

## NOTES

# 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

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### INTRODUCTION

Imagine, if you will, the Chairman of the Senate Judiciary Committee, a Republican, and the President of the United States, a Democrat, in a fist fight in the front yard of the California summer home of the Chief Justice of the United States Supreme Court, the result of an argument at a private barbecue over the evidentiary admissibility of allegations of prior misconduct in a civil suit accusing the President of sexual harassment. The President's wife jumps into the fray, and slaps her husband. The news media, which had been kept one block away, photographs the event from that distance.

As Secret Service agents separate the combatants, photographs of the incident are flashed around the world. Two weeks later, the

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president's wife sues the professional photographers and individual members of a network pool camera crew that took the pictures, senior officials of each network, but only one of two sketch artists who drew images of the scene from the front yard of a house across the street from the incident. The president's wife explains that in her action she named the artist who, she observed, was wearing eyeglasses. The other, who did not wear glasses, is not made a defendant, but a local resident videotaping the scene with a home camera while standing in his own front yard, half a block closer than the news media, is named. The Chief Justice, reading of the suit in the newspaper the next day, files his own action, naming the same defendants.

The scenario only seems implausible to those unfamiliar with California Civil Code section 1708.8, the only one of several new pieces of legislation proposed in the wake of public outrage over the death of Britain's Princess Diana to actually be enacted into law as of the writing of this paper.<sup>1</sup> Signed after heavy lobbying by the Screen Actors Guild,<sup>2</sup> section 1708.8 created two new torts, "physical invasion of privacy" and "constructive invasion of privacy,"<sup>3</sup> distinguishing both between images captured for profit and those which are not,<sup>4</sup> and applying its penalties to images acquired through the use of "visual or auditory enhancing devices."<sup>5</sup> One would be guilty of committing the new torts if one attempts to capture,

in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory

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1. See Ralph Frammolino, *California and the West; Reforms on Cornea Harvesting OKD*, L.A. TIMES, Oct. 1, 1998, at A3. The federal "Personal Intrusion Act & Privacy Protection Act," originally introduced as H.R. 2448, has not been enacted.

2. See *SAG Persuades California Legislature to Curb Paparazzi*, 20 ENT. L. REP. 5, (Entertainment Law Reporter Publishing Company), Oct. 1998.

3. Cal. Civ. Code § 1708.8 (1999).

4. *Id.* § 1708.8 (c).

5. *Id.* § 1708.8 (b).

enhancing device was used.<sup>6</sup>

This note analyzes the multiple infirmities that render section 1708.8 unconstitutional, including singling out the professional news media for discriminatory treatment, overbreadth, vagueness, and its confusion of Fourth and First Amendment standards.<sup>7</sup> While a full discussion is beyond the scope of this paper, the author notes that federal legislation proposed in this area suffers from identical problems.

Part One of this note discusses the history of section 1708.8. Part Two defines the various First Amendment standards by which both laws of general applicability and legislation otherwise affecting the news media are judged. Part Three tests section 1708.8 against those standards, finding that section 1708.8 fails constitutional muster at virtually every level, and discusses the policy implications of section 1708.8, leading to the conclusion of this paper, that, despite occasional excesses and incidents demonstrating poor judgment by representatives of some media outlets and their editors, the damage section 1708.8 does to the free flow of information far exceeds any benefit to plaintiffs under section 1708.8, who have ample other available remedies to redress any media related torts.

#### I. THE CALIFORNIA LEGISLATION: BAD CASES MAKE BAD LAW

On August 30, 1997, Princess Diana Spencer, the ex-wife of Britain's Prince Charles, was killed, along with her lover, in an automobile accident in a Paris highway tunnel.<sup>8</sup> Although French authorities determined that the intoxicated driver of Diana's car was responsible for the high speed crash,<sup>9</sup> the presence of media photographers apparently pursuing the car, and the photographers' behavior both prior and subsequent to the accident prompted pub-

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6. *Id.*

7. As of the writing of this comment, no reported court case had tested the constitutionality of § 1708.8.

8. See Craig R. Whitney, *Diana Killed in a Car Accident in Paris*, N.Y. TIMES, Aug. 31, 1997, at A1.

9. See Marlise Simons, *French Magistrates Clear Photographers in Death of Diana*, N.Y. TIMES, Sept. 4, 1999, at A2.

lic furor<sup>10</sup> followed quickly by domestic legislation, which its sponsors said was designed to curb the excesses purportedly demonstrated in the incident.<sup>11</sup>

Within two days of the accident, California state legislators proposed several bills they asserted would “regulate the aggressive photographers who relentlessly pursue celebrities—and who are the alleged cause of death in this case.”<sup>12</sup> California State Senate Majority Leader Charles Calderon proposed floating protective zones requiring photographers to stay at least 15 feet from subjects who did not want their picture taken,<sup>13</sup> notwithstanding the Supreme Court’s previous rejection of such zones as unconstitutional.<sup>14</sup>

State Senator Tom Hayden proposed a “Paparazzi Harassment Act” including both floating protective zones around those who did not want their pictures taken and a ban on use of telephoto lenses to take pictures of such individuals from outside the “protected” zone.<sup>15</sup> The Hayden bill was designed to “enable courts to fine journalists engaging in behavior that was ‘threatening, intimidating, harassing, or causes alarm, harm or the potential of harm to any person who is the subject of media interest,’” and the behavior

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10. See A.M. Rosenthal, *On My Mind: Blood on Their Hands*, N.Y. TIMES, Sep. 2, 1997, at A21.

11. See *Legislation Aimed at Paparazzi Places All Journalists at Risk*, LIBEL DEF. RESOURCE CENTER BULL., (Libel Defense Resources Center), Dec. 23, 1998.

12. See First Amendment Center, *Tragic Accident Prompts Anti-Paparazzi Legislation*, Sept. 3, 1997 <<http://www.fac.org/news/970903a-p.asp>> [hereinafter First Amendment Center]. In September 1997 there were widespread allegations that the photographers who were following the car had somehow caused the accident. Two years later, French magistrates dismissed all charges against nine photographers and a motorcyclist who had been under investigation since the accident, following release of a report indicating that the driver of Princess Diana’s car “was in a state of drunkenness and under the influence of medicines incompatible with alcohol, a state which prevented him from keeping control of his vehicle.” See, Simons, *supra*, note 9.

13. See, First Amendment Center, *supra*, note 12.

14. See *Schenk v. Pro Choice Network*, 519 U.S. 357 (1997). The holding is distinguishable from the 1973 ruling of the Second Circuit, requiring one specific photographer accused of persistently stalking and harassing the late Jacqueline Kennedy Onassis to maintain a 30 foot separation between himself and Mrs. Onassis. See *Gallella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), discussed further *infra* in text accompanying notes 159-162.

15. See, First Amendment Center, *supra*, note 12.

could be penalized even if unintentional.<sup>16</sup> One California legislator, Senator Diane Watson, said the state legislature would consider licensing professional photographers.<sup>17</sup>

Soon thereafter, a bill was introduced in Congress entitled the "Protection from Personal Intrusion Act,"<sup>18</sup> which would create the crime of felony harassment, which it defined as:

persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to insure 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.<sup>19</sup>

The bill called for penalties of up to twenty years in prison and a fine for violation.<sup>20</sup>

The Congressional measure was proposed by an occasional target of paparazzi photographers, the late Representative Sonny Bono (R-Ca.).<sup>21</sup> One month after Representative Bono's death, Senators Orrin Hatch (R-Utah), the chairman of the Judiciary Committee, and Dianne Feinstein (D-Ca.) announced similar legislation.<sup>22</sup> A version of the "Protection from Personal Intrusion Act" has been reintroduced into each session of Congress subsequent to Bono's death.<sup>23</sup>

Of all the legislation proposed, only one bill was actually signed into law, a California measure, SB 262, enacted as Civil

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16. Jacqueline Sharkey, *The Diana Aftermath*, AM. JOURNALISM REV., Nov. 1997 at 19, 22-23.

17. *Id.* at 24.

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

19. *Id.*; see also, Onell R. Soto, *Bono Proposes Bill to Limit Paparazzi*, PRESS-ENTERPRISE, Riverside, CA, Sept. 11, 1997, at A13; Sharkey, *supra*, note 16, at 22.

20. H.R. 2448 § (2)(a)(1), 105th Cong. (1997).

21. Rep. Bono was killed in a skiing accident January 6, 1998. See, Dan Morain et al., *Sonny Bono Dies In Ski Accident*, L.A. TIMES, Jan. 7, 1998, at A1.

22. See Todd S. Purdum, *Two Senators Propose Anti-Paparazzi Law*, N.Y. TIMES, Feb. 18, 1998, at A16.

23. See Randall Boese, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press*, 17 COMM. LAW. 1, 1-3 (1999). The Protection from Personal Intrusion Act was reintroduced into the 106th Congress as H.R. 97. H.R. 97, 106th Cong. (1999).

