

# 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

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*“They converge several times a week like flies on a dead carcass.  
Blocking the street, the sidewalk, hanging their cameras over the fence.  
Making boatloads of noise.”<sup>1</sup>*

## ABSTRACT

*With our culture’s celebrity obsession intensifying each year, it is not surprising that recent media attention has concentrated on the children of these famous faces. Unfortunately, there are currently no adequate federal or state laws in place to protect these children from being hounded by paparazzi and exploited by entertainment magazines and Web sites worldwide. This Note examines the evolution of antipaparazzi legislation and analyzes the inadequacies of current and proposed legal protections. Further, it recommends strengthening existing safeguards by creating paparazzi-free buffer zones around family-oriented areas and following*

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1. Tammara, *The Paparazzi Pursuit*, L.A. METBLOGS (Aug. 11, 2009, 3:53 PM), <http://la.metblogs.com/2009/08/11/the-paparazzi-pursuit/>.

*international approaches to maintaining an adequate level of privacy, and consequently safety, for celebrity children.*

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## I. INTRODUCTION

It's a bit like an animal looking for its prey, isn't it?

—*Duncan Raban*<sup>2</sup>

We all have seen the pictures splashed across the colorful pages of tabloids and plastered all over the Internet on celebrity blogs: Suri Cruise skipping down the streets of New York in children's high heels,<sup>3</sup> and Shiloh Jolie-Pitt cradling her doll as she is carried by her famous father.<sup>4</sup> In recent years, celebrity children have become objects of fascination and doting attention by millions worldwide.<sup>5</sup> Their births are heralded on the front pages of magazines and newspapers,<sup>6</sup> and Internet bloggers race to break the news of the unique and off-beat names selected for celebrities' just-born, already-famous children. And while the world is captivated by images of these children, who are known for nothing more than being the products of two beautiful and familiar faces, many of us forget the reason that we are able to dote on photographs of these angelic children—paparazzi.

In the years since the tragic death of Princess Diana,<sup>7</sup> the word

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2. PETER HOWE, PAPARAZZI 36 (2005).

3. See Molls, *Suri Cruise Is Better at Walking in Heels than Me*, EVIL BEET GOSSIP (Nov. 21, 2009, 12:16 PM), <http://evilbeetgossip.film.com/2009/11/21/suri-cruise-is-better-at-walking-in-heels-than-me/>.

4. See *Angelina Jolie and Brad Pitt Take Maddox and Shiloh Shopping in Cannes*, PEOPLE CELEBRITY BABY BLOG (May 19, 2008, 11:47 AM), <http://celebritybabies.people.com/2008/05/19/jolie-pitts/>.

5. For purposes of this Note, the term “celebrity” will be used to refer to “people well known for their well knownness.” HOWE, *supra* note 2, at 23 (quoting Daniel Boorstin). This includes actors, performers, musicians, models, reality television stars, athletes, socialites, and other individuals who receive media attention. Further, for purposes of this Note, the term “children” will refer to minor children, who are under the age of legal adulthood (typically eighteen).

6. For example, see the front cover of *People* from June, 19, 2006, which prominently displays Angelina Jolie and Brad Pitt with their newborn daughter Shiloh. PEOPLE, June 19, 2006, *available at* <http://www.people.com/people/archive/issue/0,,7566060619,00.html>.

7. Although various other theories have been presented, a British jury found that the deaths of Princess Diana and her companion, Dodi al-Fayed, were “caused by the gross negligence of her

“paparazzi” has become a household term.<sup>8</sup> We know these pest-like characters not for the photographs that they take of celebrities in glamorous ball gowns, waltzing down the red carpet, but for the images of celebrities in sweats, without makeup, and in compromising situations with costars. Former picture editor for *The New York Times* Peter Howe describes the job of the paparazzi as “taking photographs you shouldn’t take in places you shouldn’t be.”<sup>9</sup> And the motivation that the paparazzi have to go to such extreme lengths to get the “best” shot is enormous. The price tag for exclusive shots of celebrities is at its peak, with photographs of Britney Spears’s Las Vegas wedding going for a reported \$120,000,<sup>10</sup> and rumors of the final picture of Michael Jackson alive selling for a whopping \$500,000.<sup>11</sup>

The fact that entertainment publications are able to pay such extraordinary amounts for these photographs speaks to the current state of the industry. American Media, Inc., the owner of several celebrity and entertainment publications worldwide, including *National Enquirer*, *Star*, and *Globe*, had reported revenues of nearly \$1.6 billion in 2006.<sup>12</sup> The celebrity magazine *People* expected revenues of over \$1.5 billion in 2006,<sup>13</sup> with readership exceeding that of *Newsweek* and *Sports Illustrated*.<sup>14</sup> And this does not include the major Internet gossip sites visited by as many as twenty million unique visitors per month.<sup>15</sup> Well-known celebrity Web sites TMZ and PerezHilton.com bring in an estimated

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speeding driver and pursuing paparazzi.” Mary Jordan, *Paparazzi and Driver Found Negligent in Princess Diana’s Death*, WASH. POST, Apr. 8, 2008, at C1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/07/AR2008040702743.html>.

8. “Paparazzi” is the plural form, while “paparazzo” is the singular form used for “a freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 896 (11th ed. 2003).

9. HOWE, *supra* note 2, at 17.

10. *Id.* at 32.

11. *The Paparazzi Reach Their Zenith Capturing Michael Jackson’s Death*, THE PAPARAZZI REFORM INITIATIVE BLOG (July 7, 2009, 12:03 AM), <http://www.paparazzi-reform.org/journal/2009/7/7/the-paparazzi-reach-their-zenith-capturing-michael-jacksons.html> [hereinafter PRI BLOG].

12. *American Media (publisher)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/American\\_Media\\_%28publisher%29](http://en.wikipedia.org/wiki/American_Media_%28publisher%29) (last visited Nov. 8, 2010).

13. *People (magazine)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/People\\_%28magazine%29](http://en.wikipedia.org/wiki/People_%28magazine%29) (last visited Nov. 8, 2010).

14. *Average Circulation for Top 100 ABC Magazines: 2005*, MAG. PUBLISHERS AM., [http://www.magazine.org/CONSUMER\\_MARKETING/CIRC\\_TRENDS/16117.aspx](http://www.magazine.org/CONSUMER_MARKETING/CIRC_TRENDS/16117.aspx) (last visited Nov. 8, 2010).

15. See, e.g., Douglas A. McIntyre, *Yahoo! (YHOO) Entertainment Site Hammers Competition, TMZ.com Should Pass*, 24/7 WALL ST. (July 1, 2009, 1:54 PM), <http://247wallst.com/2009/07/01/yahoo-yhoo-entertainment-site-hammers-competition-tmz-com-should-pass/> (reporting that Yahoo!’s OMG! entertainment site received 20.6 million unique visitors in May 2009).

\$25.4 million<sup>16</sup> and \$6.2 million,<sup>17</sup> respectively, in annual revenue. As the public's interest in celebrities (and consequently tabloids) continues to climb, the purchasing power of the entertainment news outlets will only increase, proving that these paparazzi issues are more relevant than ever before.

Few people who have witnessed the paparazzi chasing celebrities down the sidewalks, swerving in and out of traffic while following their cars, or flashing cameras in their faces as they leave the grocery store would argue that there is not a serious problem.<sup>18</sup> The Paparazzi Reform Initiative Web site features a video of supermodel Kate Moss arriving at Los Angeles International Airport that serves as a prime example of the problem.<sup>19</sup> In the video, Moss is literally swarmed by dozens of paparazzi to the point that she physically cannot move, forcing her to shove her way through a blockade of photographers as she pushes her terrified young daughter on a luggage cart. The video has an almost strobe-like effect from the constant flashing of lights, as paparazzi scream at the star—a situation that would be unimaginably horrifying for a young child caught in the crossfire. While Moss is finally able to gain some privacy by crouching behind an airport security desk (and having her daughter taken out of the airport separately), she has to be escorted to her shuttle van by a blockade of at least six airport security personnel linked arm in arm while surrounding her to keep the paparazzi off of her.<sup>20</sup> This video is only one of hundreds available at Web sites such as TMZ and Hollywood.tv that capture the horrific safety and privacy concerns that the paparazzi present.

Although some may contend that celebrities “can’t have it both ways”<sup>21</sup>—enjoying fame, fortune, and attention when promoting their films

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16. Rafat Ali, *With AOL Spinoff, TMZ to Move to Time Warner/Telepictures, as Expected; \$25M 2008 Revenues*, PAIDCONTENT.ORG (Nov. 16, 2009, 4:54 PM), <http://paidcontent.org/article/419-with-aol-spinoff-tmz-to-move-to-time-warnertelepictures-as-expected-25m/> (stating that TMZ had revenues of \$25.4 million in 2008).

17. Douglas A. McIntyre, *The Twenty-Five Most Valuable Blogs in America*, 24/7 WALL ST. (Nov. 10, 2009, 3:15 AM), <http://247wallst.com/2009/11/10/the-twenty-five-most-valuable-blogs-in-america/> (estimating that PerezHilton.com is the third most valuable blog on the Internet, with a value of \$44 million and annual revenue of \$6.2 million).

18. *But see* Tim Cavanaugh, Op-Ed., *The Myth of the “Stalkerazzi,”* L.A. TIMES, Feb. 20, 2006, at B15, available at <http://articles.latimes.com/2006/feb/20/opinion/oe-cavanaugh20> (arguing that the paparazzi problem is a myth and that the celebrities themselves are to blame for their car accidents while being chased by photographers).

19. *Featured Video: Supermodel Kate Moss and Her Children Are Swarmed and Harassed by Paparazzi at Los Angeles International Airport*, THE PAPARAZZI REFORM INITIATIVE, <http://www.paparazzi-reform.org/> (last visited Nov. 10, 2010) [hereinafter PRI].

