

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.¹ Celebrity culture is pervasive;² the public wants to have a piece of celebrities and read about them again and again.³ To feed society's insatiable appetite for celebrity stories, paparazzi⁴ battle to meet the demand—and collect handsome paychecks for their

1. See Jo Piazza, *Americans Have an Unhealthy Obsession with Celebrities*, HUFFINGTON POST (Mar. 28, 2012), http://www.huffingtonpost.com/jo-piazza/americans-unhealthy-obsession-with-celebrities_b_1385405.html.

2. See Joseph Epstein, *The Culture of Celebrity*, WEEKLY STANDARD (Oct. 17, 2005), <http://www.weeklystandard.com/the-culture-of-celebrity/article/7381>.

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.

4. Merriam-Webster defines "paparazzo" (plural: paparazzi) as "a freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs." *Paparazzo*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/paparazzo> (last visited Oct. 21, 2016). The term originated from the name of a tabloid photographer character in Federico Fellini's 1959 film *La Dolce Vita*. See PETER BONDANELLA, *THE FILMS OF FEDERICO FELLINI* 68 (2002); see also Gaby Wood, *The Origins of the Paparazzi—and What a Hot Snap Fetches Nowadays*, GUARDIAN (Sept. 23, 2006, 7:39 PM), <http://www.theguardian.com/media/2006/sep/24/pressandpublishing1>.

photographs.⁵ Early paparazzi quickly recognized the value of using “an element of confrontation” and spontaneity.⁶ 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.⁷

The Internet is filled with list after list of the most “scandalous,”⁸ “notorious,”⁹ or “legendary”¹⁰ 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.¹¹

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.¹² Controversy immediately arose after the accident, with allegations that the paparazzi and media were directly to blame.¹³ 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,”¹⁴ thereby assigning a portion of the fault to the photographers who pursued the speeding Mercedes-Benz before it crashed into an underpass.¹⁵ The inquest consisted of 278 witnesses testifying throughout six months of hearings.¹⁶ 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.”).

9. See Darrell Hartman, *Nine Notorious Paparazzi Moments*, *VANITY FAIR* (June 7, 2010, 3:40 PM), <http://www.vanityfair.com/hollywood/2010/06/notorious-paparazzi-moments>.

10. See *7 Most Legendary Paparazzi Photos*, *N.Y. POST* (Feb. 7, 2010), <http://www.nypost.com/2010/02/07/7-most-legendary-paparazzi-photos>.

11. See *supra* notes 8-10.

12. See Billington, *supra* note 8.

13. Jayme Deerwester, *How Princess Diana’s Death Shook the Media Landscape*, *USA TODAY* (Aug. 31, 2015, 8:26 AM), <http://www.usatoday.com/story/life/people/2015/08/27/how-princess-dianas-death-shook-media-landscape/31937795>.

14. Hearing Transcripts, *Coroner’s Inquests into the Deaths of Diana, Princess of Wales and Mr Dodi Al Fayed*, *NATIONAL ARCHIVES* (Apr. 7, 2008), http://webarchive.nationalarchives.gov.uk/20080521144222/http://www.scottbaker-inquests.gov.uk/hearing_transcripts/verdict.htm [<https://goo.gl/4FjwJo>].

15. See Alan Cowell, *Negligent Driving Killed Diana, Jury Finds*, *N.Y. TIMES: EUROPE* (Apr. 8, 2008), <http://www.nytimes.com/2008/04/08/world/europe/08diana.html>.

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.¹⁷

Following Diana’s death, the public and celebrity outcry against paparazzi escalated.¹⁸ In response, more legislation was enacted specifically to curb paparazzi.¹⁹ 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.”²⁰ 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.”²¹

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 government²² from “abridging the freedom of speech, or of the press.”²³ Because of the value and benefits that free speech contributes to our society at large,²⁴ it is imperative to carefully consider and scrutinize laws that inhibit speech.

17. Mary Jordan, *Paparazzi and Driver Found Negligent in Princess Diana’s Death*, WASHINGTON POST (Apr. 8, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702743.html>.

18. *Stars Denounce Paparazzi Fervor*, CNN (Aug. 31, 1997, 3:46 AM), <http://edition.cnn.com/WORLD/9708/31/diana.paparazzi>.

19. See Note, *Privacy, Technology and the California “Anti-Paparazzi” Statute*, 112 HARV. L. REV. 1367, 1368 (1999).

20. Deerwester, *supra* note 13.

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.

