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Introduction

Recent attempts by legislature bodies to prevent abuses by paparazzi have brought into focus the debate over how far freedom of the press should extend, and at what point its harm to the personal right of privacy becomes intolerable. Public outrage over paparazzi has led to new legislation which emphasizes the conflict between freedom of the press and the right to privacy.

A. History of Conflict Between Freedom of the Press and Right to Privacy

Freedom of the press, as established by the First Amendment,[1] has consistently been considered important to the survival of a democratic society. In *Estes v. Texas*, the Supreme Court noted that "the free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences."[2] In acknowledging the importance of a free press, courts have extended First Amendment rights and privileges to journalists beyond protecting the publication or broadcast of their results. As Justice White expressed in *Branzenburg v. Hayes*, "without some protection for seeking out the news, freedom of the press could be eviscerated."[3] In extending this constitutional protection to news-gathering, the Court relies on the assumption that the implicit goal of the Free Press Clause is to prevent prior restraint on publication.[4]

The right of privacy finds its roots in a law review article written

1. The pertinent part of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The First Amendment was held to be applicable to states in Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. 381 U.S. 532, 539 (1965).

3. 408 U.S. 665, 681 (1972).

4. *See* New York Times Co. v. United States, 403 U.S. 713, 715 (1971) (Black, J., concurring) (arguing that a holding allowing the publication of news to be enjoined "would make a shambles of the First Amendment"). *See also* CBS Inc. v. Davis, 510 U.S. 1315, 1318 (1994) (holding harms in the First Amendment context should not be redressed by prior restraints, but by subsequent civil or criminal proceedings); Grosjean v. American Press Co., Inc., 297 U.S. 233, 249 (1936) (stating that the First Amendment was meant to keep government from adopting any form of prior restraint on speech); Near v. Minnesota, 283 U.S. 697, 713 (1931) (noting that the primary purpose of the free press guarantee is "generally, if not universally" believed to be the prevention of prior restraints on publication).

by Samuel Warren and Louis Brandeis in 1890.[5] In *The Right of Privacy*, Warren and Brandeis argued for "a right to be left alone," railed against the press's pursuit of "idle gossip" and criticized the press for its "prurient taste."[6] While the word "privacy" is noticeably absent from the text of the Constitution, the Supreme Court, often citing the 9th Amendment, has acknowledged that the right to privacy is fundamental to the right of individual dignity[7] and autonomy that underlies the rights guaranteed by the Constitution.[8]

However, freedom of the press inevitably conflicts with the right of privacy. James Madison made clear that the Founding Fathers understood this potential harm yet considered the benefits of the free-press to outweigh that harm:

> Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press .... [I]t is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any one who reflects that to the press alone, checkered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression ... ?[9]

This inevitable conflict between freedom of the press and individual privacy rights retained by the people has never been

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5. *See* Samuel Warren & Louis Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193 (1890). The ideas expressed in this article later found their way into opinions written by Justices Warren and Brandeis.

6. *Id.*

7. Courts have recognized the link between privacy and dignity. *See, e.g.,* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37 (Cal. 1971) (stating that the loss of control over which "face one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object."(citations omitted)).

8. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (Goldberg, J., concurring).

The Ninth Amendment provides, in pertinent part, "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

The right of privacy is also acknowledged in reference to the Fourth Amendment as a protection against intrusions by the government. *See* Harris v. United States 331 U.S. 145, 150 (1947) (asserting "that the rights of privacy and personal security protected by the Fourth Amendment '... are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen ....'" (quoting Gouled v. United States, 225 U.S. 298, 304 (1921)).

9. James Madison, *Report on the Virginia Resolutions*, 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FED. CONST. 546, 571 (1836).

adequately resolved by law, and thus has led to the current problem in dealing with the paparazzi.

