BREAKING NEWS AND BREAKING THE LAW: REINING IN CALIFORNIA’S CRIMINALIZATION OF PAPARAZZI AND THE INTENT TO PHOTOGRAPH

I. INTRODUCTION

Today’s society is consumed by an unhealthy fascination with celebrities, more now than ever before. Celebrity culture is pervasive; the public wants to have a piece of celebrities and read about them again and again. To feed society’s insatiable appetite for celebrity stories, paparazzi battle to meet the demand—and collect handsome paychecks for their


3. See generally Michael Jackson, Eddie Cascio, & James Porte, Breaking News, on MICHAEL (Epic Records 2010). The album’s liner notes for this song proclaim, “This is Michael’s life under the microscope. The more success you have the more some try to tear you down . . . [Michael] seemed to find a lot of humor in how silly things would make the news . . .” The song’s lyrics further reflect this sentiment:

   Everybody wanting a piece of Michael Jackson
   Reporters stalking the moves of Michael Jackson
   Just when you thought he was done
   He comes to give it again
   They can put it around the world today
   He wanna write my obituary
   No matter what, you just wanna read it again
   No matter what, you just wanna feed it again . . .

   Id.

photographs. Early paparazzi quickly recognized the value of using “an element of confrontation” and spontaneity. Paparazzi photographers, therefore, are able to catch moments that reveal both flaws and normal behavior in our celebrity idols, such as falling off a bike or playing air guitar.

The Internet is filled with list after list of the most “scandalous,” “notorious,” or “legendary” celebrity photographs. These lists typically highlight noteworthy photos that revealed affairs, showed private moments between couples on the brink of a rumored breakup, confirmed illicit drug use, depicted violent or reckless behavior, or captured the final images before a celebrity’s death.

One such infamous photo shows Diana, Princess of Wales in the back seat of a car shortly before her untimely death in a high-speed paparazzi pursuit. Controversy immediately arose after the accident, with allegations that the paparazzi and media were directly to blame. In 2008, a jury at a British inquest found that Diana and fellow passenger Dodi al-Fayed were unlawfully killed by “grossly negligent driving of the following vehicles and of the Mercedes,” thereby assigning a portion of the fault to the photographers who pursued the speeding Mercedes-Benz before it crashed into an underpass. The inquest consisted of 278 witnesses testifying throughout six months of hearings. Because it was nearly impossible to

5. See Peter Howe, Paparazzi: And Our Obsession with Celebrity 32 (2005). Some shots can fetch price tags of $600,000. Id.
6. Id. at 29.
7. Id. at 28.
8. See Heather Billington, 15 Most Scandalous Moments Ever Captured by the Paparazzi, The Richest (Nov. 7, 2014), http://www.therichest.com/rich-list/most-shocking/15-most-scandalous-moments-ever-captured-by-the-paparazzi (“Here, we’ve taken a look at fifteen just such cases, when some of the most scandalous moments in the history of celebrity were caught by the paparazzi, whether sad, violent, shocking, scandalous—or all four at the same time.”).
11. See supra notes 8-10.
12. See Billington, supra note 8.
16. Id.
determine individual negligence and liability, nine manslaughter charges against photographers in France were thrown out, although three photographers were fined “a symbolic amount” of one euro each for the invasion of privacy.  

Following Diana’s death, the public and celebrity outcry against paparazzi escalated. In response, more legislation was enacted specifically to curb paparazzi. Actor George Clooney condemned the media by proclaiming, “You’ve deflected responsibility. Yet I wonder how you sleep at night. You should be ashamed! I watch as you scramble for high ground, take your position on CNN saying there is a market for this and you are just supplying the goods.” He urged the public, “Do not purchase your news. Do not use tabloids as a source. You define the difference between tabloid and legitimate news.”

The public is certainly free to make its own choices about what news to consume or what sources they deem to be legitimate. That should be the driving factor to shut down paparazzi—not legislation that targets the act of taking photographs.

Despite the laudable intentions of anti-paparazzi legislation, we must also carefully balance those interests with the First Amendment of the United States Constitution. The First Amendment prohibits the government from “abridging the freedom of speech, or of the press.” Because of the value and benefits that free speech contributes to our society at large, it is imperative to carefully consider and scrutinize laws that inhibit speech.

