

Report of the Tennessee Advisory Commission on Intergovernmental Relations

**Civil Remedies for Invasion of Privacy**  
***Updating the Law to Reach New Technology***

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## Protecting Privacy in the Technological Age

Everyone needs a certain amount of privacy for their emotional wellbeing—to have solitude in their homes, to have control over personal information, to be free from surveillance, and to protect their reputations. Generally, privacy is the right to be left alone. Unfortunately, shielding one’s privacy has become increasingly difficult. Although traditional legal remedies protect against physical invasions of privacy and exposure of private information, they do not explicitly protect against the use of technological devices to expose private activities that couldn’t otherwise be seen or heard. Current law allows a person whose privacy has been violated to bring a lawsuit for

- unreasonable intrusion upon the seclusion of another or
- unreasonable publicity given to the other’s private life.

These rights to sue are not mutually exclusive, and many privacy lawsuits involve both. These are judicial not statutory remedies—often called *common law*—and have traditionally been used only to protect against physical privacy invasions and publication of private information. No cases involving the use of technological devices to invade someone’s privacy without some public disclosure of information thus obtained have been reported, so it is impossible to know whether courts would allow someone to recover damages in a case of that kind. They might be limited to physical invasions. Legislative action may be necessary to ensure that damages can be recovered in those situations.

House Bill 1855 by Representative Ryan Williams (Senate Bill 1840 by Norris), during the second session of the 108th General Assembly, would have done that by expanding current common-law rights to sue for invasions of privacy by creating a new civil cause of action for capturing or attempting to capture an image, recording, or impression by using a visual or auditory enhancing device—what we might call a virtual invasion of privacy—regardless of whether the image or recording were published. See appendix A for a copy of the bill, which was sent to the Commission by the House Civil Justice Committee.

Other than this new right to sue, much of the conduct covered by the bill is already illegal in Tennessee under both common law and statutory actions for trespass, assault, false imprisonment, and intrusion upon seclusion. But the bill would have provided greater penalties against those who profit from the conduct prohibited by the bill if committed for a commercial purpose and would have created an explicit right to sue third parties that use the illegally made image, recording, or impression under certain circumstances.

Personal privacy may also be threatened by an emerging technology not explicitly covered in the bill, unmanned aircraft (often called drones). Drones flying low or close enough could be used to capture images or recordings using just traditional photographic or recording equipment. It’s not clear whether the bill would reach an invasion of privacy by that means, although drones flown low enough might constitute trespass under current law.

The traditional remedies allow recovery only for actual losses and, under the most egregious circumstances, punitive damages. Punitive damages would have been explicitly authorized by the bill but capped at three times actual damages. Actual losses for the ordinary person are often minimal and may be difficult to prove, making punitive damages minimal as well, even under the proposed bill. Of more importance, though probably not to the ordinary person, is a provision that seems to have been designed more to benefit persons whose actual damages are substantial and would have provided for payments of any profits to the aggrieved party if the image or recording were made for commercial purposes, regardless of whether it was ever published.

The bill included an amendment that would have exempted “established news media,” a form of discrimination that raises Fourteenth Amendment equal protection issues—as well as First Amendment “identity of the speaker” issues, especially since *Citizens United v. FEC*—and likely renders that amendment unconstitutional.<sup>1</sup> If challenged, the amendment would probably be ruled unconstitutional. A second constitutional concern with the bill is that the United States Supreme Court has never allowed penalties against a publisher of truthful matters of public concern, even when the party that published the material knew it was obtained illegally. Although a lawsuit brought under those circumstances would likely fail on constitutional grounds, that possibility would not render the bill itself unconstitutional. The severability clause included in the bill would save the broader bill if either of these provisions were found unconstitutional.

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<sup>1</sup> See appendix B for a copy of the amendment.