24. See generally Interview with Antonin Scalia, *Piers Morgan Tonight*, CNN (Jul. 18, 2012, 9:00 PM), <http://transcripts.cnn.com/TRANSCRIPTS/1207/18/pmt.01.html> (“I think Thomas

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.²⁵ Convictions carry the possibility of fines and imprisonment.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.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 *Raef v. Superior Court*,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.

II. 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 21701,²⁹ 21703,³⁰ or 23103³¹) “with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.”³² Punishment can rise to as much as six months

Jefferson would have said the more speech, the better. That’s what the First Amendment is all about.”).

25. CAL. VEH. CODE § 40008 (West 2014).

26. CAL. VEH. CODE § 40008(a)-(b) (West 2014). A violation of the underlying reckless driving statutes, by contrast, is only an infraction. *See id.*

27. *See infra* Part III.

28. 193 Cal. Rptr. 3d 159 (Ct. App. 2015).

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.” CAL. VEH. CODE § 21701 (West 2000).

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.” CAL. VEH. CODE § 21703 (West 2000).

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.” CAL. VEH. CODE § 23103(a)-(b) (West 2014).

32. CAL. VEH. CODE § 40008 (West 2014).

in jail and a \$2,500 fine.³³ 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.”³⁴

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.³⁵ 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.³⁶ 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.”³⁷ It was the first time section 40008 was used by prosecutors.³⁸

Raef challenged the First Amendment aspects of the law.³⁹ His trial lawyer noted that the statute “targets a special group of people[,] which is another constitutional issue.”⁴⁰ The Los Angeles Superior Court agreed with the constitutional challenge and, on November 14, 2012, dismissed the charges brought under section 40008.⁴¹

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.⁴² The court pointed out that section 40008 “is not limited to paparazzi chasing celebrities or reporters gathering news” and looked to its “broad

33. CAL. VEH. CODE § 40008(a) (West 2014).

34. CAL. VEH. CODE § 40008(b) (West 2014).

35. *People v. Raef*, No. BR050611 (L.A. Super. Ct. 2012); see Bruna Nessif & Natalie Finn, *Justin Bieber’s Alleged Paparazzi Chase: City Prosecutors on the Case*, EONLINE (Jul. 17, 2012, 3:34 PM), <http://www.eonline.com/news/328546/justin-bieber-s-alleged-paparazzi-chase-city-prosecutors-on-the-case>.

36. Dennis Romero, *Justin Bieber Freeway Chase Nets Charges Against Paul Raef*, PAPARAZZO, L.A. WEEKLY (Jul. 25, 2012, 12:01 PM), <http://www.laweekly.com/news/justin-bieber-freeway-chase-nets-charges-against-paul-raef-paparazzo-2385451>.

37. *Raef v. Superior Court*, 193 Cal. Rptr. 3d 159, 162-63 (Ct. App. 2015).

38. Romero, *supra* note 36.

39. Rebecca Macatee & Claudia Rosenbaum, *Justin Bieber Paparazzo Snaps Back at Reckless Driving Charges*, EONLINE (Aug. 9, 2012, 12:35 PM), <http://www.eonline.com/news/336759/justin-bieber-paparazzo-snaps-back-at-reckless-driving-charges>.

40. *Id.*

41. *People v. Raef*, No. BR050611 (L.A. Super. Ct. Nov. 14, 2012); see also *Judge Dismisses Anti-Paparazzi Charges in Justin Bieber Case*, ROLLING STONE (Nov. 14, 2012), <http://www.rollingstone.com/music/news/judge-dismisses-anti-paparazzi-charges-in-justin-bieber-case-20121114>; *Judge Throws Out Anti-Paparazzi Charges in Justin Bieber Chase Case*, L.A. TIMES: L.A. NOW (Nov. 14, 2012, 12:54 PM), <http://latimesblogs.latimes.com/lanow/2012/11/anti-paparazzi-charges-bieber.html>.

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-paparazzis-driving/73112582>.

formulation.”⁴³ 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.⁴⁴

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.”⁴⁵

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.⁴⁶ 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.”⁴⁷ 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 corraling and deliberately colliding with their vehicles.”⁴⁸

One attorney for several media outlets called the Court of Appeal’s decision “very troubling” because

[i]t 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.⁴⁹

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.

49. Elizabeth Warmerdam, “Anti-Paparazzi” Law Passes Muster in Calif., COURTHOUSE NEWS SERVICE (Oct. 2, 2015), <http://www.courthousenews.com/2015/10/02/anti-paparazzi-law-passes-muster-in-calif.htm>.

