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Crimes

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I. INTRODUCTION

Counterfeiting has become a serious problem in America. Each year it costs American businesses nearly $200 billion in lost revenue. As John S. Bliss, President of the International Anti-Counterfeiting Coalition, explains, “Counterfeiting ruins businesses, steals hundreds of thousands of jobs, and cheats millions of consumers.

Recently, counterfeiting has become especially painful for the American computer software industry. In 1993, the industry’s losses due to counterfeiting were estimated at $12.8 billion; the sale of counterfeit goods represented fifty-five percent of the software market. This problem is especially great because computer software is so easy to duplicate. In order to enter the software counterfeiting business, the aspiring criminal needs only a few relatively inexpensive tools, such as a computer, a disk-duplicating machine, and a printer. Furthermore, the fake software is usually as good as the legal variety, making the counterfeit software more difficult to detect.

Easy money has made software counterfeiting especially attractive to organized crime, which dominates the counterfeiting industry generally. Although counterfeit software is typically sold for ten percent to twenty-five percent less than the legitimate versions of the product, counterfeiters are still able to sell their wares for up to ten times the cost of production. Easing the risk of entering such a business is the...
fact that most cases against software counterfeiters fail for lack of evidence. Likewise, fines have proven ineffective.

II. EXISTING LAW AND CHAPTER 861

In 1982, the California Legislature enacted the California Control of Profits of Organized Crime Act, with the express purpose of “punishing and deterring criminal activities of organized crime . . . through the forfeiture of profits acquired and accumulated as a result of such criminal activities.” This statute provides that whenever a person is convicted of engaging in a “pattern of criminal profiteering activity,” all property gained through that activity is subject to forfeiture. However, until Chapter 861, this law did not apply to counterfeiting.

Although existing law prohibits the manufacture, intentional sale, and possession of goods bearing counterfeit trademarks, until now it has not required the forfeiture of the proceeds of the illegal activity. Depending upon the number of counterfeit articles manufactured, sold, or possessed, and based upon the number of prior offenses, California Penal Code § 350 provides for a maximum penalty of three years imprisonment and/or a $250,000 fine, unless the person is a corporation, in which case the maximum penalty under § 350 is $500,000. Significantly, California Penal

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9. Id.; see id. (mentioning some of the obstacles to stopping counterfeiters under existing laws); see also Protecting Consumers from Counterfeiting, supra note 1, at *2 (claiming that “counterfeiters have little chance of being arrested and prosecuted under current law, and even if their activities are discovered, the penalties are insignificant”).

10. Iritani, supra note 4, at A1; see id. (noting that monetary penalties have been ineffective in deterring software counterfeiters).


13. See id. § 186.2(a) (amended by Chapter 861) (defining “criminal profiteering activity” as “any act committed or attempted or any threat made for financial gain or advantage, which act or threat may be charged as a crime under” any of the various sections of the California Penal Code that are described in § 186.2).

14. Id. § 186.3 (West 1988); see id. (describing the requirements of the California Control of Profits of Organized Crime Act); cf. FLA. STAT. ANN. § 831.03 (West Supp. 1997) (allowing the seizure and destruction of goods bearing counterfeit trademarks, but making the owner of the trademark responsible for the costs incurred in disposing of the goods); N.Y. PENAL LAW § 165.74 (McKinney Supp. 1997) (providing for the seizure and destruction of goods bearing counterfeit trademarks).

15. SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1558, at 1 (Aug. 21, 1996); see id. (noting that offenses relating to the counterfeit of a registered mark are included by Chapter 861 in the list of offenses subject to existing forfeiture provisions); see also 1982 Cal. Stat. ch. 1281, sec. 1, at 4736 (enacting CAL. PENAL CODE § 186.2) (omitting counterfeit from the definition of “criminal profiteering activity”).

16. See CAL. PENAL CODE § 350 (amended by Chapter 861) (listing the penalties for willfully manufacturing, intentionally selling, or knowingly possessing for sale any counterfeit mark that is registered with appropriate government agencies).

17. Id.; see id. (outlining penalties that vary in severity with the number of counterfeit articles and the number of prior offenses); cf. N.Y. PENAL LAW § 70.00(2)(e) (McKinney 1987 & Supp. 1997) (explaining that the maximum prison term for a class C felony is fifteen years); id. § 70.00(2)(e) (McKinney 1987 & Supp. 1997) (announcing that the maximum prison term for a class E felony is four years); id. § 156.30 (McKinney 1988) (labeling the unlawful duplication of computer related material as a class E felony); id. § 165.73 (McKinney Supp. 1997).
Code § 350 also requires the forfeiture and destruction of all goods bearing counterfeit trademarks, along with any equipment that could be used to make such counterfeit marks. In contrast, until recently, applicable federal law would have allowed United States customs officials to redistribute counterfeit goods to government agencies or eleemosynary institutions that are determined to need them, thereby perpetuating the violation of American intellectual property rights by diminishing the market for legitimate goods. In addition to the penalties imposed by § 350, California Penal Code § 502 provides for the forfeiture of computer equipment used in counterfeiting software, and § 12022.6 allows California courts to increase prison terms by up to four additional years, depending upon the amount of financial loss due to the defendant's counterfeiting activities.

Chapter 861 includes in the definition of "criminal profiteering activity" offenses that, under California Penal Code § 350, relate to the counterfeiting of registered trademarks, and offenses that, under California Penal Code § 502, relate to the unauthorized use of computers and computer data. Accordingly, Chapter 861 provides that when any person willfully manufactures, intentionally sells, or knowingly possesses for sale counterfeit computer software under § 350 or § 502, that person may be required to forfeit any property or proceeds from the activity, as long as the activity was committed "for financial gain or advantage." Additionally, Chapter 861 modifies Penal Code § 350, § 502.01, and § 12022.6 to require that courts consider the retail price of authentic computer software as the appropriate measure of value.

1997) (proclaiming that the manufacture, distribution, sale, or offering for sale of counterfeit goods with a value exceeding $100,000 is a class C felony); Wash. Rev. Code Ann. § 9.16.030 (West 1988) (declaring that every person who uses, or possesses with the intent to use, a counterfeit trademark is guilty of a gross misdemeanor); id. § 9.92.020 (West 1988) (allowing, in the absence of a punishment affixed by statute, that the maximum punishment for a gross misdemeanor shall be not more than one year in the county jail, or a fine of not more than $5000, or both).

18. Cal. Penal Code § 350(e) (amended by Chapter 861); see id. (requiring the forfeiture and destruction of counterfeit goods and the means of making counterfeit marks).

19. See Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 211(c), 92 Stat. 888, 903 (providing various nondestructive methods for disposing of counterfeit goods, and allowing destruction only in situations where "the merchandise is unsafe or a hazard to health"). Congress recently passed a law that forbids this type of redistribution, permitting the destruction of all counterfeit goods, whether or not they are unsafe or hazardous. See Anticounterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, sec. 9, § 211(e), 110 Stat. 1386, 1388 (amending 19 U.S.C. § 1526(e)); see also Protecting Consumers from Counterfeiting, supra note 1, at *4-*5 (explaining the limitations of federal law prior to the Anticounterfeiting Consumer Protection Act).

20. See Cal. Penal Code § 502(g) (West Supp. 1996) (providing for the forfeiture of property used in committing computer crimes); id. § 12022.6 (amended by Chapter 861) (providing that when a person takes, damages, or destroys property in the commission of a felony, the court shall impose additional prison terms, the length of which depends upon the amount of the loss).

