ARIZONA STATE SPORTS AND ENTERTAINMENT LAW JOURNAL

VOLUME 11 FALL 2021 ISSUE 1

SANDRA DAY O'CONNOR COLLEGE OF LAW
ARIZONA STATE UNIVERSITY
111 EAST TAYLOR STREET
PHOENIX, ARIZONA 85004

SPORTS & ENTERTAINMENT LAW JOURNAL
ARIZONA STATE UNIVERSITY

VOLUME 11 FALL 2021 ISSUE 1

THE REIGN OF PAPARAZZI: THE RENEWED CALL FOR FEDERAL LEGISLATION TO CURB PAPARAZZI

Owen Sandstrom*

CONTENTS

* I would like to thank Professor Dragnich and the *SELJ* staff. I would also like to thank my mother Gail, my father Robert, and my sister Olivia for making this publication possible. Thank you to my friends Noah and Evan for their words of encouragement.

No government ought to be without censors: and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defence. Nature has given to man no other means of sifting out the truth either in religion, law, or politics. I think it as honorable to the government neither to know, nor notice, it's sycophants or censors, as it would be undignified and criminal to pamper the former and persecute the latter.[1]

— Thomas Jefferson

INTRODUCTION

Jenny quickly exited the taxi as the porter pulled out her suitcase. Lights continued to flash as photographers swarmed her. She pulled out her ticket while pushing towards security at John F. Kennedy International Airport. Jenny had been planning her Hawaiian vacation for months and was excited to finally get away from work and, of course, the paparazzi. She could already hear the sound of the waves crashing onto the shore and the ukulele playing as she lay on a beach in her swimsuit. Jenny breathed a sigh of relief as she went through security, believing she had finally left those vexing photographers behind; however, to her surprise, the paparazzi were right on her tail again. Jenny asked herself, "how did the paparazzi get through security without a ticket?" Unfortunately for Jenny, many paparazzi had purchased tickets to follow her to Hawaii, all in the hopes of snapping that "money shot" for the tabloids. State lines and thousands of miles could not keep the paparazzi away.

Although hypothetical, Jenny's predicament is an all too true reality for many renowned individuals.[2] The age of social media, the ubiquity of cameras, and the ever-growing interest in celebrities has helped fuel the interminable growth of paparazzi pursuing their target day-and-night for the perfect shot to sell to tabloids. Tensions between celebrities and paparazzi have led to

[1] Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, 1 June-31 Dec. 1792, 351-60 (John Catanzariti et al. eds., Princeton Univ. Press 2018). This article strives to show a balance between censorship and individual liberty.

[2] Herein referred to as "celebrities."

heated, even dangerous confrontations at times.[3] Many celebrities now live or spend the majority of their time abroad in order to avoid the paparazzi, seeking refuge behind stricter foreign laws that limit the extent to which paparazzi can pursue and follow them.[4]

Some states have enacted or attempted to enact legislation limiting paparazzi, to help protect individual privacy rights,[5] but no such federal legislation is currently in place. Congressional lawmakers had previously proposed and sponsored legislation to curb the seemingly limitless bounds of the paparazzi, but none have been enacted.[6] Moreover, paparazzi continue to claim constitutional protections under the First Amendment's freedom of the press.[7] Thus, legislation must not only be enacted by Congress, but be carefully drafted to withstand judicial scrutiny upon legal challenges to the legislation's constitutionality.

---

[3] *See* Denise Quan & Jack Hannah, *Chris Brown Totals Car While Dodging Paparazzi, Rep Says*, CNN (Feb. 11, 2013, 5:26 AM), https://www.cnn.com/2013/02/10/showbiz/chris-brown-crash/index.html (Chris Brown cut off in car by paparazzi who ran out to take pictures); Alan Duke, *Official: Paparazzi Pursuit of Justin Bieber 'Tragedy Waiting to Happen,'* CNN (July 10, 2012, 11:43 AM), https://www.cnn.com/2012/07/10/showbiz/bieber-paparazzi-chase/index.html (City Councilman observed Justin Bieber speeding to evade four or five paparazzi cars while going down the U.S. 101 highway); *Justin Bieber-Chasing Paparazzo Killed by Car*, CBC (Jan. 2, 2013, 6:49 AM), https://www.cbc.ca/news/world/justin-bieber-chasing-paparazzo-killed-by-car-1.1374149 (paparazzi photographer killed darting across street to photograph Justin Bieber's car) (hereinafter *Paparazzo Killed by Car*).

[4] Natalie Finn, *American Stars Abroad: Why Angelina Jolie, Johnny Depp and More Celebs Have Preferred to Live Outside the United States*, E! NEWS (Dec. 6, 2016, 2:29 PM), https://www.eonline.com/news/813974/american-stars-abroad-why-angelina-jolie-johnny-depp-and-more-celebs-have-preferred-to-live-outside-the-united-states.

[5] *See, e.g.*, CAL. CIV. CODE § 1708.8 (West 2016); *Hawaii Senate Passes 'Steven Tyler Act' on Celeb Privacy*, FOX NEWS (Apr. 6, 2016), https://www.foxnews.com/politics/hawaii-senate-passes-steven-tyler-act-on-celeb-privacy.

[6] *See, e.g.*, Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[7] *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465 (1990) (photographer's First Amendment rights violated when prevented by police from taking pictures of accident).

This article renews the call for federal legislation to limit paparazzi's actions[8] by attempting to draft legislation that will both limit paparazzi and withstand constitutional scrutiny, using previously proposed federal legislation and current state laws as a starting point. In order to propose constitutional limitations on the paparazzi, it is essential to understand how courts determine if legislation comports with the first amendment.

Part I discusses the standards of review courts apply to determine the constitutionality of legislation which implicates the First Amendment. Part II discusses the legislative history of previously proposed federal legislation limiting paparazzi, and the legislation's potential inability to pass constitutional muster. Part III discusses current state laws attempting to limit paparazzi without offending the First Amendment. Part IV proposes federal legislation that attempts to curb paparazzi without violating the First Amendment. Part V concludes with a short summary encouraging renewed efforts to pass federal legislation which curbs the paparazzi.

I. CONSTITUTIONAL STANDARDS OF REVIEW FOR FIRST AMENDMENT LEGISLATION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[9]

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of . . . the press."[10] When determining whether legislation violates the First Amendment, courts first categorize the legislation as either

---

[8] Scholars have previously proposed federal legislation to protect individual privacy rights. *See* Larysa Pyk, Legislative Update, *Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills*, 9 DEPAUL J. ART, TECH. & INTELL. PROP. L. 187, 201 (1998); *see generally* Jennifer R. Scharf, Note, *Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights,* 3 BUFF. INTELL. PROP. L.J. 164 (2006).

[9] U.S. CONST. amend. I.

[10] *Id.*

(1) "content-neutral"[11] or (2) "content-based."[12] Content-neutral legislation "serves purposes unrelated to the content of the expression," while content-based legislation serves to suppress speech based on the message's content.[13] Courts consider the government's purposes in passing the legislation to be the "controlling consideration" when determining whether the legislation is content-neutral or content-based.[14] Legislation passed because the government disagrees with or disapproves of the message is content-based.[15] In contrast, legislation passed for purposes unrelated to the message's content is content-neutral, even if the legislation has an "incidental effect" on some individuals.[16] Once legislation is classified as content-based or content-neutral, courts apply the appropriate standard of review to determine whether the legislation violates the First Amendment.[17]

A. STANDARD FOR "CONTENT-NEUTRAL" LEGISLATION

Content-neutral legislation is reviewed for First Amendment constitutionality under the standard of "intermediate scrutiny."[18] Legislation satisfies intermediate scrutiny when it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more

---

[11] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313 (1984) (finding general National Park Service regulation prohibiting camping in certain park areas when applied to demonstrations calling attention to homelessness content-neutral).

[12] *See* Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989) (requiring fully scrambling or blocking sexually oriented programming during certain hours as content-based since it focused on the content of the speech).

