surrounded and protected by a phalanx of court officials. He never went out among the people. Indeed, no one was supposed to look at his face. For the Japanese, the Emperor was a living God. His position in Japanese society, culture, and politics was complex; but you could never describe him as “familiar” and the word “celebrity” could never be attached to him. He maintained an awesome distance from the general public. When, in 1945, the Emperor Hirohito announced the surrender of Japan, it was the first time in his reign that he had ever spoken to the public—the first time ordinary people had ever heard his voice.

The contrast to the American President, Franklin Delano Roosevelt, could hardly have been more dramatic. Roosevelt was a master of the art of communication. He was constantly seen in public. He spoke frequently on the radio, and everyone listened to his smooth, wonderful voice. He was seen all over the country in newsreels. For that matter, Adolph Hitler was also a communicator; he rose to fame as a demagogue, a charismatic rabble-rouser, a man with a raucous but mesmerizing voice on the radio. He was indeed a celebrity—a man who attracted huge masses of people and whose face was plastered all over Nazi Germany.

We live in the age of the celebrity. In this essay, I am going to talk about some of the social and legal consequences of this aspect of the world we live in—the world that has created, nurtured, and fostered the celebrity culture.

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7. FRIEDMAN, *supra* note 6, at 30.

The celebrity is a product of the mass media. Celebrity culture did not occur overnight. It has been a long time coming, and it has evolved as the media themselves have evolved. The process has become steadily more intense and dramatic. The first mass medium was the printed press. Many early newspapers seem fairly dreary and austere to us; but there was also, in the nineteenth century, the penny press and such magazines as the *Police Gazette*, full of stories about sports figures (boxers in particular) and about particularly lurid crimes. Then, in the late nineteenth century came “yellow journalism.” These were the newspapers that catered to mass audiences and printed sensational news, which they sometimes made up themselves. It was the age of William Randolph Hearst and his competitors. Their journalism was vivid and intense. They used photographs and drawings to give their stories extra color. They covered grisly murders and executions. In a great trial, like Lizzie Borden’s, reporters swarmed like flies around the courtroom and sent daily stories to their papers to be devoured by an eager public.<sup>8</sup> In 1928, a reporter for the *New York Daily News*, Thomas Howard, had a front row seat in Sing Sing, as a woman named Ruth Snyder died in the electric chair. Using a concealed camera on his ankle, he took a picture of Snyder as the electricity surged through her body. The picture sold an incredible number of newspapers.<sup>9</sup>

The newspaper’s contribution to popular culture was magnified greatly by the invention of radio in the early twentieth century. Radio made it possible to hear the voices of entertainers. Radio quickly became a crucial entertainment medium. Radios were cheap, and every home soon had one. People listened to news, but they also listened to comedy shows and dramas. Simultaneously, the movie industry developed and also became enormously popular. Here the stars could be seen, and, after the invention of “talkies,” they could be heard. Movie stars made huge amounts of money, and the public eagerly followed the details of their personal lives. The movie stars were great celebrities. They had fan clubs and fan magazines. Likewise, newsreels, which were shown in movie houses, made political figures familiar; it showed them moving and talking in ways that were much more life-like and real than still photographs. Television was another gigantic leap forward (or, if you will, backward). Television was incredibly more vivid and intense than anything before it; especially when it blossomed into brilliant color. It quickly became the most popular form of entertainment. Almost every home today has television, and probably more than one set. In

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8. The literature on this case is, of course, immense. *See, e.g.*, ROBERT SULLIVAN, *GOODBYE LIZZIE BORDEN* (1974).

9. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 445 (1993).

addition, television could be seen and heard twenty-four hours a day. The few channels of early television have blossomed into dozens and dozens of channels with the advent of cable television, and now we have the Internet.

Every day, the media pour out millions of words and pictures of the stars. Millions of people consume information about celebrities or are obsessed with them—alive or dead. Elvis Presley has become a cult figure. So has Diana. Diana's flowers were a way for people to show their personal involvement; it connected them to Diana and her tragic death. This is one reason for the growth of a new custom: the creation of instant memorials. People heap flowers and leave notes and signs at the place where somebody has tragically died. This is their way of participating in the death of a celebrity or in the death of an ordinary person who died a celebrity death. For example, people were shocked in the late 1990s when two men beat to death a young gay man, Matthew Shepard, and strung him up on a fence in Laramie, Wyoming. The fence became a "kind of pilgrimage shrine with a cross of stones built beneath the fence and offerings of flowers and other totems of bereavement left on the ground."<sup>10</sup> The site of the World Trade Center in New York was transformed into a huge, popular memorial in the months after 9/11. Here the victims were ordinary people, from bond salesmen to firemen to dishwashers. But the grief was collective. This was a tragedy that millions or billions of people saw on TV. The horror was visible to all of them. The destruction of the World Trade Center was a celebrity tragedy, if I can use that term. A hundred years ago, an earthquake that killed thousands could pass almost unnoticed in the rest of the world. The newspapers might put it in headlines, but as the old saying goes, a picture is worth a thousand words—and a moving picture, a picture of something actually happening, is worth a thousand still photographs. The image of the plane crashing into the World Trade Center, like the image of the celebrities on TV, was intensely vivid; it gave the viewers the illusion of familiarity. We have seen it; we know what it looks like, smells like, acts like—it is almost as if we were there. This is why I call the destruction of the World Trade Center a celebrity event. This too is something fairly new in human history, and it has had vast political consequences. But the influence of celebrity events and celebrity tragedies on society is, perhaps, a theme for another essay.

The world we live in is full of celebrities—hundreds, in fact. In this country, movie stars, rock and roll musicians, the occasional opera singer like Luciano Pavarotti, baseball, football and basketball players, and television

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10. Tom Kenworthy, *After Slaying, Community Takes a Punishing Look at Itself*, WASH. POST, Apr. 5, 1999, at A3.

personalities are all celebrities. The celebrity-fan magazines are now supplemented with tabloids and other magazines that crowd the newsstands of every Western country, brim-full of material on the lives, loves, and habits of the stars. This is by no means something distinctively American. If you look at a German, French, or Spanish popular magazine some of the names will be unfamiliar, but the breathless tone will be the same. The content will be very similar and you will in fact recognize at least some of the names—the names of international stars, men and women known all over the world.