Code section 1708.8.<sup>24</sup> SB 262 was originally drafted as a relatively modest piece of legislation that would have doubled, from \$750 to \$1500, civil damages recoverable for the use of an individual's photograph, name, voice or likeness on products without the individual's consent.<sup>25</sup> However, by the time it passed the legislature SB 262 had been completely rewritten.<sup>26</sup> Gone was any reference to unauthorized use of an individual's name, voice, likeness or photograph.<sup>27</sup> In its place was language creating the two new torts of physical invasion of privacy and constructive invasion of privacy.<sup>28</sup> The measure was supported by the Screen Actors Guild and many of its marquee name members,<sup>29</sup> but was opposed by the major U.S. television networks, the American Civil Liberties Union, and perhaps surprisingly, the Motion Picture Association of America.<sup>30</sup>

## II. FIRST AMENDMENT STANDARDS OF REVIEW

In First Amendment cases, when a statute "covers the particular conduct" of the statute's challengers, courts must review the constitutional question involved.<sup>31</sup> California's section 1708.8 implicates several areas of First Amendment jurisprudence.

Its framers apparently hoped section 1708.8 would pass muster as a law of general application, relating to conduct, not speech. However, since the regulation's motive is to prevent media interests from gathering and disseminating certain types of information, it must be analyzed, at a minimum, under First Amendment right to access standards.<sup>32</sup> As a restriction on First Amendment pro-

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24. See Frammolino, *supra*, note 1.

25. State Net, California Committee Analysis, Senate Floor Bill SB 262, August 27, 1998.

26. *Id.*

27. *Id.*

28. *Id.*

29. The list of supporters included Tom Cruise, Tom Hanks, Barbara Streisand, Julia Roberts, Mel Gibson, Michelle Pfeifer, Whoopi Goldberg and James Earl Jones. *See id.*

30. *Id.*

31. *See* United States v. Grace, 461 U.S. 171, 176 (1983) (stating that review of constitutional issue is required when a statute limits expressive public activity, even if the issue is not directly argued before lower courts).

32. *See e.g.*, Press-Enterprise v. Superior Court of Cal., 464 U.S. 501, 510 (1984)

tected activity, section 1708.8 might be viewed, alternatively, to act as a prior restraint, which would implicate the strictest scrutiny,<sup>33</sup> as a content based regulation, which would also require strict scrutiny,<sup>34</sup> or, alternatively, as a regulation that fits within the traditional analytical structure applied to any attempt by government to regulate speech on a content neutral basis.<sup>35</sup>

#### A. *Traditional Standards for Regulation of Speech*

It has become axiomatic that regulation of non-broadcast speech which imposes content based discrimination must meet strict scrutiny,<sup>36</sup> while content neutral regulation that imposes only an incidental burden on non-broadcast speech is subject to a lesser test, requiring that the regulation further an important or substantial government interest and be no greater a burden than essential to furtherance of that interest.<sup>37</sup>

Content based statutes that regulate speech in a public forum are constitutional only if narrowly tailored to accomplish a compelling governmental interest.<sup>38</sup> Speech, in this context, has been defined to include what might be called conduct-inclusive speech,

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(holding that there is a right to access to criminal trials which is guaranteed absent a finding that closure is both essential to preserve higher values and is narrowly tailored to serve that interest); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975) (stating that there is a First Amendment protects right to publish names of crime victims if they appear in public records); *compare*, *Stahl v. Oklahoma*, 665 P.2d 839 (Okla. Crim. App. 1983), cert. denied, 464 U.S. 1069 (1984) (holding that there is no First Amendment right of access to private property).

33. *See* *U.S. v. New York Times*, 328 F. Supp. 324, 330 (S.D.N.Y.), aff'd, 403 U.S. 713 (1971) (limiting prior restraint to only those circumstances when absolutely vital to national security).

34. *See* *Regan v. Time*, 468 U.S. 641, 648-49 (1984).

35. *See e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (holding that First Amendment is not a bar to damages against media defendant in breach of contract); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (allowing time, place and manner restrictions if they are narrowly tailored, and stating that the regulations need not be least restrictive possible).

36. *See* *Consolidated Edison v. Public Serv. Comm'n.*, 447 U.S. 530, 540 (1980) (holding that content based regulations must be a precisely drawn means of serving a compelling state interest).

37. *See* *Quincy Cable v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985).

38. *See* *Consolidated Edison*, 447 U.S. at 540, citing *Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valleo*, 424 U.S. 1 (1976).

such as collection of polling data by questioning voters as they emerged from polling places, notwithstanding a statute forbidding such activity within 300 feet of a polling place.<sup>39</sup>

Broadcast speech, however, is regulated under standards which the Supreme Court has said are suited to its unique nature.<sup>40</sup> This has generally meant lesser First Amendment protection for broadcast speech under the half century old scarcity doctrine,<sup>41</sup> which lives on, notwithstanding the explosive increase in the number of available signals and transmission sources, including those provided by cable, direct broadcast satellite (DBS) and the internet.

### B. *Prior Restraints*

Government efforts to restrain speech prior to its utterance are tested at the highest level of scrutiny, and almost invariably fail constitutional review.<sup>42</sup> Any system of prior restraint of expression bears “a heavy presumption against constitutional validity,” and the government “carries a heavy burden of showing justification for imposition of such a restraint.”<sup>43</sup> Absent the movement of troops in time of war,<sup>44</sup> or a substantial threat to national secu-

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39. See *Daily Herald v. Munro*, 939 F.2d 380 (9th Cir. 1988) (striking down as unconstitutional Washington state ordinance prohibiting exit polling within 300 feet of a polling place).

40. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975); *Capital Cities Cable v. Crisp*, 467 U.S. 691 (1984).

41. See *National Broad. Co. v. United States*, 319 U.S. 190 (1943); *FCC v. Pacifica Found.* 438 U.S. 726 (1978); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984). Since spectrum use is not at issue in newsgathering and section 1708.8 covers both broadcasters and non broadcasters, the broadcast First Amendment tests, utilizing diminished scrutiny, are not relevant in analysis of section 1708.8.

42. See *U.S. v. New York Times*, 328 F. Supp. 324, 330 (S.D.N.Y.), *aff'd*, 403 U.S. 713 (1971) (finding publication of Pentagon Papers not restrainable absent a showing that preventing publication was “absolutely vital to national security”); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-151 (1969) (striking down as unconstitutional a permit requirement for use of public forum); *cf. Schenk v. Pro-Choice Network*, 519 U.S. 357 (1997) (permitting a ban on picketing within 15 feet of abortion clinic and holding that the ban was not an unlawful prior restraint).

43. *New York Times*, 403 U.S. at 714; *see also, Capital Cities Media v. Toole*, 463 U.S. 1303, 1304 (1983) (holding that even if a gag order is in place for a brief time, it causes irreparable injury to First Amendment interests).

44. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (holding that during wartime the government could theoretically restrain publication of sailing dates of transports or number and location of troops).

rity,<sup>45</sup> prior restraint of publication is routinely rejected by courts, whether the restraining order is sought by a private<sup>46</sup> or public entity.<sup>47</sup>

Significantly, the restraints need not preclude or even delay publication to be unconstitutional. Regulations which discourage publication by permitting damages for the publication of truthful information which has been lawfully obtained have been routinely overturned as impermissible.<sup>48</sup> It is of note, however, that from time to time, the clear and unequivocal limitations on prior restraint are tested, particularly when powerful interests seek to avoid embarrassment to themselves or family members.<sup>49</sup>

In part to avoid prior restraint issues, remedies for tortious or criminal activity by the media generally are limited to those available post publication. It is well established that media status is not a protection from prosecution for criminal or tortious activity,<sup>50</sup> and that a variety of remedies are available to those wronged in the course of media newsgathering as well as publishing activity.<sup>51</sup> Notwithstanding frequent suggestions that the news media should be exempt from torts committed during the course of news gather-

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45. See *New York Times*, 328 F. Supp. at 330 (holding that prior restraint of publication is constitutional only when absolutely vital to national security).

46. See *CBS v. Davis*, 511 U.S. 661 (1994) (staying injunction against broadcast despite allegations that videotape to be broadcast was obtained by trespass and in violation of Uniform Trade Secrets Act).

47. See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) (striking down as unconstitutional a statute authorizing the mayor to use his unbridled discretion to grant or deny applications for newsrack licenses).

48. See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (state law prohibiting publication of name of rape victim unconstitutional); *Lowe v. SEC*, 472 U.S. 181 (1985) (publication of investment advice not restrainable notwithstanding publisher's failure to register under Investment Advisers Act of 1940); *In re Providence Journal*, 820 F.2d 1342, 1353 (1st Cir. 1986) (prior restraint overturned despite assertion information restrained was obtained in violation of criminal defendant's Fourth Amendment rights).