21. Id. § 186.3 (West 1988); see id. (describing the assets that are subject to forfeiture under the California Control of Profits of Organized Crime Act); see also id. § 186.2(a) (amended by Chapter 861) (explaining that "criminal profiteering activity" refers only to acts committed "'for financial gain or advantage"); id. § 350(a) (amended by Chapter 861) (revealing that this section applies to those who willfully manufacture, intentionally sell, or knowingly possess for sale any counterfeit of a registered trademark); id. § 502(c) (West 1988 & Supp. 1997) (forbidding the knowing access and nonpermissive use or copying of computer data or support documentation).
when assessing losses due to software counterfeiting. Likewise, when components of computer software packages are recovered, courts that determine the value lost due to counterfeiting must consider the number of completed software packages that could have been produced from the components seized.

III. THE CHAPTER 861 APPROACH

The California Control of Profits of Organized Crime Act has been used to address particularly vexing criminal problems within the state. For example, as part of the Omnibus Motor Vehicle Theft Act of 1989, the California Legislature modified Penal Code § 186.2 to include among the list of crimes that qualify as "criminal profiteering activity" the "theft or taking of any motor vehicle." In that act, the legislature [found] and declare[d] that the rapid increase in motor vehicle theft has reached crisis proportions within the state, and that there is a lucrative vehicle theft industry which has spawned the development of sophisticated criminal operations. The legislature further [found] that the escalating problem of vehicle theft is nurtured by the lack of any serious deterrent to this crime, and that vehicle thieves consider sanctions under existing law merely as routine operating costs.

The legislature believed that the asset forfeiture provisions of Penal Code § 186 should be used to address this problem. The same facts that encouraged the inclusion of motor vehicle theft within the definition of "criminal profiteering activity" in 1989 also support expanding that definition to include software counterfeiting. As was the case with motor vehicle theft, software counterfeiting is a crime that has reached crisis proportions, counterfeiters have developed sophisticated operations that are difficult to detect, and current criminal sanctions do not provide a serious deterrent.

Software counterfeiting in California has become so serious that legislative action is imperative. In 1993, more than half of all software sold was counterfeit. In only the first four months of 1995, California law enforcement officers broke up

24. See id. §§ 350(f)(6)(B), 502.01(5)(B), 12022.6(e)(2) (amended by Chapter 861).
26. Id., sec. 3, at 3247.
27. Id., sec. 1, at 3246-47.
28. See id. (explaining that the legislature believed that enhancing criminal penalties was in the public's best interest).
29. See infra notes 39-41 and accompanying text (discussing the limited deterrence provided by existing criminal penalties).
30. See supra note 3 and accompanying text (describing the losses to the software industry due to counterfeiting).
two counterfeiting rings, confiscated millions of dollars worth of duplication equip-
ment, and seized thousands of copies of counterfeit software, along with fake licenses and manuals.\textsuperscript{31} Southern California has become the center of the software counterfeiting industry, and California bears a serious share of the losses, since many of the victim companies have significant operations in the state.\textsuperscript{32}

Software counterfeiters have also developed sophisticated operations that are difficult to detect.\textsuperscript{33} Counterfeiting equipment is both easy to obtain and relatively inexpensive.\textsuperscript{34} Even though many legitimate software manufacturers use difficult-to-duplicate holographic labels in an attempt to distinguish their authentic software from the counterfeit, counterfeiters who have problems buying such labels in the United States can often obtain the labels from overseas.\textsuperscript{35} Fake holograms have been traced to Chinese manufacturers that have not honored American property laws.\textsuperscript{36} In one bust, California law enforcement officers seized 48,000 fake Chinese holograms, enough to "authenticate" an equal number of counterfeit software packages.\textsuperscript{37} Since duplicated software is identical to the original, and counterfeiters have access to sophisticated holograms, software counterfeiters are difficult to find and prosecute.\textsuperscript{38}

Existing criminal penalties have not provided a serious deterrent for software counterfeiters. Although prior law allowed counterfeiters to be imprisoned for as many as seven years, that penalty may be insignificant when balanced with the enormous financial benefits of counterfeiting.\textsuperscript{39} Despite penalties like these, in the last ten years counterfeiting has increased 3000\%.\textsuperscript{40} Law enforcement officers have been able to seize millions of dollars worth of software in a single raid.\textsuperscript{41} When criminals have such enormous profits available, some may think that the risk of a three or four year jail sentence is worth taking if he can get enough profits first.

\begin{quote}
\textsuperscript{31} Iritani, \textit{supra} note 4, at A1.

\textsuperscript{32} See \textit{SENATE FLOOR COMMITTEE ANALYSIS OF SB 1558}, at 2 (Aug. 21, 1996) (noting both the extent of counterfeit operations in the state and the particular impact on California companies).

\textsuperscript{33} \textit{Protecting Consumers from Counterfeiting}, \textit{supra} note 1, at *2.

\textsuperscript{34} \textit{See supra} notes 5-6 and accompanying text (discussing what is required to establish a software counterfeiting operation).

\textsuperscript{35} \textit{See Iritani, supra} note 4, at A1 (reporting that "the items most commonly smuggled into the United States are the holograms—laser-produced three-dimensional images—used on software packaging as a mark of authenticity").

\textsuperscript{36} \textit{See id.} (noting that many counterfeit holograms are made by Chinese manufacturers with links to government agencies).

\textsuperscript{37} \textit{Id.; see id.} (reporting the results of one investigation by the Los Angeles County Sheriff's Asian organized crime squad).

\textsuperscript{38} \textit{See id.} (explaining that "most cases are not prosecuted for lack of evidence or end up in civil court"); \textit{see also supra} note 6 and accompanying text (discussing the fact that, because counterfeit software is as good as the original it was copied from, consumers have little to fear).

\textsuperscript{39} \textit{See supra} note 8 and accompanying text (discussing the financial rewards of software counterfeiting); \textit{supra} notes 17, 20 and accompanying text (discussing the penalties for counterfeiting).

\textsuperscript{40} \textit{Protecting Consumers from Counterfeiting}, \textit{supra} note 1, at *5; \textit{see id.} (noting the increase in counterfeiting since Congress passed the Trademark Counterfeiting Act).

\textsuperscript{41} \textit{See L.A. Sheriff's Unit Seizes Fake Microsoft Software}, \textit{SEATTLE TIMES}, Feb. 21, 1995, at D3 (reporting that in one raid the Los Angeles Sheriff's organized crime unit seized $2 million worth of counterfeit software).
\end{quote}
IV. CONCLUSION

The current problem with software counterfeiting is serious enough that the California Legislature needed to take more aggressive action to protect the intellectual property of California software producers. By enacting Chapter 861, the legislature has allowed the criminal justice system to seize not only counterfeit goods, and the means of producing them, but also any proceeds gained from such illicit activity. The legislature has thus reduced the profit incentive that may have encouraged counterfeiters to risk a prison sentence in order to stockpile earnings for the future. Accordingly, Chapter 861 will probably help restore the benefits that software producers have earned.

APPENDIX

Code Sections Affected

Penal Code §§ 186.2, 350, 502.01, 12022.6 (amended).
SB 1558 (Marks); 1996 STAT. Ch. 861
Cheerios, Free Speech and Racism: A Legislative Response to an Ugly Problem

Michael C. Weed

I. INTRODUCTION

It would seem unlikely that issues of free speech, consumer protection, product integrity, and white supremacy would all meet in the same arena. That is, before it happened. Because of the actions of a racist organization, lawmakers were forced to react in order to close a loophole in existing law. With the enactment of Chapter 140, these unrelated issues have been brought together.

II. THE PROBLEM

Beginning in 1992, consumers in southern California began finding racist materials in various products they purchased in retail stores. Evidently, members of the White Aryan Resistance (W.A.R.) were entering local supermarkets and inserting their racist materials into product packages. Shortly thereafter, southern California law enforcement officials began to receive numerous complaints from consumers, retailers, and manufacturers. This presented an annoying and offensive problem, but certainly one that could be addressed effectively by existing law.

