PROTECTING PRIVACY FROM TECHNOLOGICAL INTRUSIONS

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The tension between privacy and freedom of the press is not new. In 1890, Samuel Warren and Louis Brandeis wrote: "The press is overstepping in every direction the obvious bounds of propriety and decency."[1] Warren and Brandeis spoke eloquently about the excesses of the media, especially in covering gossip about celebrities.[2] They proposed creating a civil cause of action for invasion of privacy.[3] Such a cause of action, of course, has developed along with constitutional protections for privacy in specific areas.[4]

Although the tension between privacy and freedom of the press is old, there are new forms of threats to privacy. Technology, in so many different ways, undermines aspects of privacy that we have long taken for granted. One such threat to privacy stems from technology that allows eavesdropping into private places. Extremely powerful telephoto lenses permit pictures to be taken even when people are on private property and assume they are in total seclusion. Similarly, parabolic microphones allow conversations to be overheard at great distances. There even is technology that allows listeners to hear conversations in closed rooms by translating vibrations from glass windows.

Unfortunately, the existing tort law of trespass and privacy is based on concepts of physical intrusion. There is a need to expand this law to create a cause of action against those who use technological enhancing equipment to accomplish the same invasions of privacy. The California Privacy Protection Act of 1998 does exactly this.[5] The law creates a civil cause of action against those who use technological enhancement equipment to obtain images of personal or family activity where there is a reasonable expectation of

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

2. *See id.*

3. *See id.* at 198.

4. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing the right to privacy in declaring unconstitutional a state law prohibiting sale, distribution, or use of contraceptives).

5. *See* CAL. CIV. CODE § 1708.8 (West 1998).

privacy and where the image otherwise could not be obtained except through a physical trespass.[6] The Act is a very narrow law that seeks to deal with a type of technological problem that was not known until relatively recently.

I must disclose that I played a role in helping to conceive and draft this legislation. On October 1, 1997, the California Senate's Select Committee on the Entertainment Industry held a hearing in Los Angeles on regulating the paparazzi. In testifying before the Committee, I stated that most of the proposals that had been advanced for curbing the paparazzi were unconstitutional.

I stated: "No law directed just at the paparazzi is likely to withstand constitutional scrutiny. There never can be a clear line distinguishing the aggressive investigative reporter from the paparazzi."[7] I explained why many of the proposals that had been advanced to regulate the paparazzi—ranging from creating a buffer zone around celebrities to licensing photographers to restricting picture taking in public places—were unconstitutional. Yet, I also stated:

> However, the government can prohibit particular offensive conduct. For instance, the government can prohibit any person from taking a photograph into the residence of another without consent. Such a law is an extension of the concept of trespass. The law is content-neutral with regard to speech and does not discriminate among members of the media. The law, of course, would need to define residence, but could constitutionally limit this intrusion into privacy.[8]

This testimony led to my working closely with the Screen Actors Guild and several legislators over the next year to help formulate what became the Privacy Protection Act. I also testified in favor of it before the Assembly Judiciary Committee.

Although I am an ardent supporter of press freedoms and believe that there should be far greater First Amendment protection for aggressive newsgathering techniques,[9] I nonetheless am firmly convinced that the California Privacy Protection Act is constitutional and desirable. It is a very narrow law that serves a compelling

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6. For other commentary on this Act, see Andrew D. Morton, *Much Ado about Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435 (1999); Note, *Privacy, Technology, and the California Anti-Paparazzi Statute*, 112 HARV. L. REV. 1367 (1999).

7. Testimony before the Senate Select Committee on the Entertainment Industry, October 1, 1998 [on file with the Annual Survey of American Law].

8. *Id.*

9. *See* Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000).

purpose; it is not directed at the press, but rather regulates anyone who engages in the proscribed behavior.

Part I of this essay describes why the California Privacy Protection Act is necessary. Part II describes the Act and the requirements for liability under it. Part III explains why I believe that the Act is clearly constitutional. Finally, Part IV concludes with some of the lessons that I learned from working on the Act throughout the legislative process.

I
THE NEED TO PROTECT PRIVACY FROM TECHNOLOGICAL INTRUSIONS

Every person, no matter how big a celebrity, should be able to close the doors to his or her home and shut out the world. Those who thrust themselves into the limelight do sacrifice a great deal of their privacy. When they are in public places, they are exposing themselves to observation and photographs. But celebrities, whether voluntary or involuntary, do not relinquish all of their privacy.

