Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla

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Professor Smolla's paper is an important contribution to the literature concerning privacy and the rights of the press.[1] As always with Professor Smolla's scholarship, I was impressed by the clarity and grace of his prose and the persuasiveness of his arguments. I was impressed, too, by the breadth of the paper. Professor Smolla considers everything from paparazzi to on-line privacy, from public disclosure of private facts to surveillance cameras, and from discussing the celebrity culture to considering police ride-alongs.

In fact, my initial reaction to the paper was to question whether these disparate topics have enough in common to warrant treatment in the same paper. On reflection, I agree with Professor Smolla that it is appropriate to handle these various aspects of privacy together because they all involve the same basic issues. In each area Professor Smolla discusses, the legal rule depends on a need to balance the expectation of privacy with the First Amendment benefit of the speech involved. The fundamental question is always the same: what is the reasonable expectation of privacy and what are the social benefits of protecting it? How is this to be balanced against the First Amendment benefits of the speech and press activity that would be restricted?

It is hardly profound to say that privacy and speech are, at times, in tension and that balancing is required. At the simplest level, the press publicizes information that sometimes people want to keep private and secret. When privacy and freedom of the press come into conflict there is no alternative but to balance. There is no reason always to prefer one value over the other. Both privacy and freedom of the press are constitutionally protected values. Besides, even if privacy was not regarded as constitutionally protected, safeguarding privacy could be deemed a compelling interest sufficient to warrant infringing freedom of the press.

Nor is there any apparent common calculus for weighing freedom of the press and the right to privacy. When in conflict, the rights of privacy and the press are incommensurate and judges simply must balance the competing concerns in deciding the protection for each.

Yet, courts, including the Supreme Court, often fail to engage in this balancing, or at least fail to do so explicitly. In fact, Professor Smolla's paper also, at times, fails to engage in this balancing. In this reply, I want to consider two areas Professor Smolla discusses in his paper: anti-paparazzi laws and the tort of public disclosure of private facts. In each area, analysis would

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1 Rodney A. Smolla, *Privacy and the First Amendment Right to Gather Information*, 67 GEO. WASH. L. REV. 1097 (1999).

be improved and different conclusions reached if an explicit balancing approach were employed.

I. The Constitutionality of the California Privacy Protection Act of 1998

The California Privacy Protection Act of 1998 provides protection against technological intrusion and trespass.[2] Professor Smolla continually refers to this as anti-paparazzi legislation, but this characterization is incorrect. As explained below, the law does not single out paparazzi for regulation. Rather, the law applies to all who engage in particular, specifically defined behavior: using technological enhancing equipment to gain images or sound of personal or family activity that otherwise could not have been obtained except through a physical trespass.

At the outset, 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.[3] In testifying before the Committee, 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."[4] 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 taking pictures 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 in[ ] 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.[5]

To my surprise, after testifying at the hearing, I received a call from the Screen Actors Guild to attend a meeting to discuss possible legislative strategies to protect privacy. I later learned that Screen Actors Guild President Richard Masur had a similar idea for a possible legislative effort to protect privacy. Among the ideas discussed at that meeting, which also included several prominent law professors and attorneys, was the concept that later became the Privacy Protection Act. I continued my involvement with the bill through many conversations about how to refine it and by testifying in favor of it before the California Assembly's Judiciary Committee.

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

3 *California State Senate Select Committee on the Entertainment Industry* (Cal. Oct. 8, 1997) (statement of Erwin Chemerinsky) (on file with *The George Washington Law Review*).

4 *Id.*

Professor Smolla provides a detailed description of the law,[6] so I will not repeat it. Unlike Professor Smolla, I believe that this law is clearly constitutional because the interests in protecting privacy outweigh the First Amendment restrictions on the gathering of information. Consider each side of the balance and then Professor Smolla's arguments as to why the law is unconstitutional.