Unfortunately, retailers and law enforcement quickly discovered that W.A.R. was not violating any existing law. Because W.A.R. did not place an injurious sub-

1. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996); see infra notes 6-10 (discussing the loophole in the criminal law and the ineffectiveness of civil remedies which were being exploited).

2. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 2-3 (May 14, 1996); see id. (stating that, beginning in 1992, the White Aryan Resistance (W.A.R.) had inserted hate materials into packages on supermarket shelves); see also Errol A. Cockfield, Jr., Blacks Fear Growth of Hate in a New Antelope Valley, L.A. TIMES, Mar. 27, 1995, at A1 (relating that W.A.R. recruitment flyers had been found in beer packages in Palmdale supermarkets); Scott Harris, They Don't Buy Messages of Hate, L.A. TIMES, Oct. 26, 1995, at B5 (describing how one consumer found a racist flyer in a box of crackers purchased at a local grocery store).

3. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 2-3 (May 14, 1996); see id. (discussing the pamphlets found in retail products, and noting that members of W.A.R. had actually been caught while placing the materials into packages).

4. Id.; see id. (detailing the complaints and outrage created by the inserted materials).

5. But see infra notes 6-10 and accompanying text (explaining that existing law did not provide a criminal remedy, nor were civil remedies, such as injunctions, effective).

6. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996); see id. (explaining that existing law did not prohibit W.A.R.'s activity).
stance into the products, nor did they break the seals on the packages in order to insert their materials, they could not be stopped and prosecuted under existing law.\(^7\)

Although law enforcement officials could do little, the grocers became sufficiently outraged to seek and win civil injunctions against those inserting the materials into packages.\(^8\) However, the civil actions were costly and the injunctions were effective against only those specific persons named in the suit.\(^9\) Other groups not named were free to continue the offensive and disruptive activity.\(^10\)

### III. The Remedy—Chapter 140

Faced with this problem, local lawmakers in Los Angeles enacted a city ordinance prohibiting any person from placing any material into a product package, without the retailer's consent.\(^11\) Because the problem with racist propaganda is not limited to southern California, state legislators enacted Chapter 140 in order to close the gap in state law which W.A.R. and other similar groups could continue to exploit.\(^12\)

Chapter 140 creates a new crime, making it a misdemeanor for any person to stamp, print, place, or insert any writing into a product or package.\(^13\) However,

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7. Id.; see id. at 2-3 (expressing lawmakers frustration that current California law was not helpful in combating W.A.R.'s conduct because of technicalities in the laws, such as the broken seal requirement); see also CAL. PENAL CODE § 347(a) (West 1988) (specifying that poison or another harmful substance must be added to a product in order to activate its prohibitions and penalties); Harris, supra note 2, at B5 (explaining that California product tampering laws were ineffective to prevent a known person from continuing to insert racist materials into product packages); cf. Carl D. Holcombe, Words of Hate—NAACP Members Find Racist Fliers Left on Their Cars, POST REGISTER (Idaho Falls), Dec. 4, 1994, at A1 (relating the frustration of local law enforcement officials at their inability to prosecute an organization that had placed racist flyers on cars for any offense other than littering). But see Andrew D. Blechman, East Ventura County Focus: Thousand Oaks; Racist Flyers Found in Mailboxes, L.A. TIMES, July 8, 1995, at B3 (explaining that it is a violation of federal law to place anything in a mailbox without postage).

8. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996); see id. (detailing how supermarket owners successfully obtained an injunction preventing W.A.R. from entering their premises to distribute the group's literature); Harris, supra note 2, at B5 (noting that the California Grocers Association won an injunction against a particular person, preventing him from continuing to insert racist materials in supermarket packages).

9. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996); see id. (stating that the grocer is put in the unenviable position of seeking new injunctions against each group or person that undertakes the activity); Harris, supra note 2, at B5 (explaining how the injunction obtained by the California Grocers Association is effective only against the one individual named in the action).

10. SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996); see id. (stating that the injunction against W.A.R. will not prevent other groups from continuing the practice).

11. Id. (referencing the Los Angeles Municipal Code section enacted to directly confront this problem in that city); see id. (explaining that the Los Angeles code prohibits any person from inserting or placing any writing into or on any product offered for sale, without consent of the retailer).

12. Id., see id. (stating the author's intention that the racist activities undertaken in Los Angeles be prevented state-wide by closing the loophole in the law).

13. CAL. PENAL CODE § 640.2(a) (enacted by Chapter 140).
Chapter 140 does not apply if consent to the material is given by the retailer, distributor, or manufacturer. The authors of Chapter 140 define “writing” to mean any form of communication or representation, including handbills, notices, or advertising that contain letters, words, or pictorial representations. With these simple declarations and broad prohibitions, Chapter 140 is likely to be effective against the racist activity it aims to prevent. Clearly, W.A.R.’s conduct in southern California falls within the prohibitions of Chapter 140; thus law enforcement agencies will now have the means to stop the offensive conduct.

IV. POTENTIAL PROBLEMS CREATED BY CHAPTER 140

A. Conflicts with Consent

Chapter 140 prohibits dissemination of any writing by attaching it to or printing it on any product or package, unless the manufacturer, distributor, or retailer consents. The goal is to effectively protect businesses that are not willing to allow their premises or products to be the vehicle of distribution, regardless of the nature of the material. However, as written, Chapter 140 may create situations in which one entity consents to the insertion of materials into products, when the other named entities do not. For example, a retailer with a particular political ideology may consent to distribution of material by means of the product packages in his or her store. At the same time, however, the manufacturer of the product may not wish his product to be associated with that particular message, or any message at all. As written, Chapter 140 does not provide any mechanism for the manufacturer to override the consent of the retailer.

Although Chapter 140 does not provide the manufacturer with the power to override the retailer’s consent, traditional economic leverage, already in place, may be sufficient to solve the conflict. The manufacturer, unhappy with the retailer who granted consent, can threaten to withdraw his product from the retailer’s shelves, exerting economic pressure on the retailer to change his position. Depending on the

14. Id. § 640.2(b) (enacted by Chapter 140).
15. Id. § 640.2(c) (enacted by Chapter 140).
16. Id. § 640.2(b) (enacted by Chapter 140).
17. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 2140, at 2 (Apr. 22, 1996); see id. (stating that the goal of Chapter 140 is to allow retailers and manufacturers to avoid being associated with W.A.R.’s racist materials, or any other material).
18. This hypothetical will not be that uncommon, because racists come from every walk of life, including retail business owners.
19. See SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140, at 3 (May 14, 1996) (explaining that the intent of Chapter 140 is to give retailers and producers a method to prevent their products from being associated with W.A.R.’s racist materials).
20. See CAL. PENAL CODE § 640.2(b) (enacted by Chapter 140) (listing the manufacturer, distributor, or retailer as those entities with the power to consent). But the way Chapter 140 is worded, the authority would seem individual and absolute to each.
size of the respective operations, the demand for the product, and the ideological resolve of the retailer, the manufacturer may or may not be successful. If unsuccessful, however, the manufacturer is forced to choose between an economic hardship, reducing his sales outlets to avoid the negative association between his product and the materials, or the risk of negative association to avoid the economic loss. This result may be an inadvertent negative effect of Chapter 140, notwithstanding the beneficial effects the law creates overall.

B. Freedom of Expression Concerns

It seems logical that as a society people ought to be able to prevent persons from distributing unwanted, offensive materials by placing them in another's private property, in their places of business. In fact, the offenders can be stopped without free speech concerns, through civil injunctions obtained by the individual owners of the property. However, these remedies are inefficient and, in effect, force the victims of the conduct to bear the expense and inconvenience of stopping the activity. Ideally, the government should be able to step in and address the problem through legislation.