20. *See id.*

21. *Paparazzi and the “They Can’t Have It Both Ways” Excuse*, PRI BLOG (May 14, 2009, 10:07

and products, while also maintaining a private life with no media attention<sup>22</sup>—it is not just the celebrities themselves, but the people who do not *choose* this lifestyle who we have to consider. Paparazzi also pose a serious threat to a celebrity's children and spouse, as well as innocent noncelebrity bystanders who unknowingly get between the paparazzi and their celebrity prey. Countless celebrities have discussed the aggressive paparazzi actions that have caused their fearful children to burst into tears, demonstrating the traumatic impact of these dangerous and potentially violent encounters.<sup>23</sup> One such instance with blameless bystanders occurred in 2005 when Scarlett Johansson clipped a car carrying a woman and her children while being chased by four paparazzi vehicles in a Disneyland parking lot.<sup>24</sup> Luckily, there have been no serious injuries or deaths caused by these wild “stalkerazzi”<sup>25</sup> in the United States to date, but “it may only be a matter of time before California witnesses its own Princess Diana tragedy.”<sup>26</sup>

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PM), <http://www.paparazzi-reform.org/journal/2009/5/15/paparazzi-and-the-they-cant-have-it-both-ways-excuse.html>. See also HOWE, *supra* note 2, at 97 (“The celebrities create the monster and then they want to cage the beast.” (quoting Frank Griffin)).

22. In recent years, the list of those who deal with hostile paparazzi behavior has expanded to include people who are not the traditional “celebrities” we think of, who enjoy the supposed Hollywood fame and fortune. Politicians (such as President Obama), businessmen (for instance, Bill Gates), and magazine editors (*Vogue* editor Anna Wintour, for example) are now included on the list as well.

23. See, e.g., *Paparazzi Make It Harder for Isla Fisher to Protect Daughter*, PEOPLE CELEBRITY BABY BLOG (Jan. 11, 2009, 4:00 PM), <http://celebritybabies.people.com/2009/01/11/paparazzi-make-it-harder-for-isla-fisher-to-protect-daughter/> [hereinafter *Paparazzi Make It Harder*] (quoting actress Isla Fisher describing her job as a mother as “protecting a tiny person from scary men swarming around them with massive black things in their face screaming their name”).

24. See Pamela McClintock, *Governator Snaps Back at Paparazzi*, DAILY VARIETY, Oct. 3, 2005, at 1. Another well-known instance of a paparazzo acting aggressively toward innocent individuals who impeded his ability to photograph a celebrity with her children also occurred at Disneyland. Just two weeks after the incident with Johansson, a paparazzo was arrested at Disney's California Adventure for allegedly assaulting two security guards who attempted to block actress Reese Witherspoon and her children from his view. See Entertainment News Staff, *Reese Witherspoon Attacked Again by Paparazzi*, SOFTPEDIA (Sept. 7, 2005, 1:31 PM), <http://news.softpedia.com/news/Reese-Witherspoon-Attacked-Again-By-Paparazzi-7830.shtml>.

25. See, e.g., Stephen G. Rodriguez, *Can the New California Anti-Paparazzi Law Stop the Stalkerazzi?*, PRWEB (Jan. 19, 2010), <http://www.prweb.com/releases/LosAngelesPaparazziLaw/1/prweb3462574.htm> (referring to the paparazzi as the “stalkerazzi” due to their aggressive tactics).

26. Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99, 119 (2006). Further, the severe harm caused by the paparazzi is not limited to physical injuries: “To say that the paparazzi's intense scrutiny does not inflict its own wounds and contribute to the implosion of some of our most beloved personalities would be simply unobservant.” *The Paparazzi and Heath Ledger's Sandblasted Dignity*, PRI BLOG (Feb. 28, 2009, 10:29 AM), <http://www.paparazzi-reform.org/journal/2009/2/28/the-paparazzi-and-heath-ledgers-sandblasted-dignity.html> (insinuating that Heath Ledger's prescription drug problem was in part a result of the constant surveillance and criticism he dealt with from the media).

California, the birthplace of Hollywood and home to many famous faces,<sup>27</sup> likely has more trouble with paparazzi than any other locale.<sup>28</sup> Los Angeles has even been referred to as the “Wild West” for its untamed atmosphere, created in part by the rampant paparazzi.<sup>29</sup> Thus, it is not surprising that California has constantly been a leader in antipaparazzi legislation.<sup>30</sup> A little more than a year after Princess Diana’s death, California signed its first antipaparazzi legislation;<sup>31</sup> it has continued to strengthen this law with additional amendments in 2005<sup>32</sup> and 2009.<sup>33</sup> While the U.S. Constitution, with its clear, strong protection of the freedom of speech and the press,<sup>34</sup> explains why paparazzi continue to be able to legally act in an intrusive manner, the protections aimed at ensuring privacy are undefined and full of gray areas.

Thus far, California’s laws have not seemed to “stop the paparazzi-mayhem” as well as intended.<sup>35</sup> Further, the laws have neglected to create protections aimed at some of the most vulnerable and popular of the paparazzi’s prey, celebrity children. It seems clear that “[w]hat may once have been merely annoying has now often become a significant threat to the physical safety of celebrity targets and their families.”<sup>36</sup> In Part II, this Note discusses the history and policy of California’s antipaparazzi laws, including California’s attempt to curb the paparazzi with its 2009 amendment. Part III explores the right to privacy and waiver of privacy as balanced against the First Amendment, specifically in relation to celebrity children. In Part IV, this Note analyzes one of California’s newest

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27. Although Los Angeles is known for its plethora of celebrity residents, many celebrities say they have been run out of the city due to the constant media attention and lack of privacy. See Daily Blabber, *Brad Pitt: My Children Are “Scared” of Paparazzi*, THE INSIDER (Oct. 3, 2007), [http://www.theinsider.com/news/390093\\_Brad\\_Pitt\\_My\\_Children\\_Are\\_Scared\\_of\\_Paparazzi](http://www.theinsider.com/news/390093_Brad_Pitt_My_Children_Are_Scared_of_Paparazzi) (quoting Brad Pitt saying that his family has “been run out of L.A., all the major cities,” because of the paparazzi “hunt”).

28. See HOWE, *supra* note 2, at 43, 78 (stating that celebrity photographs taken in Los Angeles are preferred because there is “a better class of celebrity” and “the physical surroundings are more appealing”).

29. Liz Kelly, *Will California’s New Anti-Paparazzi Law Have Any Effect?*, WASH. POST, Oct. 19, 2009, [http://voices.washingtonpost.com/celebritology/2009/10/will\\_californias\\_new\\_anti-pap.html](http://voices.washingtonpost.com/celebritology/2009/10/will_californias_new_anti-pap.html) (quoting Sean Burke, founder of the Paparazzi Reform Initiative).

30. Rodriguez, *supra* note 25.

31. See 1998 Cal. Stat. 1000 (amended 2005 & 2009) (containing the provisions of California’s original Anti-Paparazzi Act).

32. Assemb. B. 381, 2005–06 Leg., Reg. Sess. (Cal. 2005).

33. Assemb. B. 524, 2009–10 Leg., Reg. Sess. (Cal. 2009).

34. See U.S. CONST. amend. I.

35. Rodriguez, *supra* note 25.

36. Ann Loeb & Jonathan E. Stern, *Paparazzi Exposed to Expanded Liability*, L.A. LAW., May 2006, at 12, 12.

proposals aimed at protecting celebrities and stopping paparazzi, and discusses various approaches to the paparazzi problem taken internationally. Finally, Part V introduces recommendations for improving privacy protections for celebrity children by looking to the European Court of Human Rights' balancing test and implementing buffer zones around schools, parks, and medical facilities. Part VI concludes.

## II. THE POLICY AND HISTORY BEHIND CALIFORNIA'S ANTIPAPARAZZI LEGISLATION

Princess Diana's death sparked a tremendous backlash against paparazzi worldwide. Legislatures raced to pass laws in attempts to prevent another tragedy from occurring at the hands of the paparazzi.<sup>37</sup> In the United States, Congress proposed several bills "to address the 'paparazzi problem,'" but none passed.<sup>38</sup> Though antipaparazzi legislation failed at the federal level, California was quick to react, with Governor Pete Wilson signing the Anti-Paparazzi Act in 1998,<sup>39</sup> which holds photographers liable for invasion of privacy when they trespass on private property or use an enhancing device to obtain an image or sound that otherwise could not have been obtained without trespass, with the intent to capture any type of visual image or sound recording.<sup>40</sup>

### A. AN ANALYSIS OF THE COMMON LAW, ANTISTALKING STATUTE, AND CALIFORNIA'S FIRST TWO LEGISLATIVE ATTEMPTS TO REIN IN THE PAPARAZZI

Prior to California's antipaparazzi legislation, celebrities had few means by which to impose liability on paparazzi, either civilly or criminally, and almost no way to prevent the tortious or criminal conduct from occurring in the first place.<sup>41</sup> Celebrities were limited to using California's common law privacy tort and antistalking statute to seek

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37. See Samantha J. Katze, Note, *Hunting the Hunters: AB 381 and California's Attempt to Restrain the Paparazzi*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1349, 1352 (2006).

38. *Id.* (citation omitted).

39. *California Passes Law to Rein in Paparazzi: Opponents Call Law Unconstitutionally Broad*, CNN.COM (Oct. 1, 1998, 3:59 PM), <http://edition.cnn.com/SHOWBIZ/Movies/9810/01/paparazzi.bill/index.html>.

40. See CAL. CIV. CODE § 1708.8(a)-(b) (Deering 2005). Ironically, the Anti-Paparazzi Act that California enacted did not even address the type of situation that caused Princess Diana's death. The paparazzi chasing her car would not have invaded either physical or constructive privacy under the statute. See *infra* text accompanying notes 67-71 (explaining the causes of action under the original Anti-Paparazzi Act).

41. Loeb & Stern, *supra* note 36, at 14.

injunctive relief and protect themselves against aggressive paparazzi behavior.<sup>42</sup> More recently, California passed legislation to curb the dangerous conduct with its original Anti-Paparazzi Act, and its first amendment in 2005. Due to practical and procedural hurdles,<sup>43</sup> however, these efforts have thus far been ineffective in bringing about change.