## Privacy versus the Public's Right to Know

One lesson of modern privacy law . . . is that if you expect legal protection for your privacy, you should stay inside your house with the blinds closed. [The] law clings stubbornly to the principle that privacy cannot be invaded in or from a public place. However sound this rule once may have been, it is flawed in a modern technological society . . . .—Professor Andrew McClurg

At the most basic level, the idea of privacy embraces the desire to be left alone, free to be ourselves.<sup>2</sup> Privacy is important for emotional wellbeing and necessary for an autonomous life.<sup>3</sup> Most people recognize and respect that each person has a part of their life that belongs to that individual alone, free from the prying of others, and in fact the law has directly or indirectly protected privacy for centuries.<sup>4</sup> Juxtaposed to this is the legitimate need to know about important issues, especially when they involve public figures.

First Amendment protections limit the reach of privacy lawsuits to only those disclosures that are not of “legitimate concern to the public.” The Supreme Court has established that the public’s right to these disclosures sometimes outweighs an individual’s right to privacy.<sup>5</sup> Public figures have less privacy protection than average people because information about their private lives could reveal biases or conflicts of interest that affect their official decisions.

### Evolution of Privacy Law

While there is no explicit protection for privacy in the United States or Tennessee constitutions, court decisions starting in the late 19<sup>th</sup> century established constitutional rights of privacy and found implied rights in both constitutions. Ten states have gone further, expressly recognizing a right to privacy in their constitutions: Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. In addition, Congress and the states have enacted laws to protect individuals' privacy in various specific areas, for instance medical and financial records, and courts have established a right to privacy in certain areas as well.

### *Common Law Privacy Protections in Tennessee*

The Tennessee Supreme Court first encountered the issue of invasion of privacy in 1956 when it established the right to privacy as “the right to be let alone; the right of a person to be free

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<sup>2</sup> Wacks 2010.

<sup>3</sup> Solove 2008.

<sup>4</sup> Before 1890 no English or American court had ever explicitly recognized a right to privacy, although there were decisions that in retrospect protected it in one manner or another.

<sup>5</sup> *Connick v. Myers*, 461 U.S. 138 (1983).

from unwarranted publicity."<sup>6</sup> This quote reflects the thinking in a long line of cases influenced by the pivotal 1890 Harvard Law Review article "The Right to Privacy" by Samuel Warren and Louis Brandeis, which proposed the creation of a specific legal cause of action for invasion of privacy, describing its origin and nature:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the new demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible. . . .

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Over the decades, state courts slowly recognized the right to privacy, and by the mid-20<sup>th</sup> century, every state recognized this right. In 1967, Tennessee's Supreme Court<sup>7</sup> revisited the issue of invasion of privacy, acknowledging the widely recognized legal principle that

A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other. . . . Liability exists only if the defendant's conduct was such that he should have realized that it would be offensive to persons of ordinary sensibilities. It is only where the intrusion has gone beyond the limits of decency that liability accrues.<sup>8</sup>

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<sup>6</sup> Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W.2d 32 (1956).

<sup>7</sup> Martin v. Senators, Inc., 220 Tenn. 465, (1967).

<sup>8</sup> Restatement (First) of Torts (1939).

A 2001 Tennessee Supreme Court case adopted the more specific rule developed in cases elsewhere that

- 1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- 2) The right of privacy is invaded by
  - a) unreasonable intrusion upon the seclusion of another;
  - b) unreasonable publicity given to the other's private life;
  - c) appropriation of the other's name or likeness; and
  - d) publicity that unreasonably places the other in a false light before the public.<sup>9</sup>