Unfortunately (or fortunately from the civil libertarian perspective), whenever the government attempts to restrict the expressive activities of a political group, issues arise with regard to the Bill of Rights, and in this situation, the First Amendment in particular. In order to validly restrict expression, legislators must ensure that they draft a law that can pass constitutional muster. Chapter 140, for several reasons, has achieved the required constitutional validity.

1. An Overview of Free Speech Protection

One of the fundamental touchstones of American democracy has long been the vigorous protection of free speech. Staunch defense of free speech derives, in part, from the notion that an unencumbered exchange of ideas is vital to a thriving demo-

21. See supra notes 8-10 and accompanying text (detailing how some retailers obtained civil injunctions against specific persons to prevent them from entering their stores for the purpose of distributing racist materials in packages).
22. See supra notes 8-10 and accompanying text (explaining that civil actions are expensive and effective only against the named parties).
23. See infra Part IV.B.1. and accompanying text (discussing the First Amendment implications raised by regulations addressed to the activities of any political group).
24. See infra notes 29-33 and accompanying text (discussing the constitutional limits and requirements legislators must observe when enacting laws that restrict freedom of expression).
25. See U.S. CONST. amend. I (prohibiting Congress from enacting any law that abridges freedom of speech); Texas v. Johnson, 491 U.S. 397, 414 (1989) (stating that a bedrock principle of the First Amendment is that the government may not restrict dissemination of any idea or expression simply because it disagrees with it).
Described as the "marketplace of ideas" theory, it is based on the premise that the free exchange of diverse, even antagonistic, ideas and philosophies is the best method of arriving at the truth of any issue. Rather than suppressing offensive or hateful ideas, the "marketplace" theory suggests that encouraging the free exchange of all positions is most effective to root out abusive and undesirable philosophies, thus destroying their credibility through open debate.

Although free speech has been, and continues to be, vigorously protected, exceptions to an absolute protection of all speech have developed. Competing interests must be balanced, and occasionally, a collateral interest is of sufficient significance to outweigh the interest of protecting free expression of a particular idea. Certain ideas and information have been found to be of such insignificant social value to be unworthy of the full protection of the First Amendment. Moreover, the government has been allowed to regulate free expression when the suppression of the idea is merely a collateral effect of controlling the time, place, or manner of the expression. Thus, the protection provided free speech by the First Amendment is not absolute, and not every person who cries foul in the name of free expression will win the constitutional argument. For the most part, however, the

26. See Erik F. Ugland, Hawkers, Thieves and Lonely Pamphleteers: Distributing Publications in the University Marketplace, 22 J.C. & U.L. 935, 940 (1996) (stating the premise that it is essential to the public welfare that the widest possible dissemination of ideas is encouraged and ensured).

27. See id. (stating the belief that the free exchange of ideas more easily uncovers the truth).

28. Id.

29. See R.A.V. v. City of St. Paul, 505 U.S. 377, 382-83 (1992) (pointing out that although the First Amendment generally prevents the government from limiting free speech, the protection is not absolute); Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) (stating expressly that the right to free speech is not in all instances absolute).

30. See Frisby v. Schultz, 487 U.S. 474, 488 (1988) (holding that a state government may restrict free expression (picketing) when the statute is sufficiently narrow to further the legitimate government interest of protecting citizens who are unwilling captives to the expression); United States v. O'Brien, 391 U.S. 367, 376-77 (1968) (expressing the Court's history of allowing incidental limitations on free expression when the government seeks to regulate expressive conduct and is seeking to further a significant government interest).

31. See Roth v. United States, 354 U.S. 476, 484-85 (1957) (stating that although ideas with minimal social value must receive the full protection of the First Amendment, some ideas (obscenity) are completely without redeeming value and can be constitutionally restricted); Chaplinsky, 315 U.S. at 572 (listing lewd, obscene, and libelous ideas or utterances, among others, as being without social value deserving of First Amendment protection). Of course, regarding obscenity, the battle only begins with the declaration that obscene materials are without First Amendment protection. Once that has been settled, determining what is and is not obscene, and thus vulnerable to government regulation, can create even more difficult and heated debates. See Miller v. California, 413 U.S. 15, 20-28 (1973) (reviewing the Court's evolving history of the definition of "obscenity" and then defining the parameters of what is and is not obscene).

32. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (stating that reasonable time, place, and manner restrictions placed on expression are constitutionally valid); Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (explaining that governments may regulate expression by restricting the time, place, and manner in order to protect the public peace). Fundamental to the constitutional validity of a time, place, or manner restriction is its ability to limit expression without regard to the content. See Clark, 468 U.S. at 293, 295. The limitation must be directly for the purpose of an interest other than suppressing the particular expression effected, such as consumer protection. In short, the limitation must be content-neutral. Id.
fundamental concept that the government cannot attempt to restrict expression because of disagreement with its content continues to thrive.\textsuperscript{33}

2. \textit{Chapter 140 and the First Amendment}

Chapter 140 satisfies the constitutional requirements imposed by the First Amendment primarily because Chapter 140 does not discriminate between the types of materials to which it applies. If a law restricting free expression applies specifically to the particular content of the expression, the restriction must satisfy the highest level of constitutional scrutiny.\textsuperscript{34} However, Chapter 140 is silent regarding the content of the materials to which it applies\textsuperscript{35} even though the clear intent of the measure is directed at the racist activities of W.A.R.\textsuperscript{36} Thus, although lawmakers seek specifically to address W.A.R.'s activity, and the activity of others like them, because Chapter 140 bans all similar dissemination, regardless of the content, Chapter 140 qualifies as a content-neutral restriction.

Additionally, Chapter 140 passes constitutional muster because it restricts the method of expression, rather than the expression itself.\textsuperscript{37} The fact that Chapter 140 is content-neutral is vital to its validity. Chapter 140 derives further constitutional strength because it regulates the time, manner, and place of the expression, in order to further a significant government interest.\textsuperscript{38}

The Supreme Court has consistently held that lawmakers may restrict expression, if the restriction is sufficiently linked to a justifiable interest in controlling the time, manner, or place of the expression.\textsuperscript{39} The Court requires further that adequate alter

\textsuperscript{33} \textit{See R.A.V.}, 505 U.S. at 382 (stating that the First Amendment generally prohibits any proscription of speech that is aimed specifically at suppressing that particular idea); \textit{Texas}, 491 U.S. at 414 (calling the notion that the government cannot prohibit expression of an idea solely based on disagreeable content a "bedrock principle").

\textsuperscript{34} \textit{See Boos v. Barry}, 485 U.S. 312, 321 (1988) (stating that a content-based restriction on expression must receive the Court's most exacting scrutiny); \textit{see also R.A.V.}, 505 U.S. at 382 (stating that content-based restrictions are presumptively invalid).

\textsuperscript{35} \textit{See CAL. PENAL CODE} § 640.2(a) (enacted by Chapter 140) (stating that "any" writing falls within its prohibitions).

\textsuperscript{36} \textit{SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140}, at 2-3 (May 14, 1996); \textit{see id.} (relating the events initiated by W.A.R. in southern California and the intent of the lawmakers to address that specific type of situation).

\textsuperscript{37} \textit{See supra} notes 32-33 (explaining the requirement that a valid restriction on expression be content-neutral).

\textsuperscript{38} \textit{See CAL. PENAL CODE} § 640.2(a) (enacted by Chapter 140) (prohibiting only the method of distribution of materials, rather than the materials themselves); \textit{see also SENATE COMMITTEE ON CRIMINAL PROCEDURE, COMMITTEE ANALYSIS OF AB 2140}, at 3 (May 14, 1996) (stating the author's intent that Chapter 140 not infringe on any person's First Amendment rights, but rather protect retailers and manufacturers from negative associations with racist materials).