[13] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 798 (1989).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See, e.g.*, United States v. Playboy Ent. Grp., Inc. 529 U.S. 803, 813 (2000) (finding legislation was content-based and then applied standard of strict scrutiny to determine legislation's constitutionality under the First Amendment); Reno v. American C.L. Union, 521 U.S. 844, 871 (finding legislation under constitutional review was content-based and reviewed constitutionality of legislation); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) (finding legislation is content-neutral and then begins review of constitutionality).

[18] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 186 (1997).

speech than necessary to further those interests." [19] Many government interests have been recognized as substantial or important under intermediate scrutiny.[20] In order to avoid burdening substantially more speech than necessary, legislation must be "narrowly tailored to serve the government's legitimate, content-neutral interests" and not restrict the speech itself or other forms of expression.[21] Under intermediate scrutiny, legislation is narrowly tailored when the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." [22] Notably however, courts do not require the government to employ the least restrictive means when tailoring the statute to withstand constitutional scrutiny.[23] For example, courts have found legislation to be content-neutral, despite the legislation having an "incidental effect" on certain messages or speakers, when the legislation "serves some purpose unrelated to [the] content of [the] regulated speech." [24] Additionally, courts have upheld legislation restricting the "time, place, or manner" of protected speech as content-neutral legislation.[25]

B. STANDARD FOR "CONTENT-BASED" LEGISLATION

Content-based legislation is presumptively unconstitutional, with the government bearing the burden of rebutting this presumption. [26] Courts review content-based legislation under the standard of "strict scrutiny."[27] In order to satisfy strict scrutiny, legislation must be "narrowly tailored to promote a compelling Government interest."[28] Narrowly tailored legislation in accordance with strict scrutiny uses "the least

---

[19] *Id.* at 189.

[20] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (legislation ensuring continued availability of selective service certificates a substantial government interest); *Clark*, 468 U.S. at 297 (government regulation prohibiting people from sleeping in national parks served legitimate government interest of insuring national parks are adequately protected); Ginsberg v. New York, 390 U.S. 629, 639 (recognizing protection of children from harmful material as valid government interest).

[21] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[22] United States v. Albertini, 472 U.S. 675, 689 (1985).

[23] *See id.*

[24] *Ward*, 491 U.S. at 791.

[25] *Id.* (and cases cited therein).

[26] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000).

[27] *Id.* at 814.

[28] *Id.* at 813.

restrictive means to further the articulated interest."[29] Courts have declared content-based laws unconstitutional for failure to use the least restrictive means, despite furthering a compelling government interest.[30]

C. GENERAL FIRST AMENDMENT CONSTITUTIONAL CONCERNS: OVERBREADTH AND VAGUENESS

Whether legislation facing First Amendment challenges is classified as content-neutral or content-based, courts will also review the legislation for overbreadth and vagueness. Courts find statutes void for vagueness when the statute either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." [31] Overbreadth allows legislation to be challenged based on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." [32] Courts therefore are concerned with legislation's ability to inadvertently deter constitutionally protected conduct when reviewing for overbreadth.[33]

II. PREVIOUSLY PROPOSED CONGRESSIONAL LEGISLATION ATTEMPTING TO CURB PAPARAZZI

Congressional lawmakers have previously proposed federal legislation to curb the paparazzi's quest for high-paying tabloid photos. [34] There was a major push to limit paparazzi through

---

[29] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[30] *See, e.g.*, *Playboy*, 529 U.S. at 827 (declaring legislation requiring cable providers to block or scramble sexually oriented programming during hours children would likely watch television to be unconstitutional under First Amendment, despite compelling interest to shield children, because legislation was not the least restrictive means).

[31] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[32] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[33] *See id.*

[34] *See, e.g.*, Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997).

legislation following Princess Diana's death.[35] Thus, the 105th Congressional session saw a plethora of bills that attempted to limit paparazzi.[36] However, any proposed legislation died in committee.[37] This section examines these proposed federal bills in an attempt to learn and draw from previous attempts by Congress to limit paparazzi when drafting legislation in section IV.

A. H.R. 2448

The Protection from Personal Intrusion Act, introduced in September of 1997, attempted to limit paparazzi through imposing criminal penalties for harassment of any person in the United States and its territories.[38] The definition of "[h]arass" under the bill was:

> persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to [e]nsure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit in or affecting interstate or foreign commerce.[39]

The bill also established a cause of action in civil court for violations through which the court can fashion "any appropriate relief."[40]

---

[35] *See* Christina M. Locke, *Does Anti-Paparazzi Mean Anti-Press: First Amendment Implications of Privacy Legislation for the Newsroom*, 20 SETON HALL J. SPORTS & ENT. L. 227, 228-36 (2010) (discussing Princess Diana's death while being pursued by paparazzi and legislative action by the European Union and California following her death); *see generally* Alissa Eden Halperin, Comment, *Newsgathering after the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct That Places Individuals in Fear or at Risk of Bodily Harm*, 6 VILL. SPORTS & ENT. L.J. 171 (1999).

[36] *See, e.g.,* H.R. 2448; Privacy Protection Act of 1998, H.R. 3224, 105th Congress (1998).

[37] *See* H.R. 2448 (last action referred to House Committee on the Judiciary); H.R. 3224 (last action referred to House Committee on the Judiciary); Personal Privacy Protection Act, S. 2103, 105th Cong. (1998) (last action referred to Senate Committee on the Judiciary); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998) (last action referred to House Committee on the Judiciary).

[38] *See* H.R. 2448 § 2(a).

[39] *Id.* § 2(b).

[40] *Id.* § 2(d).

The bill required a two-prong objective test in which the victim had to (1) have a "reasonable expectation of privacy" and (2) "take reasonable steps to [e]nsure that privacy," ensuring that the statute would not be applied arbitrarily to the differing sensitivities of individuals.[41] At the same time, the lack of clarity as to what would constitute "reasonable steps" to ensure privacy might have deterred members of the press from pursuing newsworthy stories, opening up the legislation to a claim of unconstitutional vagueness. [42] Based on the bill's language, another potential issue was that law enforcement officials could arbitrarily use the bill to target members of the press pursuing a story, and the legislation might therefore have an overbearing effect on the press.[43]

In response to these concerns, legislators could have added a comment or definition section defining "reasonable steps," and provide examples. This clarification would have reduced the chances of a court finding the proposed legislation void for vagueness because people would have adequate warning of exactly what conduct was outlawed.[44] Additionally, this clarification would have reduced the chances of the bill deterring other members of the press from covering newsworthy stories, reducing the bill's chances of being struck down for overbreadth.[45] Additionally, it is difficult to imagine a specific situation where paparazzi could follow someone who has a reasonable expectation of privacy.[46] A person residing in their home with the blinds down likely has a reasonable expectation of privacy, but it would be a stretch to claim an

---

[41] *Id.* § 2(b).

[42] *Id.*; Ashley C. Null, Note, *Anti-Paparazzi Laws: Comparison of Proposed Federal Legislation and the California Law*, 22 HASTINGS COMM. & ENT. L.J. 547, 560 (2000) (claiming bill contemplates reasonableness from the plaintiff's perspective rather than that of a "reasonable person").

[43] *See* Null, *supra* note 42.

[44] Under US Supreme Court precedent, a statute is void for vagueness when it fails to inform an average person what conduct is illegal. Members of the press may be uncertain when someone has taken reasonable steps and the lack of clarification may cause a court to find such statute overly vague. Hill v. Colorado, 530 U.S. 703, 732 (2000); *see* Null, *supra* note 42.

[45] Members of the press may fear criminal liability under this statue and therefore not cover otherwise newsworthy stories. This is the exact issue the overbreadth doctrine seeks to prevent. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); *see* Null, *supra* note 42.

[46] *See* Null, *supra* note 42, at 560 (claiming that federal legislation is potentially liable to overbreadth claim because author interprets legislation to protect privacy in public places).

individual has a reasonable expectation of privacy when in public.[47] One exception might be when a celebrity is inside a limo with tinted windows.