49. For a recent example, see Frances Robles, *Philanthropists Seek Low Profile at Son's Hearing*, MIAMI HERALD, Mar. 10, 2000 (reporting that after a newspaper sought appellate hearing, a Florida state judge acknowledged having no legal basis for his ruling prohibiting publication of names of witnesses testifying on behalf of the defendant-son of a wealthy local family at a bail hearing on child pornography charges).

50. See *infra* text accompanying notes 59-62; discussion *infra* Part III.C. (discussing tailoring requirements); see also, *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Dietemann v. Time, Inc.* 449 F.2d 245 (9th Cir. 1971).

51. *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937).

ing activities,<sup>52</sup> plaintiffs have been successful in seeking these tort remedies in a variety of actions against media defendants, even in cases in which there was a substantial argument that the media was pursuing news of considerable significance.<sup>53</sup> Injunctive relief has been granted not only to the famous<sup>54</sup> but also to those whose names are virtually unknown to the public.<sup>55</sup>

### C. Laws of General Applicability

Laws of general applicability, and structural regulation of the media that do not affect speech, are tested at a level at the rational relationship level, at which the regulations almost invariably survive testing.<sup>56</sup> If the government-imposed restriction relates to

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52. See e.g., John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability*, 18 COMM. LAWYER 1 (2000) at 8 (proposing general exemption from torts committed during newsgathering relating to "matters of legitimate public concern"); see also, Sandra S. Baron et al., *Tortious Interference: The Limits of Common Law Liability for Newsgathering*, 4 WM. & MARY BILL RTS. J. 1027 (1996), (proposing media exemption from tort of intentional interference with contractual relations if alleged interference is with a confidentiality agreement); David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property*, 18 COLUM. L. REV. 1298 (1984) (advocating extension of First Amendment to protect reporters against trespassing claims).

53. See *Food Lion v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (holding that undercover reporters who obtained jobs and secretly videotaped at grocery store suspected of marketing unsafe meat committed the tort of employee disloyalty); *Shulman v. Group W Prods.*, 955 P.2d 469 (Cal. Sup. Ct. 1998) (finding triable issue of intrusion on seclusion in media ride-along in rescue helicopter carrying plaintiff who had been injured in auto accident, while precluding media liability for public disclosure of private facts because of newsworthy nature of broadcast); *Miller v. National Broad. Co.*, 232 Cal. Rptr. 668 (Cal. Ct. App. 1986) (finding triable issues of trespass, intentional infliction of emotional distress and invasion of privacy claims of wife after news crew accompanied paramedics who treated her husband even though wife had been completely unaware of presence of crew during incident); compare, *Desnick v. American Broad. Comps.*, 44 F.3d 1345, 1355 (7th Cir. 1995) (holding that investigatory tactics of the media may be "surreptitious, confrontational, unscrupulous, and ungentlemanly," but unless the tactics are also tortious, there can be no recovery).

54. See *Gallella v. Onassis*, 487 F.2d 986, 991 (2d Cir. 1973) (enjoining photographer from approaching Jacqueline Kennedy Onassis).

55. See *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Pa. 1996) (granting injunction against crew from television program *Inside Edition* found to have harassed, hounded, frightened and terrorized HMO executive's family.)

56. See e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (finding that the First Amendment is not a bar to requirement that reporters testify before grand jury); *National Broad. Co. v. United States*, 319 U.S.

conduct, rather than speech, it is subject to what is known as intermediate scrutiny, defined in *United States v. O'Brien*:

a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>57</sup>

Commercial speech is also protected under the First Amendment.<sup>58</sup> Restrictions on commercial speech may not stand unless there is a reasonable fit between the means used to restrict the speech and the end the government seeks to accomplish through the restriction.<sup>59</sup>

### III. SECTION 1708.8 FAILS FIRST AMENDMENT TESTS, AND IS UNNECESSARY

Although discussed by its proponents almost exclusively in relation to its anticipated application against paparazzi, an ill-defined subgroup of the news media,<sup>60</sup> California's section 1708.8, an ap-

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190, 216 (1943) (upholding structural restrictions of broadcasting in the public interest, convenience or necessity).

57. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). There is a slightly lower standard used in broadcast speech cases. *See FCC v. League of Women Voters*, 364 U.S. 364, 398 (1984) (holding that restriction must be crafted with sufficient precision to remedy those dangers that may exist to justify the significant abridgment of speech). The lower, broadcast, standard is inapplicable here because the rationale for the diminished protection, spectrum use, is not implicated in newsgathering activity, and because both print and broadcast interests are regulated by section 1708.8.

58. *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 496 (1996); *Smith v. California*, 361 U.S. 147, 150 (1959).

59. *See Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 418 (1993).

60. Fellini's classic film "La Dolce Vita" was the first to use the term "paparazzo." It was the name of the pesky photographer who annoyed the actress Anita Ekberg in the film. *See* Matthew Cooper, *Was the Press to Blame?*, NEWSWEEK, Sept. 8, 1997, at 36, 36. Paparazzi are, literally, a kind of annoying insect. *See Gallella v. Onassis*, 487 F.2d 986, 991 (2d Cir. 1973). In the context of current media usage they are a subgroup of photographers, usually working freelance, known for their focus on celebrity subjects. However, distinguishing paparazzi from other news photographers as a matter of law may be every bit as difficult as Justice Stewart found defining obscenity. *See, Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it.");

parent compromise between the proposals of Senators Hayden and Calderon, was cast in language designed to make it appear as a law of general applicability,<sup>61</sup> evidently in the authors' hopes that it not invoke heightened scrutiny under the First Amendment. Section 1708.8 is restricted to post-publication civil remedies, apparently to avoid prior restraint issues.

However, its intent was made clear by California Governor Pete Wilson, who, in signing section 1708.8 into law, said the bill would deter "the so-called 'stalkerazzi' . . . from driving their human prey to distraction – or even death."<sup>62</sup> Wilson's prepared statement also spoke of protecting "the personal safety and privacy rights of Californians from irresponsible members of the press."<sup>63</sup>

In the following pages, this paper discusses the language of section 1708.8, which, while facially regulating the paparazzi at whom it was aimed, has an all-encompassing sweep in its limitations on news gathering. That sweep, this paper concludes, goes far beyond constitutional limitations, and, even were it constitutional, its limited benefits are far outweighed by the damage section 1708.8 could do to the free flow of news and information.

#### A. *The Effect of Section 1708.8 Falls Disproportionately on the Media*

Notwithstanding the precise wording of the First Amendment<sup>64</sup> as supported by the well reasoned dissent of Justice Hugo Black to *Konigsberg v. State Bar of California*,<sup>65</sup> it is clear that press is not

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*see also infra*, text accompanying notes 91-100.

61. Section 1708.8 (a) and (b) speak of violations by "a person," as does section 1708.8 (c), which discusses "commercial purpose," and section 1708.8 (d) discusses employer-employee relationships. Only in section 1708.8 (e) is "transmission, publication, [or] broadcast" mentioned, and then only in asserting that those activities "shall not itself constitute a violation" of section 1708.8. *See* Cal. Civ. Code § 1708.8 (1999).

62. Governor's Office of the State of California, *Wilson Signs Legislation to Protect Privacy Rights* (Press Release, Sept. 30, 1998).

63. *Id.*

64. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

65. 366 U.S. 36 (1961). Justice Black, in a dissent joined by Chief Justice Warren and Justice Douglas, wrote, "The First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." *Id.* at

free to violate laws of general applicability.<sup>66</sup> The Ninth Circuit's interpretation of the First Amendment, announced almost thirty years ago, in *Dietemann v. Time, Inc.*,<sup>67</sup> is still often quoted, and is, perhaps, the ideological parent of 1708.8. "The First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."<sup>68</sup> That basic principle has been applied relatively consistently by lower courts over the years, particularly with regard to trespassing by reporters and camera crews, even when accompanying government investigators.<sup>69</sup>

However, when the issue reached the Supreme Court, the same case that narrowly affirmed the basic principle that the media must follow laws of general applicability also strictly limited its own holding: Justice White writing for the divided Court, in *Cohen v. Cowles Media*,<sup>70</sup> that, when applied to the press, only laws of general applicability that have no more than "incidental effects" on newsgathering are consonant with the First Amendment.<sup>71</sup> Thus, it is equally clear that when a law, even one of general applicability, is enforced against the media, it offends the First Amendment if, absent a compelling governmental interest, the statute has more than an incidental effect on the ability to gather and report the news.<sup>72</sup> When a law specifically targets the media, the scrutiny is

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61. That this unequivocal defense of the First Amendment came in the justices' defense of the refusal of a candidate, denied admission to the bar, to discuss his alleged Communist Party membership does not diminish the simplicity or power of their logic.

66. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991).

67. 449 F.2d 245 (9th Cir. 1971).

68. *Id.* at 447.

69. See *Belluomo v. KAKE T.V. & Radio, Inc.*, 596 P.2d 832, 841-42 (Kan. Ct. App. 1979) (finding liability for trespass by media representatives accompanying health inspector); *Le Mistral, Inc. v. Columbia Broad. Sys.*, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978) (finding liability for trespass in course of media investigation of alleged restaurant health violations when television crew entered restaurant with camera rolling); *Anderson v. WROC-TV*, 441 N.Y.S.2d 220, 226 (N.Y. Sup. Ct. 1981) (finding trespass when media accompanied Humane Society agents).

70. 501 U.S. 663 (1991).

71. See *id.* at 671-72.

72. See *id.* at 669-70.

even higher.<sup>73</sup>

While section 1708.8(e) asserts that “sale, transmission, publication, broadcast, or use of any image or recording . . . shall not itself constitute a violation” of the statute,<sup>74</sup> section 1708.8(c) makes it plain that professional media are to be treated differently than others accused of violating the statute, reading, in pertinent part, that if a plaintiff proves a violation “was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff” of any payment received for photographs, recordings or images gathered “as a result of . . . violation of this section.”<sup>75</sup> Even though commercial does not equate media in all cases, and singling out violations purportedly committed for commercial purposes has other constitutional problems,<sup>76</sup> both the legislative history of section 1708.8 and the comments made by its proponents before and after its signing into law indicate the statute was written to target the media.<sup>77</sup>

The effects of the statute vary dramatically by the type of defendant, with the greatest impact falling on the freelancer in the professional media. Indeed, the bill specifically exempts “employees of governmental agencies or other entities, either public or private” who in the scope of employment and supported by articulable suspicion, attempt to capture images or recordings which would otherwise be prohibited, so long as they are attempting to do so during the course of “an investigation, surveillance, or monitoring . . . to obtain evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent insurance claim, or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety.”<sup>78</sup> Section 1708.8(f) is not a mere loophole in section 1708.8’s coverage, it is large enough to preclude liability for an individual engaged in almost any kind of investigation, be it

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73. See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983) (finding differential treatment of the media presumptively unconstitutional).

74. Cal. Civ. Code § 1708.8 (e) (1999).

75. Cal. Civ. Code § 1708.8 (c) (1999).

76. See *infra*, Part III.B.

77. See *supra*, text accompanying notes 65-66.

78. Cal. Civ. Code § 1708.8 (f) (1999).

governmental, private, or, possibly, journalistic, something to which proponents of section 1708.8 can point in asserting the measure does not limit what they might consider legitimate journalistic inquiry.<sup>79</sup>

However, in the hypothetical regarding the incident involving the President and his wife, there could be no exclusion under section 1708.8(f), since coverage of the incident was the result of what would be defined as “spot” news, rather than the result of an investigation. Applying section 1708.8 to the hypothetical, if the amateur photographer who videotaped from his front yard were found to have violated section 1708.8(b), in a constructive invasion of privacy, he would be liable for unspecified “general and special damages” but, assuming he had not sold the video, he would not face disgorgement of “proceeds or other consideration obtained as a result of violation” called for under the section.<sup>80</sup> A staff news media photographer’s proceeds might be her wages for the day, but a freelance photographer’s proceeds would include any moneys received from the sale of the photographs or videotape.

Were one to hypothetically place a private investigator at the scene of the incident, and were that investigator to have taken pictures identical to those recorded by the media photographers, under section 1708.8(f), the investigator would be exempt from liability. Her activity would have been protected because she would be, in the words of the statute, an employee of a private entity who, in the scope of employment and supported by an articulable suspicion, attempted to capture images involving a violation of law.<sup>81</sup>

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79. It seems axiomatic, however, that one of the First Amendment’s most valuable protections is that no legislature may (or should) make judgments as to the relative legitimacy of stories. Indeed, both *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Welch*, 418 U.S. 323 (1974), Prof. Sims has pointed out, protect “‘bad speech’ . . . so that ‘good speech’ will not be chilled.” See Andrew B. Sims, *Food For the Lions: Excessive Damages For Newsgathering Torts And The Limitations of Current First Amendment Doctrines*, 78 B.U.L. REV. 507, 529 (1998). By contrast with section 1708.8, Prof. Sims suggests that, in recovery for torts committed in the course of newsgathering activities, publication damages, and, under certain conditions, punitive damages, should be eliminated and recovery limited to actual injuries sustained from the tort itself. See *id.* at 514.

80. Cal. Civ. Code §§ 1708.8 (b), (c) (1999).

81. See Cal. Civ. Code § 1708.8 (f) (1999).

The above analysis demonstrates that the substantive effect of section 1708.8(c) falls disproportionately on media interests protected by the First Amendment, and that effects on newsgathering are far more than incidental.<sup>82</sup> This failure alone puts section 1708.8 at a level of constitutional scrutiny it can not survive.

B. *The Commercial – Non-Commercial Distinction Makes Section 1708.8 A Content Based Regulation*

The Supreme Court has regularly rejected government efforts to distinguish between publications on the basis of their commercial nature, for example, on the basis of their intent in using photographs or reproductions, finding unconstitutional a statute that permitted photographic uses of U.S. currency and stamps for “newsworthy purposes” in articles, books, journals, newspapers, or albums but not advertising purposes, except illustrations in “legitimate” publications.<sup>83</sup> The Court, in *Regan v. Time*,<sup>84</sup> appropriately labeled as a content based restriction an attempt by Congress to regulate by distinguishing on the basis of how a photograph was used,<sup>85</sup> and, adhering to the bedrock First Amendment principle, reiterated that “regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”<sup>86</sup>

The media itself seems divided as to whether it is possible or advisable to distinguish between the paparazzi, so-called “stalk-erazzi” cited by Gov. Wilson as he signed section 1708.8 into

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82. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) (permitting incidental limitations on newsgathering); *Arkansas Writers’ Project v. Ragland*, 481 U.S. 221, 228 (1987) (finding that laws that single out the press “pose a particular danger of abuse by the State”).

83. See *Regan v. Time, Inc.*, 468 U.S. 641, 644 (1984).

84. *Id.*

85. See *id.* at 647-648.

86. *Id.* at 648-49, citing *Carey v. Brown*, 447 U.S. 455, 463 (1980); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). See also, *Leathers v. Medlock*, 449 U.S. 439, 447 (1991) (finding that law singling out speech on a specific subject for a financial burden placed on no other speech is presumptively violative of the First Amendment); *Arkansas Writers Project v. Ragland*, 481 U.S. 221, 230 (1987) (holding that a law taxing a percentage of speech derived income from certain types of magazines but excluding others violates First Amendment).

law,<sup>87</sup> and more mainstream newsgatherers. Washington Post Publisher Katharine Graham, in a column published shortly after the incident in which Princess Diana died, wrote, “one point we all have to keep clear is that the paparazzi are different from the news media and most other photographers.”<sup>88</sup> By contrast, Cable News Network executive Ed Turner was quoted, in response to the Graham essay, “This characterizing as ‘legitimate’ or ‘not legitimate’ seems to me to be a dangerous sort of road to travel.”<sup>89</sup>

Supporters of the type of regulation represented by §1708.8 apparently recognize the problem of distinguishing between photographers they would classify as paparazzi and those whose activities they presumably value more, although they seek to minimize the difficulty.<sup>90</sup> One California based law journal editor, either out of naiveté or failure to understand that not all freelancers are paparazzi and not all paparazzi freelancers, asserted that paparazzi can be distinguished from their mainstream media counterparts because “the paparazzi’s sole motive is a monetary one.”<sup>91</sup>

This argument ignores virtually every aspect of First Amendment jurisprudence.<sup>92</sup> Courts have long afforded full First

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87. See Governor’s Office of the State of California, *Wilson Signs Legislation to Protect Privacy Rights* (Press Release, Sept. 30, 1998).

88. See Katharine Graham, *Diana Remembered; Determined To Be Her Own Person*, WASH. POST, Sep. 7, 1997, at C1.

89. See Sharkey, *The Diana Aftermath*, *supra* note 16, at 24.

90. See Sharon A. Madere, Comment, *Paparazzi Legislation: Policy Arguments and Legal Analysis In Support of Their Constitutionality*, 46 UCLA L. REV. 1633 (1999) (arguing that because paparazzi are motivated by profit their activities can be distinguished from “institutional press,” and that paparazzi should not be considered members of the press within the meaning of the First Amendment).