\textsuperscript{39} \textit{See City of Renton v. Playtime Theaters}, 475 U.S. 41, 46-47 (1986) (stating that a substantial government interest will serve to validate a content-neutral time, place, and manner restriction); \textit{Clark v. Community for Creative Non-Violence}, 468 U.S. 288, 293 (1984) (explaining the Court's position that content-neutral time, place, and manner regulations are valid if designed to further a substantial government interest); \textit{United States v. O'Brien}, 391 U.S. 367, 376-77 (1968) (stating that expressive conduct, when mixed with
native methods of expression remain available in order for the restriction to be constitutionally valid. If these further requirements can be satisfied, a content-neutral law regulating free expression will be upheld against a First Amendment challenge.

Chapter 140 will survive any First Amendment challenge because it can satisfy the Supreme Court's requirements. First, it is content-neutral; thus it will not be subjected to the highest judicial scrutiny. Second, Chapter 140 furthers legitimate government interests by controlling the time, place, and manner in which free expression can occur. By keeping materials out of product packages, Chapter 140 serves to protect consumers from being exposed to unsolicited, and perhaps offensive, materials. Furthermore, Chapter 140 protects retailers and manufacturers from being associated with viewpoints and ideologies to which they have not voluntarily subscribed. Collaterally, this may prevent a potential negative impact on interstate commerce. Therefore, these interests, combined with the content-neutral nature of Chapter 140, ensure that it will survive any First Amendment challenge that may be issued.

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40. See City of Renton, 475 U.S. at 47 (requiring that a constitutionally valid restriction on expression not unreasonably restrict alternative methods of communication); Clark, 468 U.S. at 293 (stating that a valid restriction on expression must leave open ample alternative channels for the information).

41. See City of Renton, 475 U.S. at 41 (stating that content-neutral time, place, and manner restrictions are valid so long as they are justified by a substantial government interest and do not unreasonably foreclose alternative avenues of expression of the idea).

42. See supra notes 33-36 and accompanying text (explaining how Chapter 140 qualifies as a content-neutral restriction because it applies to all materials, regardless of their nature).

43. See supra note 32 and accompanying text (explaining that it is constitutionally permitted to restrict expression when regulating the time, place, or manner of the expression).

44. Senate Committee on Criminal Procedure, Committee Analysis of AB 2140, at 2-3 (May 14, 1996); see id. (detailing how unsuspecting consumers became outraged upon discovering W.A.R.'s racist flyers in the products they had purchased); see also Frisby v. Schultz, 487 U.S. 474, 485 (1988) (declaring that there is no constitutional right to force speech into the home of an unwilling listener). In Frisby, the Court upheld a statute prohibiting picketing in front of a specific residence, basing its decision on the government's interest in protecting residential privacy. Id. at 488. Although placing literature into products is not necessarily targeting a particular person or group, the unwitting and unwilling nature of the consumer's exposure to the materials is analogous to the situation in Frisby. The consumer wishing to purchase a product is forced to risk exposure to the materials or do without the product. In this way, the consumer who buys a product containing inserted materials has essentially been forced to allow an unsolicited and undesired expression into his or her home. See id. at 487-88.

45. Senate Committee on Criminal Procedure, Committee Analysis of AB 2140, at 3 (May 14, 1996); see id. (stating the author's intention to protect retailers and manufacturers from being associated with W.A.R.'s racist positions).
V. CONCLUSION

It is unfortunate that Chapter 140 is necessary, but as previously discussed, the activities of a racist group forced a legislative response.6 It is true that one of our most valued rights is the ability to freely express ideas, regardless of their perceived merit. This right should be vigorously protected, even though to do so necessitates exposure to, and provides a forum for, patently offensive expressions. Even so, to do away with the freedom would be a far worse result.

However, allowing divergent ideas to be freely expressed is clearly distinct from allowing people to force their ideas onto unwilling participants in covert manners. Moreover, the interests of businesses must be considered when the protection of free expression threaten to encroach on a business’s freedom to conduct itself with autonomy.

Chapter 140 is a valuable response to a discouraging problem. It prevents activity that deserves to be prevented; yet it also manages to walk that fine line between protecting free speech and unjustifiably repressing our right to free expression.

APPENDIX

Code Section Affected
Penal Code § 640.2 (new).
AB 2140 (Kuehl); 1996 STAT. Ch. 140

46. See supra notes 2-10 and accompanying text (discussing W.A.R.’s racist activities and the need for a legislative response to close a loophole in existing law).
Peeping Tom Crimes

Lisa F. Wu

I. INTRODUCTION

At common law, Peeping Tom crimes were unknown. As time went by, the concept of invasion of privacy grew, in large part because of the publication of an influential law review article by two distinguished Harvard scholars. Although their article focused primarily on privacy invasion from publication, it marked the beginning of the expansion of the concept to include areas such as intrusion upon a person's seclusion. This included Peeping Tom acts. Today, many states, including California, criminalize such conduct through statutes aimed to deter peepers and to protect individual privacy. The problem with the prior status of California's statute is that there were too many loopholes through which persons committing such acts could escape punishment.

1. See GA. CODE ANN. § 16-11-61(b) (1996) (defining “Peeping Tom” as one “who peeps through windows or doors, or other like places . . . for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature which invade the privacy of such persons”); see also Jon Auerbach, Neighbors: We're Being Watched; Parents Point to Peeping Tom Suspect, BOSTON GLOBE, Apr. 3, 1995, at 1 (explaining the legendary origin of the term “Peeping Tom”). Apparently, in the year 1040 in England, Lady Godiva rode naked through the streets of Coventry in an attempt to persuade her husband, Leofric, Earl of Mercia, to lift a tax he had imposed on his tenants. Auerbach, supra, at 1. The townspeople were ordered to stay indoors with curtains drawn during this ride, but one man defied this order. Id. He was immediately struck blind and given the nickname “Peeping Tom.” Id.

2. Bill Prewett, The Criminization of Peeping Toms and Other Men of Vision, 5 ARK. L. REV. 388, 388 (1951); see id. (explaining that mere peeping or looking would not constitute a common law crime).

3. See infra notes 16-23 (discussing Brandeis and Warren’s article).


5. Prosser, supra note 4, at 389-90; see id. (explaining how the principle of privacy was extended to eavesdropping by wiretapping and peering into windows of a home).

6. Id. at 390.

7. See CAL. PENAL CODE § 647(k) (amended by Chapter 1020) (categorizing the act of looking through a hole into a bathroom with the intent to invade the privacy of persons therein as disorderly conduct); GA. CODE ANN. § 16-11-61(a) (1996) (making it unlawful for any person to be a Peeping Tom on or about the premises of another); TEX. PENAL CODE ANN. § 42.01(a)(7) (West 1994 & Supp. 1997) (including under the definition of disorderly conduct one who enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling); see also People v. Lopez, 249 Cal. App. 2d 93, 103, 57 Cal. Rptr. 441, 448 (1967) (stating that § 647 of the California Penal Code is designed to control Peeping Toms); ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2051, at 1 (Apr. 9, 1996) (stating that the purpose of Chapter 1020 is to clarify what constitutes a “peeping offense,” thus making it easier to prosecute Peeping Tom cases).

8. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 2051, at 2 (Apr. 9, 1996); see id. (citing several examples in which the peeping incident did not constitute a crime because the act committed was not specifically included in the statute). One such incident involved a man watching others in a tanning salon room
which have stumped law enforcement officials because they did not know which crime had been committed.9

Recently, the California Legislature passed a bill that would close these loopholes and make it easier to criminalize such acts.10 Under existing law, anyone who looks through a hole in a bathroom with the intent to invade the privacy of the individual inside is guilty of disorderly conduct.11 Chapter 1020 expands the scope of this provision by providing that anyone who looks through an opening or otherwise views, by means of any instrumentality,12 the interior of any area13 in which the occupant has a reasonable expectation of privacy with the intent to invade the privacy of the person inside is guilty of disorderly conduct.14

This Legislative Note focuses on the creation of the common law tort action of invasion of privacy and the problems associated with it. In addition, the legal ramifications of Chapter 1020 will be addressed.

II. INVASION OF PRIVACY

At common law and in states with no Peeping Tom statutes, one must bring a tort action for invasion of privacy in order to recover for harm suffered by the actions of "peepers." Article One of the California Constitution has been interpreted to allow

through a hole drilled into the ceiling. Id. Because this act did not constitute looking through a hole into a bathroom, he could not be punished. Id.; see CAL. PENAL CODE § 647(k) (amended by Chapter 1020) (limiting the scope of acts punishable to that of merely looking through a hole into a bathroom).

9. See Henry K. Lee, Eavesdropping Charges in Filming of Nude Men at Oakland Gym, S.F. CHRON., Mar. 26, 1996, at A13 (describing a case in which a man secretly videotaped other men showering at a gym through a camera in his workout bag). Because the act did not involve trespassing, minors, lewd acts, or constitute a "Peeping Tom" case, it took authorities three months before finally coming up with the criminal statute of eavesdropping with which they could charge him. Id. The only reason this charge was able to be brought was because the camera recorded audio in a few instances. Id.; see Chuck Sheperd, Peeping Tom Laws Didn't Envision These Two Cases, STAR TRIB. (Florida), June 22, 1995, at 7E (describing how police in both Virginia and Florida searched law books in order to come up with a crime with which to charge men they believed to be Peeping Toms). The Virginia case involved a man who climbed a ladder to look into a high school girls locker room, but state law holds that it is only illegal to peep into a dwelling, not a public building. Id. In the Florida case, the difficulty was that the man held a video camera under a co-ed beach changing room stall, but only audiotaping is illegal. Id.

10. See CAL. PENAL CODE § 647(k) (amended by Chapter 1020) (amending the scope of crimes covered under the present statute).

11. CAL. PENAL CODE § 647(k) (amended by Chapter 1020); see id. (classifying disorderly conduct as a misdemeanor); cf. N.Y. PENAL LAW § 240.20 (McKinney 1989) (setting forth various acts that constitute disorderly conduct); OR. REV. STAT. § 166.025 (1995) (same); WASH. REV. CODE ANN. § 9A.84.030 (West 1988) (same). But see TEx. PENAL CODE ANN. § 42.01(a)(7) (West 1994 & Supp. 1997) (including under its definition of disorderly conduct one who enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling).

12. See CAL. PENAL CODE § 647(k) (amended by Chapter 1020) (defining "instrumentality" to include, but not be limited to, periscopes, telescopes, or binoculars).

13. See id. (defining "area" to include a bathroom, changing room, fitting room, dressing room, or tanning booth).

14. Id.
private parties to bring an invasion of privacy action against other parties. The origin of the common law right to privacy stems from Warren and Brandeis' famous law review article in which they propose that a tort for invasion of privacy should be created. This essentially stemmed from Warren's annoyance at the press for coverage of his daughter's wedding.

Seventy years later, this concept of invasion of privacy was broken down into four separate torts by Dean William L. Prosser in his well-known law review article titled Privacy. These four areas consist of the following: (1) Intrusion upon one's seclusion, (2) public disclosure of private facts, (3) publicity placing a person in false light, and (4) misappropriation of a person's name or likeness. Peeping Tom acts fall under the first of the four branches—intrusion upon one's seclusion.

The tort of intrusion is comprised of three basic elements. First, there must be an intrusion. Second, the intrusion must be highly offensive to a reasonable person. And third, the thing intruded upon must be private, in other words, the plaintiff must have a reasonable expectation of privacy in the situation.

15. Hill v. NCAA, 7 Cal. 4th 1, 20, 865 P.2d 633, 644, 26 Cal. Rptr. 2d 834, 845 (1994); see id. (holding that Article 1, section 1 creates a right of action against private as well as governmental entities); J. Clark Kelso, California's Constitutional Right to Privacy, 19 PEPP. L. REV. 327, 405-06 (1992) (declaring that since section one contains no reference to a state action requirement, it may be read as declaring rights enforceable against both private and public actors); see also CAL. CONST. art. I, § 1 (providing that "[a]ll people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property and pursuing and obtaining safety and happiness and privacy.").

16. See Louis D. Brandeis & Samuel D. Warren, The Right to Privacy, 4 HARV. L. REV. 193, 195 (1890) (arguing for the need to protect the individual's "right to be let alone" due to recent inventions that threaten to invade the sanctity of private life).

17. Prosser, supra note 4, at 383-84; see id. (providing a historical background of that era of "yellow journalism," during which the press had begun to pry into the business of others, much like the tabloid papers of today do). Mrs. Samuel Warren belonged to the social elite, and certain Boston newspapers had covered her parties in very personal and embarrassing detail. Id. The coverage of one of the Warren daughters' wedding was the final straw for Samuel Warren, who subsequently turned to his law partner, Louis Brandeis, and they wrote the article. Id.

18. See generally Prosser, supra note 4.

19. Id. at 389.


21. Id. at 1013; see RESTATEMENT (SECOND) OF TORTS § 652(B) (1977) (defining "intrusion" as when "one who intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive").

22. Melvin, 490 N.E.2d at 1013-14; see Harkey v. Abate, 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) (holding that where one installs viewing devices into the ceiling of a skating rink restroom, that type of invasion of privacy does not depend upon the publicity given to the person whose interest is invaded, but consists solely of an intentional interference with a person's solitude or seclusion that would be highly offensive to a reasonable person); see also Prosser, supra note 4, at 390-91 (defining the elements of intrusion, including the "highly offensive" requirement).

23. Melvin, 490 N.E.2d at 1013-14; see Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971) (stating that the tort of invasion of privacy should be extended to instances of intrusion into areas where an ordinary person in plaintiff's position could reasonably expect that the defendant should be excluded). Here, Life Magazine employees entered into the house of the plaintiff, a self-proclaimed healer, and secretly photographed him as he examined one of the employees. Dietemann, 449 F.2d at 249.
Several examples of early cases in which courts have allowed recovery for intrusion include an instance where one looked into windows through elevated railways,24 and also one in which a detective spied into windows.25 With growing technology came an increasing problem in video surveillance and subsequent intrusion through videotaping and photographing.26 Despite this new problem, most courts today are reluctant to acknowledge these videotaping and photographing cases as intrusions as long as they occur in a public place.27 This is because of the long-standing notion that one cannot have a reasonable expectation of privacy in a public place.28 This notion is exemplified in numerous cases involving employee surveillance by employers.29 Of course, when the person has a reasonable expectation of privacy, courts will hold that an intrusion has occurred. Thus, where a TV news crew rushed into a woman's home to film her husband as he was having a heart attack and later aired the segment, the court held that the woman could recover for intrusion.30 The court reasoned that the acts of the TV crew in filming the husband's dying moments were highly offensive.31 In another case, several models who were videotaped in their dressing area during a fashion show were deemed to have a cause of action also, even though they were not taped in a state of undress.32 In Miller v. Willis,33 a woman who discovered she was being videotaped while using a tanning bed recovered punitive damages against the voyeur.34 These cases demonstrate how courts have allowed plaintiffs to recover when they are in a private area.