On the one hand, 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.[7] The law is very narrow: it creates liability for constructive trespass only when the visual image or sound recording is taken of "a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy" and only when the "impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used."[8]

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 exclude the eyes and ears of others.[9] When a person actively tries to shut out the rest of the world such that an outsider could see only through a physical trespass, this privacy should not be violated through the use of technology.

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 burden is a necessary cost and consequence of celebrity and of a free press. Even the most watched celebrities and public figures, however, 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 and when they are engaged in personal or family activity, they deserve protection.

Tort law provides causes of action for trespass and for intrusion. These claims, though, traditionally require an unauthorized physical invasion of property. Modern technology has provided the means for taking photographs or gaining sound recordings where otherwise a physical trespass would have been required. For instance, telephoto lenses allow photographers to take pictures of personal and family activities that occur on private property and with the greatest expectation of privacy. The California Privacy Protection Act provides that this conduct, too, should be regarded as a tres-

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6 *See* Smolla, *supra* note 1, at 1107-08.

7 *See* § 1708.8(b).

8 *Id.*

9 *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 476, 487 (1998) (holding that an ordinance prohibiting focused picketing in front of a residence serves a significant government interest of protecting residential privacy); Stanley v. Georgia, 394 U.S. 557, 567 (1969) (holding that a per-

pass when the image could not have otherwise been obtained except through a physical trespass.[10]

Balanced against this privacy interest are the interests of the press in gathering of information. The First Amendment impact of the Act, however, is relatively small. First, the law imposes *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.

Second, the law creates liability only for trespass and constructive trespass; there is no First Amendment right for the press, or any one else, to trespass onto 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.[11]

The Supreme Court consistently has refused to find that the protection of freedom of the press entitles it to exemptions from general regulatory laws. In *Cohen v. Cowles Media Co.*,[12] 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.[13]

The California Privacy Protection Act is a general law that applies to anyone—press or curious on-looker or stalking fan—who obtains images in the proscribed manner with the hope of selling them.[14]

Third, the Supreme Court has failed to provide the press First Amendment protection in gathering information. In *Branzburg v. Hayes*,[15] the Court stated: "without some protection for seeking out the news, freedom of the press could be eviscerated."[16] In *Branzburg*, however, 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] Although I disagree with the Court's decision in *Branzburg* and in other cases failing to recognize First Amendment protection for the press in gathering information, the reality is that the Court has failed to protect a constitutional right for the press in newsgathering.

Indeed, one would search in vain for cases that protect a First Amendment right for the press in gathering information. The cases are all to the contrary. For example, in *Zurcher v. Stanford Daily*,[18] the Court upheld the

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10 *See* § 1708.08.

11 *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977).

12 501 U.S. 663 (1991).

13 *Id.* at 669-70.

14 *See* § 1708.8(j) ("For the purposes of this section, 'for a commercial purpose' means any act done with the expectation of a sale, financial gain, or other consideration.").

15 408 U.S. 665, 681 (1972).

16 *Id.* at 681.

17 *Id.* at 684.

ability of the police to search press newsrooms to gather information to aid criminal investigations.[19] In *Pell v. Procunier*[20] and *Saxbe v. Washington Post Co.*,[21] the Court upheld state and federal prison regulations that prohibited press interviews with particular inmates.[22] The Court said: "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[23]

Again, I disagree with each of these rulings, but they mean that a general law restricting behavior is not vulnerable to a First Amendment challenge based on its impact in restricting the gathering of information. The First Amendment impact of the California Privacy Protection Act is minimal.

I was therefore surprised to read Professor Smolla's conclusion that he believes that the law is unconstitutional. Professor Smolla, however, reasons from an inaccurate premise. He writes:

> [T]he proponents of the anti-paparazzi legislation may 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.[24]

This description of the law is simply wrong. The law does not limit itself to regulating only the paparazzi. The word paparazzi never appears in the law; nor does any synonym. The law applies to *all* who engage the defined conduct: obtaining through technological enhancement equipment images of personal or family activity, where there is a reasonable expectation of privacy and where the images could not otherwise have been obtained except by a physical trespass.[25] The law does not target "a narrow class of photographers"; it applies to everyone who engages in the conduct.