Most celebrities are drawn from the world of entertainment. This is quite natural. The media create celebrities, and we turn to the media mostly to be entertained. Entertainment is one of the largest industries in the country.<sup>11</sup> An affluent society provides people with more money than they need for subsistence, and more importantly it gives people leisure time—evenings, weekends, holidays, and vacations. They fill the dead spaces with entertainment. Entertainment means celebrities. Celebrities are equated with entertainment, with what is fascinating, fun, and enjoyable. Celebrities pique the curiosity of the average person. But this simple, obvious fact has some fairly serious consequences. As I will argue, the celebrity society transforms politics in a radical way.

Outside the world of entertainment as such, who are the celebrities? A few political figures, very notably the President of the United States and his counterparts in other countries: presidents, kings and queens, prime ministers, and a few religious leaders like the current Dalai Lama, or the Pope. A tiny number of business people become celebrities; Bill Gates is one. He excites our interest because he is so incredibly rich. Most business people and most political figures, however, are not celebrities. Nor are scholars, authors, and scientists, for the most part.

I have stated that a celebrity is a person who is both famous and familiar. In other words, a celebrity culture vastly expands the circle of people “we know,” or think we know—the people whose voice is familiar or whose face we recognize. What the media have done is to create for all of us a new class of intimate strangers. Of course, in reality we have no personal contact with these celebrities. And much of what we think we know might be an illusion—or outright lies. Images can be and are manipulated. Yet the illusion itself is terribly important; there are aspects of these people that we really do know. We know what they look like, how they talk, the way they dress, who they marry and divorce. Perhaps we even know something about

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11. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003, at 439 tbl.660, 502 tbl.742 & 717 tbl.1120 (2003).

the way they live—their home life. There was a TV program called *Life Styles of the Rich and Famous* that was quite popular for a while. It purported to take you inside the houses of the rich and famous, so you could see what their kitchen was like, what was hanging on their walls, what kind of rugs they walked on, and what chairs they sat on.

Celebrities, then, are very familiar. They are probably more familiar to us than the people who live down the street. They are so familiar that we often call them by their first names such as Oprah, or Bill, or Hillary, or Tony. Yet obviously for their part, they do not know us. We are looking at them, seeing them, observing them, through what is in effect a one-way mirror. In short, what the media have done is to perfect the technology of the one-way mirror. The illusion of familiarity is the illusion created by the one-way mirror.

In many ways, it is uncomfortable to be a celebrity, to be on the other side of the one-way mirror. If you appear on TV, you are at least aware that people are watching you although you cannot see them or hear them. It is odd and unsettling, *because* people think they know you. They recognize you. You cannot walk down the street with anonymity, or go to a restaurant, or shop in a store. Your fans come to feel as though they own you; they feel they have a claim on you. Yet most celebrities want this, or are willing to put up with it, because it brings them fame or power or money, or all of these. What is true of movie stars and members of rock groups is equally true of political figures. There is no longer any room in political life for people who are shy, who would find the one-way mirror intrusive and troubling. Only those who thrive on it can survive.

Indeed, the world of the one-way mirror has transformed politics. Ideology has been at least partly replaced with image. In fact, politics is a more extreme case than sports or theater. A baseball star is a celebrity; but he is still judged by how well he bats and pitches and catches. His image, his personal life, his way of walking and talking: these are secondary. The baseball player who strikes out consistently or who constantly drops the ball will lose his job—and with it his celebrity status—pretty quickly.

But in politics, image is almost all there is. A successful politician is one that cultivates the “right image” and makes the best use of the media. Franklin Delano Roosevelt was perhaps the first president to master this art. He was especially effective on radio. His fireside chats were famous. He spoke directly to the public, in a wonderful, mellow voice. Not only his face, but his voice thus became familiar to everyone in the country. He was also familiar in the newsreels. He was, historically, an important figure in an important process: the transformation of fame into celebrity. The process has now gone very far. Nothing is more important than a candidate’s voice, his way of expressing himself, his family, his dogs and cats, his sex life, his



personal habits, or the way a female candidate dresses or wears her hair, or whether she chooses to keep her maiden name or not. The *New York Times* published an article about the wife of Governor Howard Dean, who was seeking the Democratic party's presidential nomination.<sup>12</sup> Dean's wife, a family doctor in Vermont, never campaigned with her husband or appeared at his side. Some people found this acceptable, according to the story; but many people thought it was odd and damaging to Dean's campaign. People like to see the President as a family man, as a nice person, and as a religious and moral being. The President, after all, is a celebrity. Nobody expected Martha Washington to campaign or make speeches. Nobody expected this from Lincoln's wife, or even from Mrs. Theodore Roosevelt. Today it is a different story.

The celebrity society has assimilated politics to entertainment. The President, in Neal Gabler's phrase, is the "entertainer-in-chief."<sup>13</sup> Campaigning is less ideological than in the past and what is essential is what people think of the candidates—whether they like the candidates or not. We like candidates because they engage us personally, and because they seem honest, or sincere, or seem like a "good leader." In a celebrity society the focus is also on whatever is most newsworthy, whatever appears on national TV. Tip O'Neill once said that all politics is local. Perhaps that was once the case, but today all politics is national. Everybody knows the President and can tell you the names of his wife and children, probably even the name of his dog, and so many other things about him. Ask the average person who represents him in the state legislature, or the city government, and you will likely get a blank stare. Anyone who wants to play a role in political life, in any sense of the term, must reckon with its celebrity aspect. The transformation of the Queen of England from what Victoria was to what Elizabeth is, was a process essential to preservation of the monarchy. The Emperor of Japan, the Pope, the Dalai Lama: their roles, too, have been transformed. It is no disrespect to call them celebrities. What the Pope wants to accomplish, what the Dalai Lama wants to accomplish, can only be achieved in a celebrity society through making use of the tools and arts of publicity and familiarity. A distant, invisible leader is no leader at all.

Politicians, above all others, must be people who are comfortable with life on their side of the one-way mirror. In part, they give up privacy voluntarily or at least look on a certain loss of privacy as inevitable. If this is not a way of life that they can accept, then they have no place in politics. The President

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12. Jodi Wilgoren, *The 2004 Campaign: The Ex-Governor's Wife; The Other Doctor in Dean's House Shuns Politics*, N.Y. TIMES, Jan. 13, 2004, at A1.