21. Id.
22. Although the First Amendment states that “Congress” shall make no such law abridging free speech or the press, the amendment was incorporated and applied to the states through the Fourteenth Amendment in Gitlow v. New York, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”) and Near v. Minnesota, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.”).
23. U.S. CONST. amend. I.
California has enacted a law that arguably does just that: California Vehicle Code section 40008 adds a criminal enhancement to certain existing reckless driving violations when those violations are committed with the intent to capture photographs for a commercial purpose.\textsuperscript{25} Convictions carry the possibility of fines and imprisonment.\textsuperscript{26} Statutes that prohibit and punish nothing more than the act of photography or newsgathering—when the alleged harm that the statutes seek to prevent is already addressed through existing conduct-based prohibitions—overstep constitutional bounds.\textsuperscript{27}

This Note will examine the impact of these types of anti-paparazzi laws and the concerns they raise about encroaching upon the First Amendment and inhibiting a free press. Part II explains section 40008 of the California Vehicle Code and the California Court of Appeal decision in \textit{Raef v. Superior Court},\textsuperscript{28} which upheld the law. Part III examines the problems with section 40008 and other similarly designed anti-paparazzi legislation. Part IV describes successful attempts to curb the problematic and dangerous conduct that is at the heart of the legislative intent behind anti-paparazzi laws. Finally, Part V concludes with recommendations for legislating and regulating paparazzi’s conduct without inhibiting the press.

\section*{II. \textbf{CALIFORNIA VEHICLE CODE SECTION 40008: THE “RECKLESS DRIVING WHILE PHOTOGRAPHING” STATUTE}}

California Vehicle Code section 40008 makes it a misdemeanor, not an infraction, for any person to drive recklessly (in violation of Vehicle Code sections 21701,\textsuperscript{29} 21703,\textsuperscript{30} or 23103\textsuperscript{31}) “with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.”\textsuperscript{32} Punishment can rise to as much as six months

\footnotesize{Jefferson would have said the more speech, the better. That’s what the First Amendment is all about.”}.\textsuperscript{33}

\begin{itemize}
  \item 25. \textsc{Cal. Veh. Code} § 40008 (West 2014).
  \item 26. \textsc{Cal. Veh. Code} § 40008(a)-(b) (West 2014). A violation of the underlying reckless driving statutes, by contrast, is only an infraction. \textsc{See id.}
  \item 27. \textit{See infra} Part III.
  \item 28. 193 Cal. Rptr. 3d 159 (Ct. App. 2015).
  \item 29. “No person shall wilfully interfere with the driver of a vehicle or with the mechanism thereof in such manner as to affect the driver’s control of the vehicle.” \textsc{Cal. Veh. Code} § 21701 (West 2000).
  \item 30. “The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of, the roadway.” \textsc{Cal. Veh. Code} § 21703 (West 2000).
  \item 31. “A person who drives a vehicle upon a highway . . . [or] who drives a vehicle in an offstreet parking facility . . . in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.” \textsc{Cal. Veh. Code} § 23103(a)-(b) (West 2014).
  \item 32. \textsc{Cal. Veh. Code} § 40008 (West 2014).
\end{itemize}
in jail and a $2,500 fine. Penalties may be doubled when “caus[ing] a minor child or children to be placed in a situation in which the child’s person or health is endangered.”

This law was first put to the test in a high-profile way in 2012 when a photographer fought back against the charges stemming from his reckless pursuit of singer Justin Bieber. Paul Raef was alleged to have been driving in excess of eighty miles per hour and to have sometimes been driving on the shoulder of the freeway. He was charged, in part, with “driving with willful and wanton disregard for the safety of others . . . and following another vehicle too closely . . ., both done with the intent to capture a visual image of another person for a commercial purpose.” It was the first time section 40008 was used by prosecutors.

Raef challenged the First Amendment aspects of the law. His trial lawyer noted that the statute “targets a special group of people[,] which is another constitutional issue.” The Los Angeles Superior Court agreed with the constitutional challenge and, on November 14, 2012, dismissed the charges brought under section 40008.

On September 30, 2015, the California Court of Appeal upheld the law for the first time and found that it did not violate the First Amendment. The court pointed out that section 40008 “is not limited to paparazzi chasing celebrities or reporters gathering news” and looked to its “broad

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33. CAL. VEH. CODE § 40008(a) (West 2014).
34. CAL. VEH. CODE § 40008(b) (West 2014).
37. Raef v. Superior Court, 193 Cal. Rptr. 3d 159, 162-63 (Ct. App. 2015).
38. Romero, supra note 36.
40. Id.
42. Raef, 193 Cal. Rptr. 3d at 179; see also Anti-Paparazzi Law Strengthened in California, USA TODAY (Sept. 30, 2015, 6:03 PM), http://www.usatoday.com/story/life/people/2015/09/30/court-upholds-california-law-to-control-paparazzi-driving/73112582.
formulation.” The court explained its view that the law did not specifically target the press or paparazzi:

Nothing in the statutory language suggests the Legislature intended to target the gathering of newsworthy material to be delivered to the general public via some medium of mass communication. As written, section 40008 applies without limitation, whether the intended image or recording is of a celebrity or someone with no claim to fame, whether it qualifies as news or is a matter of purely private interest, and whether it will be sold to the mass media or put to purely private use.