91. *Id.* Only in a footnote does Ms. Madere concede what she calls the institutional press have a financial motive in its activities. Ms. Madere dismisses this inconsistency in her argument with a statement that it is her “opinion” that members of the mainstream press “generally are also interested in serving as an effective check on government, or at least in contributing truthful information to the marketplace of ideas. See *id.* at 1657 n.112.

92. A point-by-point dissection of Madere’s comment is beyond the scope of this paper. However, among its additional questionable assertions are that legislation limiting the activities of paparazzi can be justified because of the small number of purported paparazzi excesses (the Madere comment cites fewer than a dozen, including those resulting in litigation under criminal and civil statutes that pre-dated § 1708.8), its use of “straw man” analogies, such as “the paparazzi should not be exempt from the standards to which the law holds the general public,” see *id.*, at 1646-47, when clearly they are not, see,

Amendment protection to publications of all types for stories of all types,<sup>93</sup> expressly refusing to distinguish between pulp magazines and fine literature, or limit protection based on the perceived relative merit of the publication,<sup>94</sup> reporters and photographers are given no lower First Amendment protection because they are paid, or because they work for newspapers and broadcast operations that are commercial outlets.<sup>95</sup> Similarly, efforts to confiscate profits of those accused of or convicted of crimes who publish books relating to their criminal activity have been rejected as presumptively inconsistent with the First Amendment.<sup>96</sup>

Perhaps recognizing the weakness of the position taken by the more radical proponents of anti-paparazzi legislation, the framers of Section 1708.8 sought to avoid the issues raised by the commercial – non commercial distinction by expressly stating that sale, transmission, publication, broadcast, or use of any image or recording acquired in violation of the section “shall not itself constitute a violation” of the statute.<sup>97</sup> However, the limitation of section 1708.8(e) is undercut by section 1708.8(c), which provides for “disgorgement to the plaintiff of any proceeds” received by a defendant, if the plaintiff proves the violation “was committed for a commercial purpose.”<sup>98</sup> Section 1708.8(d) also adds liability for

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Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (holding that all media must obey laws of general applicability), and Madere’s consistent description of the legislation as relating to conduct of paparazzi supported by a recitation of complaints about the paparazzi, not noting until 27 pages into her comment that the regulations would, in fact, apply not just to paparazzi but to all reporters and photographers regardless of their media affiliation. See Madere, *supra* note 93, at 1660.

93. *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174, 184 (1984) (holding that the newsworthiness exception to New York Civil Rights Law, “applies not only to reports of political happenings and social trends . . . but also to news stories and articles of consumer interest including developments in the fashion world.”)

94. See *Winters v. New York*, 333 U.S. 507 (1948) (according full First Amendment protection to non obscene pulp magazines and finding that distinction between “newsworthy and educational” and those that were not amounted to impermissible content based regulation in violation of the First Amendment).

95. See *Cincinnati v. Discovery Network, Inc.* 507 U.S. 410, 420-21 (1993), (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (finding that “speech . . . is protected even in a form that is ‘sold’ for profit.”))

96. See *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1991).

97. Cal. Civ. Code § 1708.8 (e) (1999).

98. Cal. Civ. Code § 1708.8 (c) (1999).

employers of photographers and reporters as well as any person who “directs, solicits, actually induces, or actually causes another person” to violate section 1708.8,<sup>99</sup> thereby imposing liability on editors who hire freelance photographers, including, but not limited to, paparazzi.

This would seem to put section 1708.8 squarely in the area proscribed by *Simon & Schuster v. New York State Crime Victims Board*,<sup>100</sup> in which a unanimous Supreme Court overturned New York’s “Son of Sam” law, which provided that an entity contracting with a person accused of or convicted of a crime for the production of a work describing the crime was required to turn over to the State Crime Victims Board any money that otherwise would have been paid to the author of the work.<sup>101</sup> Although the authors of section 1708.8 seem to have attempted to write around the Court’s objections to the Son of Sam Law, they have failed in their effort.

The *Simon & Schuster* Court wrote that even if there was compelling state interest in ensuring that crime victims were compensated by those who harmed them<sup>102</sup> and in insuring that criminals could not profit from their crimes,<sup>103</sup> the interest in classifying assets on the basis of how they were earned was “hardly compelling.”<sup>104</sup> The “Son of Sam” statute was held to be unconstitutional in that it both limited compensation to profits earned from the criminals’ illegal activity, and was overinclusive in that it reached moneys derived from literary or story-telling works that might be only peripherally related to the crime for which an individual had been convicted or to which that individual had admitted, so long as there was incidental or tangential reference to the crime.<sup>105</sup>

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99. Cal. Civ. Code § 1708.8 (d) (1999).

100. 502 U.S. 105 (1991).

101. *See id.* at 511.

102. *See Simon & Schuster*, 502 U.S. at 509.

103. *See id.* at 510.

104. *See id.*

105. *See id.* at 511. The New York State Legislature, in response to the Supreme Court striking down the “Son of Sam” law, promptly passing a reincarnation of the “Son of Sam” statute, Laws of 1992, Ch. 618. Son of Sam II was intended “to recapture for crime victims much of what was intended for them under ‘Son of Sam,’” Memorandum of Sen. Emmanuel R. Gold, cited in HUGH C. HANSEN, N.Y. INTELL. PROP. HANDBOOK

Section 1708.8 (c) stays within the bounds of *Simon and Schuster* in that it does not directly reach peripherally related work, that is, it limits specific recovery from a violator to the proceeds of the images recorded or otherwise captured in violation of the statute.<sup>106</sup> However, a key aspect of *Simon & Schuster* the language of section 1708.8 does not avoid is that it subjects speech on a particular subject, speech defined by the statute as invasive, to a financial burden that it places on no other speech.<sup>107</sup> This burden alone is enough to require that a statute be subject to narrow tailoring.<sup>108</sup> As discussed below, narrow tailoring is a test that section 1708.8 also fails.

### C. Section 1708.8 is not Narrowly Tailored

Whether subject to strict scrutiny, defined as a limitation on commercial speech, a “time, place and manner” regulation or an incursion into the fundamental First Amendment right of the media to gather news, section 1708.8 would be subject to a narrow tailoring requirement. In *Zablocki v. Redhail*,<sup>109</sup> Justice Marshall wrote that a statutory classification which significantly interferes with the exercise of a fundamental right must fail unless it is supported by

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(2000), § 3(1) n.2. No challenge to Son of Sam II, Prof. Hansen wrote, has reached the Supreme Court, but the revised statute “does address the constitutional problems identified in *Simon & Schuster*,” while leaving unresolved the question of whether its provisions are necessary, in light of the other strong remedies available to serve the identified compelling state interest in obtaining compensation for victims of crime. *Id.* § 3(d). Some 40 states now have variants on the Son of Sam legislation. *Id.*

106. See Cal. Civ. Code § 1708.8 (c) (1999). However, section 1708.8 also allows plaintiffs to recover other damages, including “up to three times the amount of any general or special damages that are proximately caused” by the violation of section 1708.8, and punitive damages as well. See *id.* This proximate cause requirement appears not to be problematic from a First Amendment standpoint, in that it is content neutral and is otherwise within the bounds of standard tort liability. See *Palsgraf v. Long Island Railroad*, 248 N.Y. 339 (1928) (defining proximate cause as a minimum standard for tort liability).

107. See *Simon & Schuster*, 502 U.S. at 508. Although proponents of section 1708.8 would almost certainly assert that what the section regulates is conduct, not speech, the Supreme Court has for more than 60 years recognized that fully protected speech can have a conduct component. See *Thornhill v. Alabama*, 310 U.S. 88 (1940) (invalidating statute prohibiting picketing or speech with the purpose of inducing others to join in a strike).

108. See *Simon & Schuster*, 502 U.S. at 512.

109. 434 U.S. 374 (1978)

sufficiently important state interests and is “closely tailored to effectuate only those interests.”<sup>110</sup>

While narrow or close tailoring need not be the narrowest tailoring possible,<sup>111</sup> even the intermediate scrutiny of *United States v. O'Brien*<sup>112</sup> requires that restrictions on expressive conduct be “no greater than essential.”<sup>113</sup> Time, place and manner regulation are also limited due to First Amendment concerns, and may “not burden substantially speech than is necessary to further the government’s legitimate interests.”<sup>114</sup> Even were there some situations in which the protections of section 1708.8 might be salutary, the measure’s sweep far exceeds any such legitimate goal.

One obviously critical element in the analysis of section 1708.8 as a time, place and manner restriction is the location of the prohibited activity. The statute itself fails to distinguish violations on the basis of place of occurrence, whether it is traditionally public or private space, or even whether or not the alleged violations take place in California,<sup>115</sup> a state which allows claims for intrusion that would be rejected in other states as a matter of law.<sup>116</sup> Rather, section 1708.8 focuses on the actions of those who photograph or record and that which they are photographing or recording, regard-

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110. *Zablocki*, 434 U.S. at 388.