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

50. Claudia Rosenbaum, *Photographer to Appeal Anti-Paparazzi Law to California Supreme Court*, BUZZFEED NEWS (Nov. 6, 2015, 1:42 PM), <http://www.buzzfeed.com/claudiarosenbaum/photographer-appeals-anti-paparazzi-law-to-california-suprem>.

51. *Raef v. Superior Court*, No. S230469, 2016 Cal. LEXIS 509 (Cal. Jan. 20, 2016).

52. *Sarti v. Salt Creek Ltd.*, 85 Cal. Rptr. 3d 506, 510 (Ct. App. 2008).

53. See 9 WITKIN, CALIFORNIA PROCEDURE § 498 (5th ed. 2008) (“A decision of a Court of Appeal is not binding in the Courts of Appeal. One district or division may refuse to follow a prior decision of a different district or division . . .”). However, as a practical matter, the court usually will follow prior decisions of other districts or divisions. See *id.* § 499(1).

54. “It is a law of general application that does not target speech or single out the press for special treatment.” *Raef v. Superior Court*, 193 Cal. Rptr. 3d 159, 163 (Ct. App. 2015).

55. See Christina M. Locke & Kara Carnley Murrhee, *Is Driving with the Intent to Gather News a Crime? The Chilling Effects of California’s Anti-Paparazzi Legislation*, 31 LOY. L.A. ENT. L. REV. 83, 94 (2011).

56. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

57. *Raef*, 193 Cal. Rptr. 3d at 171.

23103:⁵⁸ willful interference with a driver's control of the vehicle,⁵⁹ following too closely,⁶⁰ or driving "in willful or wanton disregard for the safety of persons or property."⁶¹

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.⁶² Focusing on the state of mind of paparazzi as the basis for punishment is a potentially fatal mistake in the statute.⁶³ 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.⁶⁴

The general concerns about safety and violations of traffic laws are already addressed through underlying legislation.⁶⁵ 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 photographs⁶⁶—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.⁶⁷ 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).

63. Julie Hilden, *Can California's Anti-Paparazzi Statute Survive a First Amendment Challenge?*, JUSTIA: VERDICT (Mar. 4, 2013), <https://verdict.justia.com/2013/03/04/can-californias-anti-paparazzi-statute-survive-a-first-amendment-challenge>.

64. Locke & Murrhee, *supra* note 55.

65. See CAL. VEH. CODE § 21701 (West 2000) (prohibiting "wilfully interfer[ing] with the driver of a vehicle or with the mechanism thereof in such manner as to affect the driver's control of the vehicle"); CAL. VEH. CODE § 21703 (West 2000) (prohibiting "follow[ing] another vehicle more closely than is reasonable and prudent"); CAL. VEH. CODE § 23103 (West 2014) (prohibiting "driv[ing] a vehicle . . . in willful or wanton disregard for the safety of persons or property").

66. Or, specifically, without capturing "any type of visual image, sound recording, or other physical impression of another person for a commercial purpose." CAL. VEH. CODE § 40008 (West 2014).

67. 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.⁷⁷ A First Amendment problem arises, however, when a regulation is instead directed at suppressing free expression.

B. First Amendment Scrutiny

The *O'Brien*⁷⁸ test is one standard with which to gauge the constitutionality of anti-paparazzi statutes.⁷⁹ 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.⁸⁰ 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.⁸¹

Generally, anti-paparazzi statutes are constitutional under the *O'Brien* test.⁸² The statutes target safety and citizens’ privacy, which may be considered important interests.⁸³ 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.⁸⁴

Section 40008, however, differs from prior anti-paparazzi statutes. This law only adds on top of existing Vehicle Code violations the prohibition of “captur[ing] any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.”⁸⁵ 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.⁸⁶ It is not, therefore, furthering any government interest, much less one that is unrelated to the suppression of free expression.

77. *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973).

78. *United States v. O'Brien*, 391 U.S. 367 (1968).

79. See Richard J. Curry, Jr., *Diana's Law, Celebrity and the Paparazzi: The Continuing Search for a Solution*, 18 J. MARSHALL J. COMPUTER & INFO. L. 945, 953-54 (2000).

80. *O'Brien*, 391 U.S. at 376.

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*⁸⁷ test requires that differential treatment of the press be justified by a compelling interest that cannot be achieved without this differential treatment.⁸⁸ 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."⁸⁹

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."⁹⁰ 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."⁹¹ Indeed, fan-led pursuits and harassment—done for personal desires, not commercial or financial gain—pose a serious, sometimes deadly, threat to celebrities' safety.⁹²

The differential treatment of the press⁹³ 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.⁹⁴ Because other conduct regulations already address the compelling safety interest, regulations like section 40008 must fail the *Minnesota Star* test.⁹⁵

87. *Minn. Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983).