However, there appears to be a narrow exception to the rule that people have a right to privacy only in private areas. In Daily Times Democrat v. Graham,35 a photographer took a picture of a woman inside a carnival "funhouse" at the moment her

24. Moore v. New York Elevated R.R. Co., 29 N.E. 997, 998 (N.Y. 1892); see id. (deciding that recovery is proper because the defendants furnished the means and opportunity for persons to invade the privacy of rooms by looking into them through windows).
27. Id. at 991-92; see id. (stating how courts have clung to the traditional notion that what occurs in public cannot be private).
28. Id.
29. See, e.g., Brazinski v. Amoco, 6 F.3d 1176, 1183 (7th Cir. 1993) (holding that one does not have a cause of action where there is no evidence that an employee was actually observed on video); Marrs v. Marriott Corp., 830 F. Supp. 274, 283-84 (D. Md. 1992) (stating that an employee has no reasonable expectation of privacy in an open office, even if an employer secretly videotaped the employee during nighttime hours).
31. Id. at 1484, 232 Cal. Rptr. at 679.
32. In re Doe, 945 F.2d 1422, 1427 (8th Cir. 1991); see id. (holding that as long as there was an intrusion in an area where one has a reasonable expectation of privacy, a cause of action will be maintained).
34. Miller, 1993 WL 76303, at *1.
35. 162 So. 2d 474 (Ala. 1964).
skirt blew over her head by hidden air jets.\textsuperscript{36} The woman sued and recovered under an invasion of privacy claim, with the court referring to wrongful intrusions into one’s private activities.\textsuperscript{37}

The downside to bringing a tort action for invasion of privacy as opposed to a criminal action under a statute includes the fact that tort actions are generally more lengthy. Furthermore, there is not the same stigma attached to civil actions as victims of peepers would probably want there to be. Finally, the biggest obstacle to overcome is the fact that most courts refuse to recognize an action for intrusion by acts of videotaping.

### III. CHAPTER 1020

Chapter 1020 appears to be one solution for many people.\textsuperscript{38} By expanding the scope of acts covered under the previous statute, Chapter 1020 covers a far greater number of Peeping Tom incidents than merely those of looking through a hole into a bathroom.\textsuperscript{39} At the same time, Chapter 1020 does not go too far by creating harsher penalties for certain acts involving videotaping or photographing.\textsuperscript{40} This is important because not only are courts reluctant to hold such acts as intrusions if they occur in a public place, but criminalizing this behavior has its ramifications. Such laws would create more crimes, which would ultimately lead to more people being incarcerated in our already overcrowded prisons.\textsuperscript{41} Furthermore, we must keep in mind the costs associated with more prisoners, and whether it would outweigh the benefits of having more Peeping Toms off the streets.\textsuperscript{42}

\textsuperscript{36} Daily Times Democrat, 162 So. 2d at 476.

\textsuperscript{37} Id. at 478; \textit{see id.} (stating that it is wrongful and illogical to hold that one forfeits a right of privacy merely because the person was part of the public at the moment of the involuntary, embarrassing pose).

\textsuperscript{38} \textit{See supra} note 7 and accompanying text (setting forth illegal conduct, including Peeping Tom acts).

\textsuperscript{39} \textit{See supra} notes 12-14 and accompanying text (explaining how the scope of acts covered under the statute was expanded).

\textsuperscript{40} AB 2111, which failed to become law in California, would have created a separate criminal category for any person who committed certain acts under California Penal Code § 647 for the purpose of making a videographic or photographic record of any person without the knowledge and consent of all parties involved. AB 2111 (1996) (copy on file with the Pacific Law Journal). Such acts would have been considered aggravated disorderly conduct, and would have been punishable as either a misdemeanor or a felony. \textit{Id.}


\textsuperscript{42} Auerbach, \textit{supra} note 1, at 1; \textit{see id.} (quoting a criminologist who finds Peeping Toms analogous to those who make threatening phone calls because they both lack the capacity for close physical contact). This fact leads many psychologists and criminologists to believe that Peeping Toms are relatively harmless. \textit{Id.}
IV. CONCLUSION

The general trend in our society today appears to favor imposing harsher penalties for all crimes in general. Although these harsher penalties may deter some crimes from being committed, it is important not to lose sight of the overall picture—taking potentially dangerous people off the streets does not necessarily make our society a safer place to live. This is especially true when there is no evidence that “peeping” leads to more dangerous criminal behavior and, moreover, there exists a shared belief among psychologists and criminologists that such people are incapable of committing dangerous acts. We must balance all costs and benefits attached to such a move. Passing Chapter 1020 appears to have been just such a balance.

APPENDIX

Code Section Affected

Penal Code § 647 (amended).
AB 2051 (Alpert); 1996 STAT. Ch. 1020

43. See Christy Hoppe, Legislators File Spate of Crime Bills; Longer Sentences Sought for Variety of Offenses, DALLAS MORNING NEWS, Dec. 6, 1994, at 1A (describing how approximately 50 Texas anticrime bills have been filed to increase penalties for certain offenses in response to the public’s fear of crime); What About Victims?, SAN DIEGO UNION-TRIB., Dec. 5, 1994, at B-6 (stating that the increase in violent crime in the U.S. during the past year explains why most Americans, including most Californians, are in a “tough anti-crime mood”).

44. See Auerbach, supra note 1, at 1 (quoting a criminologist who believes that Peeping Toms are relatively harmless).
The Street Terrorism Enforcement and Prevention Act: Gang Members and Guilt by Association

Carol J. Martinez

I. INTRODUCTION

In 1988, the legislature enacted the Street Terrorism Enforcement and Prevention (STEP) Act. The STEP Act was directed at gang activity that the legislature found presented a “clear and present danger” to society. It was passed in an attempt to attack the behavioral patterns and social structure associated with street gangs. However, the STEP Act was passed with a sunset clause because there was some concern that it might be found to be either unconstitutional or unnecessary. In 1996, the legislature passed Chapter 982, which amended California Penal Code § 186.22 and repealed the sunset clause of § 186.27. This Legislative Note will discuss the provisions of the STEP Act and the changes made to it by Chapter 982, the question of its constitutionality and necessity, and, finally, the antigang statutes of other states.

II. STEP ACT PROVISIONS

The STEP Act makes active participation in a criminal street gang illegal and punishable by imprisonment in a county jail for up to a year or the state prison for a period of sixteen months, or two or three years. It also provides sentencing enhancements of one, two, or three years of imprisonment for felonies committed in

2. Id. § 186.21 (West Supp. 1997); see id. (finding that California has around 600 street gangs in operation); see also BLACK'S LAW DICTIONARY 251 (6th ed. 1990) (defining “clear and present danger” as a doctrine of constitutional law that allows restrictions on First Amendment freedoms when “necessary to prevent grave and immediate danger to interests which government may lawfully protect”).
4. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 318, at 5 (July 2, 1996); see 1991 Cal. Legis. Serv. ch. 201, secs. 1(g), 2, at 1354 (amending CAL. PENAL CODE §§ 186.22, 186.27); 1996 Cal. Legis. Serv. ch. 982, sec. 2, at 4658 (repealing CAL. PENAL CODE § 186.27); see also infra notes 20-34 and accompanying text (discussing the constitutionality and necessity of the STEP Act).
5. CAL. PENAL CODE § 186.22(g) (amended by Chapter 982); 1996 Cal. Legis. Serv. ch. 982, secs. 1, 2, at 4630-31 (amending CAL. PENAL CODE § 186.22(g), repealing CAL. PENAL CODE § 186.27).
6. See infra Part II.
7. See infra Part III.
8. See infra Part IV.
9. See CAL. PENAL CODE § 186.22(f) (amended by Chapter 982) (defining a “criminal street gang” as three or more people who have an identifying name, sign, or symbol, who are united primarily to engage in one or more listed criminal activities and who exhibit a “pattern of criminal activity”).
10. CAL. PENAL CODE § 186.22(a) (amended by Chapter 982); see id. (establishing punishment for active, knowing, and willful violations of the STEP Act).
conjunction with gang activity and two, three, or four years for felonies committed within 1000 feet of an occupied school. Adults who use physical violence or threats of physical violence to induce a minor to join a gang will also be incarcerated for a period of one, two, or three years.