The California Privacy Protection Act is based on a simple concept: the press and others should not be able to gain through technology what they cannot otherwise obtain except by breaking the law or exposing themselves to civil liability. Any image or sound that can be obtained only by a physical trespass, should not be obtainable by technology, if it is of personal or family activity where there is a reasonable expectation of privacy. The California Privacy Protection Act seeks to make the law clear in this regard by creating a civil cause of action against those who engage in such behavior.

The law of trespass is based on an unauthorized physical presence on the property of another. In researching, I could find no cases where courts allowed recovery for trespass, or even for invasion of privacy, for the use of technological enhancement equipment in the circumstances covered by the Act. My prediction is that the common law, especially the tort law concerning privacy, will develop to allow this, but this is a matter properly addressed by legislation. A statute can clearly and precisely describe the conduct that is impermissible and establish a basis for liability.

The need for the law to change in response to technology is illustrated by the Supreme Court's Fourth Amendment jurisprudence. The Supreme Court initially held that wiretapping is not a violation of the Fourth Amendment because it does not involve "en-

try of the houses or offices of the defendant."[10] In *Olmstead v. United States*, the Court ruled that there were no Fourth Amendment limits on wiretapping since there was no trespass. Chief Justice Taft, writing for the Court, emphasized that "those who intercepted the projected voices were not in the house of either party to the conversation."[11] As the technology became more widely used, however, the Court realized that insisting on a physical presence for a violation of the Fourth Amendment was unduly limiting and that wiretapping is a search within the meaning of the Fourth Amendment, thus overruling *Olmstead*.[12]

Quite similarly, today, there is a need to protect people from intrusions through new technologies such as zoom lenses and parabolic microphones. Imagine an aggressive photographer—whether a fan, a stalker, a paparazzo, or a part of the media—who stands on a ten foot ladder on a public sidewalk so as to see over an eight foot wall and with a zoom lens pointed in a window takes pictures of what someone is doing in his or her home. No trespass has occurred, yet surely there is exactly the kind of intrusion that the law of trespass always has meant to stop. There is a need to update the law in this area to deal with this problem.

Although celebrities are those most often subjected to such behavior, many can come under press scrutiny through no choice of their own. Monica Lewinsky and Linda Tripp, for instance, were stalked by those with cameras and microphones as much as the most famous actor or actress, yet no one would contend that they relished this attention. Relatives of the famous, such as their children (Chelsea Clinton comes immediately to mind), might be subjected to such scrutiny. As illustrated by the O.J. Simpson case, attorneys, witnesses, and family members in high profile criminal cases all can attract great media attention. There are an infinite variety of circumstances, beyond celebrity status, that might cause intense attention to focus on a person.

II
THE CALIFORNIA PRIVACY PROTECTION ACT OF 1998

The California Privacy Protection Act creates new civil liability in only very narrow circumstances. It provides:

10. Olmstead v. United States, 277 U.S. 438, 464 (1928).

11. *Id.* at 466.

12. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967).

> A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.[13]

Simple examples are illustrative of the Act's narrow scope. Imagine a politician receiving bribes in an office and a photographer gaining the image through the use of a telephoto lens. There is no liability under the law because the subject was not engaged in personal or family activity. Similarly, imagine a photographer who gets a picture, with a zoom lens, of a politician in a restaurant or in a public park in a romantic pose with a staff person. Again, the law would not apply; there is not a reasonable expectation of privacy for what is done in public places. Likewise, if a photographer can gain the picture without technological enhancement equipment—such as when the conduct is visible to the naked eye from a public sidewalk—the statute is inapplicable.

In contrast, the law is meant to apply to the example given earlier of the photographer standing on a ten foot ladder to see over an eight foot fence, who through a zoom lens gets pictures of family activities inside a home. Technology also now enables individuals to hear private conversations from great distances. If it is a conversation that otherwise could have been heard only through a physical trespass, listening through technology is likewise made actionable.

The narrowness of the Act must be emphasized. Several requirements all must be met in order for there to be a cause of action. First, the image obtained must be of personal or family activity. Criminal or fraudulent conduct would not be included in this definition and thereby protected from exposure. Including a requirement that the activity be personal or familial significantly narrows the circumstances in which there can be liability and makes clear that the sole focus of the Act is the protection of a core aspect of privacy.

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13. CAL. CIV. CODE § 1708.8(b) (West 1998).