#### 1. California's Common Law Tort: Intrusion into Seclusion

Although there are four traditional common law causes of action for invasion of privacy, intentional intrusion into the solitude or seclusion of one's private affairs is the most useful one in paparazzi cases.<sup>44</sup> But the common law tort is too narrow to provide celebrities with adequate means to prosecute paparazzi for their intrusive conduct.<sup>45</sup>

California case law lays out two elements that must be met to prove a privacy tort cause of action for intrusion into seclusion.<sup>46</sup> First, there must be "intrusion into a private place, conversation or matter," which is satisfied only if the plaintiff had an objectively reasonable expectation of privacy at the time of the intrusion.<sup>47</sup> An individual usually cannot have a reasonable expectation of privacy when he or she is "within the sight and hearing of members of the public."<sup>48</sup> Second, the manner of intrusion must be "highly offensive to a reasonable person" when considering the degree of intrusion, the risk of physical harm to the plaintiff, the intruder's motivation, and the intrusion's justification based on newsworthiness.<sup>49</sup> Considering that the majority of paparazzi harassment does not occur in private and secluded locations, but on city streets, sidewalks, and in other public places, celebrities typically cannot meet the first element of having a reasonable expectation of privacy, rendering this common law tort

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42. *Id.*

43. *See infra* Part II.B.2.a (discussing the weaknesses of prior versions of the statute that have not been improved by the 2009 amendment).

44. Under the Restatement, the other common law sources of liability for invasion of the right to privacy include appropriation of a plaintiff's name or picture for the defendant's commercial advantage, publication of facts placing the plaintiff in a false light, and public disclosure of private facts. *See* RESTATEMENT (SECOND) OF TORTS § 652A(2) (1977). *See also infra* text accompanying notes 163–67 (further discussing the tort of intrusion into seclusion).

45. *See* Vance, *supra* note 26, at 105–07 (analyzing intrusion into seclusion under California common law and concluding that it provides inadequate remedies for celebrities).

46. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998).

47. *Id.*

48. *See id.* at 491. *But see* Sanders v. ABC, 978 P.2d 67, 72 (Cal. 1999) ("The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." (quoting 1 MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10[A][2], at 5-120.1 (1998))).

49. *See Shulman*, 955 P.2d at 490, 493 & n.17.

practically useless for punishing aggressive paparazzi behavior, and even more ineffective at preventing it in the first place.<sup>50</sup>

## 2. California's Antistalking Statute

In 1990, California became the first state to pass a criminal antistalking law, Penal Code section 646.9.<sup>51</sup> Since then, California also has codified a civil antistalking statute, Code of Civil Procedure section 527.6.<sup>52</sup> But these statutes are ineffective at preventing aggressive paparazzi behavior. Under the Penal Code, “Any person who willfully, maliciously, and repeatedly follows or . . . harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety” is guilty of stalking.<sup>53</sup> Given the difficulty of proving requisite intent beyond a reasonable doubt in criminal cases, and the low likelihood that a paparazzo actually *intends* to make celebrities and their families fear for their safety (as opposed to intending to capture a profitable image, and inadvertently placing them in fear), the criminal statute is virtually useless to protect against paparazzi.

Under California's civil statute, “A person who has suffered harassment . . . may seek a temporary restraining order and an injunction.”<sup>54</sup> To prove harassment, there must be “a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose.”<sup>55</sup> Thus, section 527.6 of the Code of Civil Procedure provides no protection for celebrities until a paparazzo actually has made a credible threat of violence or has acted violently. Essentially, the statute is useless until celebrities and their family members have already been physically or verbally harassed to the point that they feel their safety is in jeopardy—and by this time, it is too late.<sup>56</sup> Thus, California stalking laws are not enough to keep celebrities and their families safe.

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50. *See id.* at 490; Vance, *supra* note 26, at 105–07 (discussing several California Supreme Court decisions regarding the breadth of the cause of action for intrusion into seclusion and concluding that “[t]aking pictures of a person in a public place, or on a public street while he or she is driving . . . does not fit within this notion of a [reasonable] expectation of . . . privacy”).

51. CAL. PENAL CODE § 646.9(a) (Deering 2008). *See also Fact Sheet 14: Are You Being Stalked?*, PRIVACY RTS. CLEARINGHOUSE, <http://www.privacyrights.org/fs/fs14-stk.htm> (last visited Nov. 9, 2010) (discussing the history and evolution of stalking laws in the United States).

52. CAL. CIV. PROC. CODE § 527.6(a) (Deering Supp. 2010).

53. CAL. PENAL CODE § 646.9(a).

54. CAL. CIV. PROC. CODE § 527.6(a).

55. *Id.* § 527.6(b).

56. For a discussion of the limitations of using California Code of Civil Procedure section 527.6 against the paparazzi, see Loeb & Stern, *supra* note 36, at 14.

### 3. Is Injunctive Relief a Possibility?

A major drawback for celebrities seeking a temporary or permanent injunction against a paparazzo (presuming that the paparazzo's identity can be established) is that there must already have been harassment or a credible threat in order to get protection.<sup>57</sup> Further, the fact that only the rare celebrity has been successful in obtaining restraining orders against the paparazzi for invasion of privacy in California indicates the difficulty of proving the requisite elements.<sup>58</sup> Nicole Richie stands as one of the few examples of a celebrity who succeeded in getting a restraining order against the paparazzi. In 2009, a Los Angeles judge granted Richie and her two young children a temporary restraining order against two photographers who rear ended her car while chasing it in Beverly Hills.<sup>59</sup> But it took a car accident and a hospital visit for her to obtain this injunction because of the required showing of harassment or a credible threat of violence.<sup>60</sup> Further, the restraining order only protected Richie and her daughters against the two specific paparazzi involved in the accident, as opposed to all paparazzi, or even all paparazzi who worked at the same agency. This demonstrates an additional shortcoming of the injunctive relief remedy, as a celebrity would have to seek restraining orders against each aggressive paparazzo individually.

In what is likely the most famous case of injunctive relief against a paparazzo, *Galella v. Onassis*, the Second Circuit affirmed the granting of a restraining order to Jacqueline Kennedy Onassis against an aggressive paparazzo, Ronald Galella.<sup>61</sup> Galella, who had Onassis and her family under constant surveillance, was ordered by the trial court to stay fifty yards away from her and seventy-five yards away from her two children,

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57. Additionally, even if a celebrity is able to get a restraining order, the order may be only temporary, and celebrities may have trouble actually enforcing the order against the paparazzo without police enforcement or a supplementary court order of enforcement.

58. It is not uncommon, however, for celebrities to obtain restraining orders against stalkers. Thus, one possible solution is to amend current legislation to allow celebrities to use stalking as a cause of action to prove invasion of privacy. See, e.g., Jason Gregory, *Justin Timberlake Granted Permanent Restraining Order Against Stalker*, ENTERTAINMENTWISE (Nov. 10, 2009), <http://www.entertainmentwise.com/news/50553/justin-timberlake-granted-permanent-restraining-order-against-stalker>.

59. Ken Lee, *Nicole Richie Gets Restraining Orders Against Two Paparazzi*, PEOPLE (Oct. 30, 2009, 9:00 PM), <http://www.people.com/people/article/0,,20316761,00.html>. The photographers were ordered to stay one hundred yards away from Richie and her two young children after sitting outside of her home daily, screaming at Richie and her family, following her, and chasing her in their vehicle. *Id.*

60. See *id.*

61. *Galella v. Onassis*, 487 F.2d 986, 991 (2d Cir. 1973).

among other restrictions.<sup>62</sup> Despite the fact that Onassis was a public figure, and thus subject to a lower expectation of privacy,<sup>63</sup> the court found that “Galella’s action went far beyond the reasonable bounds of news gathering.”<sup>64</sup> The court emphasized the importance of “Galella’s inexcusable conduct toward [Onassis’s] minor children” as well as “his obtrusive and intruding presence, [which] was unwarranted and unreasonable”; his tortious conduct prohibited him from receiving First Amendment protection from liability for his conduct while gathering news.<sup>65</sup>

While several celebrities have successfully obtained restraining orders against paparazzi, practical issues make injunctive relief ineffective in curbing the majority of paparazzi issues in California. Not only must celebrities be able to identify a particular paparazzo in court, but there must also already have been an identifiable incident of harassment, and the celebrities must be able to convince the court that they are likely to succeed on the merits of the case without introducing discovery.<sup>66</sup> This leaves most celebrities without effective injunctive recourse against the paparazzi who place them under constant surveillance.

#### 4. The Original Anti-Paparazzi Act

California’s 1999 statute, known as the Anti-Paparazzi Act (Civil Code section 1708.8), served as the state’s first attempt to hold the media, and specifically the paparazzi, more accountable for its intrusion into the lives of celebrities. The law extended California’s trespass law to create a new civil cause of action making it illegal for a photographer to attempt to capture an image of an individual engaged in a “personal or familial activity” while trespassing,<sup>67</sup> or while using a “visual or auditory enhancing device” such as a telephoto lens, if the manner in which it occurs would be “offensive to a reasonable person.”<sup>68</sup> Narrowly drafted to avoid creating liability for legitimate photojournalists,<sup>69</sup> the law aimed to protect

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62. *Id.* at 993.

63. *See infra* text accompanying note 172 (discussing privacy rights of public figures).

64. *Galella*, 487 F.2d at 995.

65. *Id.*

66. *See* CAL. CIV. PROC. CODE § 425.16 (Deering Supp. 2010) (providing California’s Anti-SLAPP Statute); *infra* text accompanying notes 125–28 (discussing the anti-SLAPP barrier).

67. CAL. CIV. CODE § 1708.8(a) (Deering 2005) (amended 2005 & 2009). For purposes of the statute, “personal [or] familial activity” is defined to include “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of plaintiff’s private affairs or concerns.” *Id.* § 1708.8(k).

68. *Id.* § 1708.8(b).

69. Vance, *supra* note 26, at 108 (“The legislature drafted the statute . . . narrowly so as to ensure

celebrities' privacy interests by creating financial disincentives for paparazzi to violate the statute—violators would face “up to three times the amount of any general and special damages that are proximately caused by the violation,” as well as punitive damages and disgorgement of profits.<sup>70</sup> Further, any agency or individual “who directs, solicits, actually induces, or actually causes” the paparazzo to take pictures in violation of the statute would be liable for resulting and punitive damages as well.<sup>71</sup>

Although the statute was a step in the right direction and “may have discouraged some paparazzi from scaling the walls of celebrity homes or utilizing telephoto lenses to snap topless sunbathing photos from afar, it almost certainly had no deterrent effect on aggressive tactics in places where celebrities have no reasonable expectation of privacy,” such as at parks, outside of restaurants, and on city streets.<sup>72</sup> Given that many of the most hostile encounters between celebrities and aggressive paparazzi occur in these public locations, the original law had little impact on the outrageous behavior of the paparazzi in Los Angeles.<sup>73</sup>

#### 5. Introducing Assault in the 2005 Amendment—Assembly Bill Number 381

After seeing little effect from the original statute, California Governor Arnold Schwarzenegger, a frequent victim of paparazzi harassment himself,<sup>74</sup> signed an amendment aimed at strengthening the existing antipaparazzi legislation. The amendment extended the damages available under the original version of the law to include damages for any “assault committed with the intent to capture any type of visual image,”<sup>75</sup> regardless of whether the assault occurred while the plaintiff was engaged in a “personal or familial activity,” on private property, or had a reasonable expectation of privacy.<sup>76</sup>

Individuals are liable for assault when they act intentionally or recklessly, and cause the plaintiff to feel an imminent apprehension of

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that legitimate photojournalists would not be held liable under its provisions . . .”).