The court further explained that, even when “[a]ssuming that the intent to take a photograph or make a recording of another person generally is entitled to First Amendment protection as a speech-producing activity,” the court was ultimately “not persuaded that section 40008 punishes that intent per se or that the commercial purpose requirement imposes a content-based restriction on speech.”

The court found that “the legislative history confirms that the Legislature was primarily concerned with regulating the paparazzi’s conduct” and that it was not trying to censor the type of photos and media that could result from the conduct. Instead, the law “is aimed at the special problems caused by the aggressive, purposeful violation of traffic laws while targeting particular individuals for personal gain.” The court stated that the targeted conduct is not “garden-variety tailgating, reckless driving, or interference with the driver’s control of a vehicle,” but instead, “‘relentless’ pursuits of targeted individuals on public streets, as well as corolling and deliberately colliding with their vehicles.”

One attorney for several media outlets called the Court of Appeal’s decision “very troubling” because it imposes extra penalties on drivers simply for the desire to take newsworthy photographs. This could have a profound effect on mainstream photojournalists heading, for example, to cover people being displaced by a forest fire or covering the brave work of fire fighters themselves. The purpose and effect of the law is to punish the intent to take pictures, but pictures is not a crime.

43. Raef, 193 Cal. Rptr. 3d at 165.
44. Id. at 165-66.
45. Id. at 169.
46. Id. at 173-74.
47. Id. at 174.
48. Id. at 171.
Reporters Committee for Freedom of the Press, the National Press Photographers Association, the Association of Alternative Newsmedia, the Associated Press Media Editors, the California Broadcaster Association, and the Society of Professional Journalists have also voiced their objections to the law.50

Raef subsequently petitioned the California Supreme Court for review, which was denied on January 20, 2016.51 Although Raef’s case has reached its end, this is not necessarily the end of all challenges to section 40008. The California Court of Appeal system does not have horizontal stare decisis;52 the decision issued by the Second District, Division Four does not preclude other districts—or even other divisions within the Second District—from deciding in a different manner in the future.53

III. THE PROBLEM WITH SECTION 40008

Despite the Court of Appeal’s contrary stance,54 section 40008 arguably does specifically target the press for enhanced penalties under a law of general applicability.55 Laws that single out the press, either as a whole or by targeting individual members therein, for differential treatment are subject to heightened scrutiny because they “pose[ ] a particular danger of abuse by the State.”56

The Court of Appeal described the targeted conduct as “‘relentless’ pursuits” and deliberate collisions, and it declared that the statute does not target “garden-variety tailgating, reckless driving, or interference with the driver’s control of a vehicle.”57 However, the language of the statute makes no such distinction. The requisite driving-related conduct within section 40008 is merely a violation of Vehicle Code sections 21701, 21703, or
willful interference with a driver’s control of the vehicle, following too closely, or driving “in willful or wanton disregard for the safety of persons or property.”

The only difference between committing an infraction under sections 21701, 21703, or 23103 and committing a misdemeanor under section 40008 is the intent to capture a photograph or recording of someone for a commercial purpose. Focusing on the state of mind of paparazzi as the basis for punishment is a potentially fatal mistake in the statute. A photographer rushing to the scene of a disaster or another newsworthy event for a commercial purpose would face harsher punishment for his reckless driving than would an average citizen who was driving recklessly with a more sinister intention, such as driving to or from a murder or bank robbery.

The general concerns about safety and violations of traffic laws are already addressed through underlying legislation. A person can be guilty of driving recklessly without taking photographs. A person can take photographs without violating section 40008. But a person cannot violate section 40008 without taking photographs—and it is simply that intent to take photographs that makes all the difference between facing an infraction or facing a misdemeanor.