This is the common law on privacy in Tennessee today. Two of these remedies—“appropriation of the other's name or likeness” and “publicity that unreasonably places the other in a false light before the public”—have been used mainly when the likeness was obtained without invading someone's privacy but are not limited to those situations. In fact, these two remedies need not involve private matters at all. The appropriation remedy allows for recovery against a person who appropriates to his own use or benefit the name or likeness of another. As former dean of William and Mary College of Law Rodney Smolla says, “appropriation is arguably not a true form of invasion of privacy at all.”<sup>10</sup> The false light cause of action, which is similar to defamation, is based on protecting the interest of the individual from publication of false or misleading information about them. Dr. Smolla calls false light “not much more than defamation warmed-over.” About the two true privacy remedies, he says, “publication of private facts is a powerful cause of action constantly trumped by a more powerful First Amendment” and “intrusion, while a reasonably strong cause of action for plaintiffs when establishing liability, usually proves paltry when it comes to awarding damages, allowing only those damages that flow in some direct sense from the intrusion itself. And most intrusions don't involve physical or financial injury.”<sup>11</sup>

Tennessee law defines “unreasonable intrusion upon seclusion” as intentionally intruding, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, and liability occurs if the intrusion would be highly offensive to a reasonable person. Unlike the other remedies, this remedy does not require that the private material have been made public. It does, however, require “a reasonable expectation of privacy,” a phrase that is not defined in any Tennessee civil case.

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<sup>9</sup> Section 652A of the Restatement (Second) of Torts (1977).

<sup>10</sup> Smolla 2002., 290.

<sup>11</sup> Smolla 2002., 290-291.

The phrase “physically or otherwise” seems to suggest that intrusion upon seclusion could apply to the use of technology to achieve the same result as a physical intrusion; however, there is no Tennessee case law on this point. It is, therefore, unknown whether Tennessee courts would allow recovery for an intrusion using technological enhancement devices without a physical invasion.

“Unreasonable publicity given to the other's private life” involves a third party revealing some fact that, in the eyes of the community, is simply nobody else's business.<sup>12</sup> Tennessee law, like other states, limits this remedy to matters that are highly offensive to a reasonable person and not a legitimate public concern. The first limitation is explained in a footnote to a 2013 Tennessee Court of Appeals case: “In other words, it applies only when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. . . . It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.”<sup>13</sup> The second limitation, to matters that are not a legitimate public concern, is driven by the First Amendment of the US Constitution.

### ***Disclosing Matters of Public Concern: First Amendment Protections***

The US Constitution's First Amendment protection of free speech and freedom of the press provides broad protections for the dissemination of information in order to benefit the public and restricts government regulation of the press. Protecting disclosure of matters of public concern is at the heart of the First Amendment's protection and reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.<sup>14</sup> Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.<sup>15</sup>

Consequently, the media has a broad right to publish information that is a legitimate public concern. The US Supreme Court has never allowed penalties against a publisher of truthful matters of public concern, even when the party that published the material knew it was obtained illegally. For example, in *Bartnicki v. Vopper*, the Supreme Court held that the First Amendment protects the disclosure of illegally intercepted communications by parties who did not participate in the illegal interception. In that ruling, Justice Stevens, writing for the majority, wrote that “in this case, privacy concerns give way when balanced against the

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<sup>12</sup> Smolla 2002.

<sup>13</sup> Jennifer E. Patterson v. Natalie D. Grant-Herms, No. M2013-00287-COA-R3-CV - Filed October 8, 2013, footnote 6.

<sup>14</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, (1985); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>15</sup> *Connick v. Myers*, 461 U.S. 138 (1983); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

interest in publishing matters of public importance.<sup>16</sup> The protection of the press is not unlimited. The truthful information sought to be published must have been lawfully acquired by the press. For example, the press may not with impunity break and enter an office or dwelling to gather news or publish copyrighted material without obeying the copyright laws.

### ***Unconstitutional Application of Constitutional Provision***

While any law specifically targeting publication by the media of matters of public concern would be unconstitutional, the application of a broader law to such a publication would not render the law itself unconstitutional even though that application of it would be. The fact that the First Amendment protects disclosures of matters of public concern from broadly written laws protecting privacy does not make those laws unconstitutional on their face. As noted in a 1994 Stanford Law Review article,

Conventional wisdom holds that a court may declare a statute unconstitutional in one of two manners: (1) the court may declare it invalid on its face or (2) the court may find the statute unconstitutional as applied to a particular set of circumstances. The difference is important. If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances, unless an appropriate court narrows its application; in contrast, *when a court holds a statute unconstitutional as applied to particular facts, the state may enforce the statute in different circumstances.*<sup>17</sup> [Emphasis added.]