70. CAL. CIV. CODE § 1708.8(c).

71. *Id.* § 1708.8(d).

72. Loeb & Stern, *supra* note 36, at 14.

73. For further discussion of the weaknesses of the 1999 version of the Anti-Paparazzi Act, see *id.* at 15.

74. See, e.g., *Arnold Schwarzenegger*, TMZ, <http://www.tMZ.com/person/arnold-schwarzenegger/> (last visited Nov. 9, 2010).

75. CAL. CIV. CODE § 1708.8(c) (Deering Supp. 2010).

76. *Id.* § 1708.8(a)–(b).

harmful or offensive contact.<sup>77</sup> Under the amendment, if an assault occurred while a paparazzo was attempting to take the plaintiff's picture, the paparazzo would be liable for three times the amount of damages proximately caused by the assault, as well as punitive damages and disgorgement of profits.<sup>78</sup> With agencies and individuals who employed the paparazzi risking liability for violations under the amendment, some scholars hypothesized that the paparazzi would be both self-deterred and more carefully policed by their employers due to the financial disincentives of putting celebrities at risk of physical harm (even in exchange for the chance to capture a highly coveted photograph).<sup>79</sup>

Following this initial amendment, the California State Legislature was "moving closer to the core problem," but had "only dipped the tip of its brush and need[ed] to approach the canvas from a different angle."<sup>80</sup> Although the incentives for the paparazzi not to take the massive financial risks presented by the amendment seemed strong, California was soon called on to "counter [the problem] with more innovative and aggressive solutions."<sup>81</sup>

#### B. CALIFORNIA'S 2009 AMENDMENT TO THE ANTI-PAPARAZZI ACT: WHY IT STILL IS NOT ENOUGH

After several failed attempts to curb the paparazzi's reckless and dangerous behavior, California once again gave it another shot. In October 2009, Governor Schwarzenegger signed a revised version of the Anti-Paparazzi Act, Assembly Bill Number 524, into law.<sup>82</sup> The bill includes legislative findings that "legitimate privacy interests of individuals and their families have been violated," and that such "[i]ndividuals and their families have been harassed and endangered by being persistently followed or chased" by the paparazzi.<sup>83</sup> On January 1, 2010, the newest version of

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77. See *Lopez v. Surchia*, 246 P.2d 111, 113 (Cal. Ct. App. 1952); *Lowry v. Standard Oil Co. of Cal.*, 146 P.2d 57, 60 (Cal. Ct. App. 1944).

78. CAL. CIV. CODE § 1708.8(d).

79. See *Katze*, *supra* note 37, at 1351 (stating that the amendment would "eliminat[e] the paparazzi's economic incentive to go to extraordinary lengths to obtain photographs of celebrities"); *Loeb & Stern*, *supra* note 36, at 15 (predicting that the financial risks aggressive paparazzi and their employing agencies faced under the 2006 version of the law would create "an incentive to police" the paparazzi). *But see Vance*, *supra* note 26, at 109–10 ("[The] amendment is nothing more than a statement of legislative disapproval and censure of paparazzi conduct, rather than a workable solution to the problem.").

80. *Vance*, *supra* note 26, at 119.

81. *Id.* at 112.

82. Assemb. B. 524, 2009–10 Leg., Reg. Sess. (Cal. 2009).

83. *Id.* § 1(a)–(b).

section 1708.8 went into effect, expanding liability by imposing civil fines on media outlets that publish illegally taken photographs and by increasing the fines for both the paparazzi and publishers up to \$50,000.<sup>84</sup>

### 1. The 2010 Anti-Paparazzi Act

California's latest amendment to the Anti-Paparazzi Act substantially expanded the liability of both the individual paparazzo who photographs a celebrity in violation of the law and the media outlets that publish such a photograph with "actual knowledge" that it was taken illegally.<sup>85</sup> It appears that the legislature's main goal again was to remove the paparazzi's primary incentive to take photographs of celebrities that could potentially violate the law—profits. By expanding liability to include media outlets that purchase the illegally captured images, the law aims to decrease the demand for such photos by media outlets, and thus lower the financial rewards available to aggressive paparazzi.<sup>86</sup> Further, the law seeks to dramatically increase the financial risks to both paparazzi and media outlets to make the paparazzi think twice before engaging in outrageous, potentially illegal behavior to capture an image and to encourage the agencies to be more discerning of which images they purchase.

The 2009 amendment imposes "a civil fine of not less than five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000)" on paparazzi who violate the statute, agents of the paparazzi,<sup>87</sup> and on the first person involved in the "transmission, publication, broadcast, sale, offer for sale, or other use of any visual image," if the person has "actual knowledge" that the image was taken in violation of the statute.<sup>88</sup> Actual knowledge is defined as "actual awareness, understanding, and recognition" that it was taken in violation of the statute before the

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84. *Id.* § 2(d)–(e).

85. *Id.* See also CAL. CIV. CODE § 1708.8(d), (f) (Deering Supp. 2010).

86. Considering how intense and tedious the day-to-day routine of a paparazzo is—from waiting outside of celebrity homes for hours on end, to having an expensive cameras knocked out of his or her hands by angry celebrities—it is logical to assume that if the major financial rewards for paparazzi were eliminated, the danger and madness would cease. See Leslie Gornstein, *How Much Money Do the Paparazzi Make?*, E! ONLINE (Apr. 28, 2008, 2:37 PM), [http://www.eonline.com/uberblog/b465\\_how\\_much\\_money\\_do\\_paparazzi\\_make.html](http://www.eonline.com/uberblog/b465_how_much_money_do_paparazzi_make.html) ("It's nine hours of boredom and 30 seconds of excitement." (quoting Gary Morgan of Splash News)).

87. CAL. CIV. CODE § 1708.8(d)–(e). This includes anyone "who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate" the statute. *Id.* § 1708.8(e).

88. *Id.* § 1708.8(f). These civil fines are in addition to the photographers' liability for "three times the amount of any general and special damages" and punitive damages included in the previous version of the statute. *Id.* § 1708.8(d).

image was purchased or acquired (meaning that the media outlet must have actual knowledge of a physical or constructive invasion of privacy, or assault).<sup>89</sup> This knowledge must be established “by clear and convincing evidence.”<sup>90</sup> Liability is limited, however, to the *first* transmission of an illegally captured photograph.<sup>91</sup> Thus, only the first person who publicly transmits or publishes the image knowing that it was a violation of the statute is liable, not any subsequent transmitters or publishers.<sup>92</sup>

## 2. Is the New Law Enough?

On its face, the revised version of the Anti-Paparazzi Act seems to provide a significant enough financial risk such that the paparazzi and media outlets will be somewhat deterred from reckless and assaultive behavior that could put them at risk of violating the statute. Practically speaking, however, there are several reasons why the amended law may not have a serious impact on the paparazzi’s behavior toward celebrities, and why more legislation may be necessary to truly protect celebrities and their families, specifically their children. In fact, the law has been criticized as being “worth about as much as the paper it’s written on.”<sup>93</sup>

### a. Same Law, Same Problems

It is clear that the amended law expands liability to include the most powerful forces behind the paparazzi industry—the news and media outlets that pay hundreds of thousands of dollars for exclusive images of celebrities and their families going about their day-to-day lives, including celebrity blogs, print tabloids, and entertainment television programs. While the expanded liability may present a slight deterrent and thus lower demand and profits for photographs that may have been taken by physical or constructive invasion of privacy, or during commission of an assault, a violation of the statute must be proven before anyone is susceptible to liability. Herein lies the weakness in California’s newest version of the law: it provides no remedies or improvements for the previous barriers (both practical and procedural) to enforcement and to the imposition of liability, specifically a celebrity’s ability to *prove* that a statutory violation occurred.

Under California’s 2010 version of section 1708.8, a violation may be

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89. *Id.* § 1708.8(f)(2).

90. *Id.*

91. *Id.* § 1708.8(f)(3).

92. *Id.*

93. Maria Puente, *Laws Do Little to Block Paparazzi*, USA TODAY, Feb. 20, 2008, at 4D, available at [http://www.usatoday.com/life/people/2008-02-19-britney-media-legal\\_N.htm](http://www.usatoday.com/life/people/2008-02-19-britney-media-legal_N.htm) (quoting Blair Berk, an attorney who represents celebrities in paparazzi cases).

proven by showing that a photograph was taken or intended to be taken under one of the following circumstances: (1) a physical invasion of privacy,<sup>94</sup> (2) a constructive invasion of privacy,<sup>95</sup> or (3) an assault.<sup>96</sup> This Note now looks at the weaknesses in each of these requirements for proving a violation of the law—weaknesses that the 2009 amendment has failed to correct.

In order to prove a physical invasion of privacy, a trespass must be established.<sup>97</sup> But paparazzi are not liable for physical trespass if they are in a public place.<sup>98</sup> Considering that the vast majority of encounters with paparazzi occur in public places, such as on city streets, in parks, at airports, and outside of restaurants and bars, this approach is ineffective at curbing most paparazzi behavior. Even if ten paparazzi surround a celebrity and the celebrity's child as they walk out of a ballet class and into a car, holding cameras inches from the child's face and flashing lights into the child's eyes, the paparazzi cannot be found liable for a physical invasion of privacy if the celebrity and child are on a public sidewalk. Thus, the number of situations that are protected by this approach is extremely limited.

