1999

Anti-Paparazzi Legislation

Rebecca Roiphe
New York Law School, rebecca.roiphe@nyls.edu

Recommended Citation
Harvard Journal on Legislation, Vol. 36, Issue 1 (Winter 1999), pp. 250-258

ANTI-PAPARAZZI LEGISLATION

Since the death of Princess Diana, virtually everyone has joined in the hue and cry against the paparazzi. As part of this uproar, Senators Orrin Hatch (R-Utah) and Dianne Feinstein (D–Cal.) have introduced legislation intended to fight overly enthusiastic paparazzi who stalk celebrities and seek out those involved in scandal.[1] Senate Bill 2103 would make it a federal crime to attempt to photograph or record a person in a way that risks bodily harm. It would also make the use of a telephoto lens to take photographs of a subject inside her apartment cognizable as a tort.[2] While superficially attractive, the Feinstein-Hatch proposal contributes to an impulse to demonize the media that ultimately compromises the civic-republican notion of an informed, self-governing public. Further, the proposal affords the rich and famous scant more protection than state tort law, which, contrary to celebrity rhetoric, adequately protects Americans from these "parasites."

The fact that the unlikely team of Hatch and Feinstein are championing this legislation indicates that the bill goes beyond partisan politics. The paparazzi are easy to hate. They are poorly behaved, and even despicable in their total disregard for the privacy of their subjects. In 1972, Ronald Galella, a photographer, was tried for stalking Jackie Onassis and her children. He jumped out of bushes in Central Park, hid in a coat rack at a Chinese restaurant, nearly knocked the Onassis children off their bicycles in an effort to snap a photo of John Kennedy, Jr., and bribed a classmate of John Jr.'s to take pictures of the family at a school pageant.[3] The judge had little patience with this paparazzo, whom he described as a pest and a "gadfly."[4] Galella was found

---

[1] *See* Personal Privacy Protection Act, S. 2103, 105th Cong. (1998); 144 Cong. Rec. S5462 (daily ed. May 22, 1998) (statements of Sen. Hatch). The bill is currently stalled in the Senate. *See also* Todd S. Purdum, *Two Senators Propose Anti-Paparazzi Law*, N.Y. TIMES, Feb. 18, 1998, at A16. Tom Hayden, a California state senator, recently pushed a similar bill through the California legislature. *See generally* Christian Berthelsen, *California Law Will Allow Celebrities to Sue Paparazzi*, N.Y. TIMES, Oct. 5, 1998, at C11; Gayle Fee & Laura Raposa, *Whiny Stars Get Anti-Paparazzi Bill Passed in a Snap*, BOSTON HERALD, Oct. 13, 1998, at 8.

[2] *See* S. 2103.

[3] *See* Galella v. Onassis, 353 F. Supp. 196, 207–09 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 487 F.2d 986 (2d Cir. 1973). More recently, two photographers were convicted of pursuing Arnold Schwarzenegger and his wife Maria Shriver shortly after Schwarzenegger received heart surgery. *See Photographers Jailed for Pursuit*, L.A. TIMES, Mar. 2, 1998, at B4.

[4] *Galella*, 487 F. 2d at 991–92.

guilty of an array of offenses including harassment, intentional infliction of emotional distress, assault and battery, and invasion of privacy.[5]

This sort of unprincipled behavior lends any act punishing the paparazzi a popular appeal. Before enacting this legislation, however, it is critical to recognize the ideological costs involved. The right to privacy, the central principle upon on which this act is based, reflects a liberal-individualist emphasis on autonomy and freedom from both government and public scrutiny. The First Amendment, on the other hand, embodies the civic-republican conviction that in a democratic polity, freedom, defined as the right to govern oneself, depends on an informed public.[6] The Anti-Paparazzi Act is just one example of the inherent tension between the right to privacy and the First Amendment guarantee of a free press. While it is important to balance these two forms of liberty, the Feinstein–Hatch bill threatens to overwhelm the civic value of informed political participation with a liberal-individualist emphasis on personal privacy.