13. NEAL GABLER, *LIFE, THE MOVIE: HOW ENTERTAINMENT CONQUERED REALITY* 108 (1998).

of the United States has a retinue of bodyguards and Secret Service people who try to protect him. They have a difficult job because, out of necessity, the President is exposed every day to large groups of citizens. A hidden President, a hermit President, or a President who simply spends the day in the White House working on national business is no longer possible or acceptable.

What is true of politicians is, of course, true of all celebrities. The essence of celebrity is loss of privacy—at least in part. The celebrity has to struggle to control the publicity, the familiarity, and to keep at least some parts of his or her life truly private. It is a struggle against their fans and against the public. The biggest stars are pursued by paparazzi.<sup>14</sup> The paparazzi are professional photographers who pursue the stars with zoom lenses and other equipment; the paparazzi score a “hit” if they get a sensational picture—for example, the Princess of Monaco taking a topless sunbath on a yacht, unaware that somebody is looking—or score some similar scoop. A hidden camera took pictures of Princess Diana working out in a leotard and shorts at a London fitness club in 1995. The gym owner, who took the pictures, sold them for about \$150,000 to a newspaper; but the princess went to court and, in an out-of-court settlement, got the defendants to agree to stop any further hawking of the pictures. The defendants also promised to destroy all copies and negatives.<sup>15</sup>

Prince Charles had been less fortunate the year before. A German tabloid, *Das Bild*, scored a tremendous scoop. The tabloid published a photo, taken with a telephoto lens, showing the Prince of Wales in his birthday suit. A page one headline shouted in huge type: “Prince Charles Naked . . . !,” and of course displayed the photograph.<sup>16</sup> The royal family complained, but in the end they decided to let matters lie. People snapped up the issue of the paper. In another instance, huge sums were shelled out for topless photos of the Duchess of York. The *Daily Mirror* sold almost half a million extra copies when it ran these photos.<sup>17</sup>

There is, in other words, an insatiable and almost prurient interest in the lives of celebrities—their love lives, and everything else about them. It both comes from and strengthens the feeling among members of the general

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14. The term comes from the Italian movie, *La Dolce Vita*, directed by Fellini, in which Paparazzo was the name of a photographer. See Vincent Canby, *Trailing the Photographers Who Follow the Famous*, N.Y. TIMES, July 1, 1992, at 18.

15. Paul Gould, *Gym Photos Victory for Princess Diana*, UPI INT'L, Feb. 8, 1995, LEXIS, Nexis Library, UPI File.

16. See Richard Kay, *Charles Fury at Naked Pictures*, DAILY MAIL, Sept. 8, 1994, LEXIS, News Library, Major World Publications File.

17. See *Tabloids Claim Duchess Sales Lift*, FIN. TIMES (London), Aug. 22, 1992, at 4.

public that the celebrity belongs to them, that they have a right to something more than watching the celebrity on TV. Occasionally, this results in a real pathology; some people completely lose sight of the distinction between image and reality; they forget that they have been looking through a one-way mirror.<sup>18</sup> This can give rise to the behavior called stalking. In the nineteenth century, there was no such crime on the statute books. Now every state in the union has passed a law making stalking a crime.<sup>19</sup>

Quite a few celebrities have been victims of stalkers. John Hinckley, Jr. stalked Jodie Foster, the movie star. He later shot President Reagan, and wounded him seriously, in an apparent attempt to attract Foster's attention. A woman stalked David Letterman and even moved into his house once when he was out of town. The very first law explicitly addressing stalking was passed in California in 1990.<sup>20</sup> It was the direct result of a crime against a celebrity. Rebecca Schaeffer, a television actress, was murdered by a man named Robert Bardo who shot her at the entrance to her apartment. He had stalked her for two years. The crime was widely reported in the press.<sup>21</sup> The California law states that anyone who "willfully, maliciously, and repeatedly follows or . . . harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety," is guilty of stalking.<sup>22</sup> Florida law defines a stalker as any person who "willfully, maliciously, and repeatedly follows or harasses another person."<sup>23</sup> If the perpetrator also threatens that person, he is guilty of "aggravated stalking," which is a felony.<sup>24</sup> There were also congressional hearings on the subject of stalking and proposals for federal legislation, so far without result.<sup>25</sup>

Stalking is a particular hazard for celebrities—unbalanced fans become so obsessed and hypnotized by the one-way mirror that they forget that it is

18. "When we know a series of intimate details about a famous person—his mannerisms, his love life, his quirks of speech and dress . . . we may be lured into a false sense of intimacy with him. . . . A celebrity has an interactive personality: people feel free to approach [the celebrity] . . . on the street." JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 201 (2000).

19. See B. Benjamin Haas, Comment, *The Formation and Viability of Anti-Stalking Laws*, 39 VILL. L. REV. 1387, 1387 & n.2 (1994).

20. See CAL. PENAL CODE § 646.9 (West 2004). Stalking also is a tort in California. CAL. CIV. CODE § 1708.7 (West 2004).

21. *Man is Being Held in Actress' Death*, N.Y. TIMES, July 20, 1989, at A15.

22. § 646.9.

23. FLA. STATS. ANN. § 784.048(2) (West 2000).

24. § 784.048(3). "'Harass' means to engage in a course of conduct directed at a specific person that causes substantial emotional distress . . . and serves no legitimate purpose." § 784.048(1)(a).

25. See *The Stalking Prevention and Victim Protection Act of 1999: Hearings on H.R. 1869 Before the Subcomm. on Crime of the House Comm. on the Judiciary*. 106th Cong. (1999).

there. Of course, stalking itself is not new. For a long time, there have been insanely jealous ex-boyfriends and ex-husbands who have hunted their prey. Moreover, it remains true that most stalking is private—that is, most stalking is committed by ex-boyfriends and ex-husbands.<sup>26</sup> But the small number of people who stalk celebrities get most of the publicity, and the stalking of celebrities was the direct cause that led state legislatures to pass the first anti-stalking laws.