Constructive invasion of privacy is intended to limit those situations in which a paparazzo uses a telephoto lens to snap close-up pictures of celebrities who are a significant distance away, and oftentimes located on private property.<sup>99</sup> Typical images that come to mind are the celebrity sunbathing at a private pool or a married celebrity in a compromising situation, visible through a hotel window. Without the use of an enhancing device, the picture could not be captured without trespassing onto the private property (and thus making the paparazzo liable for physical invasion of privacy). Though this approach may provide celebrities more privacy when in a private place, it does not lessen the serious dangers celebrities face in locations where they have no reasonable expectation of privacy. It may limit the number of "Peeping Tom" images that paparazzi can sell, but the constructive invasion of privacy approach does nothing to improve actual safety for celebrities and their families when they are in public.

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94. CAL. CIV. CODE § 1708.8(a).

95. *Id.* § 1708.8(b).

96. *Id.* § 1708.8(c).

97. *Id.* § 1708.8(a). *American Jurisprudence* defines trespass as a "tort against possession committed when one, without permission, interferes with or invades another's exclusive right to possession of property." 75 AM. JUR. 2D *Trespass* § 1 (2007).

98. See CAL. CIV. CODE § 1708.8(a); 75 AM. JUR. 2D *Trespass* § 1.

99. See CAL. CIV. CODE § 1708.8(b).

Although extending liability to when a paparazzo commits an assault while attempting to capture an image is a step toward improving safety for celebrities and their families, it may not be enough. While the solution is reactive, and thus can help celebrities hold paparazzi liable for aggressive behavior that has already occurred, it is not preventative, and provides no protection against a paparazzo until after some disturbing behavior has occurred. This is particularly problematic when it comes to celebrity children, who may be seriously traumatized by unfamiliar paparazzi exhibiting frightening conduct. Although a celebrity might be able to prove that a paparazzo met the assault standard in a situation in which the celebrity “realiz[es], after the fact, that he or she has narrowly escaped [an imminent injury],”<sup>100</sup> the fact that the plaintiff has already felt an “imminent apprehension” of “harmful or offensive contact”<sup>101</sup> means that people have likely already been put in harm’s way. For instance, in the case of a high-speed car chase, by the time a celebrity could meet the assault standard and prove that he or she felt in imminent danger of harmful contact, hundreds of innocent noncelebrities in surrounding cars and on sidewalks may have been put in danger by aggressive paparazzi.

The plaintiff must also prove that the defendant acted *intentionally* to cause such apprehension, or that the defendant knew “to a substantial certainty” that such apprehension would result.<sup>102</sup> The burden of proving the requisite intent and establishing that the defendant was more than just negligent in his or her assaultive behavior makes the plaintiff’s likelihood of success slim.<sup>103</sup> Many paparazzi do not intend to cause a celebrity to feel apprehension of harm.<sup>104</sup> Instead, they intend to act however is necessary to capture the most valuable image.<sup>105</sup> Even Frank Griffin, a Los Angeles

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100. Vance, *supra* note 26, at 111.

101. RESTATEMENT (SECOND) OF TORTS § 21(1)(a) (1965).

102. *Id.* § 21 cmt. d.

103. This was acknowledged by the California State Legislature in its hearing on the law, when it stated that only “rare instances may produce criminal charges due to the egregious nature of the assault, [while] many others go unpunished due to the difficulty of proving criminal assault.” *Civil Assault: Liability: Hearing on Assemb. B. 381 Before the Assemb. Comm. on Judiciary*, 2005–06 Leg., Reg. Sess. (Cal. 2005) (statement of Dave Jones, Chair, Assemb. Comm. on Judiciary), available at [http://info.sen.ca.gov/pub/05-06/bill/asm/ab\\_0351-0400/ab\\_381\\_cfa\\_20050908\\_094509\\_asm\\_comm.html](http://info.sen.ca.gov/pub/05-06/bill/asm/ab_0351-0400/ab_381_cfa_20050908_094509_asm_comm.html).

104. See *In Defense of Paparazzi*, CNN.COM (May 14, 2006, 12:36 AM), <http://edition.cnn.com/2006/SHOWBIZ/Movies/05/09/griffin.access/index.html> (quoting Frank Griffin, a co-owner of a paparazzi agency, who claims that as a paparazzo “there’s never an intention of causing damage” to a celebrity). See also Vance, *supra* note 26, at 111.

105. A paparazzo clearly would not be able to argue that extremely reckless behavior did not meet the intent requirement if the paparazzo knew with substantial certainty that an apprehension of harm would occur (and some paparazzi behavior arguably could fall into this category). See Vance, *supra*

paparazzo, recognizes the outrageous improbability that a celebrity could succeed in proving assault under the typical circumstances of paparazzi-celebrity interactions. Calling the assault approach “ridiculous,” he says that “[t]o actually break this law we would have to put our cameras down, punch a celebrity in the face and then take pictures of them afterwards. That is ridiculous. No one would do that and no one would want pictures of it.”<sup>106</sup> Thus, the assault approach does not provide adequate redress for some of the most common paparazzi behavior, and renders the law useless and inapplicable in many situations.<sup>107</sup>

Will the 2009 amendment improve the situation for celebrity children? Although it has been said that the new law “makes a point to mention not just individuals (aka celebs), but their families—who often find themselves targeted by aggressive paps,”<sup>108</sup> identical language appears in the previous versions of the law, which did little to curb aggressive paparazzi behavior.<sup>109</sup> For instance, one aspect of a paparazzo’s liability under physical or constructive trespass is that the plaintiff be “engaging in a personal or familial activity.”<sup>110</sup> This specification, which has appeared since the initial legislation, has not seemed to have a strong impact on actual enforcement of the law. The statute defines “personal and familial activit[ies]” as including “intimate details of the plaintiff’s personal life, interactions with the plaintiff’s family or significant others, or other aspects of the plaintiff’s private affairs or concerns”;<sup>111</sup> however, this does not mean that the application of the law in practice is clear. No court has clarified the definition of a familial activity, or given a solid example of what would be classified as such.

Based on where paparazzi have been able to successfully photograph celebrities interacting with their young children (arguably one of the situations that should most clearly fall within the category of a “personal or familial activity”), including at schools, parks, and medical facilities, it seems evident that despite being engaged in a familial activity, the main issue in finding a violation of section 1708.8 is the broad, fuzzy definition of a “circumstance in which [a celebrity] ha[s] a reasonable expectation of

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note 26, at 110–11.

106. Paul Harris, *LA Paparazzi Cry Foul over “Terminator,”* THE OBSERVER, Jan. 8, 2006, available at <http://www.guardian.co.uk/media/2006/jan/08/business.theobserver>.

107. See Vance, *supra* note 26, at 110–11.

108. Kelly, *supra* note 29. “Paps” is often used as slang for paparazzi.

109. Compare CAL. CIV. CODE § 1708.8 (Deering 2005) (amended 2005 & 2009), with CAL. CIV. CODE § 1708.8 (Deering Supp. 2010).

110. CAL. CIV. CODE § 1708.8(a)–(b) (Deering Supp. 2010).

111. *Id.* § 1708.8(l).

privacy.”<sup>112</sup> Additionally, the First Amendment’s broad protections of “newsworthy” speech prohibit many of these images from being protected by privacy rights.<sup>113</sup>

Further, given that photographs of celebrities with their children are some of the most highly valued (and thus highly profitable) photographs a paparazzo can capture, with images frequently garnering over \$100,000,<sup>114</sup> it is unclear whether the risk of violating the statute (especially given the difficulty in proving such violations) will serve as a sufficient financial deterrent. In fact, “as long as there’s significant money to be made in the ‘undignified treatment’ of celebrities, paparazzi are going to be as undignified as they have to be.”<sup>115</sup>

b. Media Outlet Liability: Will It Work?

The major addition to section 1708.8 is the extension of liability to media outlets involved in the “transmission, publication, broadcast, sale, offer for sale, or other use of any visual image . . . captured in violation” of the statute.<sup>116</sup> In order to hold a media outlet liable, the plaintiff must prove “by clear and convincing evidence” that it had “actual knowledge” of the violation.<sup>117</sup> This requirement presents serious practical challenges for enforcement, and critics suggest it is unlikely that anyone will be able to successfully prosecute a case under the statute.<sup>118</sup>

To meet the “actual awareness” standard, a celebrity must prove by clear and convincing evidence that a publisher (such as a newspaper, magazine, or Internet blog) was fully aware, before purchasing an image, that it was taken while the photographer was physically trespassing, constructively trespassing by using a visual or auditory enhancing device to

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112. *Id.* § 1708.8(b).

113. *See infra* text accompanying notes 252–58 (suggesting that the “newsworthy” standard be adjusted to provide stronger protections for celebrity children).

114. *See* Gornstein, *supra* note 86 (quoting photographer Brad Elterman as stating that photographs of Angelina Jolie and Brad Pitt walking with their then-unseen children could garner up to one million dollars for U.S. rights alone).

115. Anna North, *New Anti-Paparazzi Law Unlikely to Shut Down Megan Fox Pipeline*, JEZEBEL (Oct. 13, 2009, 3:40 PM), <http://jezebel.com/5380672/new-anti-paparazzi-law-unlikely-to-shut-down-megan-fox-pipeline>.

116. CAL. CIV. CODE § 1708.8(f)(1).

117. *Id.* § 1708.8(f)(2).

118. *See* Amanda Becker, *California Bill Allows Anti-Paparazzi Suits Against Third Parties*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Oct. 13, 2009, 6:28 PM), <http://www.rcfp.org/newsitems/index.php?i=11060> (quoting Tom Newton, general counsel at the California Newspaper Publishers Association, as saying it will be almost impossible to successfully bring a suit under the statute).

capture an otherwise impossible-to-see image, or there was an assault.<sup>119</sup> While there are certain indicators that would suggest the method of capture violated the statute—for instance, if the image is highly pixilated and clearly of a celebrity in a private residence, or the photograph shows a paparazzo physically attacking the celebrity—there are a plethora of instances in which there would be no way for a media outlet to know whether there was a violation of the statute.

Instead, the media outlet is left to trust the word of the profit-seeking paparazzo. But should a media outlet escape liability by taking the word of a photographer looking to make a sale? Does the statute give media outlets any incentive to investigate whether the image was taken illegally, or does it encourage them to just bury their heads in the sand in order to avoid actually knowing whether there was a violation? Most likely, it is the latter. Under the statute's definition of "actual knowledge," a media outlet that *should* have known from the circumstances (such as from prior interactions with the particular paparazzo, or from situational evidence in the images) is free to publish illegally obtained images as it pleases without facing financial consequences.<sup>120</sup> Thus, the deterrent effect that the statute aims to have is much less valuable in practice.