A photographer who violates traffic laws still faces liability for those actions, as would any private citizen who was not in pursuit of photographs for a commercial purpose. The liability for the underlying reckless driving violations would nonetheless remain: the fact that someone is engaged in

58. CAL. VEH. CODE § 40008(a)-(b) (West 2014) (“any person who violates Section 21701, 21703, or 23103”).
59. CAL. VEH. CODE § 21701 (West 2000).
60. CAL. VEH. CODE § 21703 (West 2000).
61. CAL. VEH. CODE § 23103(a)-(b) (West 2014).
62. See CAL. VEH. CODE § 40008 (West 2014).
64. See supra note 65.
65. See supra note 65.
newsgathering does not excuse any crimes or torts committed during that newsgathering process. 68

A. The Press and the Law

The press is not immune from regulation and prosecution, and a publisher “has no special immunity from the application of general laws.” 69 The Fourth Circuit case of Food Lion, Inc. v. Capital Cities/ABC, Inc. 70 is a popular illustration of the lack of newsgathering privilege. Reporters from television network ABC went undercover as job applicants (soon becoming employees) to get inside a Food Lion grocery store and investigate allegations of unsanitary meat-handling processes. 71 The reporters obtained about forty-five hours of hidden camera footage that revealed serious mishandling and treatment of meat for sale. 72 This video footage was later broadcast in an episode of ABC’s PrimeTime Live, and Food Lion sued based on the methods that ABC used to obtain the video footage. 73 The Fourth Circuit found that the reporters breached their duty of loyalty to Food Lion and committed a trespass. 74 Food Lion could not, however, use these non-reputational tort claims to “recover defamation-type damages . . . without satisfying the stricter (First Amendment) standards of a defamation claim,” and thus it could not also receive publication damages. 75

The newsgathering privilege, or lack thereof, suggests that the section 40008 criminal statute is an unnecessary burden on the press. Like the reporters in Food Lion, paparazzi are not excused from the underlying acts they take in pursuit of photography or any other fruit of their newsgathering. 76 The First Amendment’s speech protections are not endangered by merely

68. See Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973); see also Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (“The press may not with impunity break and enter an office or dwelling to gather news.”).

69. AP v. NLRB, 301 U.S. 103, 132-33 (1937) (“He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and nondiscriminatory taxes on his business.”); see also Cohen, 501 U.S. at 670 (“[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”).

70. 194 F.3d 505 (4th Cir. 1999).
71. Id. at 510.
72. Id. at 510-11.
73. Id. at 511.
74. Id. at 524. The court awarded $2.00 in damages. Id.
75. Id. at 522-24.
76. Again, to be in violation of section 40008, one must already be in violation of specified sections of the California Vehicle Code that govern unsafe conduct. CAL. VEH. CODE § 40008(a)-(b) (West 2014).
requiring the press to act within the limits of the law. A First Amendment problem arises, however, when a regulation is instead directed at suppressing free expression.

B. First Amendment Scrutiny

The O’Brien test is one standard with which to gauge the constitutionality of anti-paparazzi statutes. This test states that, in the case of “speech” and “nonspeech” elements being combined in the same conduct, a “sufficiently important” governmental interest in regulating nonspeech elements can justify “incidental” limitations on free speech. A government regulation is sufficiently justified if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Generally, anti-paparazzi statutes are constitutional under the O’Brien test. The statutes target safety and citizens’ privacy, which may be considered important interests. These interests are arguably unrelated to the suppression of free expression because photography of celebrities, or anyone, is still permissible when done from a safe distance.

Section 40008, however, differs from prior anti-paparazzi statutes. This law only adds on top of existing Vehicle Code violations the prohibition of “capturing any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.” One must already be in violation of other reckless driving sections of the Vehicle Code. Section 40008 is only implicated after the concerns of safety are already addressed. It is not, therefore, furthering any government interest, much less one that is unrelated to the suppression of free expression.

81. Id. at 377.
82. See Curry, supra note 79.
83. Id. at 954.
84. Id.
85. CAL. VEH. CODE § 40008 (West 2014).
86. See id. ("any person who violates Section 21701, 21703, or 23103, with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose, is guilty of a misdemeanor and not an infraction" (emphasis added)).
The Minnesota Star test requires that differential treatment of the press be justified by a compelling interest that cannot be achieved without this differential treatment. Justice O’Connor stated for the majority in Minnesota Star that “differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.”

The Court of Appeal noted that “the legislative history confirms that the Legislature was primarily concerned with regulating the paparazzi’s conduct” by focusing on “the special problems caused by the aggressive, purposeful violation of traffic laws while targeting particular individuals for personal gain.” However, “it is irrational to suggest that a more compelling need exist to prohibit harassment by individuals working for profit than harassment by an overly zealous or obsessive fan.” Indeed, fan-led pursuits and harassment—done for personal desires, not commercial or financial gain—pose a serious, sometimes deadly, threat to celebrities’ safety.