Stalking a celebrity is, of course, a pathology; but the feeling that the celebrity “belongs” to us is much more general. Most people, fortunately, are not deranged. They recognize that the mirror is there. Celebrity culture nonetheless has a powerful impact on minds and hearts. The public comes to feel it has a *right* to know everything about celebrities. Nothing by rights should remain hidden. The hunger for information, gossip, and news about celebrities gets converted into a norm that the information, gossip, and news *must* be provided, one way or another. It is not easy to tease out the causal chain. The media make celebrity culture possible by spreading and glorifying it. Whether this creates or simply feeds a feeling among members of the public that they have a right to know everything about celebrities is hard to say. Technology as such does not change social norms. But it does change the conditions under which we live and that in turn affects the way we think, behave, our ideas, our hopes and our habits. Regardless of how it came about, and why, there is now a powerful feeling that we need—and want—and must have all that we can possibly see and hear of the life on the other side of the one-way mirror.

It is possible to trace the development of this sense of right, of entitlement, this social norm, by looking at the way it gets translated into law. At one time, the press practiced a kind of self-censorship. Certain things were simply not published. There are more than 35,000 photographs of Franklin Delano Roosevelt at his Presidential library. But according to one scholar, exactly two of these show him sitting in a wheelchair.<sup>27</sup> People knew that he was disabled; but they were never permitted to *see* it for themselves. In England, in 1936, a constitutional crisis was brewing. The new King, Edward VIII, was romantically involved with an American woman, Wallis Simpson. He wanted her to get a divorce and marry him. This was unacceptable to the British government at that time. But, the British press was completely silent

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26. Cf. PATRICIA TJADEN & NANCY THOENNES, U.S. DEPT’T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 8 (1998), available at <http://ncjrs.org/pdffiles/172837.pdf> (last visited Oct. 2004).

27. HUGH C. GALLAGHER, *FDR’S SPLENDID DECEPTION*, at xiv (1985).

on the matter by virtue of a kind of “gentleman’s agreement.” The American press, and the rest of the world, was, on the other hand, “in full cry.”<sup>28</sup> Of course, such a “gentleman’s agreement” would be completely unthinkable today. Gossip about the royal family is reported every day, especially in the tabloid press. The American press practiced its own form of self-censorship. Surely many reporters knew about John F. Kennedy’s many sexual adventures; but none of them were reported during his lifetime. Today, of course, nothing is sacred. Everything about Presidents, movie stars, celebrities in general, is grist for the mill.

The legal system rather faithfully reflects this development—that is, the decline in privacy for famous people and the emphasis on the right of the public to know. One place where this shift comes out rather clearly is in the evolution of the tort of invasion of privacy. As regards public figures, this tort has had a very short and ineffectual life.<sup>29</sup>

The conventional history of the tort of invasion of privacy begins with a famous *Harvard Law Review* article entitled *The Right of Privacy* by Samuel D. Warren and Louis D. Brandeis, published in 1890.<sup>30</sup> The two authors were wealthy and respectable men—Brandeis, of course, later became a Supreme Court Justice. Brandeis and Warren were shocked at the popular press of their day. The newspapers, they said, were “overstepping . . . the . . . bounds of . . . decency,” they were filled with “idle gossip,” and even told stories about “sexual relations.”<sup>31</sup> Warren and Brandeis were appalled. They were also alarmed at the potential uses of a piece of new technology: the Kodak, or candid camera.<sup>32</sup> Before the Kodak was invented, cameras had trouble taking pictures of moving objects. This meant that nobody could take your picture unless you actually sat still and posed for the cameraman. But now, it was possible to “take pictures surreptitiously.”<sup>33</sup> Brandeis and Warren were warning, in short, about an early form of the one-way mirror: the secret photographer. It seemed to them to present a clear and present danger to privacy and respectability; and they wanted the law to put a stop to this.

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28. The story is told, among other places, in Deirdre Carmody, *The Woman Who Won a King*, N.Y. TIMES, Apr. 25, 1986, at D19.

29. This tort is not to be confused with the constitutional “right of privacy” in such cases as *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Connecticut birth control case, and *Roe v. Wade*, 410 U.S. 113 (1973), on abortion rights. On the history and background of this doctrine, see DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994).

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

31. *Id.* at 196.

32. *Id.* at 195.

33. *Id.* at 210.

The danger was real enough. Two Germans had used a Kodak camera to take pictures of the Chancellor of Germany, Otto Bismarck, as he lay dying. Bismarck's son went to court and prevented them from selling these pictures to the press.<sup>34</sup> This was the sort of behavior that Warren and Brandeis had in mind. Their notion of privacy had a more or less elite, traditional ring to it. They wanted to protect people like themselves from the deadly eye of the camera. Their attitudes were thoroughly Victorian. To them, nice people did not talk about things like sex. Of course, people did have sex, and even babies; but this was private behavior, personal behavior, such matters were not on the public agenda for respectable people.

Actually, not many courts took the hint from Warren and Brandeis and recognized the existence of a tort of invasion or privacy. The New York courts, for example, simply rejected the idea. A flour company and a box company in New York had used the picture of a young woman on advertising posters without her permission. She sued the companies, but she lost.<sup>35</sup> The New York legislature passed a law in response, but it was quite limited in scope. It only applied to cases like hers: where somebody used the "name, portrait or picture of a living person" for "advertising purposes," without the person's permission.<sup>36</sup>

One court that did take up the suggestion, and which recognized a right of privacy, was an appellate court in California. The case, *Melvin v. Reid*,<sup>37</sup> was decided in 1931. The plaintiff, a woman who called herself Gabrielle Darley Melvin, told a rather fascinating story. She had led a rather unconventional life. She had once been a prostitute. Her lover and pimp, Leonard Tropp, dumped her and moved away to Los Angeles. She followed him, found him, and shot him dead. She was tried for murder in 1918. It was, as you can imagine, a fairly sensational trial. She was defended by a famous lawyer; he argued that Gabrielle was the victim of a thorough cad, and that she shot Tropp in self-defense. The jury believed this story, and she was acquitted. Years later, Hollywood made a movie based more or less on her life story called *The Red Kimono*.<sup>38</sup> It used her real name. The first scene, in fact, shows a woman reading a newspaper account of her trial. Historical accuracy is not a strong point in Hollywood, and the movie was a sentimental mélange of fact and fiction. Gabrielle brought a lawsuit against the producers. It was

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34. Fedor Seifert, *Postmortaler Schutz des Persönlichkeitsrechts und Schadenersatz—Zugleich ein Streifzug durch die Geschichte des allgemeinen Persönlichkeitsrechts*, 52 Neue Juristische Wochenschrift 1889 (1999).