Another practical issue arises in determining which particular media outlet was involved in the first transmission of the illegally obtained image when multiple outlets transmit or publish images simultaneously. It is unclear from the language of the statute whether both outlets would be held liable, or that even with today's technological advances, including email and download records, a plaintiff would be able to prove with certainty who was first to transmit the image.<sup>121</sup> These practical issues will likely inhibit celebrities from successfully utilizing the statute.

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119. See CAL. CIV. CODE § 1708.8(f)(2).

120. See *id.*

121. Additional practical issues are sure to surface once celebrity plaintiffs attempt to utilize the new version of section 1708.8 against the paparazzi. Douglas E. Mirell, a media, entertainment, and intellectual property litigation attorney, introduced an inventory of the foremost uncertainties likely to arise.

How will a media outlet know with certainty whether a particular image or recording was illegally obtained? Can it rely exclusively upon the word of the paparazzo? What if the subject claims to the contrary? What if the material comes from a stock photo agency under a quitclaim? In future years, how will one be able to prove that a particular image or recording was taken or captured before January 1, 2010? Are aerial photographs or satellite imagery of a California location excluded? Who is the first user if a particular image is simultaneously broadcast or published by multiple media outlets on the very same day (or, on the Internet, at the very same moment)?

Douglas E. Mirell, *Compounding the Felony: California's Amended Anti-Paparazzi Statute*, MLRC MEDIALAWLETTER, Oct. 2009, at 24, 26.

c. The Anti-SLAPP Barrier

A major challenge for celebrities who want to bring a claim for violation of section 1708.8 against a paparazzo lies in the California Anti-SLAPP (“Strategic Litigation Against Public Participation”) Statute in the Code of Civil Procedure, section 425.16.<sup>122</sup> After observing “a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,” and finding that “it is in the public interest to encourage continued participation in matters of public significance,” the California State Legislature enacted the law to ensure that “this participation [would] not be chilled through abuse of the judicial process.”<sup>123</sup> Essentially, the legislature intended to curb the filing of frivolous lawsuits that lacked substantial merit (referred to as SLAPP suits) by nongovernmental plaintiffs against defendants with the intention of “silencing” them and infringing on their exercise of constitutionally protected rights.<sup>124</sup> To accomplish this goal, the legislature created the Anti-SLAPP Statute, which provides that

[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.<sup>125</sup>

In essence, the court laid out a two-prong test to determine whether a lawsuit is a SLAPP suit and subject to the special motion to strike. First, the defendant must be engaged in conduct that is in furtherance of his or her right to engage in public discussion, petition, free speech, or other action that would traditionally be protected by the First Amendment.<sup>126</sup> If this is met, then the burden immediately shifts to the plaintiff to show a probability of prevailing on the merits.<sup>127</sup> In determining the probability that a suit will succeed on the merits, a court may only “consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.”<sup>128</sup> This presents plaintiffs with a

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122. CAL. CIV. PROC. CODE § 425.16 (Deering Supp. 2010).

123. *Id.* § 425.16(a).

124. See Kathryn W. Tate, *California’s Anti-SLAPP Legislation: A Summary of and Commentary on Its Operation and Scope*, 33 LOY. L.A. L. REV. 801, 802–03 (2000).

125. CAL. CIV. PROC. CODE § 425.16(b)(1).

126. *Id.*

127. *Id.*

128. *Id.* § 425.16(b)(2).

heavy burden of proving that the suit has a probability of prevailing on the merits (especially if the plaintiff must prove intent) without the opportunity to introduce any discovery, or additional outside information or support.<sup>129</sup> If the plaintiff is unable to prove this, then the case will be dismissed.<sup>130</sup> Moreover, the plaintiff may even be liable for all of the defendant's attorney's fees and costs.<sup>131</sup>

Although initially drafted to prohibit plaintiffs from intimidating unsophisticated defendant-protestors by filing suits which would be costly and burdensome to defend (thereby chilling their free speech activities and dissuading others from partaking in similar activities),<sup>132</sup> the Anti-SLAPP Statute has become a barrier to potentially successful suits by celebrities against paparazzi for invasion of privacy. In most cases brought by celebrities against a paparazzo or other media defendant for an invasion of privacy under section 1708.8, the court will have little trouble finding that the conduct (capturing or attempting to capture an image of the celebrity) is a type of conduct that traditionally would be covered by free speech.<sup>133</sup> Thus, the burden would immediately shift to the celebrity to prove, without introducing any outside evidence through discovery, that the suit has a probability of succeeding on the merits. With regard to a suit against an individual paparazzo, celebrities would need to achieve a threshold showing that they probably could prove that the photographer was liable for physical or constructive invasion of privacy, or an assault, while attempting to capture the image or recording at issue.<sup>134</sup> Considering the difficult barriers that celebrities already face in proving such a violation *with* discovery,<sup>135</sup> successfully proving this solely through pleadings and affidavits is not easy. Further, this could present an even greater challenge for a celebrity bringing a suit against a media outlet for publishing a picture that it knew was taken in violation of section 1708.8. Serious difficulty in passing the anti-SLAPP barrier arises when a plaintiff must show the

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129. The purpose of the "stay of discovery" seems to be to freeze excessive discovery costs and alleviate a defendant's potential intimidation by the pretrial discovery requests. *See* Tate, *supra* note 124, at 811. Further, the court may allow limited discovery to be introduced if there appears to be good cause. CAL. CIV. PROC. CODE § 425.16(g).

130. CAL. CIV. PROC. CODE § 425.16(b)(1).

131. *Id.* § 425.16(c)(1).

132. *See* Tate, *supra* note 124, at 803–04.

133. Free speech traditionally includes not only words, but also photographs, videos, and sounds. *See, e.g., Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1183, 1186 (9th Cir. 2001) (holding that a doctored image of actor Dustin Hoffman was entitled to First Amendment protection).

134. CAL. CIV. CODE § 1708.8(a)–(c) (Deering Supp. 2010).

135. *See supra* text accompanying notes 97–115 (discussing the challenges of proving a section 1708.8 violation).

probability of a requisite state of mind (here, actual knowledge), because of the problem of proving this without introducing additional discovery.

By strictly requiring that a plaintiff be able to prove a probability of success on the merits without introducing outside discovery, the Anti-SLAPP Statute deters celebrities from even bringing a claim in the first place. Consequently, the Anti-SLAPP Statute as applied to paparazzi is largely untested. Although section 1708.8 has rarely been litigated, one of its most well-known cases involved a successful anti-SLAPP motion against Barbra Streisand by photographer Kenneth Adelman.<sup>136</sup> In 2003, Streisand filed a \$50 million lawsuit against Adelman for constructive invasion of privacy after he captured, published, and identified an aerial image of her Malibu home as part of a photographic database of the California coast.<sup>137</sup> Adelman filed an anti-SLAPP motion arguing that his photographs did not capture a “personal or familial activity” as required under section 1708.8.<sup>138</sup> The motion succeeded, with the lawsuit being dismissed<sup>139</sup> and Streisand being ordered to pay over \$177,000 in legal fees.<sup>140</sup>

Considering the uncertain outcome of such actions in the right-to-privacy arena, there is a possibility that media defendants would be more likely to settle early (rather than bringing an anti-SLAPP motion) for fear of increased liability for civil fines they now face under the 2009 amendment to section 1708.8. Given the heavy burden of proof that remains on the plaintiffs, however, it is still unclear whether the amendment actually will have a positive impact on a celebrity’s ability to survive an anti-SLAPP motion.

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136. See Kenneth Adelman, *Coastal Archivist Files Anti-SLAPP Motion Against Barbra Streisand to Safeguard Website Documenting the California Coast*, CAL. COASTAL RECORDS PROJECT, <http://www.californiacoastline.org/streisand/lawsuit.html> (last visited Nov. 10, 2010).

137. Bruce Haring, *Streisand Files \$50 Million Lawsuit over Aerial Photos*, SFGATE.COM (May 29, 2003), <http://www.californiacoastline.org/news/grudge.html>.

138. Notice of Motion and Motion of Defendant Kenneth Adelman to Strike Complaint Pursuant to Civ. Proc. Code § 425.16 at 13, *Streisand v. Adelman*, No. SC077257 (Cal. Super. Ct. Dec. 3, 2003), available at <http://www.californiacoastline.org/streisand/motion-anti-slapp-adelman.pdf>. See also CAL. CIV. CODE § 1708.8(a)–(b).

139. Kenneth Adelman, *Barbra Streisand’s Lawsuit to Silence Coastal Website to Be Dismissed*, CAL. COASTAL RECORDS PROJECT, <http://www.californiacoastline.org/streisand/lawsuit.html> (last visited Nov. 10, 2010).

140. Kenneth Adelman, *Barbra Streisand Ordered to Pay Legal Fees*, CAL. COASTAL RECORDS PROJECT, <http://www.californiacoastline.org/streisand/lawsuit.html> (last visited Nov. 10, 2010).

### III. A CONSTITUTIONAL ANALYSIS: THE FIRST AMENDMENT, THE RIGHT TO PRIVACY, AND THE ANTI-PAPARAZZI ACT

“If you take a picture of a mailman, he has more rights to privacy because he’s not a celebrity. Celebrities are paid to be famous. And once you’re famous, it’s like a faucet you can’t turn off.”<sup>141</sup>

Since California passed its first antipaparazzi legislation, and even more so since word of California’s new law came out, scholars and media outlets alike have been debating whether the law would be found constitutional under further analysis. Numerous individuals and agencies are in strong support of the law and its constitutionality, including actress Jennifer Aniston, the Screen Actors Guild, the City of Los Angeles, and the Los Angeles County Sheriff’s Department.<sup>142</sup> The media and publishing industries—including television stations, magazines, newspapers, and Web sites—are up in arms about the potential effects that the law could have on their ability to publish celebrity photos and the severe financial consequences they could face for publishing images taken in violation of the law.<sup>143</sup> To date, the constitutionality of the Anti-Paparazzi Act has not been challenged in court, but “several scholars and critics have opined that the free speech implications of the law are ominous.”<sup>144</sup>

#### A. THE RIGHT TO PRIVACY

##### 1. An Overview

In their famous 1890 *Harvard Law Review* article, *The Right to Privacy*, legal scholars Samuel D. Warren and Louis D. Brandeis introduced the notion of the “right to privacy” by declaring it “the right to be let alone,”<sup>145</sup> which led to the creation of four actionable torts to protect the right.<sup>146</sup> Although the U.S. Constitution does not specifically create a

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141. HOWE, *supra* note 2, at 93 (quoting former paparazzo Ron Galella).