111. *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 479 (1989).

112. 391 U.S. 367 (1968)

113. *United States v. O'Brien*, 391 U.S. at 376-77. *See also Fox*, 492 U.S. at 480.

114. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

115. *See Cal. Civ. Code* § 1708.8 (1999).

116. For example, California allows recovery for false light claims. *See KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Cal. Ct. App. 2000). Texas does not allow recovery for false light defamation. *See Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tx. 1994) (rejecting false light claims as overlapping defamation and intentional infliction of emotional distress). New York courts reject the idea of any common law claim for invasion of privacy. *See Howell v. New York Post Co.*, 612 N.E.2d 699 (N.Y. 1993). Even if willing to consider a false light claim under the state’s Civil Rights Law section 51, New York courts have strictly limited such claims to the point that they would not be useful in any paparazzi related claim. New York courts have taken this position where the use of a photograph is in connection with a newsworthy article, even if the photograph is used entirely out of context and in what, in a non-legal sense, would clearly be a false light. *See Messenger v. Gruner*, 727 N.E.2d 549 (N.Y. 2000) (precluding recovery under false light theory in use of teenager girl’s picture to illustrate a column about a girl who had sex with her boyfriend and two other teenagers while drunk, even though the girl depicted had not done anything of that nature).

less of the location of the activity.<sup>117</sup>

This raises the nightmarish specter of attempts by California litigants to pursue section 1708.8 remedies for allegedly violative activity transpiring in other jurisdictions, claiming long arm jurisdiction on the basis of commission of an allegedly tortuous act outside the state that has an effect within the state of California,<sup>118</sup> notwithstanding the fact that no other state or federal jurisdiction has a regulation comparable to section 1708.8. For national publications and broadcast networks this type of claim would be particularly problematic, as their representatives could not possibly know whether a subject of one of their photographs or videotapes shot outside California was in fact a California resident who, upon returning to California, might claim damages under section 1708.8, or who might have a relative in California who might make an identical claim.

If considered under the heading of a manner restriction, section 1708.8 is perhaps even more dramatically flawed. As Justice Kennedy wrote in *Turner Broadcasting System v. FCC*,<sup>119</sup> “when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the diseases sought to be cured.’”<sup>120</sup>

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117. See Cal. Civ. Code § 1708.8 (1999).

118. See Cal. Code Civ. Proc. § 410.10 (2000). California’s long arm statute is broad, allowing jurisdiction on “any basis not inconsistent with the Constitution of this state or of the United States.” *Id.* The California long arm statute has been interpreted to support a possible finding of California courts’ jurisdiction in an alleged invasion of a Californian’s privacy by an out-of-state publication on the grounds that the publication has sufficient contacts with California. See *Sipple v. Des Moines Register & Tribune Co.*, 147 Cal. Rptr. 59 (Cal. Ct. App. 1978) (finding no jurisdiction over the Des Moines Register for its publication of a story regarding a California resident but suggesting that had the newspaper sent a reporter to California jurisdiction might attach). Significantly, the *Sipple* court cited to *David v. National Lampoon, Inc.*, 432 F. Supp. 1097 (D.S.C. 1977), in which the U.S. District Court for the District of South Carolina found long arm jurisdiction even without sending of a reporter or other representative to South Carolina when the allegedly offending publication was distributed in South Carolina. While a full discussion of the problems that would be engendered by attempts to enforce section 1708.8 beyond California’s borders is beyond the scope of this note, notice and due process issues are obvious initial hurdles to such litigation.

119. 512 U.S. 622 (1994).

120. *Turner Broadcasting System v. FCC*, 512 U.S. at 664, (quoting *Quincy Cable TV, Inc. v. F.C.C.* 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

Justice Kennedy emphasized that in order to draft a constitutional regulation that restricts speech, the legislature “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”<sup>121</sup>

Although it might seem overkill, the author posits the California legislature’s efforts in passing section 1708.8 failed in this area too. The California legislature did not demonstrate that section 1708.8 would alleviate any harms, but would merely punish, after the fact, those who engaged in the prohibited form of speech.<sup>122</sup>

Assuming, however, *arguendo*, that there is a compelling government interest in protecting personal privacy, it is already well established that media status is not a protection from prosecution for criminal or tortious activity, and that a variety of remedies have long been available to those wronged in the course of media news-gathering as well as during publishing activity.<sup>123</sup> In addition to the post publication remedies for libel and defamation, actions seeking damages for pre-publication media excesses such as trespass, harassment, invasion of privacy and intentional infliction of emotional distress are available to both celebrity and non-celebrity victims alike.<sup>124</sup> There are also traditional legal means of protecting personal privacy, which courts have applied in a creative and protective fashion, such as the injunctive relief granted Jacqueline Kennedy Onassis in 1973.<sup>125</sup>

By contrast, section 1708.8 fails to distinguish between the ac-

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121. *Id.*

122. The author is not unmindful that the legislature attempted to position § 1708.8 as regulation of conduct rather than of speech, and that legislators might argue strenuously, albeit in the author’s opinion, without merit, that they did so successfully. *See supra*, Part III.A.

123. *See* *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971) (finding liability for libel by media defendant); *Dietemann v. Time, Inc.* 449 F.2d 245 (9th Cir. 1971) (finding media liability for invasion of privacy).

124. *See* *Baron*, *supra* note 52; *Freedman*, *supra* note 52.

125. *Gallella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (granting permanent injunction against paparazzi photographer who persistently harassed and assaulted members of Kennedy family); see additional discussion of the *Gallella* case, *supra* text accompanying notes 159-62. *See also*, *Wolfson v. Lewis*, 924 F. Supp 1413 (E.D. Pa. 1996) (awarding injunctive relief to HMO executive against television program and its staff who were found to have harassed, hounded, frightened and terrorized executive’s family).

tivities of news crews covering the President of the United States and those of paparazzi pursuing Hollywood starlets, most likely because it is impossible to do so constitutionally in the language of a statute.<sup>126</sup> Given that there are ample remedies already available to plaintiffs alleging tortious harm from newsgathering activity, ranging from injunction to post publication damages, and that these remedies constitute substantially less restrictive alternatives addressing the harm section 1708.8 seeks to cure, it is clear that section 1708.8 cannot survive examination for narrow tailoring.

#### D. Section 1708.8 is Overbroad

The overbreadth doctrine prohibits laws that, along with their allowable proscriptions, restrict constitutionally protected rights of free speech, press, or assembly.<sup>127</sup> Both section 1708.8(a) and (b) declare a violation any image depicting “personal or familial activity,” something only defined in section 1708.8(k) in the broadest of terms, including, apparently virtually anything that the target of a news report wants to keep private, subject only to a limitation of a “reasonable person”<sup>128</sup> or “reasonable expectation of privacy”<sup>129</sup> test.

Section 1708.8(k) also purports to include within its ambit any “interactions with the plaintiff’s family or significant others, or other aspects of plaintiff’s private affairs or concerns,” and, were that not enough, says the “personal and familial activity” covered by the statute is not limited to that specifically defined by the statute.<sup>130</sup> Only illegal or criminal activity is specifically excluded from section 1708.8 (k), and even that exclusion is limited by the section’s inclusion within section 1708.8 (k)’s coverage of activities of crime victims.<sup>131</sup>

Thus, under section 1708.8, not only could a plaintiff unilaterally and arbitrarily decide what constitutes tortious activity, the law would sweep within its virtually all-encompassing coverage every-

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126. *See supra* Part III.B.

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

128. Cal. Civ. Code § 1708.8 (a) (1999).

129. Cal. Civ. Code § 1708.8 (b) (1999).

130. Cal. Civ. Code § 1708.8 (k) (1999).

131. *Id.*

thing from the activities of the hypothetical president's wife discussed at the beginning of this piece to the victims of a terrorist incident, depending only on the locale of that incident. The Chief Justice, in the hypothetical fist fight with the President, might plausibly assert that his activity was a personal activity, within the meaning of section 1708.8(b), notwithstanding the clear newsworthiness of the event.

The law plainly would make it impossible for news photographers to do their jobs with any certainty as to potential liability under section 1708.8. Recent events offer a graphic example of how section 1708.8 would create such problems: had the April 22, 2000 raid by U.S. authorities on the Miami house from which Elian Gonzales was taken to a reunion with his father<sup>132</sup> taken place in California, those who photographed that undoubtedly newsworthy event would have arguably violated section 1708.8.<sup>133</sup> The raid, which started on the public street but immediately moved onto private property,<sup>134</sup> interrupted what might have been characterized as a dispute between family members over the future of a child. Since the cameras used by the professional media were certainly within the statute's intended, if poorly articulated, definition of "visual enhancing devices,"<sup>135</sup> coverage of the event, seen worldwide on television, and in the United States within three minutes of its occurrence,<sup>136</sup> would have fallen within section 1708.8's definition of both physical and constructive invasion of privacy.