B. H.R. 3224

The Privacy Protection Act, introduced in February of 1998, also attempted to curb paparazzi through imposing criminal liability for harassment.[48] This bill defined harassment as "persistently follow[ing] or chas[ing]" someone when done for the purpose of obtaining a "visual image, sound recording, or other physical impression of that or another individual" for commercial purposes.[49]

Instead of a two-prong test, this bill had a three-prong objective test, requiring an additional prong that analyzed a reasonable fear of death or bodily injury from the following or chasing.[50] Compared to the Protection from Personal Intrusion Act, the additional prong limited the bill's scope because members of the press could still follow individuals and pursue stories as they normally would without fear of imprisonment, as long as they did not take outlandish or dangerous actions to cause in a reasonable person fear of injury or death.[51] The third prong also better guarded against a constitutional overbreadth challenge.[52] Thus, the free press would continue to be able to do its job, while the daring, dangerous escapades of paparazzi faced punishment.[53] Moreover, society at large would become safer because paparazzi would be deterred from going on high-speed car chases or taking other risky actions to capture celebrities photos.[54]

However, this bill could still have been improved upon. A comment or definition section that defines "reasonable steps" and provides examples would have made members of the press aware of

---

[47] *See generally id.*

[48] *See* Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[49] *Id.* § 2(a).

[50] *Id.*

[51] *Compare* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(b) (1997), *with* H.R. 3224 § 2(a).

[52] Press members are arguably less likely to be deterred from covering the news when they know the statute only applies when inciting fear of death or bodily injury. This argument combats the claim members of the press will be deterred from exercising their freedom to cover the news (overbreadth concern). *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[53] *See id.*; Pyk, *supra* note 8, at 200.

[54] *See generally* Pyk, *supra* note 8, at 200.

what conduct was prohibited and the bill would more likely have withstood a constitutional vagueness challenge.[55]

C. S. 2103

Introduced in May of 1998, the Personal Privacy Protection Act (PPPA-I), this bill was noticeably different from the two bills discussed above.[56] PPPA-I actually included an explanation section discussing the reasons for drafting the legislation and the need to protect individual and families from harassment and violations of privacy interests perpetrated by "photographers, videographers, and audio recorders."[57] The bill further stated that people whose privacy interests were threatened included "not only professional public persons and their families, but also private persons and their families for whom personal tragedies or circumstances beyond their control create media interest."[58] Liability was predicated on the captured physical impression being "for commercial purposes."[59]

PPPA-I also included rules of construction. The rules specified that a court may not find a physical impression of someone to have been intended "for commercial purposes" unless the physical impression was intended to be "sold, published, or transmitted in interstate or foreign commerce," or the person "moved in interstate or foreign commerce" to capture the physical impression.[60] The bill also contained a severability clause, so if one portion of the legislation was struck down as unconstitutional, the other parts would still be valid, avoiding Congress having to start from scratch.[61]

Under the PPPA-I, a person could be found liable for harassment, "trespass for commercial purposes," and the "invasion of [a] legitimate interest in privacy."[62] Harassment was defined as occurring when someone "persistently physically follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury."[63] Individuals found to have harassed someone in

---

[55] Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Null, *supra* note 42, at 560 (claiming that federal legislation is potentially liable to overbreadth claim because author interprets legislation to protect privacy in public places).

[56] Personal Privacy Protection Act, S. 2103, 105th Cong. (1998).

[57] *Id.* § 2(a).

[58] *Id.* § 2(a)(3).

[59] *Id.* § 3(a)(1)(B).

[60] *Id.*

[61] *Id.* § 5.

[62] *Id.* §§ 3-4.

[63] *Id.* § 3(a)(2).

violation of this bill faced a fine and sentence of (1) up to a year if neither death nor serious bodily injury occurred, (2) at least five years if "serious bodily injury" occurred, or (3) at least twenty years if death occurred.[64] The bill required death or serious bodily injury to be "proximately caused by such harassment,"[65] which ensured law abiding members of the press were differentiated from paparazzi who endangered individuals and the public.[66] Moreover, the sentencing levels based on the resulting harm were a far better legislative attempt to narrowly tailor the statute, as compared to a one-size-fits-all sentencing range where potential abuses in sentencing might result or where the fear of an excessive sentence might deter non-paparazzi press members.[67]

Under PPPA-I, harassment was the only violation that carried possible imprisonment; the other violations were enforceable through civil suits only.[68] The bill defined "trespass for commercial purposes" as trespassing on private property to capture a physical impression of someone.[69] "Invasion of legitimate interest in privacy" was defined as a constructive trespass with the use of a "visual or auditory enhancing device" when (1) there was a reasonable expectation of privacy and, (2) the physical impression could not have been captured without the sensory enhancing device.[70]

PPPA-I allowed the person whose property was trespassed upon and whose "visual or auditory impression" had been captured, to sue in civil court, even if it implicated the privacy rights of two individuals, further increasing violators' liability.[71] Also, PPPA-I allowed the court to award attorney's fees, and any expert's fees, to the winner in the lawsuit.[72] The inclusion of fees for the winning party helped to encourage attorneys and plaintiffs to bring these lawsuits. Even when the compensatory and punitive damages were nominal, the attorney would still be paid if victorious, and the plaintiff would not come away with a net loss from a large legal

---

[64] *Id.* § 3(b).

[65] *Id.*

[66] *See* Pyk, *supra* note 8, at 199.

[67] *Compare* Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998), *with* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997), *and* Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[68] *See* S. 2103 § 3.

[69] *Id.* § 4(b).

[70] *Id.*

[71] *Id.* § 4(c).

[72] *Id.*

bill.[73] Here, one potential concern is that the legislation had no limit on damages and fees, so defendants may have faced excessive fines; nevertheless, this could have been addressed by defense counselors and reviewed by appellate judges.[74] A broad definition of fees further allowed the court to tailor damages on a case-by-case basis.[75]

D. H.R. 4425

The Personal Privacy Protection Act (PPPA-II), proposed in August 1998, provided "protection from personal intrusion for commercial purposes" through imposing criminal liability for "reckless endangerment" and "tortious invasion of privacy."[76] Under this bill, an individual could be found liable for reckless endangerment when they:

> [I]n or affecting interstate or foreign commerce and for commercial purposes, persistently follow[ ] or chase[ ] a person, in a manner that causes that person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person.[77]

When reckless endangerment "results" in death or serious bodily injury, the violator faced up to thirty years in prison.[78] Additionally, liability was imposed for tortious invasion of privacy which was defined as:

> [A] capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through the use of a visual or auditory enhancement device, if (i) the subject has a reasonable expectation of privacy with respect to that activity; and (ii) the image, recording, or impression could not have been captured without a trespass if not produced by the

---

[73] *See id.*

[74] *Id.*

[75] *See id.*

[76] Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998).

[77] *Id.* § 2(a).

[78] *Id.* § 2(a)(1).

> use of the enhancement device; or (B) a trespass on private property in order to capture any type of . . . physical impression of any person.[79]

The reasonableness standard for both reckless endangerment and tortious invasion of privacy ensured an objective test that courts could apply to determine culpability, rather than a subjective test that could vary greatly between individuals.[80] Yet, under the bill, reckless endangerment only required a reasonable fear of bodily injury, not serious bodily injury.[81] Bodily injury is general.[82] Does bodily injury include a person's reasonable fear that he or she will trip and fall? A reasonable fear of scraping one's knee? Or is something more required?

Adding "serious" to a definition would provide clarity to the bill and ensure individuals could not use fears of minor injuries to inhibit members of the press from covering stories. Legislation should be aimed at preventing truly dangerous situations to protect individuals and the public at large, not to completely handicap the freedom of the press.