Professor Smolla's attack on the constitutionality of the law is very much based on his conclusion that it is a content-based restriction on speech.[26] For many reasons, this is wrong. First, it is unclear that taking photographs or gathering sound should be regarded as "acts of communication and expression." Professor Smolla premises his argument on the statement that the coverage of these laws is triggered only by acts of communication and expression, and on that basis alone they constitute content-based regulation of speech of the sort presumptively violative of the First Amendment.[27]

It is important to note that Professor Smolla here is not making an argument about the press's right to gather news, but rather a claim about a con-

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19 *See id.* at 551, 560, 567-68.

20 417 U.S. 817 (1974).

21 417 U.S. 843 (1974).

22 *See Pell*, 417 U.S. at 834-35; *Saxbe*, 417 U.S. at 850.

23 *Pell*, 417 U.S. at 834.

24 Smolla, *supra* note 1, at 1114.

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

26 *See* Smolla, *supra* note 1, at 1112, 1113.

tent-based restriction of speech. Yet, courts have never equated photography with a speech act. Professor Smolla's footnote cites to a large number of cases standing for the proposition that government must be content-neutral in regulating speech.[28] All of these cases, however, involved government regulating expression; none pertained to taking photographs or restrictions on gathering the news.

In fact, it is uncertain whether the prohibition of content-based restrictions has any application in the newsgathering context. All of the Supreme Court decisions thus far involving newsgathering—cases such as *Branzburg*, *Zurcher*, *Pell*, and *Saxbe*—involved explicitly content-based government action. *Branzburg* concerned the First Amendment right of the press to keep specific information secret because it was obtained through a confidential source.[29] *Zurcher* involved the police search of a newsroom for particular pictures.[30] *Pell* and *Saxbe* dealt with the media's right to interview a prisoner of their choice.[31] Yet, in each instance, the government prevailed. In none of the cases did the Court characterize the government's action as a content-based restriction on speech.

The second response to Professor Smolla's argument is that the Privacy Protection Act is content-neutral. A law is content-based if it restricts speech based on viewpoint or subject matter.[32] 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 behavior and creates a cause of action against those engaging in it. The content of the ultimate speech is irrelevant.

Third, the Supreme Court has held that a facial content-based restriction will be deemed content-neutral if it is motivated by a permissible content-neutral purpose. The Court articulated this rule in *Renton v. Playtime Theaters, Inc.*[33] In *Renton*, the Court rejected a First Amendment challenge to a zoning ordinance that prohibited "adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school."[34] The ordinance was clearly content-based in its very terms: it applied only to theaters that showed films with sexually explicit content.

The Court, however, treated the law as content-neutral because it said that the law was motivated by a desire to control the secondary effects of

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28 *See id.* at 1112-13 n. 56.

29 *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972).

30 *See* Zurcher v. Stanford Daily, 436 U.S. 547, 551 (1978).

31 *See* Pell v. Procunier, 417 U.S. 817, 834 (1974); *see also* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974).

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

33 475 U.S. 41, 47-48 (1986).

adult movie theaters, such as crime, and not to restrict the speech.[35] The Court said that "the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are *justified* without reference to the content of the regulated speech.'"[36] *Renton* thus makes the test of whether a law is content-based or content-neutral not its terms, but rather, its justification. A law that is justified in content-neutral terms is deemed content-neutral even if it is content-based on its face. Although I disagree with *Renton*,[37] it further explains why the Privacy Protection Act is properly regarded as content-neutral. The Act's purpose unquestionably is to protect privacy, not to regulate speech based on its message.

Nor is the limitation of the law to those engaged in the behavior for commercial purposes sufficient to transform the statute into a content-based regulation of speech. The law applies whenever the acts are done with the hope of generating a profit, whether the money is gained by selling the photos to the press or to fan clubs or to an obsessed stalker.