Media defendants would have been left initially in the uncomfortable position of not knowing whether photographing the raid, or, for that matter, events preceding it, constituted a violation of

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132. See Karen DeYoung, *Raid Reunites Elian and Father*, WASH. POST, Apr. 23, 2000 at A1.

133. The author anchored the initial CBS News coverage of the raid on the Miami house from which Elian Gonzales was taken by federal authorities. See Gail Shister, *TV Talk, Why did CBS's Rather anchor the early-morning Elian Saga*, PHILADELPHIA INQUIRER (April 25, 2000) <<http://www.phillynews.com/inquirer/2000/Apr/25/magazine/SHIS25.htm>>.

134. See *id.*

135. See Cal. Civ. Code § 1708.8 (b) (1999). The definitional problems associated with the terms "visual enhancing devices" and "auditory enhancing devices" are discussed in detail *infra* Part III.D.

136. See Shister, *supra* note 133.

the statute as the result of “interactions with the plaintiff’s family or significant others, or other aspects of plaintiff’s private affairs or concerns,” section 1708.8’s boundary for tortious activity, or whether the media newsgathering efforts fell within the exception created by section 1708.8(k) for investigation by a private entity of illegal activity.<sup>137</sup> The uncertainty as to what activities might subject reporters and photographers to civil liability would undoubtedly produce a chilling of newsgathering that is neither desirable nor constitutionally defensible.

Indeed, were section 1708.8 to be read literally, it would be hard to imagine any activity in life that the media *could* cover without concern. Virtually anything could be defined, by participants in events, arbitrarily and without notice to media and other photographers, to be “personal” activity. The limitations on the section 1708.8 coverage to invasions “offensive to a reasonable person,”<sup>138</sup> or violating a plaintiff’s “reasonable expectation of privacy”<sup>139</sup> offer no palliation, as conceptions of what is reasonable vary widely from week to week, to say nothing of from jurisdiction to jurisdiction.

#### E. Section 1708.8 is Unconstitutionally Vague

Under the vagueness doctrine, laws must be clear enough to put individuals on notice as to what is prohibited.<sup>140</sup> Among its vague terms, section 1708.8(b) sets as a threshold for liability the use of a “visual or auditory enhancing device,”<sup>141</sup> a term otherwise undefined in the statute. Use of eyeglasses and hearing aids, which are devices that would fit the common definition of visual or auditory enhancing devices, would seem to violate the statute.<sup>142</sup> Al-

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137. See Cal. Civ. Code § 1708.8 (k) (1999).

138. See Cal. Civ. Code § 1708.8 (a) (1999).

139. Cal. Civ. Code § 1708.8 (b) (1999).

140. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (finding vagrancy statute unconstitutionally vague because it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden); *Conally v. General Construction Co.*, 269 U.S. 385, 391 (1926) (holding that a statute “must be sufficiently explicit to inform those who are subject to it what conduct what conduct on their part will render them liable to its penalties”).

141. Cal. Civ. Code § 1708.8 (b) (1999).

142. There is no question but that both eyeglasses and hearing aids are devices

though a reading of the statute itself leaves it unclear whether a camera with a lens of any kind would be a visual enhancing device within the meaning of the statute, or whether a camera with a long or telephoto lens would be the only type regulated by section 1708.8, the legislative history would seem to indicate that any type of camera would suffice.<sup>143</sup>

In the hypothetical that began this essay, therefore, it is clear that the artist who sketched the scene wearing eyeglasses would be liable under section 1708.8, while the artist standing next to her who wore no glasses would not: the eyeglasses would be, in the words of the statute, a visual enhancing device. This type of distinction can not survive any type of First Amendment or Equal Protection analysis: there simply is no rational basis for the section 1708.8 distinguishing between the those who use eyeglasses and those whose sight requires none.<sup>144</sup>

While the traditional common law definition of privacy included details of intimate personal relations and medical condi-

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within the meaning of the law. See Nondiscrimination On the Basis of Disability in State and Local Government Services, Personal Devices and Services, 28 C.F.R. § 35.135 (2000) (discussing "individually prescribed devices, such as prescription eyeglasses or hearing aids"). Whether they are "enhancing" per se is not stated in the regulations, which merely calls them "personal devices." *see id.* However, case law refines the definition sufficiently to strongly suggest both eyeglasses and hearing aids would be "enhancing," within the meaning of § 1708.8. See *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1431 (N.D. Iowa 1996) (defining eyeglasses as enhancing devices); *Bailey v. Anderson*, 79 F. Supp.2d 1254, 1255 (E.D. Kan. 1999) (defining bioptic telescopes as enhancing devices); *Breece v. Alliance Tractor-Trailer Training II*, 824 F. Supp 576, 578 (E.D. Va. 1993) (discussing earphone amplification devices).

143. State Net, California Committee Analysis, Assembly Committee on Judiciary Bill No. SB 262, June 28, 1998. The legislative analysis indicates that, at that particular point in the process, supporters of SB 262 were attempting, in creating the new tort of constructive invasion of privacy, to follow on the California Supreme Court decision in *Shulman v. Group W Productions*, 995 P.2d 469 (9th Cir. 1998), rehearing denied, 1998 Cal. LEXIS 484 (1998) (finding triable issue of intrusion on seclusion in media ride-along in rescue helicopter carrying plaintiff who had been injured in auto accident while precluding media liability for public disclosure of private facts because of newsworthy nature of broadcast). At issue in *Shulman* was the use of a television crew's equipment, *see id.*, but the images could conceivably have been recorded with any home video equipment, if the person using the equipment were in an identical position as the Group W crew in the *Shulman* case.

144. For an excellent further discussion of this point, *see* John H. Fuson, Comment, *Protecting the Press from Privacy*, 148 U. PA. L. REV. 629, 666-667 (1999).

tions,<sup>145</sup> section 1708.8 also expands the new statutory privacy to cover “interactions with the plaintiff’s family” and “other aspects of plaintiff’s private affairs or concerns.”<sup>146</sup> This would allow the scope of section 1708.8 to be expanded dramatically, indeed, almost limitlessly, to include the taking of almost any picture of a non consenting individual engaged in virtually any type of endeavor, whether newsworthy or not, based merely on the individual’s decision.

Additionally, neither “family” nor “private affairs or concerns” are defined terms, leaving journalists completely unable to determine whether their conduct in covering or photographing events is tortious. Thus, section 1708.8 is unconstitutionally vague.

#### F. *Section 1708.8 Confuses Fourth and First Amendment Standards*

By imposing as its standard for violation whether the plaintiff had a reasonable expectation of privacy in the activity that has been depicted, the authors of section 1708.8 adopted what has become the Fourth Amendment touchstone, notwithstanding that the standard is used largely in the criminal, rather than civil, context.<sup>147</sup> The Supreme Court, in *United States v. Katz*,<sup>148</sup> made it clear that there can be Fourth Amendment protection for activities even in an area open to the public,<sup>149</sup> something the framers of section 1708.8 with which doubtlessly agree.

However, section 1708.8 breaks down quickly in positing aerial photography with the use of a visual enhancing device, e.g., a camera, with or without telephoto lens, as a violation of one’s reasonable expectation of privacy. The Supreme Court in, *Florida v. Riley*,<sup>150</sup> expressly said there was no Fourth Amendment violation in police aerial surveillance of a marijuana patch because there was no reasonable expectation of privacy which the police had vio-

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145. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973).

146. Cal. Civ. Code § 1708.8 (k) (1999).

147. See *United States v. Katz*, 389 U.S. 347, 359 (1967) (overturning conviction as a result of warrantless invasion of reasonable expectation of privacy).

148. *Id.*

149. *Id.* at 351-52.

150. 488 U.S. 445 (1989).

lated.<sup>151</sup> However, as proponents of section 1708.8 have made clear, both within California and at Congressional hearings on the various incarnations of the Protection from Personal Intrusion Act, intrusive aerial photography is one of the principal complaints at which the various pieces of legislation proposed in the wake of Diana's death was aimed.<sup>152</sup>

The majority holding in *Riley*, that the defendant "could not have expected that his greenhouse was protected from *public or official* observation from a helicopter,"<sup>153</sup> is of critical importance to the analysis of section 1708.8 under the *Katz-Riley* chain of cases. Additionally, in exempting law enforcement officers, private investigators or governmental employees from its scope,<sup>154</sup> section 1708.8 would allow a staff member working for a State Senator, supported by articulable suspicion, to exceed without penalty the limitations of section 1708.8 in the course of investigative activities that would be a violation were they undertaken by an investigative journalist, a distinction only a politician could love.<sup>155</sup>

#### G. *Media Missteps Are Already Addressed by Established Tort Law Remedies*

From the 19th century exposes of Nellie Bly<sup>156</sup> to the modern day investigations of major newspapers and broadcast news programs including 60 Minutes, access and the ability to gather news without governmental interference have served this country well. While media excesses, like any excesses, are unfortunate, the First Amendment wisely precludes impinging on media freedoms, even in an effort to protect the sensibilities of individuals and the shift-

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151. *Id.* at 450-51.