B. Impetus Behind Current Interest in Curbing "Paparazzi"

"Paparazzi" is the plural of the Italian word "paparazzo," which is defined as a "freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs."[10] While this phenomenon is not a novelty, the paparazzi's tactics seem to have been growing increasingly aggressive, fueled by the general public's seemingly insatiable desire to know everything. Princess Diana's death while fleeing paparazzi[11] increased public outrage and gave steam to celebrities' pleas for protection from the press.[12] This outcry led federal legislators to introduce three bills in the House of Representatives and the Senate,[13] and led the House Judiciary Committee to hold a hearing on May 21, 1998, where celebrities including Michael J. Fox and Paul Reiser, testified to the harassment they had suffered as the result of aggressive paparazzi.[14] Simultaneously, California passed a law attempting to curb these aggressive tactics.[15]

The problem in crafting effective anti-paparazzi legislation is that the First Amendment protects speech in general.[16] Moreover, the great degree of difficulty in distinguishing between the paparazzi and the rest of the press makes it difficult to avoid stifling legitimate news-gathering by the press, as protected by the Constitution.[17]

C. Going Forward

In proposing a solution to the problem created by the paparazzi, the federal legislature treads too much on the freedom of the press,

10. WEBSTER'S II NEW COLLEGE DICTIONARY 794 (1995).

11. Diana, Princess of Wales, and her companion, Dodi Fayed, died in a car crash in Paris while attempting to elude a group of motorbike-riding photographers. *See, e.g.,* Craig R. Whitney, *Diana Killed in a Car Accident in Paris; In Flight from Paparazzi - Friend Dies*, N.Y. TIMES, August 31, 1997, at A1.

12. *See, e.g.,* Howard Kurtz, *Public To Press: Just Play Fair; They're Peeved by Intrusiveness and Deception. But Are New Laws the Answer*, WASH. POST, Sept. 15, 1997, at B4.

13. *See* Tony Mauro, *Paparazzi and the Press*, THE QUILL, July/August 1998, at 26.

14. *See id.*

15. On September 30, 1998, California Governor Pete Wilson signed Senate Bill 262 into law. *See California and the West*, L.A. TIMES, Oct. 1, 1998, at A3.

16. *See, e.g.,* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 578 (1978).

17. *See, e.g.,* Time, Inc. v. Hill, 385 U.S. 374, 388 (1967) ("The line between informing and entertaining is too elusive for the protection of [the free press]").

and in doing so renders these proposed laws unconstitutional. While by no means perfect, the law passed in California is well-tailored to curb the worst abuses without treading on the freedom of the press. In comparing the federal legislation and the California law, it becomes evident that the California law is a good model for federal and other state legislators to consider. The California law also suggests why it might be better to leave the anti-paparazzi solutions to the states, rather than develop a federal solution.

This note will examine the proposed federal legislation and its weaknesses, and then compare it to the California law, focusing on these weaknesses.

I
Proposed Federal Legislation

A. Protection From Personal Intrusion Act (H.R. 2448)

The Protection From Personal Intrusion Act was originally introduced in September 1997 by the late Congressman Sonny Bono, and continues to be sponsored by his widow, Congresswoman Mary Bono.[18] The proposed law creates criminal and civil liabilities for "harassing" any person within the United States or a United States citizen anywhere in the world.[19] The term "harass" is defined as (1) persistently physically following or chasing a victim; (2) in circumstances where the victim (a) has a reasonable expectation of privacy,[20] and (b) has taken reasonable steps to ensure that privacy; (3) for the purpose of capturing any physical impression[21] of the victim for profit in or affecting interstate or foreign commerce.[22] Criminal liability exists under the bill even if the defendant fails to actually capture the physical impression.[23] The criminal penalties for harassment under this bill are generally not more than one year imprisonment and/or a fine.[24] However, if death results, the

18. *See* Mauro, *supra* note 13.

19. *See* H.R. 2448, 105th Cong. (1997).

20. Public figures have a greatly reduced "reasonable expectation of privacy" and are often required to show actual malice in invasion of privacy actions under *New York Times v. Sullivan,* 376 U.S. 254 (1964). *See also* Gertz v. Welch, 418 U.S. 323 (1974); Time, Inc. v. Hill, 385 U.S. 374 (1967).

21. "Physical impression," as used here and throughout the note, includes photographs, video, audio recordings, and any other type of physical impression.

22. *See* H.R. 2448, 105th Cong. §2 (a) (1997).