142. See Rodriguez, *supra* note 25 (“Jennifer Aniston lobbied hard for this legislation. . . . [And n]ot only was this bill pushed by the Screen Actors Guild (SAG), it was also supported by the City of Los Angeles and the LA County Sheriff’s Department.”).

143. See, e.g., Rodriguez, *supra* note 25 (“Understandably, the publishing industry isn’t happy about the new law.”).

144. Vance, *supra* note 26, at 112 n.85.

145. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

146. JOHN C. WATSON, JOURNALISM ETHICS BY COURT DECREE: THE SUPREME COURT ON THE PROPER PRACTICE OF JOURNALISM 118 (Melvin I. Urofsky ed., 2008). Some claim that Warren became so fed up with the “intrusive press coverage” of his daughter’s high-society wedding that he and his law partner, Brandeis, wrote this influential article condemning the practice. *Id.* at 110.

right to privacy, courts have found that “[v]arious guarantees [in the Bill of Rights] create zones of privacy.”<sup>147</sup> This right to privacy extends to children as well.<sup>148</sup> Specifically, the penumbras of the Third,<sup>149</sup> Fourth,<sup>150</sup> and Ninth Amendments<sup>151</sup> are used to support this implicit constitutional right to privacy.<sup>152</sup> Further, “the First Amendment protects the privacy of every person to think and to express thoughts freely,” although it is often in direct conflict with the traditional privacy right, given that it “fundamentally blocks the power of the government to restrict expression, even in order to protect the privacy of other individuals.”<sup>153</sup>

Under current California privacy laws, there are certain “private” situations and places in which a private citizen’s photograph cannot be taken. The *Restatement (Second) of Torts* lays out the four common law privacy torts: (1) intrusion into a person’s seclusion or solitude, or into his or her private affairs; (2) public disclosure of embarrassing private facts about a person; (3) publicity that places a person in a false light in the public eye; and (4) appropriation for the defendant’s advantage of a person’s name or likeness.<sup>154</sup> In order to determine whether one’s right to privacy has been violated, courts look to whether the government’s interest in disclosure outweighs the individual’s interest in avoiding disclosure and maintaining personal privacy.<sup>155</sup> When such conflicts arise between the right to privacy and the First Amendment freedom of the press, courts have continuously favored the First Amendment at the expense of the privacy claims.<sup>156</sup>

“Defining what is private, however, has proved problematic for those

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147. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

148. *In re Gault*, 387 U.S. 1, 13 (1966) (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

149. The Third Amendment protects a homeowner from being forced to quarter a soldier without the homeowner’s consent. U.S. CONST. amend. III.

150. The Fourth Amendment protects individuals from unreasonable searches and seizures. U.S. CONST. amend. IV.

151. The Ninth Amendment protects certain rights that are not enumerated in the Constitution. U.S. CONST. amend. IX.

152. *Griswold*, 381 U.S. at 484 (discussing the “penumbras, formed by emanations” of the First, Third, Fourth, Fifth, and Ninth Amendments).

153. FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* 55 (1997).

154. *RESTATEMENT (SECOND) OF TORTS* § 652A(2) (1977).

155. *In re State Police Litig.*, 888 F. Supp. 1235, 1258–59 (D. Conn. 1995) (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 458 (1977)).

156. See Camrin L. Crisci, Note, *All the World Is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 207, 211 (2002) (“Currently, however, these two rights, though equally important, seem to be mutually exclusive; when they clash, the courts have found in favor of the First Amendment almost without exception.”).

who . . . create and apply privacy law,”<sup>157</sup> and it even has been called “embarrassingly difficult to define.”<sup>158</sup> Although not limited to the following circumstances, under American law, a matter is typically found to be private if (1) “a reasonable person would be outraged or embarrassed by public disclosure of that matter,” (2) the person asserting a privacy right has a reasonable expectation of privacy with regard to the matter, (3) the matter is not a legitimate matter of public concern, or (4) the matter is not newsworthy.<sup>159</sup> Further, several jurisdictions, including California, seem to be in agreement that a major aspect of privacy revolves around the family. For instance, California’s antipaparazzi legislation focuses on “personal or familial activit[ies],”<sup>160</sup> while Kansas’s code of journalism ethics defines offenses against “private morality” as those “most often centering around the family relation,” regardless of celebrity status.<sup>161</sup> The Radio Television News Directors Association took it a step further in its Code of Conduct in 2000, and advised professional electronic journalists to “[e]xercise special care when children are involved in a story and give children greater privacy protection than adults.”<sup>162</sup>

Intrusion into one’s seclusion or solitude, or into one’s private affairs, is the most useful in protecting privacy interests of celebrities and their children against the paparazzi. But celebrities run into problems bringing successful causes of action because the public locations where they are most often photographed are not considered places of seclusion or solitude. Though courts have held that there is usually no liability for publishing an image of individuals walking down a public street, because they made themselves susceptible to the public’s gaze and thus cannot have a reasonable expectation of privacy,<sup>163</sup> people are not completely barred from maintaining their privacy while out in public. In *Sanders v. ABC*, the California Supreme Court acknowledged that it has never said that the reasonable expectation of privacy under the tort of intrusion must be a *complete* expectation of privacy,<sup>164</sup> leaving open the possibility that

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157. WATSON, *supra* note 146, at 112.

158. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1153 (2004).

159. WATSON, *supra* note 146, at 113.

160. CAL. CIV. CODE § 1708.8(a)–(b) (Deering Supp. 2010).

161. WATSON, *supra* note 146, at 113 (quoting KANSAS CODE OF ETHICS, *reprinted in* NELSON ANTRIM CRAWFORD, *THE ETHICS OF JOURNALISM* app. A, at 202, 207 (1924)).

162. *Code of Ethics and Professional Conduct*, RADIO TELEVISION DIGITAL NEWS ASS’N, [http://www.rtdna.org/pages/media\\_items/code-of-ethics-and-professional-conduct48.php?g=36?id=48](http://www.rtdna.org/pages/media_items/code-of-ethics-and-professional-conduct48.php?g=36?id=48) (last visited Nov. 10, 2010).

163. RESTATEMENT (SECOND) OF TORTS § 652(D) cmt. b (1977).

164. *See Sanders v. ABC*, 978 P.2d 67, 72 (Cal. 1999) (stating that the expectation of privacy “is

celebrities may maintain a level of privacy and protection against paparazzi intrusion in some circumstances when they are out in public but engaged in an activity in the private domain (for instance, possibly when participating in a familial activity with their children or significant others).<sup>165</sup>

Celebrities run into privacy problems, however, because of their status as public figures.<sup>166</sup> This characterization has led courts to classify almost all aspects of their lives as “newsworthy” or “legitimate matter[s] of public concern,”<sup>167</sup> which makes it nearly impossible for celebrities to successfully prove that a paparazzo intruded into their private affairs by photographing them in a public place.

## 2. Public Figures and the Waiver of the Right to Privacy

The U.S. Supreme Court has articulated three categories of public figures: (1) general public figures, (2) limited public figures, and (3) involuntary public figures.<sup>168</sup> In order to qualify as a general public figure (meaning a public personality for all aspects of one’s life), there must be “clear evidence of general fame or notoriety in the community,” including “pervasive involvement in the affairs of society.”<sup>169</sup> For limited public figures, the Court recommends “looking to the nature and extent of an individual’s participation in the particular controversy.”<sup>170</sup> One may

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not a binary, all-or-nothing characteristic”). In this case, some of the plaintiff’s conversations with customers seeking a psychic reading were secretly videotaped by a reporter who had obtained employment as a “telepsychic” to investigate the industry. *Id.* at 69–70. Even though the plaintiff did not have a reasonable expectation of complete privacy in the conversation because coworkers could see and hear it, though the general public could not, there was a claim for invasion of privacy by intrusion into seclusion. *Id.* at 77. The court based its holding on *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), which found that although a plaintiff may not have a reasonable expectation of confidentiality regarding the content of a communication with another individual, the plaintiff may have a reasonable expectation of privacy against the electronic recording of the communication. *Id.* at 492. The court extended this reasoning to the case at hand, and stated that when looking at intrusion into seclusion, the concept of seclusion is relative. *Sanders*, 978 P.2d at 72. Further, an important aspect of privacy was found to be “the right to control the nature and extent of the firsthand dissemination of [one’s] statements.” *Id.* (quoting *Shulman*, 955 P.2d at 492).

165. See Vance, *supra* note 26, at 106 (“The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone.” (quoting *Sanders*, 978 P.2d at 72)).

166. See *infra* text accompanying notes 168–76 (defining public figures and describing the implications for privacy rights).

167. See *infra* text accompanying notes 252–58 (arguing that the “newsworthy” and “legitimate matters of public concern” exceptions to privacy rights should be narrowed with regard to celebrity children).

168. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974). See also Patrick J. Alach, Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 234 (2008).

169. *Gertz*, 418 U.S. at 352. See also Alach, *supra* note 168, at 234.

170. *Gertz*, 418 U.S. at 352. See also Alach, *supra* note 168, at 234.

become an involuntary public figure by “becom[ing] a public figure through no purposeful action of his own.”<sup>171</sup>

Once individuals become public figures, their privacy rights are waived with regard to the matter that gave rise to the waiver.<sup>172</sup> Under the standards for public figures set out above, the majority of celebrities who are hounded by the paparazzi constitute either general or limited public figures, given that they are extremely well known throughout the country (and even worldwide) for their performances, their participation in international advertising campaigns, and their voluntary appearances on talk shows and other television programs to promote themselves, their images, clothing lines, fragrances, movies, television shows, music, and more.<sup>173</sup> Consequently, as public figures (voluntary or involuntary), aspects of their lives become of “legitimate public interest,” which leads to diminished privacy rights.<sup>174</sup>

Not only do celebrities waive their rights to privacy, but courts also have found that the legitimate public interest that gives rise to the waiver in public figures is not limited to individual celebrities. It may also include, to a reasonable extent, a waiver for celebrities’ family members, even if there is no reason to attract public attention other than relation to the public figures.<sup>175</sup> This seems to suggest that even though celebrity children have in no way volunteered or consented to being thrust into the public eye, they are fair game for the media. In order to protect their personal privacy and safety, however, the extent to which this waiver extends to celebrities’ minor children should be limited.<sup>176</sup>

What about celebrities who choose to present their children on the cover of entertainment magazines for profit?<sup>177</sup> Should they be able to

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171. *Gertz*, 418 U.S. at 345. *See also* Alach, *supra* note 168, at 234.