152. See HEARING OF THE HOUSE JUDICIARY COMMITTEE ON H.R. 2448, "Protection From Personal Intrusion Act" and H.R. 3224, "The Privacy Protection Act of 1998", May 21, 1998, (testimony of Michael J. Fox).

153. *Riley*, 488 U.S. at 450-51 (1989) (emphasis added).

154. Cal. Civ. Code § 1708.8 (f) (1999).

155. This seemingly contradictory broadening of the Fourth Amendment in the private context coupled with a governmental exemption is explored in depth in Andrew D. Morton, Comment, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435 (1999).

156. See BROOKE KROEGER, *NELLIE BLY: DAREDEVIL, REPORTER, FEMINIST* 85-89 (1994).

ing notions of what is or should be private.

This does not leave one harmed by tortious media activities without remedy: there are and have been for years criminal and civil laws that amply address concerns of individuals while leaving the important safeguards of the First Amendment intact.<sup>157</sup> One recent example of such criminal law enforcement: the conviction and sentencing to jail terms of photographers Giles Harrison and Andrew O'Brien on charges of false imprisonment for harassment of actor Arnold Schwarzenegger and television personality Maria Shriver resulting from an incident in May, 1997.<sup>158</sup> In the civil arena, the Second Circuit upheld an injunction prohibiting a paparazzo photographer who persistently intruded on the widow of former President John F. Kennedy from approaching closer than 30 feet to the former First Lady and/or her children.<sup>159</sup>

Although the use of floating protective zones has generally been rejected by the Supreme Court,<sup>160</sup> a key distinction in the *Gallella* case was that the injunction was not against the photographer taking pictures,<sup>161</sup> rather it precluded further personal invasion of privacy, which was held, under the facts of the case, to be tortious.<sup>162</sup> Indeed, despite suggestions that the media in recent years have increased their intrusiveness to the point that new controls on newsgatherers are necessary, the issue of media aggressiveness has been debated for more than a century, and the complaints of celebrities have been worded nearly identically.<sup>163</sup>

The legislative and judicial response has been to carefully pre-

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157. See Robert W. Welkos, 2 *Photographers Sentenced to Jail*, L.A. TIMES, Feb. 24, 1998 at B3.

158. See *id.*

159. See *Gallella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

160. See *Schenk v. Pro Choice Network*, 519 U.S. 357 (1997) (finding floating zones of protection around abortion clinic personnel impermissible).

161. See *Gallella*, 487 F.2d at 999.

162. See *id.* at 994.

163. Complaints about media activities were at the center of the creation of modern conceptions of privacy and privacy related torts. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890) ("The press is overstepping in every direction the obvious bounds of propriety and of decency", complaining about media intrusion at a private birthday party). Compare Earl Spencer's anti-media eulogy at the funeral of Princess Diana, quoted in Howard Kurtz, *Pictures at a High Price; Paparazzi Take More than Celebrities' Photos*, WASH. POST, Sept. 1, 1997, at A1.

serve the free flow of information, recognizing that is the lifeblood of the nation, while not foreclosing the possibility of recovery for victims of wrongdoing by media or other perpetrators. While there might be some who believe the President's wife should be free to slap her husband's face in a place from which they can be publicly observed, it is hard to fashion a substantive argument that the activities of such public figures should not be the subject of full news coverage. Indeed, as the Supreme Court has reaffirmed, "there is an undoubted right to gather news 'from any source by means within the law.'"<sup>164</sup>

News organizations have often appeared to be their own worst enemies in their efforts to avoid additional regulation. If the Constitution guarantees broad press freedoms, it seems self evident that those guarantees are subject to challenge and limitation, up to and including amendment of the Constitution itself.

Many editors, including some from the same tabloids which regularly hired photographers to pursue her and regularly purchased and then printed obviously intrusive photographs of her, sought to distance themselves from the high speed chase that resulted in the death of Princess Diana<sup>165</sup> and the relentless pursuit tactics of the paparazzi. However, a series of incidents, including some subsequent to the crash in the Paris tunnel, demonstrate that the editors' disclaimers and attempted distinctions from the paparazzi may be of limited value and that few, if any, lessons have been learned from the Diana incident or subsequent fallout, either in terms of intrusions into the personal life of public and semi-public figures, or in terms of vehicle chases.<sup>166</sup> Within months af-

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164. *Houchins v. KQED*, 438 U.S. 1, 11 (1978), quoting *Branzburg v. Hayes*, 408 U.S. 665, 681-682 (1972).

165. See Sharkey, *supra* note 16, at 21-22. (noting National Enquirer Editor Steve Coz's televised plea for organizations to refuse to publish pictures of the dying princess and saying his organization had done so, further quoting Entertainment Weekly reporter Dana Kennedy as calling Coz's comment "the worst hypocrisy," noting that the week before the crash, the National Enquirer had a headline, "Di Goes Sex-Mad, I Can't Get Enough!").

166. See, e.g., Michelle Caruso et al., *Monica & Fotogs in Fender-Bender*, N.Y. DAILY NEWS, Feb. 7, 1998, at 6 (detailing accident in which one of approximately one dozen news crews pursuing woman romantically linked to President Clinton collided with her vehicle).

ter the death of Princess Diana, the American media, including newspapers which had decried the invasive tactics of the photographers involved in the crash involving Princess Diana, made the personal life a prominent sportscaster the subject of front page speculation, widely reporting rumors and allegations relating to his sexual preferences, defending their decision as being of “public interest” since it relate to pending and potential litigation.<sup>167</sup> Even as that scandal ebbed, a car containing a television crew from the Associated Press, one of a dozen media vehicles chasing a woman who had maintained a sexual relationship with the President of the United States, Bill Clinton, crashed into the vehicle in which the woman was riding,<sup>168</sup> only a day after a photographer had physically assaulted the woman.<sup>169</sup>

These incidents and the other examples of what seems to many poor judgment by individual members of the media and/or their editors, however, are both relatively few in number and, most importantly, do not diminish the essence of the critical arguments for media freedoms, which are that the public has a right to know and that once a governmental (or other) agency is free to define limitations on that right, it may make those and future limitations in a fashion that precludes informed debate in matters of public interest and policy. Those who propose, and pass, laws such as California’s section 1708.8 exploit the dissonance between the lofty purposes of the First Amendment and the tactics of the photographers who pursued Princess Diana, which included admitted trespassing<sup>170</sup> and Peeping Tom tactics<sup>171</sup> and whose stated goals included using long lenses to penetrate windows and private property to obtain photographs of Princess Diana unclothed,<sup>172</sup> drinking her morning coffee<sup>173</sup>, playing at home with her children,<sup>174</sup> or work-

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167. See Mike Lupica, *Voice of Knicks in Foul Trouble from the Court to Courtroom*, N.Y. DAILY NEWS, May 21, 1997, at 2; Michele McPhee et al., *Marv Case Gets Bit More Hairy New Tale of Toupee Tussle, Biting & Bloomers*, N.Y. DAILY NEWS, Sept. 25, 1997, at 2.

168. See Caruso, *supra* note 166, at 6.

169. See *id.*

170. See MARK SAUNDERS & GLENN HARVEY, *DICING WITH DI* 108 (1997).

171. *Id.* (discussing peering in the window of a house in Martha’s Vineyard in which Diana was staying).

172. *Id.* at, 67, 103, 128.

173. *Id.* at 102 (“A quick snap of her standing [in her hotel room] with her coffee

ing out at a gym.<sup>175</sup> While those tactics are deplorable, and, indeed, are deplored by many in the media, as the Gallella case showed in the 1970s,<sup>176</sup> and as has been demonstrated again in the recent Schwarzenegger-Shriver incident,<sup>177</sup> even the most public of figures is not without remedy in responding to such intrusions.

### CONCLUSION

At the margins of public status the need for enhanced privacy protection for individuals may seem, on an emotional level at least, more appealing. However, as the Supreme Court put it: “[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and, like many other virtues, it cannot be legislated.”<sup>178</sup>

California’s Civil Code section 1708.8 amounts to killing a fly on baby’s nose by bashing it with an ax. It is neither sound policy nor constitutional.

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cup could more than pay for my expenses.”).

174. *Id.* at 103, 149-152, 174.

175. *Id.* at 11, 174.

176. *See supra* text accompanying notes 159-62.

177. *See Welkos, supra* note 157, at B3.

178. *Miami Herald v. Tornillo*, 418 U.S. 241, 256 (1974).