23. *See id.*

24. *See id.*

punishment is not less than twenty years imprisonment and a fine. If bodily injury results, the punishment is not less than five years imprisonment and a fine.[25] There is no vicarious liability imposed, and the bill does not make the sale, transmission, publication, broadcast, or use of any image or recording that is otherwise legal by any person subject to criminal or civil liabilities.[26]

B. Privacy Protection Act of 1998 (H.R. 3224)

Another California Representative, Elton Gallegly, introduced a similar bill in February 1998.[27] His bill creates criminal and civil liabilities for persistently following or chasing any individual within the United States for the purpose of obtaining a physical impression of that or another individual, if the individual (1) has a reasonable expectation of privacy; (2) has taken reasonable steps to ensure that privacy;[28] and (3) has a reasonable fear that death or bodily injury will result from the chasing or following.[29] Additionally, the obtaining of the physical impression must be for commercial purposes.[30] A "commercial purpose" is defined by this bill as the expectation of financial gain or other consideration for sale or transfer.[31] Again, there is no defense for not actually taking or selling the physical impression.[32] Here, the criminal penalties are generally not more than one year imprisonment and/or a fine.[33] When the result is death or bodily injury, the imprisonment is determined with reference to other code sections (United States Code section 1111 or 1112, and 1113, respectively).[34] As in the Bono bill, there is no vicarious liability, and the bill does not subject the sale, transmission, publication, broadcast, or use of any image or recording that is otherwise legal by any person to criminal or civil liabilities.[35]

C. Personal Privacy Protection Act (S. 2103)

This bill was introduced by Senator Diane Feinstein in May 1998,

25. *See id.*
26. *See id.*
27. *See* H.R. 3224, 105th Cong. (1998).
28. *See supra* text accompanying note 20.
29. *See* H.R. 3224, 105th Cong. § 2(a) (1998).
30. *See id.*
31. *Id.*
32. *See id.*
33. *See id.*
34. *See id.*
35. *See id.*

and is co-sponsored by Senator Orrin Hatch.[36] Feinstein brought together three respected constitutional scholars[37] to assist her in writing this bill.[38] The bill creates criminal and civil liabilities for harassing any person within the United States.[39] It defines "harass" as (1) persistently physically following or chasing a person (2) in a manner that causes the person to have a reasonable fear of bodily injury (3) in order to capture a physical impression for commercial purposes.[40] "Commercial purposes" is defined here as intended to be or actually sold, published, or transmitted in interstate or foreign commerce.[41] There is no defense for failure to actually take the physical impression.[42] The criminal penalties are generally not more than one year imprisonment and/or a fine, but increase to not less than five years imprisonment and fine when resulting in bodily injury, and not less than twenty years imprisonment and fine when resulting in death.[43] As in the other bills, this bill does not create vicarious liability and does not make the sale, transmission, publication, broadcast, or use of any image or recording that is otherwise legal by any person subject to criminal or civil liabilities.[44]

II
Concerns About Proposed Legislation

Since the proposed legislation aims to restrict the media, there are considerable constitutional concerns about restricting speech. Such impediments on free press must be analyzed to assure that constitutional rights are not unduly interfered with.

Regulations that place restrictions on speech are generally distinguished as either "content-neutral" or "content-based" and the standard used to assess the validity of the regulation varies depending on how it is categorized.[45] How the regulations are classified depends on the motive of the government.[46] If the regulations are intended to

36. *See* S. 2103, 105th Cong. (1998).

37. Erwin Chemrinsky, University of Southern California law professor; Lawrence Lessig, Harvard law professor; and Cass Sunstein of the University of Chicago.

38. *See* Mauro, *supra* note 13.

39. *See* S. 2103, 105th Cong. §3 (a) (1998).

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

46. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

inhibit certain speech because of its message, the regulation is content-based.[47] Alternatively, a law regulating speech is content-neutral if it applies to all speech regardless of the message.[48] A law might also be content-neutral if it regulates conduct and it has an effect on speech without regard to its content.[49] Here, the anti-paparazzi laws are "content-neutral" because they restrict the media regardless of the content of the images or recordings that the individual seeks to obtain.[50]

Because the proposed regulations are content-neutral restrictions that impose an incidental burden on speech, the appropriate standard for evaluating their constitutionality is "intermediate scrutiny."[51] Under this standard, the court examines whether the regulation (1) advances important government goals not related to censoring free speech, and (2) suppresses no more speech than necessary to achieve that goal.[52]

A. Advancing Important Government Goals

Privacy has long been recognized as important to the preservation of autonomy, dignity, and individuality.[53] Accordingly, privacy has been protected as a fundamental right, and the government has a strong interest in continuing to protect that right.

While protection of privacy has traditionally been accomplished through state property laws, such as trespass, advanced technology has made it easier to violate a person's privacy without violating the laws intended to protect it. For instance, long range camera lenses, especially those mounted on helicopters, allow photographers to capture private moments at home without trespassing.