35. *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

36. See N.Y. Civ. Rights Law § 50 (2000).

37. *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

38. *Id.*

not the fiction she complained about, but the invasion of her privacy. She claimed she had given up her life of vice, married, and settled down into respectable family life. The court believed her story, sympathized with her, and held in her favor.<sup>39</sup> She had a right to live her new life away from the curiosity of the masses. Hollywood had done her a grievous wrong.

As a matter of fact, Gabrielle was probably lying through her teeth. She was, apparently, still a prostitute, and later she made a living as a madam in Arizona. Possibly, too, she made something of a habit of killing husbands and boyfriends; in any event, quite a number of them died mysterious deaths.<sup>40</sup> The court obviously knew nothing about the real Gabrielle Darley Melvin and, even in its day, the case was somewhat exceptional. In the 1930s, there were already signs that celebrities, or people in the public eye in general, had forfeited the right that Gabrielle insisted on: the right to remain discreetly private. For people in the public eye, almost anything goes. That would certainly include a woman who was the subject of a sensational murder trial. For those on the far side of the one-way mirror, whatever anybody can find out about their private life—however they find it out—is fair game.

In one of the best-known cases, the *New Yorker* magazine published an article in 1937 about one William James Sidis.<sup>41</sup> Sidis had been a child prodigy, a whiz at mathematics, who was only sixteen years old when he graduated from Harvard. The *New Yorker* article was part of a series that asked the questions where are they now? And where *was* Sidis? Essentially, he was nowhere. He had totally flamed out. He was a loner, living in some wretched flat, working as a lowly clerk, and collecting streetcar transfers. When the story appeared, Sidis sued the magazine. He lost the case. The public had a legitimate right to know what had become of him.<sup>42</sup> Once you become a public figure, or a famous person, your life becomes, apparently, public property.

Yet, how “public” a figure do you have to be? Apparently not very. Sidis was hardly a household name. Another “public figure” was Mike Virgil; who was a well-known body-surfer, at least among people who are interested in body-surfers. A story about him in *Sports Illustrated* was, to say the least, not complimentary.<sup>43</sup> Virgil, according to the story, was uneducated, practically

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39. *Id.* at 93.

40. See Leo W. Banks, *Murderous Madam*, TUCSON WKLY., June 1, 2000, at <http://tucsonweekly.com/gbase/Currents/Content?Oid=0id:42517> (last visited Oct. 2004).

41. See J.R. Manley, *Where Are They Now?: April Fool!*, NEW YORKER, Aug. 14, 1937, at 22.

42. *Sidis v. F-R Publ'g Co.*, 113 F.2d 806 (2d Cir. 1940).

43. Thomas Curry Kirkpatrick, *The Closest Thing to Being Born*, SPORTS ILLUSTRATED, Feb. 22, 1971, at 71–72.

illiterate, and did strange things—like eating spiders and diving down flights of stairs to impress “chicks” as he put it. He too sued for invasion of privacy. The court found this a troubling case. “Morbid and sensational prying into public lives” was certainly not a desirable thing; but body-surfing, the court felt, was a subject of “general public interest.”<sup>44</sup>

For celebrities, then, is nothing sacred? A case in 1997 concerned Tommy Lee and Pamela Anderson.<sup>45</sup> He was a drummer for the rock and roll group, Motley Crue. She was a star in *Baywatch*, which the court described as an “internationally syndicated television show marketed to more than 140 countries and watched by a billion people every week.”<sup>46</sup> *Penthouse* magazine published photographs, which the two had apparently taken themselves, showing them on their honeymoon. The pictures showed them “in various states of undress,” and two pictures showed what the court called “sexual touching.”<sup>47</sup> Somebody apparently stole these pictures and peddled them to the newspapers. The Lees sued, but in the end they lost their case. Were the pictures “newsworthy?” This, the court felt, was a crucial question. The answer was yes. The plaintiffs, said the court, were “well known celebrities.”<sup>48</sup> The article in which the photographs appeared discussed their sex life, which was, apparently, a “legitimate subject for an article.”<sup>49</sup> Of course, a person could ask why *is* this a legitimate subject? Why does the public have a right to know about the sex life of celebrities? It is quite clear that many people want this information and are willing to pay for it. Thus, these cases come close to saying: if a story is about a celebrity, and a newspaper or a TV show feels it is newsworthy, then by definition it is newsworthy. The cases never go quite this far, but they seem to be heading in this direction. The courts have certainly stretched the notion of a public figure. A body surfer or a math whiz is hardly in the same league as the President or the Queen of England, or even a movie star. In a Massachusetts case, decided in 1999, the plaintiff was a well-known businessman in Boston. A woman claimed he was the father of her child; he denied it. Her claim was kept a secret; but a gossip columnist somehow found out, and printed the

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44. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975). The case was remanded to the district court, which granted summary judgment to the magazine. Mike Virgil’s “unique prowess” was something the public could be interested in; and the “personal facts” helped explain his “extremely daring and dangerous style of body surfing.” *Virgil v. Sports Illustrated*, 424 F. Supp. 1286 (S.D. Cal. 1976).

45. *Lee v. Penthouse Int’l, Ltd.*, 25 Media L. Rep. (BNA) 1651 (C.D. Cal. 1997).

46. *Id.* at 1652.

47. *Id.*

48. *Id.* at 1655.