Historians have argued that, at the turn of the century, the republican values of civic virtue, independence, and informed participation in the public arena gave way to new ideas about individuality and personality. The focus on self-government was displaced by a Lockean notion of individual pursuit of happiness and freedom from governmental interference. The concept of the public good was replaced by a new emphasis on self-fulfillment and self-realization.[7] It was during this period that Louis Brandeis and Samuel Warren conceptualized the right to privacy. In 1890, they wrote, "[t]he press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and the vicious, but has become a trade, which is pursued with industry as well as effrontery."[8] The

---

[5] *See id.* at 994.

[6] *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 263 (1992) ("[t]he First Amendment is fundamentally aimed at protecting democratic self-government"); Owen Fiss, *Why the State*, 100 HARV. L. REV. 781 (1987) (arguing that the First Amendment protects collective self-determination). Recently scholars have used civic republicanism to argue that free speech should be limited. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1540–42 (1988).

[7] *See, e.g.*, T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTIMODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE, 1880-1920 3–59 (1994); WARREN I. SUSMAN, THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY 271–87 (1984).

[8] Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

authors argued that older forms of social ostracization and community condemnation would no longer suffice. The law itself had to protect what Warren and Brandeis referred to as "public morality" and the "inviolate personality."[9] The Supreme Court has since recognized a constitutional right to privacy, and the sharp distinction between the public and the private realm continues to play an important role in twentieth-century American legal and political discourse.[10] It is important, however, to balance this right to privacy with the persistent value of civic republicanism by preserving the potency of the freedom of the press clause of the First Amendment.

Last year, the late Congressman Sonny Bono (R-Cal.) introduced legislation similar to the Feinstein-Hatch bill.[11] In promoting House Bill 2448, Bono made a gesture toward freedom of the press, but quickly added that "it is without doubt that the activities of the bounty-hunting paparazzi go beyond the robust public discourse envisioned by the Founders."[12] At the Congressional hearings for the Feinstein-Hatch bill, actor Paul Reiser similarly rejected the notion that the paparazzi should be afforded First Amendment protection. Reiser echoed the late-nineteenth-century concern for lost morals, giving moving testimony about the ruthless coverage of his son's premature birth and concluding that "[t]he code of civility and common decency we all aspire to seems to be vanishing."[13]

Despite the conviction of these celebrities, it is impossible to draw the line between valid news reporters and paparazzi. In 1798, James Madison argued that "some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in the press."[14] As editor and reporter Paul McMasters commented in his testimony at the congressional hearings:

---

[9] *See id.* at 210–11.

[10] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 478 (1928); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[11] *See* Protection From Personal Intrusion Act of 1997, H.R. 2448, 105th Cong.

[12] 143 CONG. REC. E1709-01 (daily ed. Sept. 10, 1997) (Statement of Rep. Bono). This testimony echoed sentiments of former President Nixon, who during Watergate, excoriated the press for its unscrupulous behavior. *See* THEODORE WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 154 (1975).

[13] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judiciary, 105th Cong.* (1998) (testimony of Paul Reiser).

[14] 4 ELLIOT'S DEBATE ON THE FEDERAL CONSTITUTION 571 (1876), cited in New York Times v. Sullivan, 376 U.S. 254 (1964).

> News photography has the capacity to chill our senses, inflame our passions, awaken us to the need for action, connect us to our own communities, to inform us, and to entertain us. It is possible for good writers to tell credible stories from a distance, but photographers must be there, must have access to the people and events that make the news.[15]

In our culture, the line between the paparazzi and legitimate news photographers is not easy to draw. If we abolish one, we might destroy the other.