The differential treatment of the press is arguably based on those in reckless pursuit of photography for commercial purposes, and this pursuit would be the special characteristic that could justify the treatment under Minnesota Star. However, the goal of safety is achieved through preexisting traffic laws that regulate the underlying conduct. Because other conduct regulations already address the compelling safety interest, regulations like section 40008 must fail the Minnesota Star test.

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88. See id. at 581-85.
89. Id. at 585 (emphasis added).
90. Raef v. Superior Court, 193 Cal. Rptr. 3d 159, 173-74 (Ct. App. 2015). The court also quoted the Assembly’s concurrence in the Senate amendment to the bill that later became section 40008: “According to the author, this bill is intended to curb the reckless and dangerous lengths that paparazzi will sometimes go in order to capture the image of celebrities.” Id. at 173.
91. See Curry, supra note 79, at 956.
92. See Peter Sheridan, The Curse of the Stalker: Increasing Number of Celebrities are Pursued by Obsessed Fans, SUNDAY EXPRESS (June 21, 2014, 12:01 AM), http://www.express.co.uk/celebrity-news/483921/Stalkers-Increasing-number-of-celebrities-are-pursued-by-obsessed-fans (providing examples of fans breaking into homes, stalking, harassing, and killing the celebrity targets of their obsessions); STALKING, THREATENING, AND ATTACKING PUBLIC FIGURES: A PSYCHOLOGICAL AND BEHAVIORAL ANALYSIS 289, 292-94 (J. Reid Meloy et al. eds., 2008).
93. Although average citizens can certainly also violate section 40008, the most likely offenders are paparazzi, as anticipated by the bill’s drafters. See Raef, 193 Cal. Rptr. 3d at 173-74.
94. See CAL. VEH. CODE §§ 21701 & 21703 (West 2000); CAL. VEH. CODE § 23103(a)-(b) (West 2014).
95. See Curry, supra note 79, at 956.
IV. EXISTING ALTERNATIVES

Striking section 40008 will not render individuals, celebrities, and society defenseless against aggressive paparazzi tactics. Existing laws already regulate conduct such as harassment, stalking, and invasion of privacy. If the goal of section 40008 is truly to regulate conduct and focus on safety, these existing, alternative methods of paparazzi regulation are appropriate and sufficient.

A. The Emergence of Paparazzi Regulation: Galella v. Onassis

The origins of appropriate paparazzi regulation can be attributed to the harassment endured by Jacqueline Onassis and her children. Photographer Ron Galella, “arguably the most controversial paparazzo of all time,” frequently interrupted the lives of Onassis and the Kennedy children in his attempts to gather photographs. He jumped in front of the children’s bicycles, interrupted games of tennis, and invaded their private schools. He was initially enjoined from harassing, alarming, startling, tormenting, touching the person of the defendant . . . or her children . . . and from blocking their movements in the public places and thoroughfares, invading their immediate zone of privacy by means of physical movements, gestures or with photographic equipment and from performing any act reasonably calculated to place the lives and safety of the defendant . . . and her children in jeopardy.

Soon thereafter, Galella violated this temporary order, and the order was modified to require him to keep 100 yards away from the Onassis apartment and 50 yards away from the family.

The Second Circuit acknowledged that “legitimate countervailing social needs” may warrant some intrusion into an individual’s expectation of privacy, but that interference must be “no greater than that necessary to

96. See infra Part IV.B.
100. See Raef v. Superior Court, 193 Cal. Rptr. 3d 159, 173-74 (Ct. App. 2015).
103. Galella, 487 F.2d at 992.
104. Id.
105. Id.
106. Id.
protect the overriding public interest.”

The public interest in and importance of the daily activities of Onassis, a public figure who was frequently the subject of news coverage, was *de minimis*. The court found that Galella’s actions “went far beyond the reasonable bounds of news gathering,” and his conduct toward Onassis’s minor children was “inexcusable.” Nonetheless, it found that the prior injunction was broader than necessary. The order was modified to prohibit

1. any approach within twenty-five (25) feet of defendant or any touching of the person of the defendant Jacqueline Onassis;
2. any blocking of her movement in public places and thoroughfares;
3. any act foreseeable or reasonably calculated to place the life and safety of defendant in jeopardy; and
4. any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant.

The court also noted that any additional restrictions on Galella’s photography for news coverage was “improper and unwarranted by the evidence” and that “[a]ny prior restraint on news gathering is miniscule and fully supported by the findings.” The modified order still fully allowed Galella the ability to photograph and report.