This law is not unique in creating liability only for conduct undertaken for commercial purposes. For example, the right of publicity creates a cause of action for the commercial use of a person's name or likeness, but not the non-commercial use. The right of publicity protects the ability of a person to control the commercial value of his or her name, likeness, or performance. In *Zacchini v. Scripps-Howard Broadcasting Co.*,[38] the Court held that a state may allow liability for invasion of this right when a television station broadcast a tape of an entire performance without the performer's authorization.[39] A television station broadcast a 15 second tape of a circus act where an individual was a "human cannonball" shot from a cannon into a net.[40] The Supreme Court held that the broadcast station could be held liable because it broadcast the entire performance without authorization.[41] The *Zacchini* Court emphasized that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors."[42]

In sum, the California Privacy Protection Act is a content-neutral attempt to safeguard privacy. It serves an important, indeed a compelling, purpose of protecting privacy from intrusions through technology. The law does not limit publication and only minimally affects newsgathering. Therefore, in weighing the privacy interests, on one side of the scale, and the impact on the press, on the other, the balance clearly tips in favor of the law's constitutionality. Professor Smolla errs in failing to recognize the importance of the privacy interest, in mischaracterizing the law as a content-based restriction on speech, and in failing to balance the privacy and press interests.

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35 *See id.* at 48.

36 *Id.* (citations omitted).

37 For an excellent criticism of *Renton*, see Marcy Strauss, *From Witness to Riches: The Constitutionality of Restricting Witness Speech*, 38 ARIZ. L. REV. 291 (1996).

38 433 U.S. 562 (1977).

39 *See id.* at 574-75.

40 *See id.* at 563.

41 *See id.* at 574-75.

II. Public Disclosure of Private Facts

Professor Smolla also discusses developments in the law concerning the tort of public disclosure of private facts.[43] Professor Smolla especially objects to the use of defamation categories—public official, public figure, private figure, matters of public concern—in the public disclosure tort. He writes: "For a number of reasons, I do not believe that the matrix of fault suggested above, which would attempt to mimic the rules that currently exist for defamation, are appropriate in privacy cases."[44]

I disagree with Professor Smolla here because balancing is essential in weighing the First Amendment interests of the press against the privacy lost through public disclosure of private facts. The existing defamation categories are helpful in that balancing process.

The tort of public disclosure of private facts, a tort for invasion of privacy, exists if there is publication of non-public information that is not "of legitimate concern to the public" and that the reasonable person would find highly offensive to have published.[45] Unlike defamation where the information is false and a retraction conceivably could lessen the harm to reputation, the tort of public disclosure of private facts involves the publication of true information and the harm is done once publication occurs.

Professor Smolla fails to recognize the need for balancing when courts deal with the public disclosure tort. The Supreme Court implicitly has engaged in just such a balancing approach. The Court has held that the First Amendment prevents liability for public disclosure of private facts if the information was lawfully obtained from public records and is truthfully reported. In *Cox Broadcasting Corp. v. Cohn*,[46] a broadcast reporter obtained and reported the name of a rape victim from court records that were available to the public.[47] The Court stressed that the First Amendment protects the publication of information "obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."[48]

In *Florida Star v. B.J.F.*,[49] the Court applied *Cox Broadcasting* and held that there cannot be liability for invasion of privacy when there is the truthful reporting of information lawfully obtained from public records, at least unless there is a state interest of the highest order justifying liability.[50] A newspaper reporter obtained a rape victim's name from publicly released police records.[51] The name was published in the newspaper, even though Florida law prohibited the publication of the name of a victim of a sexual offense.[52]

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43 *See* Smolla, *supra* note 1, at 1133-38.

44 *Id.* at 1136.

45 *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977).

46 420 U.S. 469 (1975).

47 *See id.* at 472-74.

48 *Id.* at 491.

49 491 U.S. 524 (1989).

50 *See id.* at 541.

51 *See id.* at 527.