However, state laws do work to protect privacy rights. For example, Jacqueline Kennedy Onassis was able to obtain an injunction against Donald Galella, a free-lance celebrity photographer, on the basis of a New York state law prohibiting harassment.[54] More recently, in February 1998, a Los Angeles

47. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

48. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

49. *See, e.g.*, Leathers v. Medlock, 499 U.S. 439 (1991) (holding constitutional a sales tax applicable to cable television, but not broadcast television).

50. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

51. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).

52. *See* United States v. O'Brian, 391 U.S. 367, 377 (1968).

53. *See generally Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1098 (1998).

54. *See* Galella v. Onassis, 487 F.2d 986, 993 (2d Cir. 1973).

Superior Court judge sentenced two photographers to jail and a fine for false imprisonment and reckless driving after the two cornered Arnold Schwarzenegger, and his wife, Maria Schriver, at their son's preschool.[55]

Even if the state laws need improvement to better protect people from the paparazzi, that does not mean that a federal solution is warranted. While the federal government does have a strong interest in protecting its citizens' privacy, this interest is weakened by the states' ability to protect that right.

B. Does Not Suppress More Speech Than Necessary

Regulation of speech must be narrowly tailored to achieve the government interest.[56] However, content-neutral regulations are not "invalid simply because there is some imaginable alternative that might be less burdensome on speech."[57] Therefore, such a regulation that restricts speech is void "on its face" only if it is explicitly vague or overbroad.[58]

1. Vagueness

A statute is too vague to pass constitutional muster if the language is so ambiguous that a reasonable person would have to guess at its meaning.[59] Laws that are too vague are void because it is necessary that people know what is legal and illegal conduct.[60] In that regard, the proposed federal legislation presents three problems with vagueness.

First, there is no explanation of the term "persistently physically follow." All three proposed laws define harassment using that term,[61] and it is not clearly defined. Nor is there a preexisting legal definition that can give the phrase meaning. At what point would a reporter be considered to be "following" a person? Is there a distance requirement? Is there a proximity requirement? Additionally, at what

55. *See* Robert W. Welkos, *2 Photographers Sentenced To Jail*, L.A. TIMES, Pg. B3 (February 24, 1998). The photographers were convicted under California Penal Code section 236 (false imprisonment) and California Vehicle Code section 23103 (reckless driving).

56. *See O'Brian*, 391 U.S. 367, 377 (1968).

57. United States v. Albertini, 472 U.S. 675, 689 (1985).

58. *See O'Brian*, 391 U.S. 367, 377 (1968). *See also* Turner Broad. Sys. v. FCC, 512 U.S. 622 (1994).

59. *See* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

60. *See id.*

61. Gallegly's House Resolution 3224 omits the word "physically." *See* H.R. 3224, 105th Cong. §2(a) (1998).

point does the following become "persistent?" Is it a certain continuous time? Is it to be measured in number of times per day, week, or month? Because there is no way to determine the meaning outside of a courtroom, the language appears to be unconstitutionally vague.

Second, there is no clear standard for enforcement. One of the principle policies behind the vagueness doctrine is to avoid inconsistent enforcement of laws.[62] Because it is not clear what constitutes "persistently physically following or chasing," how are law enforcement officials expected to determine when a violation has occurred? This lack of clarity gives officials overly broad discretion in applying the regulation, thereby allowing the possibility of arbitrary, discriminatory, and inconsistent enforcement.

Third, the proposed laws lack intent requirements. Feinstein's and Gallegly's bills only require an intent to capture a visual image, sound recording, or other physical impression, but do not require an intent to harass.[63] Bono's bill has no intent requirement whatsoever.[64] Thus, whether the harassment occurs intentionally, willfully, maliciously, negligently or accidentally, the punishment is the same. Not specifying the intent required for a violation makes it more difficult for people to know what is or is not legal conduct, and thus, these laws are overly vague.

Because the legislation lacks clear definition of its terms, lacks a clear enforcement standard, and lacks an intent requirement, it is impermissibly vague, and therefore unconstitutional.

2. Overbreadth

A statute is overbroad if application of the statute prohibits a significant amount of speech that is protected under the First Amendment.[65] Criminal statutes, such as the proposed federal legislation, must be scrutinized with particular care.[66] The proposed federal legislation is arguably overbroad because the bills apply not only to unprotected news-gathering conduct, but also to a substantial amount of legitimate, constitutionally protected media activity.[67]

62. *See* Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).