**B. California’s Existing Legislation**

Like the conduct-based restrictions in *Galella v. Onassis*, recent California legislation similarly focuses on *conduct* rather than the pursuit of press photography.

1. **Criminal Liability**

In 2013, California Senate Bill 606 (hereinafter referred to as the Child Harassment Bill) amended section 11414 of the Penal Code to criminalize the intentional harassment of a “child or ward of any other person because of that person’s employment.” Violation of the amended statute may result in up to one year of imprisonment in county jail, a fine not exceeding

107. *Id.* at 995.
108. *Id.*
109. *Id.*
110. *Id.* at 998.
111. *Id.*
112. *Id.*
113. *Id.* at 999.
114. *Id.*
$10,000, or both, and may subject the offender to a civil action. Additional convictions carry increased penalties in the form of higher fines and longer jail time.

Celebrity parents have been vocal with their concerns about the traumatic effects of paparazzi’s behavior on their children. Legendary entertainer Michael Jackson famously masked and shrouded his three young children when they were in public with him to maintain their anonymity during the occasions when they were in public without him. Numerous other celebrities have explained the effects that aggressive paparazzi tactics have had on their children, and they have lambasted these actions that can lead to dangerous and potentially violent encounters. Consequently, the Child Harassment Bill was heavily backed by some of Hollywood’s most sought-after actors and parents.

117. Id.
119. The statute provides:
A second conviction under this section shall be punished by a fine not exceeding twenty thousand dollars ($20,000) and by imprisonment in a county jail for not less than five days but not exceeding one year. A third or subsequent conviction under this section shall be punished by a fine not exceeding thirty thousand dollars ($30,000) and by imprisonment in a county jail for not less than 30 days but not exceeding one year.
120. See Lauren N. Follett, Note, Taming the Paparazzi in the “Wild West”: A Look at California’s 2009 Amendment to the Anti-Paparazzi Act and a Call for Increased Privacy Protections for Celebrity Children, 84 S. CAL. L. REV. 201, 206 (2010).
Years later, his daughter explained, “He didn’t want anyone to see what we looked like” because “[t]hat way we could have what he didn’t, which was a normal childhood.”

122. Follett, supra note 120.
123. For example, Halle Berry and Jennifer Garner both testified in favor of the bill and publicly supported its enactment. See Andrew Pulver, Anti-Paparazzi Bill Backed by Halle Berry Now California Law, GUARDIAN (Sept. 26, 2013), http://www.theguardian.com/film/2013/sep/26/halleberry-anti-paparazzi-law.
2. Civil Liability

On September 30, 2014, the California governor signed two additional paparazzi reform bills into law: Assembly Bill 1356 and Assembly Bill 1256. These were followed by another bill about a year later.

a. Stalking Reform Bill

California Assembly Bill 1356 (hereinafter referred to as the Stalking Reform Bill) amended the California Civil Stalking Law. The previous version of the law held a defendant liable for stalking when he or she engaged in a pattern of conduct intended to follow, alarm, or harass the plaintiff, that resulted in the plaintiff reasonably fearing for his or her safety, or the safety of an immediate family member, and the defendant has either made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or that of an immediate family member or has violated a restraining order, as specified.

The assembly bill proposed adding the concept of “surveillance” to the law’s proscribed conduct. The bill would also permit, as an alternative to a plaintiff reasonably fearing for his or her safety, a showing that the conduct reasonably resulted in the plaintiff reasonably suffering “substantial emotional distress.” The Stalking Reform Bill amended section 1708.7 of the Civil Code.

b. Buffer Zone Bill

California Assembly Bill 1256 (hereinafter referred to as the Buffer Zone Bill) created privacy buffer zones by expanding the definition of “physical invasion of privacy.” The previous version of the law provided that a person was liable for physical invasion of privacy when that person knowingly enters onto the land of another person without permission or otherwise commits a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound

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127. Id.
128. Id.
129. Id.
recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.\textsuperscript{132}

The assembly bill proposed removing the language “in order to physically invade the privacy of the plaintiff” and proposed including the plaintiff’s “private” activities in addition to the “personal or familial activities” for both physical and constructive invasions of privacy.\textsuperscript{133} The Buffer Zone Bill amended section 1708.8 of the Civil Code.\textsuperscript{134}

c. Drone Amendment

Civil Code section 1708.8 was further amended when, on October 6, 2015, the California governor signed into law additional legislation\textsuperscript{135} (hereinafter referred to as the Drone Amendment) that expanded the definition of a “physical invasion of privacy” to include the flying of drones above someone’s airspace with the intent to take photographs or recordings.\textsuperscript{136} The governor had previously vetoed several other drone bills, stating that the “multiplication and particularization of criminal behavior creates increasing complexity without commensurate benefit.”\textsuperscript{137}