The article went on to discuss *United States v. Salerno* in which the US Supreme Court said, “[a] facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”

### ***Statutory Protections for Privacy in Tennessee***

Like many other states, Tennessee has established civil and criminal statutory protections. Criminal privacy statutes in Tennessee relate only to “peeping tom” behavior<sup>18</sup> and the taking of nonconsensual pictures.<sup>19</sup> Both of the criminal privacy statutes require a “reasonable expectation of privacy,” but do not define the phrase, and only apply if the defendant committed the violation for the “purpose of sexual arousal or gratification.” Additionally, these laws do not address privacy invasions by new technologies.

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<sup>16</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>17</sup> Dorf 1994.

<sup>18</sup> Tennessee Code Annotated Section 39-13-607.

<sup>19</sup> Tennessee Code Annotated Section 39-13-605.

Criminal statutes on trespass, harassment, and stalking indirectly protect privacy. A person commits criminal trespass if he or she enters or remains on property, or any portion of property, without the consent of the owner.<sup>20</sup> A person commits stalking when they repeatedly or continuingly harass another in a way that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>21</sup> A person commits “harassment,” in general, when he or she intentionally targets someone else with behavior that is meant to seriously alarm, annoy, torment, or terrorize them.

Tennessee civil statutes also protect against another person using one’s likeness to advertise or solicit goods or services without consent.<sup>22</sup> These laws provide limited and indirect protection for privacy but do not explicitly protect against technological privacy intrusions.

### ***Technology and Privacy***

New technology often spurs the development of privacy law. Warren and Brandeis’s 1890 article on “The Right to Privacy,” which laid the groundwork for modern privacy law, for example, was driven by the use of new technology, namely small, inexpensive cameras. In their article, they complained about the “recent inventions,” such as “instantaneous photographs” and “numerous mechanical devices that threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops.” The power of those devices pales in comparison to the capabilities of modern technology.

Modern technology has taken away much of the protection that physical space used to provide. New technologies enable “virtual” intrusions into private property without setting foot on it. Powerful telephoto lenses and parabolic microphones allow detailed images and recordings to be taken from greater distances than would otherwise be possible. If these technologies were not available, the photographer or recorder would have to physically trespass onto private property to capture the same images or recordings. For example, a photographer may obtain a photograph without physical trespass by using a telephoto lens from a great distance outside the property.

Unmanned aircraft, or drones, are another example of a technology that presents privacy concerns because some intrusive uses of them may potentially escape liability under existing law. Drones are becoming less expensive—under \$100 for one with a remotely viewable built-in camera—and, therefore, more common. Although the FAA has predicted 10,000 active small (under 55 pounds) drones within five years, 25,000 within 10 years and 30,000 by 2030,<sup>23</sup> according to some estimates, half a million small drones have been sold in the US in the past

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<sup>20</sup> Tennessee Code Annotated Section 39-14-405.

<sup>21</sup> Tennessee Code Annotated Section 39-17-315.

<sup>22</sup> Tennessee Code Annotated Section 47-25-1105.

<sup>23</sup> Federal Aviation Administration, Aerospace Forecast, Fiscal Years 2011–2031.

three years.<sup>24</sup> The very features that make them so promising for commercial purposes—particularly their maneuverability and ability to carry various kinds of sensing or recording devices—are the same features that make them a potential threat to privacy.<sup>25</sup> Says Patrick Lin, director of the Ethics and Emerging Sciences Group at California Polytechnic State University,

Drones will likely change our expectation of privacy, which defines the limits to our right to privacy, at least in the US. . . . Compared to Europe, privacy rights in the US are largely limited to the private home or to certain sectors of society like health care and finance.