63. *See* S. 2103, 105th Cong. (1998); H.R. 3224, 105th Cong. (1998).

64. *See* H.R. 2448, 105th Cong. (1997).

65. *See* Houston v. Hill, 482 U.S. 451, 458 (1987).

66. *See, e.g.,* Winters v. New York, 333 U.S. 507, 515 (1948).

67. *See Houston*, 482 U.S. at 460 (holding that an ordinance was overbroad for applying not only to "fighting words," which are not constitutionally protected speech, but to protected speech as well).

Because the bills could stifle legitimate news-gathering, not just tabloid photographers, it seems that the bills are overbroad.

However, because the proposed legislation does not regulate "pure speech," but rather the conduct of journalists in such a way as to restrict speech to some extent, the overbreadth must be substantial when viewed in relation to the legitimate reach of the statute.[68] Additionally, courts have been reluctant to declare regulations overbroad and have instead construed them narrowly whenever possible.[69] While possible, it does not seem probable that the proposed legislation could successfully be challenged for being overbroad.

Because of the problems the proposed federal legislation has with vagueness, and possibly, with overbreadth, the laws appear to lack the narrow tailoring necessary to make them valid. Because these concerns seem to outweigh the federal governmental interest in protecting individual rights of privacy, the proposed legislation is most likely unconstitutional.

C. Additional Constitutional Considerations

The legislation may also be unconstitutional for suppressing more speech than is necessary because it is aimed specifically at journalists.

The First Amendment does not protect the press from generally applicable laws.[70] However, the proposed anti-paparazzi laws are not generally applicable laws. The Gallegly and Feinstein bills create liability only if the person is trying to obtain the visual image or sound recording "for commercial purposes."[71] The Bono bill only creates liability if the person is trying obtain the visual image or sound recording "for profit in or affecting interstate or foreign commerce."[72] All of these bills single out members of the media, the people looking to make money from the photographs or recordings, for punishment. The laws do not apply to crazed fans seeking photographs or

68. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

69. *See* U.S. v. Thirty Seven Photographs, 402 U.S. 363 (1971).

70. *See* Cohen v. Cowles Media, Co., 501 U.S. 663 (1991). *See, e.g.,* Anderson v. WROC-TV, 441 N.Y.S.2d 220, 223 (Sup. Ct. 1981) (holding that the First Amendment is not a defense to trespassing); Prahl v. Brosamle, 295 N.W.2d 768, 780-81 (Wis. Ct. App. 1980) (holding that the First Amendment is not a defense to trespassing); Annerino v. Dell Publ'g Co., 149 N.E.2d 761, 762 (Ill. Appl. Ct. 1958) (holding that the First Amendment is not a defense to invasion of privacy).

71. S. 2103, 105th Cong. (1998); H.R. 3224, 105th Cong. (1998).

72. H.R. 2448, 105th Cong. (1997).

recordings for personal enjoyment, although they may be just as dangerous.

The Supreme Court has clarified that regulations such as these that single out the press for different treatment are presumptively unconstitutional.[73] Courts must apply a heightened level of scrutiny to statutes that "although directed at activity with no expressive component, impose a disproportionate burden upon those engage[d] in protected First Amendment activities."[74] By targeting members of the media, these proposed laws are probably unconstitutional.

Looking at California's anti-paparazzi law clarifies the weaknesses in the proposed federal legislation, and reveals a better solution to this problem.

III
The California Anti-Paparazzi Law

Senate President Pro Tem John Burton's Senate Bill 262 added section 1708.8 to the California Civil Code creating civil liability for physical invasion of privacy and constructive invasion of privacy.[75]

A. Physical Invasion of Privacy

A person is liable for physical invasion of privacy when they (1) knowingly trespass (2) with intent to capture a physical impression of the plaintiff engaging in a personal or familial activity, and (3) the invasion occurs in a manner that is offensive to a reasonable person.[76] "Personal or familial activity" includes intimate details of plaintiff's personal life, interactions with the plaintiff's family and significant others, and the plaintiff's private affairs and concerns, but specifically excludes illegal or otherwise criminal activity.[77]

B. Constructive Invasion of Privacy

A person is liable for constructive invasion of privacy when they (1) attempt to capture a physical impression (a) in a manner that is offensive to a reasonable person (b) of the plaintiff engaging in a personal or familial activity (c) under circumstances in which the

73. *See* Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983).