A physical invasion of privacy is now defined as the knowing entry “onto the land or into the airspace above the land of another person without permission . . . in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity”\textsuperscript{138} when the invasion “occurs in a manner that is offensive to a reasonable person.”\textsuperscript{139} A constructive invasion of privacy occurs when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, \emph{regardless of whether there

\begin{thebibliography}{9}
\item 132. \textit{Id.}
\item 134. \textit{CAL. CIV. CODE § 1708.8 (West 2009 & Supp. 2017).}
\item 136. \textit{Id.; see also Megerian, supra note 125.}
\item 137. Megerian, \textit{supra} note 125.
\item 138. \textit{CAL. CIV. CODE § 1708.8(l) (West 2009 & Supp. 2017)} (emphasis added). A “private, personal, and familial activity” includes, but is not limited to, intimate details of a person’s life, interactions with family or significant others, activities on residential property, and “[o]ther aspects of the plaintiff’s private affairs or concerns,” any of which occur “under circumstances in which the plaintiff has a reasonable expectation of privacy.” \textit{Id.}
\item 139. \textit{CAL. CIV. CODE § 1708.8(a) (West 2009 & Supp. 2017).}
\end{thebibliography}
is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.\textsuperscript{140}

Violation of this section can impose liability for treble damages and potential punitive damages.\textsuperscript{141} If the plaintiff proves that the invasion of privacy was done for a commercial purpose, the defendant is subject to disgorgement of any proceeds or other consideration obtained as a result of the violation.\textsuperscript{142} Violations also carry the threat of a civil fine ranging from $5,000 to $50,000.\textsuperscript{143}

C. Benefits of the Alternatives

The above-mentioned methods of curbing intrusive paparazzi tactics and harassment focus specifically on the \textit{conduct} that intrudes or harasses—not the intent that accompanies the conduct. Laws that regulate the underlying conduct can sufficiently address the legislative intent of statutes like section 40008 of the Vehicle Code.

The Child Harassment Bill and its codification focus on the offender’s conduct and the safety of children. The statute defines “harasses” as “knowing and willful conduct . . . that seriously alarms, annoys, torments, or terrorizes . . . and that \textit{serves no legitimate purpose}.”\textsuperscript{144} The statute’s language continues to include conduct such as recording the child’s image or voice without the parent’s consent,\textsuperscript{145} and this prohibited conduct of recording arguably serves the “legitimate purpose” of news reporting.\textsuperscript{146} The savior of the statute, however, is that the conduct must be the type that would “cause a reasonable child to suffer substantial emotional distress” and indeed

\begin{itemize}
\item \textsuperscript{140} \texttt{CAL. CIV. CODE § 1708.8(b) (West 2009 & Supp. 2017) (emphasis added).}
\item \textsuperscript{141} \texttt{CAL. CIV. CODE § 1708.8(d) (West 2009 & Supp. 2017).}
\item \textsuperscript{142} \texttt{Id.}
\item \textsuperscript{143} \texttt{Id.}
\item \textsuperscript{144} \texttt{CAL. PENAL CODE § 11414(b)(2) (West 2015 & Supp. 2016) (emphasis added).}
\item \textsuperscript{145} “[I]ncluding, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child’s or ward’s image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child’s or ward’s activities or by lying in wait.” \texttt{CAL. PENAL CODE § 11414(b)(2) (West 2011 & Supp. 2016).}
\item \textsuperscript{146} \textit{See} Jenny M. Brandt, \textit{Anti-Paparazzi Law Effectively Meaningless}, ABOVE THE LAW (Feb. 25, 2014, 2:30 PM), \url{http://abovethelaw.com/2014/02/anti-paparazzi-law-effectively-meaningless}.
\end{itemize}

Surely, taking a photograph of a child even in a way that seriously alarms the child serves the legitimate purpose of capturing \textit{newsworthy} images (and making the photographer some money). . . . [H]ow could the paparazzi ever violate the statute when the defense will always be that they had a legitimate purpose in capturing the image?

\textit{Id.}
does cause the child to actually suffer substantial emotional distress.\textsuperscript{147} This law seems sufficiently directed at the conduct of photographers—not at the act of taking or publishing a photograph—to allow it to easily survive a First Amendment challenge.