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 laws⁹⁶ already regulate conduct such as harassment,⁹⁷ stalking,⁹⁸ and invasion of privacy.⁹⁹ If the goal of section 40008 is truly to regulate conduct and focus on safety,¹⁰⁰ 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.¹⁰¹ Photographer Ron Galella, “arguably the most controversial paparazzo of all time,”¹⁰² frequently interrupted the lives of Onassis and the Kennedy children in his attempts to gather photographs.¹⁰³ He jumped in front of the children’s bicycles, interrupted games of tennis, and invaded their private schools.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶

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.

97. CAL. PENAL CODE § 11414(a) (West 2015 & Supp. 2017).

98. CAL. CIV. CODE § 1708.7 (West 2009 & Supp. 2017).

99. CAL. CIV. CODE § 1708.8 (West 2009 & Supp. 2017).

100. See *Raef v. Superior Court*, 193 Cal. Rptr. 3d 159, 173-74 (Ct. App. 2015).

101. See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

102. Charlotte Cowles, *Ron Galella: Unseen Photographs From the World’s Most Infamous Paparazzo*, HARPER’S BAZAAR (Apr. 7, 2014), <http://www.harpersbazaar.com/culture/art-books-music/g3535/ron-galella-unseen-photographs>.

103. *Galella*, 487 F.2d at 992.

104. *Id.*

105. *Id.*

106. *Id.*

protect the overriding public interest.”¹⁰⁷ 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*.¹⁰⁸ 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.”¹⁰⁹ Nonetheless, it found that the prior injunction was broader than necessary.¹¹⁰ 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 foreseeably 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.¹¹¹

The court also noted that any additional restrictions on Galella’s photography for news coverage was “improper and unwarranted by the evidence”¹¹² and that “[a]ny prior restraint on news gathering is miniscule and fully supported by the findings.”¹¹³ The modified order still fully allowed Galella the ability to photograph and report.¹¹⁴

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 606¹¹⁵ (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.”¹¹⁶ 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.*

115. S.B. 606, 2013-14 Leg. Reg. Sess. (Cal. 2013).

116. CAL. PENAL CODE § 11414(a) (West 2015 & Supp. 2016).

\$10,000, or both,¹¹⁷ and may subject the offender to a civil action.¹¹⁸ Additional convictions carry increased penalties in the form of higher fines and longer jail time.¹¹⁹

Celebrity parents have been vocal with their concerns about the traumatic effects of paparazzi's behavior on their children.¹²⁰ 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.¹²¹ 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.¹²² Consequently, the Child Harassment Bill was heavily backed by some of Hollywood's most sought-after actors and parents.¹²³

117. *Id.*

118. CAL. PENAL CODE § 11414(d) (West 2015 & Supp. 2016).

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.

CAL. PENAL CODE § 11414(c) (West 2015 & Supp. 2016).

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).

121. "A fiercely protective father, Jackson rarely brought his brood out into public, covering their faces in veils and party masks to protect their identity when he did." *Jackson's Kids Emerge From Behind the Veil*, TODAY: CELEBRITIES (Jul. 7, 2009, 9:43:13 PM), http://www.today.com/id/31786625/ns/today-today_entertainment/t/jacksons-kids-emerge-behind-veil. 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." Erik Ortiz & Rich Schapiro, *Michael Jackson Wanted Paris Jackson and Her Siblings to Wear Masks to Have "Normal Childhood,"* N.Y. DAILY NEWS (Apr. 15, 2013, 5:54 AM), <http://www.nydailynews.com/entertainment/gossip/paris-jackson-doctor-not-entertainer-article-1.1316245>; see also Brian Hiatt, *Paris Jackson: Life After Neverland*, ROLLING STONE (Jan. 24, 2017), <http://www.rollingstone.com/music/features/paris-jackson-michael-jacksons-daughter-speaks-out-w462501> ("Michael had his kids wear masks in public, a protective move Paris considered 'stupid' but later came to understand.").

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/halle-berry-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 1256.¹²⁴ These were followed by another bill about a year later.¹²⁵

a. *Stalking Reform Bill*

California Assembly Bill 1356 (hereinafter referred to as the Stalking Reform Bill) amended the California Civil Stalking Law.¹²⁶ 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.¹²⁷

The assembly bill proposed adding the concept of “surveillance” to the law’s proscribed conduct.¹²⁸ 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.”¹²⁹ The Stalking Reform Bill amended section 1708.7 of the Civil Code.¹³⁰

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.”¹³¹ 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

124. See PAPANAZZI REFORM INITIATIVE, <http://www.paparazzi-reform.org> (last visited Oct. 2, 2016).

125. See Chris Megerian, *Gov. Jerry Brown Approves New Limits on Paparazzi Drones*, L.A. TIMES: POLITICAL (Oct. 6, 2015), <http://www.latimes.com/local/political/la-pol-sac-brown-drones-paparazzi-20151006-story.html>.