74. Arcara v. Cloud Books, Inc., 478 U.S. 697, 703-04 (1986).

75. *See* S.B. 262 (Cal. 1998).

76. *See* CAL. CIV. CODE § 1708.8 (a) (Deering Supp. 1999).

77. *Id.* at § 1708.8(k).

plaintiff had a reasonable expectation of privacy,[78] or (2) through means of a visual or auditory enhancing device without which this physical impression could not have been obtained without trespassing.[79] Constructive invasion of privacy uses the same definition of "personal or familial activity" as physical invasion of privacy.[80]

C. Damages

Anyone who commits either physical or constructive invasion of privacy, or both, is liable for treble damages.[81] There may also be liability for punitive damages. Additionally, if it is proven that the invasion of privacy was committed for a commercial purpose, then any of the proceeds or consideration received as a result of the violation can be taken away.[82] "Commercial purpose" is defined here as the expectation of a sale, financial gain, or other consideration.[83] The liability also extends to those who direct, solicit, actually induce or actually cause others to physically or constructively invade plaintiff's privacy.[84] Failure to actually obtain or sell an image, recording, or physical impression is not a defense to violating this law.[85] However, sale, transmission, publication, broadcast, or use of any image or recording obtained in violation of this law is not a violation itself.[86]

IV
Analysis/Comparison

Comparison of the California law with the proposed federal legislation emphasizes the federal legislation's three major weaknesses: vagueness, overbreadth, and disproportionate impact on journalists.

A. Vagueness

Unlike the federal legislation, the terms in the California statute are specifically defined. The statute defines "personal or familial

78. *See supra* text accompanying note 20.
79. *See* CAL. CIV. CODE § 1708.8(b) (Deering Supp. 1999).
80. *Id.* § 1708.8(k).
81. *See id.* § 1708.8(c).
82. *See id.*
83. *See id.* § 1708.8(j).
84. *Id.* § 1708.8(d).
85. *See id.* § 1708.8(i).
86. *See id.* § 1708.8(e).

activity" and specifically excludes illegal or otherwise criminal activity.[87]

The California law is also easier to enforce than the proposed federal legislation. Constructive invasion of privacy uses a "reasonable person" standard for determining if the manner is offensive.[88] This makes it clearer than considering what is reasonable from the plaintiff's perspective as contemplated by the federal bills. Furthermore, the reasonable person standard is a common standard for torts, so there is a lot of case law to rely upon.[89] Additionally, the law requires either actual trespass or use of enhanced visual or auditory devices that would otherwise have required trespass,[90] which creates a clearer line for what is or is not a violation of the law. This clarity leaves considerably less discretion to law enforcement officials, which decreases the chance of arbitrary or discriminatory enforcement of the law.

In addition, there is considerably less of a problem with the intent requirement. Physical invasion of privacy has an intent requirement – a person must "knowingly" trespass.[91] Constructive invasion of privacy does not have an intent requirement. However, given the requirement to use enhancing devices,[92] it is less likely to be accidental. Additionally, there is no jail term attached to violation of the law, making the punishment less severe.

B. Overbreadth

The California law is considerably narrower than the federally proposed legislation. First, the law only creates liability when the plaintiff is in a private place, since it requires that the violator either trespass or use devices that if not available would require trespass to capture the same physical impression.[93] One of the major drawbacks of the proposed federal legislation was that it protected "privacy" even in truly public places. Courts have been reluctant to hold

87. *See* CAL. CIV. CODE § 1708.8(k).

88. *See id.* § 1708.8(b).

89. *See generally* Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality*, 2 L. & SOC'Y REV. 241 (1968); Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951); Osborne M. Reynolds, Jr., *The Reasonable Man of Negligence Law: A Health Report on the "Odious Creature,"* 23 OKLA. L. REV. 410 (1970).

90. *See* CAL. CIV. CODE § 1708.8 (a) & (b).

91. *Id.* § 1708.8(a).

92. *See id.* § 1708.8(b).

93. *See* CAL. CIV. CODE § 1708.8(a) & (b).

journalists liable for conducting news-gathering from a public place.[94] Second, the law specifically excludes coverage of illegal or other criminal activity.[95] This provision decreases the problems for news reporters by allowing them to do their job. It does not allow the criminals, cheats and liars to avoid media coverage by claiming that their "privacy" is being invaded.