49. *Id.* It also hurt their case that the photos had already been published: in French and Dutch editions of *Penthouse*; and in *Screw* magazine. *Id.* at 1656.



story in the newspapers. The plaintiff lost his case. The court stated that the plaintiff was “a prominent real estate professional,” and a “recognized civil leader” and that the paternity suit “had a nexus to . . . these roles in the community.”<sup>50</sup> Besides, the woman was a real estate broker he had hired and a “workplace liaison between an employee and her superior” was something else the public had a right to know about.<sup>51</sup>

What about the involuntary celebrity? That is, what about the person who has not chosen to be a celebrity—who has not pursued a career in entertainment or politics—but fame somehow comes about accidentally? He or she may be a victim of a tragedy, or perhaps the winner of a lottery, or a witness to some spectacular event, or the like. The case of the involuntary celebrity is a bit more worrisome, and the courts do hesitate to strip them naked, so to speak. But take the case of one John Neff. Neff was a fan of the Pittsburgh Steelers—and quite an enthusiastic one. In 1973, photographers took pictures of fans of the Steelers, mostly drunk, screaming and howling. *Sports Illustrated* published a picture of Neff, one of the fans, with his fly open. The court pointed out, somewhat primly, that the fly was not “open to the point of being revealing.”<sup>52</sup> But it was “in utmost bad taste.”<sup>53</sup> Still, the article was about sports fans and how they behaved, which was a matter of “legitimate public interest.”<sup>54</sup> In another case, in South Carolina,<sup>55</sup> the plaintiff was arrested and charged with quite a serious crime. The police said he doused a woman with gasoline and set fire to her mobile home.<sup>56</sup> The plaintiff was later released and was never tried. A newspaper, however, published a story about his situation, which included the discovery that while the plaintiff was in jail a fellow inmate had raped him.<sup>57</sup> The plaintiff sued for invasion of privacy, but the Supreme Court of South Carolina turned down his claim. When an inmate of a county jail commits a violent crime, it is a “matter of public significance,” and the public has a right to know about it.<sup>58</sup>

One might assume, from at least some of these cases, that there are no limits at all so long as the public could possibly be interested in what was

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50. Peckham v. Boston Herald, Inc., 719 N.E.2d 888, 893–94 (Mass. App. Ct. 1999).

51. *Id.* at 894.

52. Neff v. Time, Inc., 406 F. Supp. 858, 860 (W.D. Pa. 1976).

53. *Id.*

54. *Id.* at 861.

55. Doe v. Berkeley Publishers, 496 S.E.2d 636 (S.C. 1998).

56. Doe v. Berkeley Publishers, 471 S.E.2d 731, 732 (S.C. App. 1996), *rev'd by* 496 S.E.2d 636 (S.C. 1998).

57. *Doe*, 496 S.E.2d at 636.

58. *Id.*

happening. The cases are difficult and confusing. But they do agree that there must be *some* sort of limit. As one judge put it, there is no protection if a person discloses facts that would “make a reasonable person deeply offended,” and if the facts are such that the “public has no legitimate interest.”<sup>59</sup> But only rarely does a court hold that the public does *not* have such an interest. In one rather amazing case in California, a woman named Ruth Shulman was badly hurt in a car accident.<sup>60</sup> She was trapped inside her car. A medical transport and a rescue helicopter came to save her—along with a television cameraman. The camera filmed Ruth being pulled from the car and showed her being taken to a hospital by helicopter. The flight nurse in the helicopter wore a tiny microphone, and she recorded her conversations with Ruth Shulman. The victim, suffering terribly, at one point said “I just want to die.”<sup>61</sup> All this was edited into a TV program and broadcast. The court admitted that Ruth’s accident was something the public had a right to be interested in. But the secret microphone—taking advantage of a woman who was in pain, delirious, and in agony—was invasive, intrusive, and had gone too far.<sup>62</sup>

Ruth Shulman, of course, never chose to be famous. Despite her victory, it remains true that the law has drastically reduced the privacy rights of people in the limelight and even of those who find themselves there involuntarily. But what about the rest of us, those of us who are not politicians or rock stars, who are not celebrities either voluntary or involuntary? We too are not immune. For us, modern technology has also created a one-way mirror. It is in many ways different from the one-way mirror of the celebrities. What it has in common is that people are watching us, seeing us, and learning about us; and these are people we do not know and cannot see behind the screen of the one-way mirror. Every day we face security cameras in banks and other public places. Governments and private organizations gather dossiers about our likes and dislikes, our credit history,

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59. Judge Richard Posner in *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993). The case concerned a widely praised book: *The Promised Land* by Nicholas Lemann. The book dealt with the migration of blacks from the rural south to the north. The book focused on the life of one black woman, who described her life with her ex-husband, the plaintiff—he drank, was unfaithful, and left her for another woman. *Id.* at 1230. Haynes, the ex-husband, argued that all this took place a long time ago, and that he was a reformed person, who had remarried, and led a respectable life. *Id.* at 1231. The court held against him. There was a “legitimate interest” in the story: one of the book’s themes was the “transposition . . . of a sharecropper morality,” with a “matriarchal and elastic” family structure, and “unstable” marriage bonds, to the “slums of the northern cities.” *Id.* at 1232. The book discussed “profound social and political questions.” *Id.* at 1233. No doubt the book account was painful to Haynes, but it was definitely newsworthy, and his claim had to fail.

60. *Shulman v. Group W. Productions*, 955 P.2d 469 (Cal. 1998).

61. *Id.* at 476.

62. *See id.* at 497.

and many other matters. We are not worried about paparazzi, and the world is not interested in the way we walk and talk, our pets, and the way we dress or wear our hair; but the technology that creates the celebrity, and at the same time threatens him or her, also threatens us with a loss of privacy. It shocks us to learn that a nurse in a helicopter is wearing a hidden microphone. Could there be such a microphone in the doctor's office, where we go to get a check-up? or a hidden camera? It sounds paranoid, but it is certainly *technically* possible. When we call an airline company we are told that our calls will be recorded—for our benefit (or so they say). Companies routinely monitor e-mail, computer files, and phone calls of employees. A survey found that nearly two-thirds “engaged in some form of electronic surveillance in the workplace.”<sup>63</sup>

Almost everyday we read about some new invention that threatens privacy. There are people who hide cameras in toilets and locker rooms. A man in Louisiana secretly spied on his next door neighbor—a married woman—and her family with tiny cameras he had put in the attic of her home. He was caught, arrested, fined, and put on probation.<sup>64</sup> But the possibilities are frightening. There are devices that make it possible to pinpoint the location of your car. This is a big help in the war against car thieves, but the idea that someone somewhere can monitor our whereabouts when we are driving about is somewhat unsettling. There are new cell phones that can be used to trace where we are. Parents use these to make sure they know what their children are up to. But all of these devices can be misused, and there are all sorts of sinister possibilities.