The Court began by refusing to hold that "truthful publication may never be punished consistent with the First Amendment."[53] But the Court said that liability for the truthful reporting of information lawfully obtained from public records and concerning a matter of public significance would be allowed only if there was an interest of the highest order.[54] The Court explained that the rape victim's name was lawfully obtained from police records and was truthfully communicated.[55] The Court rejected the claim that protecting the privacy of rape victims was a sufficient interest to justify liability.[56] The Court emphasized the failings of the Florida law that created liability for publishing a rape victim's identity, including that it allowed liability where the information was released by the government, that it permitted liability without any scienter requirement, and that it applied only to actions of the mass media.[57]

These cases can be understood as balancing. On the one side, there is a significant privacy interest in preventing the disclosure of a rape victim's identity without her consent. But on the other hand, the Court's rulings reflect the principle that the First Amendment almost always should protect the publication of true information.[58] Moreover, there is an important First Amendment value in allowing the press to report what is contained in government records. There is a compelling public interest in being fully informed about the government's behavior and to facilitate this service the press must feel able to report whatever is learned from public records.

In other words, the Court balanced the privacy interests against the First Amendment interests in ensuring press reporting of the contents of government records and decided the latter deserves priority. Although the Court did not use the express language of balancing, it is clear that is what occurred. There is little, if any, value in knowing the name of a rape victim, but there is significant benefit in assuring the press that it can publish anything that it learns from government records. Implicitly, the Court found that the importance of this interest outweighed the significant privacy interest involved.

Once it is recognized that the public disclosure tort requires balancing, it is apparent that the defamation categories are useful. Public officials, for example, generally should be regarded as having less of a privacy interest; by running for government office they submit to a loss of privacy, especially as to information pertinent to evaluating the candidate or official. Likewise, those who are public figures, especially all-purpose public figures, have less privacy interest than others. Private figures, in contrast, generally have a greater expectation of privacy, just as they usually deserve more protection of their reputation in defamation cases.

Professor Smolla is certainly correct that courts have failed to define what is of "legitimate concern to the public" and likely never will be able to

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53 *Id.* at 532.

54 *See id.* at 541.

55 *See id.* at 527.

56 *See id.* at 537.

57 *See id.* at 538-40.

58 *See* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L.

formulate a precise standard of this concept of "newsworthiness." It should be noted, however, that defamation law also employs this distinction and the concept should have the same meaning as to both torts.[59] Nor does Professor Smolla suggest a way to avoid this inquiry, since it is part of the tort itself and an inevitable component of First Amendment analysis.[60]

The tort of public disclosure of private facts inescapably requires a balancing of the speech interests with those in privacy. The categories used in defamation suits can be helpful in providing some guidance to courts as they balance the reasonable expectation of privacy against the press's interest in unimpeded reporting. The flaw in Professor Smolla's analysis is his failure to recognize the need for this explicit balancing.

Conclusion

Professor Smolla has done an excellent job of identifying crucial issues concerning the right to privacy in relationship to a free press. Threats to privacy have increased exponentially as a result of the development of the electronic media, the creation of technology which can facilitate intrusion, and the seemingly ever increasing cultural preoccupation with celebrity. Any efforts to better safeguard privacy might be challenged on First Amendment grounds.

There is no doubt that freedom of speech and privacy are both values of the highest order in society. The Supreme Court never has regarded and never will regard the freedoms of speech or the press as absolutes. Therefore, the only approach must be explicit and careful balancing of these important rights. Professor Smolla's fine paper offers many important new insights as to the tension between the right to privacy and freedom of the press. Yet, my primary criticism is that his paper often fails to engage in the explicit balancing required in this area of the law.

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59 *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

60 Professor Smolla argues that newsworthiness is a more appropriate concept in defamation suits where the statement is false than in public disclosure cases where the statement is usually true. *See* Smolla, *supra* note 1, at 1135-37. First, it is not clear why the truth or falsity of the statement matters in terms of the definition of "matters of public concern." Second, in any balancing of competing interests, the public's interest in knowing has to be weighed against speech interests. Finally, in both torts newsworthiness is a key element. Professor Smolla offers

PANEL II

SEXUAL PRIVACY AND THE PUBLIC LIFE

Principal

Commentaries