The punishment in the California law is also more appropriate than in the proposed federal legislation. While a long jail term might make some feel that justice is being served, the treble damages imposed by California's law measures the true social cost of the actions. With the treble damages plus the return of any profit, the cost of paparazzi's services would have to increase to take into account that risk. The only the way they could be paid the excess amount for the images, recordings, or other physical impressions, is if the public was willing to pay more, either in the form of increasing circulation or paying more per copy. Thus, either the public will pay the cost because it considers the information gathered important or it will not pay the cost, and the paparazzi will be financially deterred from taking such action.

Hence, the California law is more limited in its application and outcomes than the federal legislation.

C. Aimed Specifically at Journalists

The California law is not specifically aimed at journalists. The law covers crazed fans who are seeking the image, recording or physical impression for personal use, as well as journalists, because the liability is not limited to those who act for commercial purposes.[96] The only difference in the treatment of journalists and fans is that if

94. *See, e.g.,* Wehling v. Columbia Broad. Sys., 721 F.2d 506, 509 (5th Cir. 1983) (finding no intrusion when defendant broadcast images of plaintiff's residence because the broadcast did not show more than what could have been seen from the public street); Frazier v. Southeastern Pa. Transp. Auth., 907 F. Supp. 116, 122 (E.D. Pa. 1995) (finding no intrusion when ongoing surveillance was conducted outdoors and in public); Machleder v. Diaz, 538 F. Supp. 1364, 1374 (S.D.N.Y. 1982) (finding no intrusion when defendant conducted an "ambush interview" because the interview occurred in a semi-public place "visible to the public eye"); Fogel v. Forbes, Inc., 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (holding that the intrusion upon seclusion tort "does not apply to matters which occur in a public place or a place otherwise open to the public eye"); Aisenson v. American Broad. Co., 269 Cal. Rptr. 379, 388 (Ct. App. 1990) (holding that filming plaintiff in his driveway was not an unreasonable and highly offensive intrusion upon seclusion).

95. *See supra,* note 77

96. *See* CAL. CIV. CODE § 1708.8 (Deering Supp. 1999).

the violator is profiting from the activity, they are liable for the proceeds.[97]

However, this is not a solution the federal legislators can use. The problem is that Congress lacks the authority to pass regulations in this area. Since state law already regulates this area,[98] the easiest way for Congress to gain that authority is to bring the legislation within the Commerce Clause of the Constitution with such phrases, as "for commercial purposes" or "for profit, or affecting interstate or foreign commerce."[99]

The effect of the differences between the California law and the proposed federal legislation is clearly seen when evaluating the constitutional validity of the restriction on speech imposed by the California statute. The California law is content-neutral because it regulates conduct and has an effect on speech without regard to its content.[100] Since it is content-neutral, intermediate review is the appropriate standard.[101] There is an argument that it is content-based and thus subject to strict scrutiny[102] because it requires that the subject of the image, recording or other physical impression be of a personal or familial activity, not a criminal or otherwise illegal activity. However, the law does not prevent media coverage of personal or familial activities of a public or private figure. It only prevents the media or fans from doing so in a way that harasses that person. Additionally, whether a law is content-based or content-neutral turns on the government's motive.[103] If the regulation is intended to inhibit certain speech because of its message, the regulation would be content-based.[104] However, the motive here is to prevent problematic behavior by those pursuing visual images or audio recordings. Thus, the law is much more likely to be considered content-neutral. Under the required intermediate review,[105] the California law's mitigation of

97. *See id.* § 1708.8(c).

98. Including harassment, trespass, stalking and related conduct.

99. This problem for Congress indicates that maybe this area of legislation would be better off being resolved with state law, especially in light of the other weaknesses in the proposed federal legislation.

100. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see, e.g.,* Leathers v. Medlock, 499 U.S. 439 (1991) (holding constitutional a sales tax applicable to cable television, but not broadcast television).

101. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).

102. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

103. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

104. *See Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293.

105. *See* Turner Broad. Sys. v. FCC, 520 U.S. 180 (1997).

constitutional problems persisting in the federal legislation makes it much more likely to pass judicial scrutiny despite imposing actual restrictions on the freedom of the press.

V
Conclusion

California's approach to problems with the paparazzi is better tailored for the task of curbing aggressive paparazzi tactics than its federal counterpart. Additionally, the California statute minimizes restrictions on freedom of the press. This approach should be considered by Congress and other states trying to find a solution to the problem.

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