And Joseph Lorenzo Hall, senior staff technologist at the Center for Democracy and Technology in Washington says, "There is no common basis for privacy protection unlike the EU where there is an understanding that privacy is a fundamental right and you can regulate from that upwards."

Existing FAA guidelines for unmanned aircraft distinguish between government drones, commercial versions, and the smaller drones designed for use by hobbyists. Those hobby drones must stay below 400 feet and can't be used near airports,<sup>26</sup> but flying a drone at low altitude over private property could be an unlawful trespass under current law. Flying drones at higher altitudes likely would not unless the person somehow unreasonably interfered with the owners' use of the land. Under the traditional common law, a landowner's property rights extended up to the heavens. This rule, however, was overturned in the 1946 US Supreme Court case *United States v. Causby*, which held that owners retain property rights to at least as much of the air space as he can occupy or use and invasions of that airspace are in the same category as trespass. That case did not define exactly how high these rights extend.

According to Steven Cohen, unmanned autonomous systems education coordinator at Bergen Community College in Paramus, New Jersey, recreational drones are less efficient than commercial drones and have enough power for only about 15 minutes of flight. Cohen says this limitation actually doubles as an unintended safety benefit. "It can be fatiguing to fly for longer duration," Cohen explains, and fatigue can cause accidents. According to Cohen, personal drones have built-in safety features, including for loss of radio control or GPS signals, but he says that when it comes to safety "it really depends on the operator and someone's experience."

However, the safety features built into some drones have their drawbacks. For example, the feature called 'Return to Home' is designed to ensure that, if the drone gets out of range of its controller, instead of dropping out of the sky, the drone automatically uses GPS data to return

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<sup>24</sup> Whitlock 2014.

<sup>25</sup> Clark 2014.

<sup>26</sup> Croman 2014.

to the launch point. This feature caused a drone used to photograph a sunrise in Arizona to crash into a several hundred foot tall rock formation between it and its controller.<sup>27</sup> A number of other incidents further illustrate the hazard: In October 2013, a small camera-equipped drone reportedly crashed into a New York City sidewalk, narrowly missing a businessman who was heading home from work.<sup>28</sup> More recently, a drone crashed into a backyard in Brighton, Colorado;<sup>29</sup> another crashed into the Metropolitan Square building in St. Louis.<sup>30</sup>

### **House Bill 1855: Enhanced Damages and a New Right to Sue for Privacy Invasions**

Responding to concerns that Tennessee courts might not extend existing privacy protections to cases that do not involve physical trespass and that existing remedies are not a sufficient deterrent to those who would use these means to document or expose the private matters of others, Representative Ryan Williams introduced House Bill 1855,<sup>31</sup> which was sent to the Commission by the House Civil Justice Committee of the 108<sup>th</sup> General Assembly. In the Committee hearing, Representative Williams argued that the increased use of new technologies allow detailed images and recordings to be made from greater distances than otherwise possible. The entire focus of the bill was on images, sound recordings, and other physical impressions of “personal or familial activity,” not on privacy generally, and included provisions making trespass and assault or false imprisonment for that purpose, as well as soliciting or causing another to capture such images, explicitly unlawful and subject to specific penalties.

Similar legislation was introduced in 2011 but failed to get out of committee.<sup>32</sup> Both bills were closely modeled after the California Privacy Protection Act (appendix C) and would have excluded the lawful activities of law enforcement personnel and other public or private employees investigating illegal activity. Professor Erwin Chemerinsky, one of the drafters of the California law, described its underlying concept:

The press and others should not be able to gain through technology what they cannot otherwise obtain except by breaking the law or exposing themselves to civil liability. Any image or sound that can be obtained only by a physical trespass should not be obtainable by technology, if it is of personal or family activity where there is a reasonable expectation of privacy.<sup>33</sup>

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<sup>27</sup> Cade 2014.

<sup>28</sup> Hoffer 2013.