The bill allowed a sentence of up to thirty years if death or serious bodily injury "results;" however, the bill did not explicitly require causation.[83] An improvement on the statute would be a requirement that the following or chasing of an individual be a "proximate cause" of any death or serious bodily injury. Although arguably implied, an explicit causation requirement would help to limit constitutional claims of overbreadth while clarifying liability.[84] Members of the press, aside from paparazzi, would also be less deterred from their work because of this clarification. Additionally, there is a question of whether a range of up to thirty years in prison is excessive and not narrowly tailored to achieve the

---

[79] *Id.* §§ 2(c)(2)(A)-(B).

[80] *Id.* §§ 2(a)-(c).

[81] *Id.*

[82] *Cf.* David A. Browde, *Warning: Wearing Eyeglasses May Subject You to Additional Liability and Other Foibles of Post-Diana Newsgathering - an Analysis of California's Civil Code Section 1708.8*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 724 (2000) (noting general concern with vagueness of terms in statute).

[83] H.R. 4425.

[84] Press members are arguably less likely to be deterred from covering the news when they know the statute requires proximate cause and therefore has a limited applicability. This argument combats the claim members of the press will be deterred from their freedom to cover the news (overbreadth concern). *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

government's goal of insuring personal privacy and limiting paparazzi.[85]

E. COMMONALITIES AMONGST PROPOSED FEDERAL LEGISLATION

Much of the federal legislation proposed to limit paparazzi in the 105th Congress contains similar sections which are best analyzed together for the sake of brevity and to avoid repetitiveness.[86]

A court reviewing the three bills for constitutionality under the First Amendment would likely classify each bill as content-neutral because each bill applied regardless of the content produced.[87] The legislation targeted the manner in which photos and other physical impressions were obtained, not the resulting message.[88] Thus, the bills were arguably time, place, and manner restrictions because they did not altogether restrict taking photos and recordings; rather, they limited the location and manner in which photos and recordings were obtained.[89] Although the bills had an exemption for law enforcement officials,[90] legislation has

---

[85] Content-neutral legislation must be narrowly tailored to achieve the government's interest. *See* United States v. Albertini, 472 U.S. 675, 689 (1985); *see* McCullen v. Coakley, 573 U.S. 464, 496-97 (2014) (striking down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *cf.* Null, *supra* note 42, at 561 (issue of measuring the true social cost based on the punishments for violations).

[86] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); H.R. 4425; Personal Privacy Protection Act, S. 2103, 105th Cong. (1998).

[87] Content-neutral legislation is passed regardless of the message's content. *See Ward*, 491 U.S. at 791; Pyk, *supra* note 8, at 200.

[88] Pyk, *supra* note 8, at 200.

[89] *See Ward*, 491 U.S. at 799-803 (upholding City's sound amplification restrictions under the First Amendment as valid and narrowly tailored time, place, and manner restrictions). *See generally* Pyk, *supra* note 8.

[90] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

been classified as content-neutral despite exemptions on its applicability.[91]

In addition to potential criminal prosecutions, each bill established a private civil cause of action to be brought by victims against violators.[92] In addition to criminal prosecutions, the use of civil actions allowed victims to be financially compensated for violations and provided another means of enforcing the bills.[93] The bills allowed any appropriate relief, which was sometimes further defined to include compensatory damages, punitive damages, equitable and declaratory relief. [94] The bills that specified appropriate relief types allowed paparazzi to be placed on notice of what types of civil damages and punishments they could face.[95]

Additionally, potential plaintiffs were equally aware what remedies they could seek in civil court, had law enforcement not adequately enforced the bill.[96] The bills' allowance for equitable relief allowed courts to tailor the remedies to each case rather than create overly broad decisions that would negatively impact all members of the press. [97] Additionally, the bills inclusion of compensatory and punitive damages ensured violators faced financial punishments, regardless of whether death or serious bodily injury occurred.[98]

Defenses were limited under the bills. Each bill precluded the defense that argued the violator failed to either capture or sell any image or recording, in both criminal and civil cases.[99] These limitations on defenses ensured plaintiffs and prosecutors had a far higher likelihood of success in these cases. Also, these limitations were further evidence the bills were content-neutral because the limitations showed the government was particularly concerned with

---

[91] McCullen, 573 U.S. at 482-83 (finding statute creating buffer zones around reproductive healthcare clinics that included exceptions for healthcare workers was not content based).

[92] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[93] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 193-97.

[94] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 199-200.

[95] *See* H.R. 4425 § 2(a); S. 2103 § 2(a).

[96] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[97] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 199-200.

[98] *See* H.R. 4425 § 2(a); S. 2103 § 2(a).

[99] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

how the photos or recordings were obtained.[100] If the government was concerned with the message, the bills might have only applied when a photo or recording was obtained, and would specifically block the publishing of the photos obtained in violation of the statute.[101] The statute further discouraged paparazzi from violative conduct because penalties applied regardless of whether a major photo was obtained.[102] Thus, a paparazzo could be fined or jailed multiple times before or after getting a great shot, ultimately leading to a net loss financially and no real financial incentive.[103]

Liability under each bill required the violator engage in the conduct for a profit or commercial purpose.[104] While a requirement for an expectation of profit might seem to strengthen the statute, the requirement actually singled out paparazzi and served as evidence of a discriminatory motive by the government, suggesting protection of personal privacy was pretextual, rather than the true goal.[105] Thus te bills' requirements that the violative conduct be engaged in for a profit or commercial purpose was likely used by legislators to bring the conduct described in the bills within the federal government's jurisdiction under the Commerce Clause.[106]

However, the requirement authorized discriminatory enforcement of the statute against only paparazzi, rather than anyone who might recklessly endanger or invade another's privacy for a photo.[107] In the age of smartphones with built-in cameras, paparazzi are not the only people who might be culpable under such a bill.[108] Removing the "for profit" or "commercial purposes" requirement would give a statute general applicability. A broader

---

[100] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (content-neutral legislation serves purposes regardless of the content's message); *see also* Pyk, *supra* note 8, at 201.

[101] *See Ward*, 491 U.S. at 791 (content-based legislation passed because of message disagreement); *cf.* Pyk, *supra* note 8, at 199.

[102] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 200.

[103] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[104] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[105] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Hill v. Colorado, 530 U.S. 703, 731 (2000) (discussing danger of a "discriminatory governmental motive" when reviewing content-neutral statute for constitutionality under the First Amendment); *see also* Null, *supra* note 42, at 561-62.

[106] U.S. CONST. art. I, § 8, cl. 3.; Null, *supra* note 42, at 562.

[107] Null, *supra* note 42, at 561-62.

[108] *Id.* at 557-58.

reaching statute would strengthen its constitutionality because wider application serves as evidence the government does not have a discriminatory motive and is truly interested in protecting privacy rights.[109]

Also, the length of the bills' sentences might have caused a court to declare these bills unconstitutional on the grounds the bills were not narrowly tailored to promote the government's interest.[110] Even if neither death nor bodily injury resulted, individuals faced serious jail time for a violation under any of the bills.[111] A court may have seen the sentences' length as excessive and struck down the legislation under the First Amendment for failing to be narrowly tailored to promote the government's interest under intermediate scrutiny.[112]

Making a bill impose only a fine rather than providing the option for jail time, or making the maximum sentence fifteen or thirty days in jail would likely increase a bill's chances to pass the tailoring requirement.[113] The legislation's effects could be observed over time and, if found insufficient to deter paparazzi, the

---

[109] *See Hill*, 530 U.S. at 731 (pointing to a statute's broad applicability as a strength and supports arguments against a "discriminatory governmental motive"); *see id.* at 560-61; Patrick J. Alach, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 229 (2007) (discussing *Cohen v. Cowles Media Co.* and generally applicable laws incidentally affecting the press).

[110] Drawing parallels between excessive sentences and excessive buffer zones in U.S. Supreme Court precedents on time, place, and manner restrictions. *See McCullen*, 573 U.S. at 496-97 (Court strikes down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *see* Null, *supra* note 42, at 561.