Second, the image must be taken of personal or family activity in which there is a reasonable expectation of privacy. What a celebrity or a politician does in a public place is open for observation, even if it is a personal or family activity.

Third, the image must be obtained through the use of a visual or auditory enhancing device. In other words, the law applies only to the use of technological enhancement equipment for gaining images. As explained earlier, the focus of the law is on updating the laws of privacy and trespass to account for this new technology.

Fourth, and perhaps most importantly, it must be an image that could not have been obtained without the enhancing device except through a physical trespass. If the image could have been obtained without a trespass, then the law does not create a cause of action. For instance, if a celebrity was standing naked in front of a window for all on the street to see without any special lens, the Act would not create a cause of action against those taking a picture.

Finally, the image must have been obtained in a manner that would be offensive to the reasonable person. A further limit on liability is the need for proof of offensiveness in the taking of the photo.

The inclusion of all of these requirements in the Act makes its scope narrow, but important. The law ensures protection for privacy in light of new and developing technology that risks undermining even the most basic aspects of privacy.

III
THE CONSTITUTIONALITY OF THE CALIFORNIA PRIVACY PROTECTION ACT OF 1998

The Act is an attempt to balance carefully competing interests: the need to protect the First Amendment activity of gathering pictures and the need to safeguard privacy from technological intrusions. Both, obviously, are important values protected by the Constitution. The law is constitutional because it achieves the compelling goal of safeguarding privacy with minimal offense to the First Amendment.

Although I believe that the law could meet strict scrutiny as being narrowly tailored to achieve a compelling purpose, a much lower level of scrutiny would be appropriate. The law only minimally interferes with First Amendment activity.[14] First, the law im-

14. In this regard, I disagree with Professor Rodney A. Smolla who has argued that the Act is unconstitutional. *See* Rodney A. Smolla, *Privacy and the First Amend-*

poses no restriction whatsoever on the ability of the press to publish what it learns, no matter how the image is gained. The law neither contains a limit on publication nor authorizes courts to restrict dissemination, even if a picture is obtained in violation of the law. The law only authorizes money damages against those who violate its proscriptions.

Money damages, of course, can chill reporting and violate the First Amendment.[15] However, it is important to recognize that the law authorizes no prior restraints on publication. Monetary liability exists not for any publication but for behavior in the gathering of information, a very different type of activity under First Amendment analysis. Although the Supreme Court has declared that "without some protection for seeking out the news, freedom of the press could be eviscerated,"[16] the Court also said that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."[17] Indeed, the Court consistently has rejected finding constitutional protection for newsgathering activities.[18] While I am critical of these decisions and support much greater First Amendment protection for newsgathering, it is clear that monetary liability for newsgathering that violates privacy is not the same as monetary liability for publication, something the California Privacy Protection Act expressly does not allow.

Second, the law creates liability only for trespass and constructive trespass; there is no First Amendment right for the press, or anyone else, to trespass on to property or to do so with advanced technology. The Supreme Court has made it clear that the First Amendment does not give the press the right to violate the law in gathering images.[19] The press certainly could not prevail in asserting a First Amendment defense to a trespass suit. The California Privacy Protection Act simply extends the definition of trespass to create the idea of a constructive trespass.

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ment Right to Gather News, 67 GEO. WASH. L. REV. 1097, 1113-16 (1999). *But see* Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1154-58 (1999).

15. *See* New York Times v. Sullivan, 376 U.S. 254, 264, 278-79 (1964) (holding that civil defamation liability can violate the First Amendment).

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

17. *Id.* at 684.

18. *See, e.g.*, Zurcher v. Stanford Daily, 436 U.S. 547 (1978); *see also* Chemerinsky, *supra* note 9, at 1146-56.

19. *See, e.g., Zurcher*, 436 U.S. at 547 (upholding the ability of the police to search press newsrooms to gather information to aid criminal investigations).

Third, the Act does not single out the press for liability. The California Privacy Protection Act[20] is a general law that applies to anyone—press or curious on-looker or stalking fan—who obtains images in the proscribed manner. Critics of the statute refer to it as anti-paparazzi legislation, but this characterization is incorrect.[21] The statute does not single out paparazzi for regulation. Rather, it applies to all who engage in particular, specifically defined behavior: using technological enhancing equipment to gain images or sounds of personal or family activity that otherwise could not have been obtained except through a physical trespass.