126. Assemb. B. 1356, 2013-14 Leg. Reg. Sess. (Cal. 2014).

127. *Id.*

128. *Id.*

129. *Id.*

130. CAL. CIV. CODE § 1708.7 (West 2009 & Supp. 2017).

131. Assemb. B. 1256, 2013-14 Leg. Reg. Sess. (Cal. 2014).

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.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 activit[ies]” for both physical and constructive invasions of privacy.¹³³ The Buffer Zone Bill amended section 1708.8 of the Civil Code.¹³⁴

c. Drone Amendment

Civil Code section 1708.8 was further amended when, on October 6, 2015, the California governor signed into law additional legislation¹³⁵ (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.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.”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”¹³⁸ when the invasion “occurs in a manner that is offensive to a reasonable person.”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, *regardless of whether there*

132. *Id.*

133. *See* Assemb. B. 1256, 2013-14 Leg. Reg. Sess. (Cal. 2014).

134. CAL. CIV. CODE § 1708.8 (West 2009 & Supp. 2017).

135. Assemb. B. 856, 2015-16 Leg. Reg. Sess. (Cal. 2015).

136. *Id.*; *see also* Megerian, *supra* note 125.

137. Megerian, *supra* note 125.

138. 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.” *Id.*

139. CAL. CIV. CODE § 1708.8(a) (West 2009 & Supp. 2017).

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.¹⁴⁰

Violation of this section can impose liability for treble damages and potential punitive damages.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.¹⁴² Violations also carry the threat of a civil fine ranging from \$5,000 to \$50,000.¹⁴³

C. *Benefits of the Alternatives*

The above-mentioned methods of curbing intrusive paparazzi tactics and harassment focus specifically on the *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 *serves no legitimate purpose*."¹⁴⁴ The statute's language continues to include conduct such as recording the child's image or voice without the parent's consent,¹⁴⁵ and this prohibited conduct of recording arguably serves the "legitimate purpose" of news reporting.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

140. CAL. CIV. CODE § 1708.8(b) (West 2009 & Supp. 2017) (emphasis added).

141. CAL. CIV. CODE § 1708.8(d) (West 2009 & Supp. 2017).

142. *Id.*

143. *Id.*

144. CAL. PENAL CODE § 11414(b)(2) (West 2015 & Supp. 2016) (emphasis added).

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." CAL. PENAL CODE § 11414(b)(2) (West 2011 & Supp. 2016).

146. See Jenny M. Brandt, *Anti-Paparazzi Law Effectively Meaningless*, ABOVE THE LAW (Feb. 25, 2014, 2:30 PM), <http://abovethelaw.com/2014/02/anti-paparazzi-law-effectively-meaningless>.

Surely, taking a photograph of a child even in a way that seriously alarms the child serves the legitimate purpose of capturing *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?

Id.

does cause the child to actually suffer substantial emotional distress.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.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.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,”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.¹⁵¹ The Buffer Zone Bill is similar to the idea of the paparazzi-free zones that were the subject of discussion several years earlier.¹⁵² The zones protect everyone, celebrities and private individuals alike, from privacy invasions.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.¹⁵⁴

147. CAL. PENAL CODE § 11414(b)(2) (West 2015 & Supp. 2017).

148. CAL. CIV. CODE § 1708.7(a)(1) (West 2009 & Supp. 2017).

149. See Katharine Quarmby, *How the Law Is Standing Up to Cyberstalking*, NEWSWEEK (Aug. 13, 2014, 6:08 AM), <http://www.newsweek.com/2014/08/22/how-law-standing-cyberstalking-264251.html>.

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.

Id.

150. CAL. CIV. CODE § 1708.7(f) (West 2009 & Supp. 2017).

151. See Megerian, *supra* note 125.

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).

153. *Id.* at 421-22.

154. *Id.* at 422.

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 40008.¹⁵⁵ Simply enforcing existing laws that more directly target conduct can provide more than enough protection against paparazzi.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.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.¹⁵⁸ News reporters are still liable for the torts and crimes committed while acquiring their news and reporting.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

155. See Curry, *supra* note 79, at 956.

156. *Id.*

157. See *supra* Part IV.B.

158. See *supra* Part III.A.

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

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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