[111] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(a) (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998); *see also* Null, *supra* note 42, at 561.

[112] Drawing parallels between excessive sentences and excessive buffer zones in U.S. Supreme Court precedents on time, place, and manner restrictions. *See McCullen*, 573 U.S. at 496-97 (Court strikes down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate").

[113] Bill would then arguably be using "less restrictive measures." *See McCullen*, 573 U.S. at 496-97; *see* Null, *supra* note 42, at 561 (discussing jail sentences not measuring the true social cost).

sentencing ranges could be increased. In cases where content-neutral legislation has failed to satisfy the constitutional tailoring requirement, courts have cited to the government's failure to demonstrate that less encumbering measures would not have sufficed.[114] Increasing the sentences over time after seeing the legislation's effect would provide strong objective proof the legislation is narrowly tailored to support the government's interest.[115]

Each bill's scope was limited by a section which explained the purchase or use of an image or recording obtained in violation of the bill was not itself a violation.[116] Vicarious liability through an employee or agent was also excluded.[117] The bills did lack a *mens rea* requirement, which could be added for further assurance that legitimate press activities are not infringed.[118] Also, the bills did not define "following," making the line of demarcation between lawful press activities and unlawful harassing unclear.[119] A definition with examples would greatly improve clarity and help avoid a potential void for vagueness challenge.

The bills also explained only individuals who were themselves committing the violation or assisting someone in the commission of the violation were culpable, which helped to narrowly tailor the bill to address issues in the methods employed to capture photos inhibiting rights of privacy.[120] Without such an explicit limitation in the bills, members of the press might otherwise refrain from publishing photos as they normally would for fear they might be inadvertently opening themselves up to liability because a photo was unknowingly obtained in violation of the bill.[121] Thus, the provision ensured the bills did not encumber constitutionally

---

[114] *See McCullen*, 573 U.S. at 496-97; *see also* Null, *supra* note 42, at 561 (discussing jail sentences not measuring the true social cost).

[115] Increasing sentences as necessary would demonstrate to a court that the government is using limited methods and show lower sentencing ranges were insufficient to deter paparazzi. *See McCullen*, 573 U.S. at 496-97.

[116] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[117] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[118] Null, *supra* note 42, at 560.

[119] *Id.* at 555-56.

[120] *Id.*

[121] This prevents basic overbreadth concerns. *See* Broadrick v. Oklahoma, 403 U.S. 601, 612 (1973).

protected activities of the press, which would potentially risk the legislation being found unconstitutional.[122]

Moreover, this explicit limitation on the scope of the bills further supports the assertion that the bills were content-neutral because the bills did not inhibit the publishing of photos or physical impressions.[123] On the other hand, the fact that tabloids would be free to use photos obtained in violation of these statutes under the guise of plausible deniability failed to discourage, if not incentivized, these individuals to continue to go to extreme lengths to get photos of individuals. Perhaps impunity in this regard is not the best solution to limit paparazzi overall.

III. STATE LEGISLATION LIMITING PAPARAZZI[124]

California has successfully passed and amended state legislation that limits paparazzi.[125] The legislation includes both civil[126] and criminal statutes.[127] California's statutes neither completely ban the paparazzi from taking celebrities' pictures, nor completely prevent the tabloids from publishing photos obtained by paparazzi.[128] Instead, the legislation attempts to balance individuals' rights to privacy against freedom of the press.[129]

---

[122] *See id.*

[123] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997) (content-neutral classification).

[124] Discussions of the cases applying the subsequent statutes is beyond the scope of this note and would likely require a separate note.

[125] *See, e.g.*, CIV. § 1708.7 (West 2015); CAL. PENAL CODE § 11414 (West 2014); *see generally* Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi,* 29 HASTINGS COMM. & ENT. L.J. 99 (2006).

[126] CIV. §§ 1708.7; CIV. §§ 1708.8-1708.9 (West 2016).

[127] PENAL § 11414; *See* Michelle N. Robinson, Note, *Protecting a Celebrity's Child from Harassment: Is California's Amendment Penal Code § 11414 Too Vague to Be Constitutional*, 4 PACE INTELL. PROP. SPORTS & ENT. L.F. 559 (2014) (discussing the Constitutionality of California penal legislation); Dayna Berkowitz, Note, *Stop the 'Nazzi': Why the United States Needs a Full Ban on Paparazzi Photographs of Children of Celebrities*, 37 LOY. L.A. ENT. L. REV. 175 (2017).

[128] *See, e.g.*, CIV. §§ 1708.7-1708.9; PENAL § 11414.

[129] *See* CIV. § 1708.8; *see generally* Null, *supra* note 42.

This section focuses on § 1708.8 under California's civil code[130] because this section of California's code is similar to previously proposed federal legislation that remains relevant when drafting legislation to combat paparazzi.[131] Scholars have also voiced support for the California legislation's attempts to limit paparazzi.[132]

A. CALIFORNIA CIVIL CODE § 1708.8

Under this statute, a person may be found liable for "physical invasion of privacy" and "constructive invasion of privacy."[133] In order for the plaintiff to prove physical invasion of privacy, the plaintiff must show the defendant:

> [K]nowingly enter[ed] onto the land or into the airspace above the land of another person without permission or otherwise commit[ed] a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.[134]

---

[130] This note does not cover § 40008 which criminalizes certain traffic violations committed to take photos of someone; this note is interested in drafting broadly applicable legislation that covers various situations and is not limited to one area such as traffic. *See* CAL. VEH. CODE § 40008 (West 2011); *see generally* Christina M. Locke & Kara Carnley Murrhee, Article, *Is Driving with the Intent to Gather News a Crime? The Chilling Effects of California's Anti-Paparazzi Legislation*, 31 LOY. L.A. ENT. L. REV. 83 (2011).

[131] California has multiple laws that attempt to limit paparazzi, but this note will focus on one such law for brevity and primarily because of that law's similarities to the earlier discussed federal laws that can be drawn upon when drafting model legislation. *See, e.g.*, CIV. §§ 1708.7-1708.9; PENAL § 11414.

[132] *See, e.g.*, Devan Orr, Note, *Privacy Issues and the Paparazzi*, 4 ARIZ. ST. SPORTS & ENT. L.J. 319 (2015) (voicing support for California legislation limiting paparazzi, which "protect[s] the privacy interests of celebrities and their children . . . without materially infringing upon the First Amendment rights of paparazzi").

[133] CIV. §§ 1708.8(a)-(b).

[134] *See id.* § 1708.8(a).

Constructive invasion of privacy occurs when the defendant:

> [A]ttempts 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 private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if the image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.[135]

The statute also imposes liability on individuals who commit false imprisonment or assault while intending to capture any "visual image, sound recording, or other physical impression of the plaintiff."[136]

A defendant found guilty of any of the above violations has to endure significant civil penalties.[137] Specifically, the violator faces (1) up to three times the cost of any general and special damages from the violation, (2) disgorgement to the plaintiff of any profit from the photo, and (3) a civil fine from five-thousand dollars to fifty-thousand dollars.[138] Moreover, the statute also states anyone who "directs, solicits, actually induces, or actually causes another person," to engage in this behavior is also liable for: (1) general, special, and consequential damages, (2) punitive damages, and (3) a civil fine between five-thousand and fifty-thousand dollars.[139] In addition to civil damages, the statute also allows equitable relief through injunctions and restraining orders.[140]

A court would likely classify this legislation as content-neutral because it applies to all people, regardless of the message's content.[141] The legislation would arguably fit as a time, place, and manner restriction[142] used to promote the government interest of an

---

[135] *Id.* § 1708.8(b).
[136] *Id.* § 1708.8(c).
[137] *Id.* § 1708.8(d).
[138] *Id.*
[139] *Id.* § 1708.8(e).
[140] *Id.* § 1708.8(h).
[141] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997) (content-neutral classification); Null, *supra* note 42, at 561-62.
[142] *See* Ward v. Rock Against Racism, 491 U.S. 781, 491 U.S. at 799-803 (example of time, place, and manner restrictions); Joshua Azriel, *Restrictions Against Press and Paparazzi in California: Analysis of Sections 1708.8 and 1708.7 of the California Civil Code*, 24 UCLA ENT. L. REV. 1, 4 (2017); Null, *supra* note 42, at 561-62.