Another contemporary problem, much discussed, is what is called identity theft. Identity theft accounted for 42% of some 200,000 complaints entered into a data base of the Federal Trade Commission in 2001.<sup>65</sup> In fiscal year 1999, a fraud hotline of the Social Security administration received 62,000 claims that somebody was misusing a social security number.<sup>66</sup> Of course, what is stolen is not really an identity but bits and pieces of an identity—a social security number, a password, a credit card number. But the conditions of modern life make us vulnerable to this kind of crime. Modern society is complex and impersonal. There is no problem of identity in a small town

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63. ROSEN, *supra* note 18, at 57.

64. CLAY CALVERT, *VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE* 198–99 (2000).

65. Press Release, Federal Trade Commission, Identity Theft Heads the FTC's Top 10 Consumer Fraud Complaints of 2001 (Feb. 23, 2002), *available at* <http://www.ftc.gov/opa/2002/01/idtheft.htm> (last visited Oct. 2004).

66. Sean B. Hoar, *Identity Theft: The Crime of the New Millennium*, 80 OR. L. REV. 1423, 1424 (2001).

where everybody knows everybody and nothing is bought from or sold to strangers. As one author put it, paradoxically, “[p]rivacy is a cause, if not the principle cause, of identity theft.”<sup>67</sup> This is a world in which we buy and sell to strangers; in which our credit transactions are with strangers; a world in which we are, for the most part, private and anonymous ourselves. This makes it possible for somebody to pass themselves off as us, at least as a holder of our credit-card or owner of our bank account. These thieves are, in a sense, on the other side of the mirror. We are also vulnerable to worms and viruses, which infect our machines—strange and disruptive diseases. These too come from strangers who have found a way to bore into the computers that we rely on so heavily. Indeed, in the computer age, we are in some ways at the mercy of sinister and malevolent people on the other side of the mirror.

What we sense here is one of those doomsday problems like global warming or the hole in the ozone layer or the threat of atomic war. It is a social doomsday—the total loss of privacy and immunity. The Constitution is supposed to protect us from unreasonable searches and seizures; in general, a person’s home is supposed to be a castle. The police, for example, are not supposed to enter and search without a warrant—at least for the most part. They are not supposed to tap our phones or attach listening devices. These are ways of searching that we cannot see, smell, or detect. These and other methods may or may not be legal in some particular situation, but they still exist.

Whatever technologies the government has are also available to other people and to companies. Again, these may not be legal, but they do exist. The paparazzi have wonderful cameras, with zoom lenses. The princess might have thought nobody could see her sunbathing on her yacht, but she was wrong. Poor Prince Charles: not only was a picture of his naked body featured in a tabloid, there were also people who listened in when he made personal cell-phone calls to his girlfriend. The cell phone is the perfect example of a piece of modern technology which poses potential problems to our privacy.

How do we react to these issues and problems? Some features of the intrusive society we simply accept. Most people do not seem to mind the searches at airports, in the interests of security, so long as these searches are not extreme and we are able to get to the plane on time. We barely notice the cameras in banks and in office buildings. When we make business calls, we are often told the calls will be monitored or recorded. Most of us probably do not feel this is a serious intrusion.

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67. Lynn M. LoPucki, *Did Privacy Cause Identity Theft?*, 54 HASTINGS L.J. 1277, 1278 (2003).

However, we find it annoying, or worse, when our name gets on mailing lists; and that these lists, together with lots of information about ourselves, are marketed around the world—hawked to all sorts of companies and institutions who buy and sell information about what products we buy, our likes and dislikes, our credit habits, and our credit history. This “market for personal information” brings about an “unprecedented erosion of individual privacy.”<sup>68</sup> Some aspects of this invasion of privacy we are likely to find positively frightening—the notion that everything we say and do can be and is recorded, or that none of our email messages are really gone for good. All this makes people profoundly uncomfortable. Privacy is still an enormous value. Most of us value it very highly; we value anonymity—the privilege of *being* a stranger, in most contexts, and at most times.

Most of us do value our privacy, but not all do. There are some people, perhaps not a large or statistically significant number, but important in other ways, who embrace the new reality and the world of one-way mirrors with passion and eagerness. First of all, there are the celebrities themselves. Some are all too eager to tell the whole world the most intimate details of their lives. The Lees, whom I mentioned before, certainly fit this category. One wonders why they brought their lawsuit in the first place. In 1996, Ms. Lee told another magazine all about her sex life. She mentioned that she and her husband took Polaroid photographs of themselves having intercourse; that she swings naked on a swing above her husband’s piano while he plays music; and that her name is tattooed on her husband’s penis.<sup>69</sup> On the Howard Stern show she talked about her sex life and how often she had sex.<sup>70</sup> Did she have *any* privacy left to be “invaded”?

In addition, there are ordinary people who love the idea of crossing over to the other side of the one-way mirror—an idea straight out of *Alice in Wonderland*. They volunteer to expose themselves to the entire world.<sup>71</sup> There are people who, of their own free will, invite cameras into their house. A kind of social pioneer, if you can call her that, was Jennifer Ringley. She had the bright idea of putting herself on the Internet. She installed cameras in her apartment, and you could watch her twenty-four hours a day if you cared to.<sup>72</sup> She has had a number of imitators. I can also mention here the people

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68. Vera Bergelson, *It's Personal But Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379–80 (2003).

69. *Lee*, 25 Media L. Rep. (BNA) at 1655.