The STEP Act also provides that landowners who know or should know that gang activity is taking place on their property can be held liable for any gang crimes committed on that property. Under the STEP Act, firearms, ammunition, or deadly weapons in the possession of gang members may be confiscated by police and will not be returned if law enforcement can show a likelihood that the return would endanger public safety. Anyone who knowingly supplies a firearm for use in criminal gang activity may be punished by a fine of up to $1000, or imprisonment for up to one year, or both.

The STEP Act defines a “pattern of criminal gang activity” as the commission of, attempted commission of, or solicitation of two or more specified offenses within three years of each other. Chapter 982 expands this definition to include a sustained juvenile petition for, or conviction of, two of these offenses.

Prior law stated that the STEP Act would be repealed as of January 1, 1997. Chapter 982 extends the STEP Act indefinitely by repealing the sunset clause.

III. THE CONSTITUTIONALITY AND NECESSITY OF THE STEP ACT

The constitutions of both the United States and the State of California protect the right of people to assemble. Critics of the STEP Act claim that it violates gang
members' rights of free association by punishing them for their choice of friends.21 According to experts, including gang members themselves, gangs form for a variety of reasons apart from the commission of crimes.22 Members of organizations cannot be punished for illegal activities committed by the organization unless they had knowledge of, and were in some way linked with, the crimes.23 However, under the STEP Act, gang members are punished only when they actively, knowingly, and willfully participate in the gang's criminal activity.24 Therefore, the STEP Act does not appear to violate the right of association.

Other constitutional challenges have claimed that the STEP Act is overbroad and vague.25 To withstand a charge of overbreadth, a statute must be constructed narrowly enough to avoid substantially impinging on activities that are constitutionally protected.26 If a statute is so vague that people of normal intelligence must guess as to what conduct it bars, it is void on its face.27 However, in People v. Green28 and People v. Gamez,29 the First and Fourth Districts, in the California Court of Appeal found that the statute withstood these challenges.30 In Green, the court stated that in challenges for overbreadth and vagueness, "[r]easonable certainty is all that is required."31 The court found that the statute's punishment for "active participation," instead of mere "membership," and its definition of the terms, "criminal street gang" and "pattern of criminal gang activity,"32 are sufficiently definite to overcome over

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22. See id. at 465 (claiming gangs form for "social, cultural and economic reasons"); see also Jeffrey J. Mayer, Individual Moral Responsibility and the Criminalization of Youth Gangs, 28 WAKE FOREST L. Rev. 943, 949 (1993) (including "friendship and social identity" among the reasons for the formation of gangs).


24. CAL. PENAL CODE § 186.22(a) (amended by Chapter 982).


26. See Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (holding that a law must "aim specifically at evils within the allowable area of state control"); see also Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (requiring that the overbreadth be substantial when compared with the legitimate applications of the law).

27. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see Lanzetta v. New Jersey, 302 U.S. 451, 457-58 (1939) (finding void a statute which prohibited gang membership but failed to define the word "gangster").


30. Gamez, 235 Cal. App. 3d at 972-73, 286 Cal. Rptr. at 902-03; Green, 227 Cal. App. 3d at 704, 278 Cal. Rptr. at 148-49.


32. See CAL. PENAL CODE § 186.22(e) (amended by Chapter 982) (listing the punishable offenses as: (1) Assault with a deadly weapon; (2) robbery; (3) unlawful homicide or manslaughter; (4) the sale, transportation, or manufacture of controlled substances; (5) shooting at an inhabited dwelling or occupied motor vehicle; (6) the discharge of a firearm from a motor vehicle; (7) arson; (8) the intimidation of witnesses and victims; (9) grand theft in excess of $10,000; (10) grand theft of any vehicle, trailer, or vessel; (11) burglary; (12) rape; (13) looting; (14) moneylaundering; (15) kidnaping; (16) mayhem; (17) aggravated mayhem; (18) torture; (19) felony extortion; (20)}
breadth and vagueness challenges. In Gamez, the court stated that “there is no right of association to engage in criminal conduct,” and referred to language used in Green when finding the STEP Act to be sufficiently specific to withstand constitutional challenge.

The necessity for and efficacy of the STEP Act are also questioned by some critics. The California Attorneys for Criminal Justice claim that the statute punishes gang members whether or not they have committed a criminal act and is unnecessary since other laws already exist for punishing criminal acts. Yet another consideration is the possibility that treating gangs as powerful, dangerous entities might encourage gang membership by supplying them with publicity and validation.

### IV. OTHER STATE’S ANTIGANG LEGISLATION

California’s STEP Act has become a model for other states desiring to develop legislation aimed at gangs. Louisiana, Georgia, and Missouri have followed that model very closely by enacting statutes almost identical to California’s STEP Act. Indiana, Illinois, Iowa, South Dakota, and Florida have broader statutes than the California statute, some of them possibly stretching beyond constitutional barriers. For instance, the Florida and South Dakota statutes utilize a broad definition of the term “gang member,” such that a person who associates with gang members and commits a specified crime could receive sentence enhancements whether or not the crime was committed in concert with a gang.

felony vandalism; (21) carjacking; (22) the sale, delivery, or transfer of a firearm; or (23) possession of a concealed firearm); see also id. (defining a “pattern of criminal activity” as the commission of two or more of those offenses).

33. Green, 227 Cal. App. 3d at 698-703, 278 Cal. Rptr. at 144-48; see id. (distinguishing the STEP Act from the statute overturned in Lanzetta and noting the similarities between the STEP Act and the Federal Racketeer Influenced and Corrupt Organizations (RICO) statutes); see also supra note 27 (discussing Lanzetta).

34. Gamez, 235 Cal. App. 3d at 971-72, 286 Cal. Rptr. at 901-02.

35. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 318, at 5 (July 2, 1996); see Mayer, supra note 22, at 949 (suggesting that criminal liability should be imposed solely on an individual basis).

36. Mayer, supra note 22, at 985.


39. See FLA. STAT. ANN. § 874.03 (West Supp. 1997); 740 ILL. COMP. STAT. ANN. 147/10 (West Supp. 1996); IND. CODE ANN. § 35-45-9-1 (West Supp. 1996); IOWA CODE ANN. § 723A.1 (West Supp. 1997); S.D. CODIFIED LAWS § 22-10-14 (Michie Supp. 1996); see also Destro, supra note 38, at 804-05 (discussing the broad approach taken by the Indiana, Iowa, and Florida laws); Truman, supra note 37, at 711-12 (questioning the constitutionality of the Florida, South Dakota, and Illinois statutes).

40. Truman, supra note 37, at 717-18; see FLA. STAT. ANN. § 874.03(2) (West Supp. 1997) (defining a “street gang member” as a person who has committed or attempted at least two felonies or violent misdemeanors and who meets two of a list of conditions, including: (1) Admits to gang membership; (2) is identified as a gang member by an informant; (3) lives or habitually visits a gang’s area and adopts the style of clothing, hand signals,
V. CONCLUSION

While the STEP Act may have some weaknesses, judicial and public opinion is such that legislation aimed at gangs is not likely to disappear any time soon. Chapter 982 has effectively assured that the STEP Act itself will be around indefinitely.

APPENDIX

Code Sections Affected
Penal Code § 186.22 (amended), § 186.27 (repealed).
AB 2035 (Frusetta); 1996 STAT. Ch. 982