individual's constitutional right to privacy.[143] While the legislation may encumber paparazzi more than others, this is merely an incidental effect of its main goal to ensure the right to privacy is not infringed upon.[144] The statute's definition for actual and constructive invasion of privacy draws parallels with Fourth Amendment jurisprudence regarding the sanctity of the home and the use of advanced technologies to observe a person's home.[145] Protecting an individual's right to privacy, especially in his or her home, is likely to be viewed as a substantial government interest.[146]

Moreover, the inclusion of "airspace above the land of another" in the definition of physical invasion of privacy, covers the use of drones by paparazzi.[147] Even if courts may have found the use of drones to be a physical invasion of privacy, the explicit mention of airspace leaves out any ambiguity and puts paparazzi on notice.[148] As content-neutral legislation, the State would have to show this government interest is achieved less effectively without the statute.[149] Documented accounts of celebrities being photographed within their property could help to evidence this claim.

The statutory definition of physical invasion of privacy includes the *mens rea* of "knowingly," which makes only willful perpetrators liable and prevents other members of the press from being deterred in doing their lawful jobs.[150] Also, when defining constructive invasion of privacy, the statute uses the reasonable person standard to determine if the impression was obtained in an

---

[143] The US Supreme Court has recognized the right to privacy regarding 4th Amendment searches and many states also recognize the individual right to privacy. *See* Gary Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133, 139-41 (2009); *see also* Browde, *supra* note 82, at 724.

[144] Content-neutral legislation can have an "incidental effect" on certain speakers. *See, e.g.*, *Ward*, 491 U.S. at 791 (content-neutral legislation upheld despite "incidental effect" on certain speakers).

[145] *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (use of a thermal-image device to look inside defendant's home a violation of his 4th Amendment rights).

[146] *See* Wax, *supra* note 143, at 139-41.

[147] CAL. CIV. CODE § 1708.8(a) (West 2015). *See generally* Amanda Tate, *Miley Cyrus and the Attack of the Drones: The Right of Publicity and Tabloid Use of Unmanned Aircraft Systems*, Note, 17 TEX. REV. ENT. & SPORTS L. 73 (2015).

[148] CIV. § 1708.8(a); *see generally* Tate, *supra* note 147.

[149] *See* United States v. Albertini, 472 U.S. 675, 689 (1985).

[150] CIV. § 1708.8(a); Null, *supra* note 42, at 560.

"offensive" manner , thereby preventing plaintiffs from enforcing the statute in overbroad and unpredictable ways.[151] "Private, personal, and familial activity" is also defined, and describes certain behaviors that are accompanied by a "reasonable expectation of privacy," ensuring paparazzi are alerted to exactly what constitutes a violation, as determined by an objective standard.[152] Therefore, the statute has a reduced likelihood of being struck down as constitutionally overbroad under the First Amendment.[153] Also, the legislation includes a severability clause which allows a reviewing court to declare portions of the legislation unconstitutional without striking down the entire statute.[154]

The statute's scope is limited by the subsequent section, which states only the purchaser involved in the first transaction after the illicit capturing of the plaintiff's impression is liable if the purchaser has "actual knowledge" the physical impression was taken in violation of the statute.[155] This is a potential constitutional concern because the requirement means members of the press must now be especially diligent determining where photos came from and how they were obtained.[156] A court may view this as excessive and strike this section down as unconstitutional, fearing the legislation may encumber press activities.[157]

On the other hand, the section disincentivizes paparazzi because obtaining financial compensation for the images violates the statute.[158] The statute further limits its reach by exempting any individual who subsequently "transmits, publishes, broadcasts, sells, or offers for sale, in any form, medium, format, or work" the illicitly obtained physical impression.[159] By making only the first purchaser of illicitly obtained photos liable, with the *mens rea* of

---

[151] CIV. § 1708.8(b); Null, *supra* note 42, at 559-60.

[152] CIV. § 1708.8(l); Null, *supra* note 42, at 559-60.

[153] A clear standard reduces the likelihood of paparazzi ceasing to perform ordinary press activities, i.e., the basic overbreadth concern. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[154] CAL. CIV. CODE § 1708.8(n).

[155] *Id.* § 1708.8(f)(1).

[156] *See* Locke, *supra* note 35, at 233 ("The Supreme Court ruled in *Bartnicki v. Vopper* that, if information is illegally obtained by a third party but lawfully obtained by the press, it can be published."); Azriel, *supra* note 142, at 13.

[157] Courts are concerned legislation may inhibit the performance of ordinary press activities, i.e., the basic overbreadth concern. *See Broadrick*, 403 U.S. at 612; Null, *supra* note 42, at 560-61; Azriel, *supra* note 142, at 13.

[158] CIV. § 1708.8(f)(1).

[159] *Id.* § 1708.8(f)(3).

actual knowledge, fewer members of the press will be deterred from traditional press work, while protecting the privacy of celebrities.[160]

A predetermined civil fine range accomplishes two tasks. It alerts potential violators that, at a minimum, they will lose five-thousand dollars, and it prevents excessive fines that a court might deem unnecessary to deter paparazzi.[161] The civil fine minimum of five-thousand dollars also increases the chances that plaintiffs and attorneys will pursue such a cause of action, rather than deeming the venture not worthwhile.[162] Through making damages "up to three times the amount of any general and specific damages," the legislation further allows courts to tailor the damages to each case.[163] Tabloid photos can often be sold for staggering amounts, making civil damages a seemingly worthwhile risk;[164] however, the statute disincentivizes such behavior by paparazzi through disgorgement of profits from such images, in addition to damages and civil fines.[165]

The statute further disincentivizes paparazzi from invading individuals' privacy by precluding any defense that the violation did not result in any "image, recording, or physical impression" being captured or sold.[166] Although the legislation may require individuals to bring multiple suits against various paparazzi, celebrities have the financial means to pursue such actions.[167] Again, the statute's flexibility empowers courts to tailor punishments on a case-by-case basis.[168]

---

[160] *Id.* § 1708.8(f)(1).

[161] *Id.* § 1708.8(d).

[162] *See id.*

[163] *Id.*

[164] *See* Richard Perez-Pena, *How Much for Those Baby Photos?*, N.Y. TIMES (May 5, 2008), https://www.nytimes.com/2008/05/05/business/media/05tabloid.html.

[165] CIV. § 1708.8(d); Null, *supra* note 42, at 561.

[166] CIV. § 1708.8(j).

[167] *See id.* §§ 1708.8(d)-(e); Kurt Badenhausen et al., *The World's Highest-Paid Celebrities*, FORBES, https://www.forbes.com/celebrities/.

[168] *See* CIV. §§ 1708.8(d)-(e).

B. ISSUES WITH § 1708.8

While the California legislation has many positive aspects, it is not infallible and could be improved upon.[169] First, rather than having simply compensatory and punitive damages, the legislation holds perpetrators liable for up to three times the amount of general and special damages along with a civil fine.[170] A court might view the totality of this financial punishment as excessive and question whether the legislation is narrowly tailored enough to protect the right to privacy without being overly broad.[171] Another argument is that the excessive fines reflect a general dislike for paparazzi in particular and the legislation should therefore be content-based.[172] Removing the option of damage awards of up to three times the actual damages, and decreasing the size of the civil fine awarded, would likely remedy this issue.