The Supreme Court consistently has refused to find that the protection of freedom of the press entitles newsgatherers to exemptions from general regulatory laws. In *Cohen v. Cowles Media Co.*, the Court declared: "[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news . . . . [E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations."[22]

Fourth, the Privacy Protection Act is content-neutral. A law is content-based if it restricts speech based on viewpoint or subject matter.[23] The Act is viewpoint-neutral in that it applies to all who engage in the behavior, regardless of their ideology or the ideology of those being photographed. The law is likewise subject-matter neutral because it does not regulate based on the topic of the story. Whether the press is interested because of political implications or entertainment interest or any other reason, the law applies just the same. The law is completely content-neutral: it defines specific be-

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20. CAL. CIV. CODE § 1708.8 (West 1998).

21. *See* Smolla, *supra* note 14, at 1107. Throughout his discussion of the statute, Professor Smolla refers to it as anti-paparazzi legislation. Professor Smolla writes, for example, "[T]he proponents of the anti-paparazzi legislation have actually shot themselves in the foot by attempting to narrow their target to the paparazzi. As already explained, the proposals trigger the First Amendment's rigorous proscriptions against content-based discrimination. That is the first shot. But the legislation also targets one narrow class of photographers. That is the second shot." *Id.* at 1114. This description of the statute is incorrect. It does not limit itself to regulating only the paparazzi. The word paparazzi never appears in the statute; nor does any synonym. The statute applies to *all* who engage in the defined conduct. *See* CAL. CIV. CODE § 1708.8.

22. 501 U.S. 663, 669-70 (1991).

23. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 759-62 (1997).

havior and creates a cause of action against those engaging in it. The content of the ultimate speech is irrelevant.

On the other side of the equation, the law applies where there is the highest expectation of privacy: when a person is engaged in personal or family activity, with a reasonable expectation of privacy, and where the image could not have been gained except through a physical trespass or the use of technological enhancement equipment that is offensive to the reasonable person. The privacy interests in such circumstances are strong. When people are in their homes, engaged in personal and family activity in which there is a reasonable expectation of privacy, they should have the right to shut out the rest of the world.

Those who are under intense media scrutiny, whether because of their celebrity or their role in events of interest, are subjected to enormous intrusions of their privacy. To a large extent, this is a necessary cost and consequence of celebrity and of a free press. However, even the most watched celebrities and public figures are entitled to protection of their privacy when they are on private property, such as in their homes. Those of interest to the media can be photographed and recorded when they are in public, but when in private—especially when engaged in personal or family activity—they deserve protection. It was in *Olmstead v. United States* that Justice Brandeis, in a dissenting opinion, described "the right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men."[24]

In sum, the law applies where the expectations of privacy are the greatest and where there are only minimal First Amendment interests involved. As such, I believe that the law is clearly constitutional.

IV
CONCLUSION: LESSONS LEARNED

I learned a great deal from participating in the conception and drafting of the California Privacy Protection Act. My involvement began with my skepticism as to whether anything could be done to deal with the problem of technological intrusions and privacy. The proposals being advanced after the death of Princess Diana were tremendously overbroad and clearly unconstitutional. The focus was on regulating the paparazzi and I believe, then and now, that no constitutional law can be drafted focusing on the paparazzi, even if they could be defined.

24. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

On the other hand, I know that those who sought restraints on the paparazzi wanted many restrictions imposed and many grounds for creating civil liability. Their goal certainly was not one, very narrow, statute.

The California Privacy Protection Act is thus the product of two sides—one primarily committed to protecting freedom of the press under the First Amendment and the other with a central concern of safeguarding privacy—working hard to find a compromise. Richard Masur, then President of the Screen Actors Guild, deserves much of the credit for pursuing a compromise and seeing it through the legislative process.

At first, I was surprised by the intense opposition to the proposal from the news media. My initial reaction was to resent their opposition. After working so hard to craft a very narrow approach and bill, I was frustrated to see opposition from those who are usually my allies. Often I had the sense that the opponents had not actually read the bill, but instead were attacking a caricature of it. On reflection, though, I think that the opposition was quite important in ensuring that the possible constitutional objections were raised early in the process and addressed in the Act.

Any law that regulates the press, however remotely, must be exceedingly narrow and drafted with great care and precision. I saw how the proposed Privacy Protection Act went through multiple drafts and countless revisions to take its final form. The end result is a law that is quite narrow, but that addresses a serious social problem in a manner likely to meet constitutional scrutiny.