Further, in the current economy, serious freelance photographers often rely on revenue from celebrity photographs to support their more political and intellectual work. For example, shortly after Princess Diana's death, *The New York Times* published a confession of a freelance photographer to his bereaved and outraged mother. The photographer wrote, "I couldn't tell her that the story on homeless drug addicts I worked on for a year earned me a tenth of what the photos of Jackie O.'s funeral did, nor that the three months' work in Russia I did in 1991 earned less than the few frames I took of John Jr."[16]

It is thus critical to balance the profound ideological costs of this legislation with the benefits the Act would purportedly provide. Feinstein and Hatch fashioned a modest bill to increase the chances that it would pass constitutional muster. In its current form, however, the bill does not offer much greater protection than state tort law.[17]

In their seminal article *The Right to Privacy*, Brandeis and Warren conceptualized the tort of invasion of privacy and defined privacy as the "right to be let alone."[18] They asserted that this fundamental human right was increasingly threatened by technology and the press: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet

---

[15] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judiciary, 105th Cong.* (1998) (testimony of Paul K. McMasters, president of the Society of Professional Journalists). For a similar argument about the power of photographs in American history, *see* VICKI GOLDBERG, THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES 7–8 (1991).

[16] Porter Gifford, *Mom, I'm Not a Paparazzo*, N.Y. TIMES, Sept. 6, 1997, at A23.

[17] Opponents of the bill, including the American Civil Liberties Union, claim that the behavior it is designed to punish is already covered by existing state law. Senator Feinstein, however, argues that state laws are inconsistent and uneven. *See* Purdum, *supra* note 1.

[18] Brandeis and Warren, *supra* note 8, at 195.

shall be proclaimed from the house-tops.'"[19] William L. Prosser more broadly defined the invasion of privacy as the intrusion upon seclusion or solitude, public disclosure of private facts, publicity which places the plaintiff in false light, or the appropriation of name or likeness.[20] The Restatement of Torts has adopted Prosser's definition of invasion of privacy, and most jurisdictions have integrated some version of this definition into their common law.[21]

The tort of invasion of privacy, recognized in some form by all but ten states, can adequately protect the victims of the paparazzi.[22] When a photographer takes a picture in a place in which the subject has a reasonable expectation of privacy, courts generally find that the photographer has intruded on the plaintiff's privacy.[23] Following this rationale, the Ninth Circuit held that magazine reporters invaded a healer's privacy when they gained entrance to her house by lying, photographed her, and used a hidden radio transmitter to record the conversation.[24] Another court held that a news picture syndicate was guilty of invasion of privacy for taking a photograph of a patient in her hospital bed when the only newsworthy quality about the patient was her obesity.[25] The Fifth Circuit similarly affirmed an award of $150,000 against Hustler magazine for publishing a stolen photograph depicting the plaintiff in the nude.[26]

In his congressional testimony, Professor Lawrence Lessig contended that it is important to extend our legal conceptions to cover offenses made possible by modern technology. Therefore, Lessig argued that the bill's "expansion" of trespass doctrine to include photographs taken with a telephoto lens was desirable.[27]

---

[19] *Id.*

[20] *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

[21] *See* Restatement (Second) of Torts §§ 652A–652E (1977).

[22] Colorado, Massachusetts, North Dakota, and Washington have avoided recognizing or rejecting the right to privacy. Nebraska, Rhode Island, and Wisconsin have refused to recognize the right, while Maine, Vermont, and Wyoming have not addressed the issue. The remaining states have recognized some statutory or common law right to privacy. *Id.*

[23] *See* Phillip E. Hassman, Annotation, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374 (1998). Notably, there is no indication that the proposed legislation would change the rule of *New York Times v. Sullivan*, and celebrities would still have to prove "actual malice" to recover on "false light privacy" claims. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).

[24] *See* A.A. Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) (interpreting California law).

[25] *See* Barber v. Time, Inc., 348 Mo. 1199 (1942).

[26] *See* Wood v. Hustler Magazine, Inc., 736 F.2d 1084, 1085 (5th Cir. 1984).