<sup>29</sup> CBS Local News, Denver 2014.

<sup>30</sup> Piper 2014.

<sup>31</sup> Senate Bill 1840 by Norris.

<sup>32</sup> House Bill 1663 by Moore and Senate Bill 2025 by Stewart.

<sup>33</sup> Chemerinsky 2000.

Hawaii attempted to pass a similar law in 2013, but it failed in the House after passing the Senate. No other state has considered this type of legislation.

### ***A New But Limited Right to Sue for "Constructive" Invasion of Privacy***

House Bill 1855 would have created an entirely new civil cause of action for invasions of privacy that use visual or auditory enhancing devices. Like the California law it is modeled on, the scope of this new cause of action is very narrow. A lawsuit brought based on it would be successful only if a person

- (1) captures or attempts to capture an image, recording, or physical impression of
- (2) "personal or familial activity"
- (3) when and where there is a reasonable expectation of privacy
- (4) through the use of a visual or auditory enhancing device
- (5) otherwise not obtainable without a physical trespass
- (6) in a manner that is offensive to a reasonable person.

The bill defines "personal or familial activity" as including "intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, other aspects of the plaintiff's private affairs or concerns, or the activities of victims of crime." The bill does not define "reasonable expectation of privacy," nor have Tennessee courts, but some states' courts have drawn on Fourth Amendment search and seizure cases to define it in privacy lawsuits as the actual belief that the situation or matter is private and that others would consider that belief reasonable. By this definition, there is no reasonable expectation of privacy in public places or where one can be seen with the naked eye from a public place.

The bill neither defines nor explains what "visual or auditory enhancing devices" are except through the following phrase, "otherwise not obtainable without a physical trespass." The legislative history for the California law that this bill was modeled on suggests that it would include things such as parabolic microphones and powerful telephoto lenses. This language does not specifically address unmanned aircraft, whose safety risks have been discussed, and it is possible that using a drone to carry an ordinary camera or recording device to capture images in a manner that would otherwise violate the new law would nevertheless escape liability. One way to make sure drones are covered by the bill's constructive invasion of privacy section would be to replace the phrase "visual or auditory enhancing device" with "any device" as California did this past year.<sup>34</sup>

Finally, the bill neither defines nor further describes "offensive to a reasonable person." As noted previously, Tennessee courts apply a "highly offensive" standard in lawsuits for intrusion upon seclusion or publication of private facts. The difference between offensive and *highly*

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<sup>34</sup> See California Assembly Bill 2306 of 2014.

offensive is not clear, and whether the intrusion was highly offensive would be a question for a jury. Traditionally, "the degree of intrusion, the context, conduct, and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded" is considered when determining what is offensive.

### ***Deterring Invasions of Privacy: More explicit penalties and third-party liability***

Other than this new right to sue, much of the conduct covered by the bill is already illegal in Tennessee under both common law and statutory actions for trespass, assault, false imprisonment, and intrusion upon seclusion. But the bill would have provided greater penalties against those who profit from the conduct prohibited by the bill if committed for a commercial purpose and would have created an explicit right to sue third parties that used the illegally made image, recording, or impression under certain circumstances.

### **Penalties Under the Proposed Bill**

Anyone sued under the bill would be liable for general damages, special damages—collectively known as actual damages—and punitive damages capped at three times the combined amount of the general and special damages. This, like the trespass provision in the bill, is not substantially different from current law; the biggest difference is the cap on punitive damages, which are not capped under current law. The more significant change, though, is the provision for "disgorgement" of any payment or benefit received as a result of conduct forbidden by the bill if (1) committed for a commercial purpose and (2) intended to be or actually sold, published, or transmitted. This disgorgement provision, which requires the person who gains from the prohibited conduct to pay the subject of the image, recording, or impression whatever they gained, would likely benefit only those whose image, recording, or impression could be published or sold for monetary gain.