Second, the statute is still susceptible to a vagueness claim. Under "constructive invasion of privacy," liability is premised on the violator attempting to take a photo "in a manner that is offensive to a reasonable person."[173] This could potentially be subject to a vagueness claim because it is unclear how a paparazzo would actually know which method of obtaining a photo would be offensive.[174] While the requirement of attempting to capture private activities helps clarify this, there is still a degree of ambiguity in the

---

[169] A full discussion of the attacks on § 1708.8 is beyond the scope of this article. Some critiques of § 1708.8 have been rendered moot by subsequent amendments. This section will provide a basic overview of the concerns other scholars have pointed to regarding § 1708.8 that are currently applicable. *See, e.g.*, Browde, *supra* note 82.

[170] CIV. § 1708.8(d).

[171] Courts require the measures employed by content-neutral legislation to not be overly restrictive. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 496-97 (2014) (striking down content-neutral statute on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *cf.* Browde, *supra* note 82, at 716. *Contra* Null, *supra* note 42, at 561 (arguing the damages support the "true social cost" of actions by the paparazzi).

[172] *See* Azriel, *supra* note 142, at 13-15.

[173] CIV. §§ 1708.8(a)-(b); *cf.* Browde, *supra* note 80, at 724 (noting general concern with vagueness of terms in statute).

[174] Under U.S. Supreme Court precedent, a statute is void for vagueness when it fails to inform an average person what conduct is illegal. Hill v. Colorado, 530 U.S. 730, 732 (2000). Members of the press may be uncertain when someone has taken reasonable steps, and the lack of clarification may cause a court to find such statute overly vague.

statute.[175] Examples of obtaining a photo in an offensive manner would help to combat a claim of void for vagueness. On the other hand, such uncertainty can be clarified by court cases over time.

Third, portions of the statute are arguably discriminatory towards paparazzi and potentially even a content-based restriction. Disgorgement of profits is applicable only when the plaintiff proves the physical impression was obtained "for a commercial purpose," which specifically implicates paparazzi and is arguably a content-based restriction.[176] This wording could be argued as an attack on paparazzi with limited rather than broad applicability.[177] This provision could vary widely in its application, causing a paparazzo to lose all profits from a photo, but a salaried photographer to lose only a day's wages.[178] Removing a commercial purpose requirement and simply stating any use of the physical impression that leads to a profit would provide this portion of the statute with broader applicability and reduce the chances of the section being found content-based.

Moreover, the legislation's limitation on first transaction publishers with actual knowledge the photo was obtained in violation of the statute could be plausibly construed as a prior restraint on publication, which the United States Supreme Court has generally opposed.[179] Also, the legislation's exemptions arguably allow any conduct, aside from the work of freelance photographers, that discriminates against paparazzi.[180] One concern with the exemption provided in the statute is that press members will be deterred from traditional investigatory work and uncovering newsworthy stories.[181] Moreover, scholars have argued the legislation does not actually alleviate any harm, but merely punishes conduct after the fact and therefore is not narrowly tailored to achieve a governmental interest.[182] However, this argument glosses over the legislation's deterrent effect which alleviates the harm of

---

[175] *See* CIV. §§ 1708.8(a)-(b); *cf.* Browde, *supra* note 82, at 724.

[176] *See* Browde, *supra* note 82, at 710, 714-15 (quoting CIV. § 1708.8(c)); Azriel, *supra* note 142, at 13.

[177] *See generally Hill*, 530 U.S. at 731 (pointing to a statute's broad applicability as a strength because it supports arguments against a "discriminatory governmental motive"); *see also* Azriel, *supra* note 142, at 13; Browde, *supra* note 82, at 710.

[178] *See* Browde, *supra* note 82, at 711.

[179] Azriel, *supra* note 142, at 4, 14 n.82.

[180] *See* Browde, *supra* note 82, at 710-11.

[181] *See* Locke, *supra* note 35, at 245-46.

[182] *See* Browde, *supra* note 82, at 719.

paparazzi by causing them to think twice before engaging in aggressive or outlandish conduct.

Fourth, the legislative history of the act, and subsequent amendments, shows an intent to target paparazzi.[183] Legislative history in California shows an intent to limit paparazzi, which, if taken into account or pointed out to a reviewing court, would serve as strong evidence the legislation is actually pretext for a discriminatory government motive.[184] Legislative history is therefore a potentially serious concern for any legislative body attempting to pass legislation limiting paparazzi.[185] The argument that the legislation is pretext for a discriminatory motive can be weakened with a general statement explaining the reasons for enacting the legislation. The general statement should appeal to the right to privacy overall, such as in PPPA-I, when reviewed alongside careful, cognizant phrasing and discussions.[186]

IV. PROPOSED FEDERAL LEGISLATION

The section attempts to draft sample federal legislation which both limits paparazzi and comports with the First Amendment, drawing from portions of previously proposed federal legislation and California's current legislation.[187]

Model Personal Privacy Security Act:

(a) **Reckless Endangerment**: a person knowingly follows another individual across state lines persistently to obtain a physical impression of the individual and proximately causes the individual serious bodily injury or death.

---

[183] *See id.* at 710; Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99, 110 (2006).

[184] *See* Browde, *supra* note 82, at 710; Vance, *supra* note 183, at 110.

[185] *See generally* Hill v. Colorado, 530 U.S. 730, 731 (2000) (discussing danger of a "discriminatory governmental motive" when reviewing content-neutral statute for constitutionality under the First Amendment); Null, *supra* note 42, at 561-62 (noting that if the government's motive was to inhibit certain speech, the statute would be content-based and subject to strict scrutiny) (first citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); and then citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[186] *See* Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998).

[185] *See* CAL. CIV. CODE § 1708.8 (West 2016).

(b) **Harassment**: a person knowingly follows another individual across state lines persistently to obtain a physical impression of the individual and causes the person to have a reasonable fear of serious bodily injury or death.

(c) **Invasion of Personal Privacy**: a person knowingly enters onto an individual's land or airspace without permission to capture a physical impression of the individual when the individual has a reasonable expectation of privacy, and the physical impression is distributed through interstate commerce whether or not for a profit.

(d) **Constructive Invasion of Personal Privacy**: a person knowingly obtains a physical impression of an individual inside the individual's land or airspace without that individual's permission that could not be obtained without the use of sensory enhancing technology when the individual has a reasonable expectation of privacy, and the physical impression is distributed through interstate commerce whether or not for a profit.

(e) **Aiding and Abetting**: A person who encourages or assists a person to commit a violation under this statute is also in violation of the statute and will be subject to the same potential criminal and civil liability.

(f) **Purchasing of Illicit Photos**: An individual or organization who has actual or constructive knowledge that a physical impression was obtained illicitly and is the initial purchaser of the physical impression, shall be liable for civil and punitive damages under this statute.

(g) **Punitive Remedies**: A violation under this section is punishable by disgorgement of any profit obtained from selling the illicitly obtained physical impression and up to 15 days in jail.

(h) **Civil Causes of Action**: The victim of any violations under this statute shall have a civil cause of action in federal court to seek civil remedies, regardless of whether punitive remedies are sought or obtained. Plaintiff must prove a violation by a preponderance of the evidence.

(i) **Civil Remedies**: Plaintiff, upon court judgment in plaintiff's favor, shall be entitled to relief which may include attorney's fees, expert's fees, disgorgement of any profit obtained from selling the illicitly obtained physical impression, compensatory damages, punitive damages, declaratory relief, injunctive relief and a mandatory civil fine of up to $5000. Seeking or obtaining punitive remedies will not preclude or bar any civil remedies.

(j) **Exemptions**: Law enforcement and private investigators shall not be found liable under this statute when executing their occupational duties. An individual who is not the initial purchaser of a physical impression obtained in violation of this statute shall not be liable under this statute for subsequently transmitting the photos.

(k) **Limitations on Defenses**: It is not a defense in a criminal or civil prosecution for a violation under this statute that no physical impression was obtained or sold or both.

(l) **Preemption**: This statute does not preempt or preclude liability under other laws, or any other federal or state claim.

(m) **Applicability**: This statute shall apply to actions taken within the United States and its territories.