[27] *Privacy Protection: Hearings on H.R. 3224 Before the House Comm. on the Judici-*

Lessig's argument, however, ignores the fact that the tort of invasion of privacy already includes non-physical invasions made possible by modern technology.[28] Thus, the Louisiana Court of Appeals has held that a police officer who looked through a suspect's bedroom window and took pictures with a telescopic lens had invaded the plaintiff's privacy.[29]

The common law right to privacy does not protect individuals when they are in public view, but the torts of intentional infliction of emotional distress and assault and battery can warrant recovery for behavior that is particularly egregious, even if the photographer only pursued the subject in public places. For example, in one case, a court acquitted a photographer who had harassed a cruise ship passenger of invasion of privacy because the harassment did not occur in an area of private seclusion, but nevertheless still held that the photographer's conduct constituted intentional infliction of emotional distress.[30] When Galella was tried in the case discussed above, New York law did not explicitly recognize a common law right to privacy; it did, however, have an harassment statute that made it a crime to follow a person into a public place, initiate physical contact, or engage in annoying conduct with the intent to harass. New York law also recognized a freedom from emotional distress that was used liberally to protect privacy interests.[31] It was these state laws, common in some form to every state, that protected the Kennedys from paparazzi.

Courts and academics continue to debate whether the constitutional guarantee of freedom of the press offers any special privileges to the news media, or whether it is simply subsumed under the category of free speech. Although this dilemma has not been resolved, most courts do not allow members of the

---

ary, 105th Cong. (1998) (testimony of Lawrence Lessig, Harvard Law School professor).

[28] The Restatement (Second) of Torts defines this intrusion as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability . . . for invasion of his privacy, if . . . offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

[29] *See* Souder v. Pendleton Detectives, 88 So.2d 716 (La. App. 1956). Similarly, courts have held that wire tapping can constitute an invasion of personal privacy. *See, e.g.*, Rhodes v. Graham, 238 Ky. 225 (1931) (holding it was an invasion of privacy to listen to plaintiff's telephone conversations by using a wire tap); Hamberger v. Eastman, 106 N.H. 107 (1964) (holding a landlord invaded his tenants' privacy when he installed a listening and recording device in their bedroom).

[30] *See* Muratore v. M/S Scotia Prince, 656 F. Supp. 471, 482 (D. Me. 1987), *aff'd in part and vacated in part*, 845 F.2d 347 (1st Cir. 1988).

[31] *See Galella*, 487 F.2d at 994–95.

press any special privileges based on their role as newsgatherers.[32] At most, courts weigh the interests of public access to the information with the privacy and property interests of the alleged victim.[33] Therefore, a photographer or journalist would not be immune from civil or criminal prosecution simply because she committed the wrongful act in pursuit of a story.

When the interest of the public is minimal, courts do not hesitate to use state law to convict the press for illegal conduct. After a scathing criticism of the photographer who stalked Jackie Onassis and her family, the *Galella* Court concluded that the First Amendment "does not immunize all conduct designed to gather information about or photographs of a public figure," and added, "there is no constitutional right to assault, harass, or unceasingly shadow or distress public figures."[34]

Senator Feinstein is right that states are not completely consistent in their application of laws against overly-aggressive media. State common law rules of trespass, invasion of privacy, harassment, intentional infliction of emotional distress, and assault and battery, however, cover most unseemly behavior, and no court grants the press immunity based on the First Amendment protection of the press. Overall, the paparazzi whom this legislation is aimed at could likely be held liable or guilty under current state law.

The Feinstein-Hatch bill does not substantively change state tort and/or criminal law. The legislation does, however, serve another purpose. It allows these senators, and the government itself, to stand squarely against the inappropriate longing to pry into the lives of the Hollywood and political elite. As the public

---

[32] *See* David F. Freedman, Note, *Press Passes and Trespasses: Newsgathering on Private Property,* 84 COLUM. L. REV. 1298, 1299 (1984); *see also* LEONARD W. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960). The Supreme Court has held "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991). Following this reasoning, the Ninth Circuit has similarly asserted that the first amendment does not exempt the media from torts or crimes committed while gathering news. *See Dietemann,* 449 F.2d at 249. Lower courts frequently offer a similar rationale. *See* Miller v. NBC, 187 Cal. App. 3d 1463, 1492 (1986); *see also* Wolfson v. Lewis, 924 F. Supp. 1413, 1418 (E.D. Pa. 1996).