### **Third-Party Liability**

Any third parties that used an image, recording, or impression made in violation of the bill would be subject to all of the bill's damage provisions, but only if that third party had

- 1) actual knowledge that the image or recording was made in violation of the bill and
- 2) provided compensation for it.

The first requirement—that the third party know that the bill had been violated—means that the damage provisions would not have applied to third-party purchasers who did not know the bill had been violated. The second requirement—that third-party liability exists only if the third party paid for the image, recording, or impression—is a response to the US Supreme Court ruling in *Bartnicki v. Vopper*, which forbid recovery against a broadcaster in a case in which a recording exposing a matter of legitimate public concern was illegally obtained by another but not paid for by the broadcaster.

Moreover, third-party liability would exist only for the first publication or transaction following the capture of the image, recording, or impression. Likewise, if a person's first publication or transaction were not a violation of the bill, then any subsequent publication or transaction by that person would not be either. As applied to matters of legitimate public concern, however, recovery of damages would likely be unconstitutional even if all of the criteria above were otherwise met.

### ***Constitutional Issues Raised by House Bill 1855***

As discussed previously, broadly written laws are not deemed unconstitutional simply because they may be or even are unconstitutionally applied. Moreover, when constitutional challenges are anticipated, bills are typically drafted with severance clauses to ensure that constitutional provisions are not stricken along with unconstitutional ones. Thus is the case with this bill. As originally drafted, the bill would have created a right to sue someone who

- "directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate" other provisions of the bill or
- "publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subsection . . . and
- "provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the visual image, sound recording, or other physical impression."

The fact that someone might sue the press for doing this in the case of constitutionally protected matters of public concern would not make the entire bill unconstitutional or even these particular sections for matters *not* of public concern. However, an amendment adopted by the House Civil Justice Committee likely would be. The amendment not only targets the media but also discriminates among segments of the media, exempting "established news media outlets whose employers are members of recognized professional or trade associations," which raises both First Amendment freedom of the press issues and Fourteenth Amendment equal protection issues. The amendment would have provided contract journalists protections that freelance journalists didn't receive, and some media outlets would have gotten benefits that others did not. This distinction appears to violate *Citizens United v. Federal Election Commission*, a 2010 US Supreme Court case that held, in part, that "the First Amendment stands against attempts to . . . distinguish among different speakers, which may be a means to control content." The Fourteenth Amendment equal protection clause of the United States is also potentially violated in the amendment to the bill because it makes a classification between the established news media and everyone else. The Supreme Court is more likely to uphold laws applying equally to all.

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## Persons Interviewed

Patrick Alach, Attorney with the Paparazzi Reform Initiative of Beverly Hills, California

Josh Blackman, Assistant Professor of Law at South Texas College of Law

Sean Burke, Founder & CEO of the Paparazzi Reform Initiative of Beverly Hills, California

Mike Carter, Representative Tennessee House of Representatives, District 29

Erwin Chemerinsky, Dean of the University of California, Irvine School of Law and Constitutional Expert

Maria De Varenne, News Director for the Tennessean

Frank Gibson, Public Policy Director for the Tennessee Press Association

Steven Hart, Tennessee Attorney General's Office of Special Counsel

Rob Harvey, Attorney for the Tennessean

Jon Lundberg, Representative Tennessee House of Representatives, District 1

Dan Haskell, Lobbyist for the Tennessee Association of Broadcasters

Richard Hollow, General Counsel for the Tennessee Press Association

Andrew McClurg, Professor of Law at the University of Memphis School of Law and Privacy Law Expert

Dana Mitchell, California Legislative Attorney

Mickey Osterreicher, General Counsel for National Press Photographers Association

Doug Pierce, Attorney for the Tennessee Association of Broadcasters

Rodney Smolla, Professor of Law at the University of Georgia School of Law and Privacy Law and First Amendment Expert

Eugene Volokh, Professor of Law at UCLA School of Law and First Amendment Expert.

Ryan Williams, Representative Tennessee House of Representatives, District 42 and Bill Sponsor