(n) **Definitions**:

a. **Physical Impression**: photograph, audio or visual recording
b. **Actual Knowledge**: awareness of what one is doing
c. **Constructive Knowledge**: based on the facts available to the individual at the time, a reasonable person would have had knowledge
d. **Knowingly**: awareness of what one is doing
e. **Persistently**: continuously without pausing for more than a few minutes
f. **Follow**: go in a given direction solely to observe or document the whereabouts of another without person from the person being followed
g. **Organization**: a business, nonprofit, or group
h. **Following across state lines**: requires the person following to physically cross state lines to continue following
i. **Distributed through interstate commerce**: physically or electronically in any form distributing the original or copies of the physical impression across state lines
j. **Reasonable expectation of privacy**: a reasonable person, based on the facts available to the individual at that time, would reasonably believe someone is unable to observe, watch, or record him or her without trespassing

(o) **Severability**: This statute is severable.

This model legislation incorporates parts of the previously proposed federal legislation and the currently active California

legislation.[188] Under this model, individuals are liable for reckless endangerment, harassment, and actual or constructive invasion of privacy. All these violations have the *mens rea* of knowingly. Similar to the California legislation, this model legislation explicitly includes airspace under its definitions of actual and constructive invasion of privacy, to outlaw the use of drones.[189] This model statute also borrows the federal limitations on defenses, precluding a defense that no physical impression was obtained or sold for profit.[190]

The model legislation employs the reasonable person to ensure an objective standard, but dispenses with the federal requirement that an individual has taken "reasonable steps" to ensure his or her privacy.[191] Instead, this requirement is encompassed by the reasonable expectation of privacy which further reduces ambiguity and uncertainty regarding what constitutes reasonable steps.[192] Civil and criminal liabilities include disgorgement of profits from physical impressions obtained in violation of the statute, borrowing from the California legislation to ensure paparazzi do not find the ends justify the means financially.[193] Also, the model legislation allows for both damages and equitable relief, again allowing the court to appropriately fashion remedies to each case. Additionally, the model discards the phrase, "in a manner that is offensive to a reasonable person," used in California's statute, thereby reducing ambiguity.[194] The model legislation also includes a plethora of definitions to reduce ambiguity and the likelihood of a court finding the statute void for vagueness, similar to the California legislation.[195]

The model legislation has noticeable differences from the previously examined legislation.[196] Here, the legislation includes

---

[188] *See id.*

[189] *See id.* § 1708.8(a).

[190] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(a) (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. § 2(a) (1998); S. 2103 § 3(a).

[191] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a).

[192] *See, e.g.*, H.R. 2448 § 2(a); H.R. 3224 § 2(a).

[193] *See* CAL. CIV. CODE § 1708.8(d) (West 2015).

[194] *See id.* §§ 1708.8(a)-(b).

[195] *See id.* § 1708.8.

[196] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998); CAL. CIV. CODE §§ 1708.7-1708.9 (West 2015); CAL. PENAL CODE § 11414 (West 2014).

liability for someone who aids or abets another in violating the statute, which is similar to the federal legislation holding liable a person physically present and assisting another in engaging a violation of the bill.[197] Also, violators do not need to have committed the act with the intention or expectation of profit, broadening the applicability of the statute and thereby reducing the likelihood of a court concluding the model legislation is pretext for governmental disagreement with paparazzi photos.

The legislation also invokes interstate commerce by requiring the pursuer to have crossed state lines physically, to follow someone, or through the distribution of photos or physical impressions, regardless of whether the purchaser actually sells the photo. An example of distribution through interstate commerce includes someone who obtains a physical impression of someone and then distributes the photo online.[198] This situation is broadly applicable to all individuals and ensures the legislation is within Congress' enumerated powers under the Commerce Clause, instead of encroaching upon State autonomy.[199]

Moreover, the legislation imposes liability on the first purchaser of physical impressions obtained in violation of the statute when the purchaser knows or should have known the photos were obtained in violation of the statute. An example of this constructive knowledge would be a picture from outside a house, showing inside a window, of an individual sitting on a toilet, seemingly unaware of the photographer. In this situation, a reasonable person would know the photo was obtained in violation of this statute, through actual or constructive invasion of privacy. Therefore, if the individual is the

---

[197] This section is necessary because now paparazzi often work in teams and share information in order to get exclusive high-earning money shots; regular photos depicting normal activities like walking down the street no longer bring in the same revenue as they once did and therefore paparazzi are incentivized to work together to get high-paying photos with unusual depictions or activities. Allison Schrager, *The 'Golden Years' of Paparazzi Have Mostly Gone*, BBC (Apr. 24, 2019), https://www.bbc.com/worklife/article/20190423-how-the-paparazzi-make-their-money.

[198] The use of interstate electronic distribution follows parallels with federal criminal statutes that allow Congressional jurisdiction when actions or communications are done through interstate commerce. *See, e.g.*, 18 U.S.C. § 1343 ("transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice").

[199] An in-depth discussion of federal versus state powers and jurisdiction is beyond the scope of this journal article. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* U.S. CONST. amend. X.

first purchaser of the photo, they are subject to the same criminal and civil liabilities as the photographer. This increases the scope of liability and makes it even harder for paparazzi to sell illicitly obtained photos, serving as an additional deterrent.

While making the first purchaser liable may seem ambitious, the *mens rea* of actual or constructive knowledge limits liability.[200] Allowing culpability for constructive knowledge also ensures purchasers do not simply turn a blind eye to evade culpability. Other members of the press will not be deterred from obtaining or using photos save for rare or extremely obvious cases. Simply asking the photographer where the photo was obtained would preclude liability because the test of constructive knowledge is based on the facts known to the initial purchaser at the time of purchase, rather than a hindsight test. Moreover, the severability clause ensures this section, if struck down, will not cause the entire statute to be declared unconstitutional.[201]

Additionally, the model legislation includes a mandatory $5,000 fine to ensure the violator takes a financial hit. This $5,000 fine is notably smaller than the maximum of $50,000 under the California legislation to reduce the likelihood of a court finding the legislation is not narrowly tailored to promote the government's interest of protecting personal privacy and prevent excessive fines.[202]

This legislation further includes a maximum sentence of fifteen days in jail. A heavy sentence might be justified in the case of reckless endangerment, but if a paparazzo is a proximate cause of serious injury or death, manslaughter and other criminal charges can be brought in addition to violations under this statute per the preemption section. The sentencing range and fine amounts can be adjusted with time, but by starting small and increasing the penalties as necessary over time, the legislature can demonstrate to the courts increased penalties are justified and necessary based on the failure of the legislation to initially deter violations of personal privacy.

While any of these individual deterrents may have minimal impact, the combination of these individual deterrents will have an aggregate effect to significantly deter paparazzi while protecting

---

[200] Scholars have argued that the US Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) allowing a publisher to publish photos it obtained legally from a third party that obtained the photos illicitly is extremely limited. *See* Patrick J. Alach, Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 231 (2007) (explaining why the *Bartnicki* holding is limited).

[201] CIV. § 1708.8(n).

[202] *Id.* § 1708.8(d).

personal privacy rights. Constitutional legislation will naturally require a balance between privacy rights and freedom of the press.

V. CONCLUSION

Continued bold and dangerous actions by paparazzi have led to a renewed need for federal legislation to ensure public safety and privacy protection rights.[203] Federal legislation following Princess Diana's death in tandem with recently amended California legislation serves as a guide for the pros and cons of past attempts to curb paparazzi.[204] Combining the benefits of previously proposed federal legislation and current California law, while improving on any deficits, helps to provide a guide for model legislation which Congress should consider when trying to limit paparazzi. Therefore, Congress should renew its attempt to pass legislation limiting paparazzi.

---

[203] *See, e.g.*, Quan & Hannah, *supra* note 3; Duke, *supra* note 3; *Paparazzo Killed by Car*, *supra* note 3.

[204] *See* CIV. § 1708.8; Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998); Personal Privacy Protection Act, S. 2103, 105th Cong. § 3(a) (1998).