70. *Id.*

71. See generally CALVERT, *supra* note 64.

72. See LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 183 (2004). The website lasted for a number of years, see Mike Musgrove, *Final Days in the Life at Jennicam*, WASH. POST, Dec. 7, 2003, at F07.

who go appear on the so-called trash talk shows—the people who wash their dirty linen in public before Jerry Springer and some of his competitors.<sup>73</sup> These programs tend to specialize in what is most sensational: transvestites, people having sexual relations with baby-sitters, or with their aunts and uncles, or who have six wives, and so on. Much less sensational, but not unrelated, are the people who bring their problems to Judge Judy and the other “judge” shows on television. Judge Judy, of course, is not a real judge, although she was at one time. She operates what amounts to a televised small claims court. Judge Judy has a sharp tongue, which she uses often enough, usually at the expense of the poor hapless creatures standing in front of her. One wonders why a person would take their claim to Judge Judy rather than to a regular court where, on the whole, the judge doesn’t insult you or if she does it is not before millions of people. Obviously, one answer is that Judge Judy is on television, and this may be your big chance, your only chance, to be on TV and tell your story in front of an enormous audience. And of course, there has been an explosion, in recent years, of so-called “reality” programs. The first American example, perhaps, was a program called *An American Family*, which came out in 1973 and took a close look at one family, the Louds family. A more recent example is MTV’s *The Real World*, which began in 1992. Seven young men and women shared an apartment; they got free room and board and some money. Cameras and microphones were all over the place and the telephones were tapped. The seven young people wore wireless microphones and their doings were edited into half-hour segments. The show has been enormously popular.

In fact, in the 1990s, there was a positive blizzard of “reality” shows. Of course, there is nothing real about them in most senses; they are in fact quite artificial. But they do not have scripts, and they use ordinary people, not actors. They are also extremely cheap to produce, which is one of the attractions for the networks. But cheap would not be enough if nobody watched and listened. Thousands of people volunteer to expose themselves on programs of this sort. But millions of people enjoy observing them—on the other side of the one-way mirror.

The people who volunteer for these programs are, as I said, a minority. Most of them are young. Young people are the ones that have taken eagerly to the Internet. They live in the world of email, text-messaging, and chat-rooms. They are in constant communication. They may go on the Internet under an alias and talk to strangers, who are also disguised. They inhabit a

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73. See generally JOSHUA GAMSON, FREAKS TALK BACK: TABLOID TALK SHOWS AND SEXUAL NONCONFORMITY 17 (1998).

sphere with a weird sort of anonymity in which each person thinks of himself as hidden behind the one-way mirror—while in truth all of them or none of them are. Is this the way the world in which we live is going? A world in which everybody is connected to everybody and everything else, or can be? A world in which privacy has to be radically redefined? Many of us hope this is not the case, but perhaps we are simply old-fashioned. What is clear is that some assumptions on which we once based our lives no longer hold true. Letters can be torn up; conversations are gone with the wind; but email messages, apparently, can last forever and perhaps cannot truly be erased. We face a world full of one-way mirrors. Not just for celebrities, but for everybody.

Of course, there are attempts, legal and extra-legal, to curb some of the worst excesses of the world of the one-way mirror. California has a law, passed in 1998, which gives people the right to sue for something called “constructive invasion of privacy.”<sup>74</sup> This is when someone uses a “visual or auditory enhancing device” to “capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression” of somebody “engaging in a personal or familial activity,” if the victim “had a reasonable expectation of privacy.”<sup>75</sup> This was clearly aimed at the paparazzi and it gives their victims the right to sue for up to three times the amount of damage caused, and perhaps also for punitive damages.<sup>76</sup> It may be that this law goes too far. It has been criticized on that score. But it reflects a deep level of resentment and fear.

Many states, in fact, have passed laws which are supposed to prevent the “invasion of privacy” in one way or another. Private wire-tapping is usually forbidden.<sup>77</sup> A Georgia statute makes it a crime intentionally and “in a clandestine manner” to “overhear, transmit, or record” a “private conversation of another” that originates “in any private place,” or to use “any device, without the consent of all persons observed,” to photograph or

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74. CAL. CIV. CODE § 1708.8(b) (West 2004). The tort is not committed unless the “image, sound recording, or other physical impression . . . could not have been achieved without a trespass unless the visual or auditory enhancing device was used.” *Id.* Probably what was intended was this: an ordinary photograph of a family having a picnic in their back yard, taken by a neighbor, would not fall under this section—there would have to be a zoom lens or some “enhancing device.” But the text is not clear.

75. *Id.*

76. CAL. CIV. CODE § 1708.8(c) (West 2004). Under this section, if the plaintiff shows that the act was “committed for a commercial purpose,” the defendant is “also . . . subject to disgorgement.” *Id.* The law was not to be construed to “impair or limit any otherwise lawful activities of law enforcement personnel.” § 1708.8(f).

77. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2000).

“record” a person’s activities “in any private place.”<sup>78</sup> There is also a statute against “peeping Toms.” A “peeping Tom” is defined as a person “who peeps through windows or doors, or other like places, on or about the premises of another,” in order to spy on that person, or in order to do anything that may “invade the privacy” of the person.<sup>79</sup> Again, one wonders how effective these statutes are, and in any event, whether they apply to everyone or only to private busybodies and not to government agencies. The danger from government agencies is as great or greater than any danger from private parties. Law is, or can be, a pretty blunt instrument.

I have come to the end of my brief survey of the world of the one-way mirror. This is a world in which technology has transformed habits, ways of thinking, ideas, and expectations. It has altered our sense of right and it has revolutionized what is hidden and what is exposed. How to cope with the issues and problems of the one-way mirror seems to me to be one of the most important tasks our society is confronted with.

For one thing, the mass media have arguably degraded political life into a *mélange* of images and sound-bites. Politics and entertainment seem to have merged. Most people no longer read newspapers (even bad newspapers); instead, they get their news from television. And on television, the news above all has to be entertaining. It has to engage an audience, or it does not survive. Moreover, political campaigns are now mostly television campaigns. These campaigns cost enormous sums of money, which is a problem in itself. The mode of campaigning also puts a premium on brevity and sound bites. Presidents are elected on the basis of personality, image, and “charisma.” Even the so-called debates are not really debates. What counts is how the candidates speak, how they “come across.” This seems vastly more important than what the candidate stands for or what his experience has been. This is politics in the age of the one-way mirror. I think the changes have been on the whole for the worse, but not everybody would, I suppose, agree.

Equally great is the problem for dealing with a world of one-way mirror on the level of personal and private life. The technology of intrusion advances more rapidly than the social technology of containment. We have to ask: how can we preserve human privacy, and human dignity, in times when these values are under ceaseless technological attack?

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78. GA. CODE ANN. § 16-11-62 (2003).

79. GA. CODE ANN. § 16-11-61 (2003).