[33] *See, e.g.*, Freedman, *supra* note 32, at 1307–12; Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. Sup. Ct. 1976); *Miller,* 187 Cal. App. at 1463 (holding NBC liable for trespass when a news crew entered a woman's home without her consent to film the paramedics' rescue attempt.); *Dietmann,* 449 F.2d at 249 ("First Amendment is not a license to trespass, to steal, or to intrude by electronic means in the precincts of another's home or office."); *Galella,* 353 F. Supp. at 223–24.

[34] *Galella,* 353 F. Supp. at 223.

is learning more and more about the indiscretions on Capitol Hill, this legislation would allow the government to assume a dignified pose while playing into the public's desire to transfer blame to the indiscreet media.

The public response to the O.J. Simpson case, Princess Diana's death, and President Clinton's sexual affairs illustrates the fact that the media serves as a perfect scapegoat. The media gives us someone to blame, not only for tragedies like Princess Diana's untimely death, but also for our own voyeuristic and prurient interests. The Anti-Paparazzi Act would allow us to transfer blame for these recent events to the media while exonerating ourselves from our own ceaseless curiosity. Rather than face the shame that accompanies our fascination with O.J.'s excesses, Diana's final date, and President Clinton's indiscretions, we blame the messenger.

The Monica Lewinsky scandal is an example of the profound ambivalence Americans have toward gossip. This social and cultural confusion gives meaning to the debate over freedom of speech and rights to privacy. Americans in general are disgusted by the media coverage of Clinton's affair. President Clinton's approval ratings, however, remain stable while the media bears the blame for the melodrama. Warren and Brandeis wrote that "[s]upply creates the demand" which results in "a lowering of social standard and of morality."[35] The moral and economic universe, however, works in the opposite direction. It is the public who buys the papers, watches the news, and turns the channel to get the latest developments. While Americans want the gossip, however, they yearn for a time when we kept secrets to ourselves and the President's semen was not a proper topic at a cocktail party. The proposed anti-paparazzi law functions as a public, national condemnation of the press. By blaming the media, we get to have it both ways. We will still hear stories about Ms. Lewinsky, and we will still see pictures of Princess Diana and Arnold Schwarzenegger, but we can look at them in horror, with a sense of moral superiority rather than having to admit our base desire see into the private lives of public figures.

Photographers can be insensitive and intrusive, but celebrity itself is created and perpetuated by this same media. Tom Cruise has dedicated himself to a public mission of criminalizing pho-

---

[35] Warren and Brandeis, *supra* note 8, at 196.

tographers who follow him and his family as they try to lead a "normal life."[36] While it is possible to feel sympathetic for Mr. Cruise in his somewhat disingenuous pursuit of privacy, these same "gadflies" have helped Cruise capitalize on his boy-next-door good looks to sell movie tickets. Actors like Cruise too easily assume that they can and should be able to benefit from the media while controlling it at the same time.

The effort to impose a code of ethics on the media will necessarily fail unless we allow the interests of privacy to obscure our First Amendment rights. It is possible that no critical news would be lost if we outlawed chasing celebrities to take pictures for tabloid papers. The distinction, however, between valid and essential newsgatherers and gossip hunters is not always so clear. The press infuriates figures like Richard Nixon, Paul Reiser, and Tom Cruise because it refuses to be controlled, but this refusal to submit is also the source of its power. Public figures will continue to paint the press as evil and mercenary, but until history unfolds, it can be hard to tell a paparazzo from an investigative news journalist. In order to inform the public, the press needs to be able to behave in a way that is contrary to the wishes of its subjects. However unpalatable their actions, the paparazzi are an inevitable underside of the legitimate use of newsgathering to inform the people, a value which is fundamental to the republican notion of a public's ability and duty to govern itself.

—Rebecca Roiphe

---

[36] *See, e.g.*, Robert Welkos, *Two Photographers Sentenced to Jail*, L.A. TIMES, Feb. 24, 1998, at B3.