The Stalking Reform Bill updated the language of the law to keep up with growing technology by adding “place under surveillance” to the list of qualifying conduct.\textsuperscript{148} Surveillance and online stalking do not implicate the trespassory concerns of “traditional” stalking, but once a victim knows of the surveillance, it carries the same, if not greater, emotional distress concerns.\textsuperscript{149} The law further specifies that it “shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly,”\textsuperscript{150} thereby ensuring its survival (or at least improving its chances) against a First Amendment challenge.

The Buffer Zone Bill and the Drone Amendment similarly expanded the scope of existing law by modifying the definition of an invasion of privacy, rather than creating a new crime.\textsuperscript{151} The Buffer Zone Bill is similar to the idea of the paparazzi-free zones that were the subject of discussion several years earlier.\textsuperscript{152} The zones protect everyone, celebrities and private individuals alike, from privacy invasions.\textsuperscript{153} These zones will not destroy paparazzi’s opportunity to obtain photographs; instead, photographers must simply keep a clear space between themselves and the subject of their photographs.\textsuperscript{154}

\begin{itemize}
\item \textsuperscript{147} CAL. PENAL CODE § 11414(b)(2) (West 2015 & Supp. 2017).
\item \textsuperscript{148} CAL. CTY. CODE § 1708.7(a)(1) (West 2009 & Supp. 2017).
\item Dr[.] Emma Short . . . found that the attacks affected all aspects of victims’ health. Frequently, because of anonymity, the harasser was not identified, and the victim lived in anxiety and fear . . . [M]any stalking victims display at least one symptom of post-traumatic stress disorder, whether or not they have been physically assaulted. Others show that victims become more fearful, distrustful of others, can develop physical illnesses and can even become suicidal.
\item Id.
\item \textsuperscript{150} CAL. CTY. CODE § 1708.7(f) (West 2009 & Supp. 2017).
\item \textsuperscript{151} See Megerian, supra note 125.
\item \textsuperscript{152} See Tara Sattler, Comment, Plagued by the Paparazzi: How California Should Sharpen the Focus on its Not-So-Picture Perfect Paparazzi Laws, 40 SW. L. REV. 403, 416-21 (2010).
\item Id. at 421-22.
\item Id. at 422.
\end{itemize}
These bills are examples of how to appropriately legislate new and emerging concerns without crossing the line into specifically prohibiting speech-related activity. These examples of legislation do not add an additional or increased penalty for taking photographs when already invading privacy; it is the conduct of invading privacy that is itself punished.

V. CONCLUSION

Section 40008 impermissibly burdens free expression and a free press. It does not prohibit any harmful conduct that is not already prohibited. Instead, it penalizes—criminalizes—individuals based on their intent to capture an image.

When other laws already prohibit the same “intrusive and abusive conduct,” such as harassment and stalking, there is no compelling justification for anti-paparazzi statutes that are designed like section 40008.\textsuperscript{155} Simply enforcing existing laws that more directly target conduct can provide more than enough protection against paparazzi.\textsuperscript{156} When the harmful conduct is already prohibited, the government should not add an additional or enhanced penalty just because the press or photography is involved for commercial purposes. The conduct prohibition will sufficiently protect the interests of safety and privacy.

Future legislation and amendments should strengthen and expand the scope of existing laws, much like the Stalking Reform Bill, Buffer Zone Bill, and Drone Amendment expanded the definitions of their operative terms.\textsuperscript{157} Statutory language can continue to be modified to keep up with growing technology. Actions that invade privacy interests, such as photography, should remain only in the realm of civil statutes; only the truly harmful conduct, such as reckless driving and harassment, should be governed by criminal law.

Paparazzi will remain accountable for their individual actions and conduct the same as any other person would be.\textsuperscript{158} News reporters are still liable for the torts and crimes committed while acquiring their news and reporting.\textsuperscript{159} Being the first media outlet to break the news of the next “legendary” or “scandalous” story will never be worth endangering the safety of that celebrity or of the public. Despite the importance of a free press, reporters and photographers cannot, and do not, get a free pass. But neither

\textsuperscript{155} See Curry, supra note 79, at 956.

\textsuperscript{156} Id.

\textsuperscript{157} See supra Part IV.B.

\textsuperscript{158} See supra Part III.A.

should they bear an excessive burden that disproportionately affects them and their line of work. By focusing on the true conduct, rather than the intent behind the conduct, laws can still seek to prevent the harm caused by aggressive paparazzi. Paparazzi may continue to break the news by breaking the law—but that law shouldn’t be one like section 40008.

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