172. 62A AM. JUR. 2D *Privacy* § 203 (2005) (noting that the matters that give rise to a waiver usually must satisfy a “newsworthiness” test or be of “legitimate public interest”).

173. *But see* Alach, *supra* note 168, at 234 (arguing that celebrities do not meet the definition of a general or a limited public figure).

174. 62A AM. JUR. 2D *Privacy* § 203.

175. *See Carlisle v. Fawcett Publ’ns, Inc.*, 20 Cal. Rptr. 405, 415 (Ct. App. 1962) (reasoning that a “necessary corollary” to the waiver of the right to privacy by a public figure is that individuals closely associated to that public figure should also lose their right to privacy to some extent).

176. *See infra* text accompanying notes 256–58 (arguing that the waiver of privacy protections should be narrowed for celebrity children).

177. Many celebrities, including singer Christina Aguilera and actors Brad Pitt and Angelina Jolie, have made deals with magazines to publish exclusive first images of them with their children. It seems that celebrities do this for a number of reasons, including to raise money for charity (as was the case with Pitt and Jolie), to make sure they have control over the dissemination of their children’s first public photographs, and to attempt to lessen the paparazzi craze surrounding their babies by giving the public

demand the same levels of privacy for their children after essentially waiving their right to privacy for them? It seems highly contradictory and unfair for celebrities to sell exclusive, “just-born” baby pictures of their children to magazines for millions of dollars, but then to consider the children’s privacy protections as strong as the protections of those children who were intentionally sheltered and kept out of the public’s eye.<sup>178</sup> Perhaps, whether celebrity parents have willingly publicized images of their children should be taken into account when determining the extent of the waiver of privacy as applied to the children. To a certain degree, celebrity children whose parents voluntarily publish their images in an entertainment magazine should still retain greater privacy protections (at least in circumstances unrelated to the reason for their parents’ notoriety) than most voluntary and involuntary public figures because the children are unable to choose whether to be in the public eye,<sup>179</sup> have not been involved in a public controversy (making them an involuntary public figure), and are at such a vulnerable age that their safety and emotional well-being is of substantial importance. Celebrity children who have been intentionally kept out of the spotlight, however, should maintain an even narrower waiver of their privacy protections. This approach gives celebrity parents more control over the degree to which their children’s privacy rights are waived, and they can make a decision from “day one” about the importance of their children’s privacy.

## B. THE FIRST AMENDMENT

Balanced against the right to privacy is a cornerstone of the U.S. Constitution, the First Amendment. The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech, or of the press,”<sup>180</sup> and provides broad protections for the dissemination of information with the purpose of benefitting the public and providing

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what it wants. *See, e.g.*, William Keck, *Pitt and Jolie to Sell Baby Photos for Charity*, USA TODAY (June 7, 2006, 12:06 PM), [http://www.usatoday.com/life/people/2006-06-05-jolie-babypic\\_x.htm](http://www.usatoday.com/life/people/2006-06-05-jolie-babypic_x.htm).

178. *See In Defense of Paparazzi*, *supra* note 104 (“You see, you got on the one hand the Britney Spearses selling their kid for \$1 million to [*People* magazine] and on the other hand they’re covering them up and not allowing them to be photographed. So it’s a very delicate issue, isn’t it, whether you should photograph celebrities carrying their children.” (quoting Frank Griffin)).

179. Further, unemancipated children cannot legally make many important decisions without parental consent.

180. U.S. CONST. amend. I. This law is extended and applied to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV. *See also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276–77 (1964) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925), as a case that incorporated the First Amendment through the Fourteenth Amendment).

safeguards against governmental regulation of the press.<sup>181</sup> The media retains a broad right to publish information that is “newsworthy” or “of legitimate public concern.”<sup>182</sup>

But the First Amendment right is not without limitation.<sup>183</sup> There is no constitutional protection for information obtained illegally, through stealth or other methods.<sup>184</sup> In essence, barring several exceptions, the First Amendment protects the publication of all information, so long as it does not infringe on one’s right to privacy, as discussed above.

Assuming that paparazzi conduct can be considered an expression of speech, paparazzi regulations are evaluated for constitutionality on the basis of whether they are content based or content neutral.<sup>185</sup> A law regulating speech may also be found unconstitutional if it is unduly vague or overbroad.<sup>186</sup> If a restriction on speech is found to be content based it is subject to strict scrutiny,<sup>187</sup> while content-neutral restrictions must only pass intermediate scrutiny.<sup>188</sup> To determine whether a restriction is content

181. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (“It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” (citing *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96 (1972))); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that government regulation of the content published in a newspaper violates the First Amendment).

182. Loeb & Stern, *supra* note 36, at 14 & n.19 (discussing the broad definitions of “newsworthy” and “legitimate public concern” and noting that injunctive relief entirely banning paparazzi activities near a celebrity would likely fail First Amendment scrutiny by analogizing to *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997)).

183. For instance, if defamatory or libelous information is published, the press may be held liable. See *Sullivan*, 376 U.S. at 283 (limiting liability in libel actions brought by public officials to cases in which the publisher acted with “actual malice”).

184. See *Turnbull v. ABC*, No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351, at \*72–74 (C.D. Cal. Aug. 19, 2004) (stating there is no constitutional protection for images obtained through methods that invade one’s right to privacy).

185. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–42 (1994).

186. See, e.g., *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that when people “of common intelligence must necessarily guess at” the meaning of a law, it is unconstitutionally vague).

187. In order to pass the strict scrutiny standard of judicial review, a content-based law must be in furtherance of a compelling state interest and must be the least restrictive alternative for achieving that government interest. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004) (applying the strict scrutiny standard to a content-based restriction of speech). Content-based restrictions are subject to the highest degree of scrutiny to prevent the government from being able to control the thoughts and ideas of the public by controlling the messages that are disseminated. See *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (stating that speech restrictions “raise[] the specter that the government may effectively drive certain ideas or viewpoints from the marketplace” (citing *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991))).

188. To pass intermediate scrutiny, there must be an important government interest, and the law must be substantially related to that interest. See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981) (“We have often approved restrictions of that kind provided that they

based, the court looks at whether the regulation is viewpoint neutral and subject-matter neutral.<sup>189</sup> In order to be viewpoint neutral, the government cannot restrict speech based on the ideology of the message, such as whether it is in favor of or opposed to a particular idea.<sup>190</sup> Subject-matter neutral means that the law cannot restrict speech based on the topic of the speech.<sup>191</sup>

California's Anti-Paparazzi Act is content neutral because its regulation of paparazzi conduct has only an incidental affect on speech, without intending to regulate particular speech on the basis of its message or viewpoint.<sup>192</sup> The law does not limit a particular type of photograph from being taken, it "just require[s] that the information be gathered in a more decent, humane, and ethical manner."<sup>193</sup> Thus, it need only meet the standard for intermediate scrutiny. To pass intermediate scrutiny, the government regulation must (1) support a significant government interest, (2) be narrowly tailored to that interest, and (3) leave open ample alternative channels of communication.<sup>194</sup> If constitutionally challenged, the 2010 version of section 1708.8 should be upheld as a reasonable restriction because it meets the requirements of intermediate scrutiny. First, the Act promotes significant (and arguably compelling) government interests such as safety, public order, personal property rights, and individuals' rights to privacy.<sup>195</sup> Further, it is narrowly tailored to serve these interests, in that it does not "place a blanket ban" on taking pictures,

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are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information." (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)).

189. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.").

190. See *Boos v. Barry*, 485 U.S. 312, 316–18 (1988) (finding a law that prohibited messages against foreign governments to be not viewpoint neutral and thus unconstitutional). An example would be a law restricting antiwar demonstrators but allowing pro-war demonstrators to express their views.

191. See, e.g., *Carey v. Brown*, 447 U.S. 455, 471 (1980) (holding that a regulation was unconstitutional because it was not subject-matter neutral, given that it restricted picketing in neighborhoods unless it was in regard to labor and employment).

192. For an in-depth analysis of paparazzi regulations under the content-neutral time, place, or manner test, see Sharon A. Madere, Comment, *Paparazzi Legislation: Policy Arguments and Legal Analysis in Support of Their Constitutionality*, 46 UCLA L. REV. 1633, 1661–62 (1999) (discussing the application of the content-neutral time, place, or manner test to paparazzi regulations, including the original version of the Anti-Paparazzi Act).

193. *Id.* at 1662.

194. *Id.* See also *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981).

195. Madere, *supra* note 192, at 1662.

and only places restrictions on conduct that is invasive, aggressive, or harmful.<sup>196</sup> Finally, given that paparazzi may still legally capture images through many other methods, the third requirement of ample alternative channels of communication is met.<sup>197</sup>

A restriction on speech will also be found unconstitutional if it is unduly vague or overbroad.<sup>198</sup> A law is unconstitutionally vague if an ordinary person could not understand what type of conduct is forbidden, leading enforcement of the law to be discriminatory and arbitrary.<sup>199</sup> Courts have emphasized the importance of using clear and precise language when regulating speech, specifically because of the significance of the First Amendment protections.<sup>200</sup> In determining whether a law is overbroad, courts consider (1) whether the law is *substantially* overbroad and regulates substantially more speech than is allowed to be restricted under the Constitution,<sup>201</sup> and (2) whether an individual whose speech is not protected against the regulation by the First Amendment could argue that the law would be unconstitutional when applied to others.<sup>202</sup> To be found substantially overbroad, there “must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections”; however, “the mere fact that one can conceive of some impermissible applications of a statute is not sufficient” to prove that it is substantially overbroad.<sup>203</sup>

Critics of the Anti-Paparazzi Act, specifically media outlets and publishers, claim that imposing expanded liability on paparazzi and on media outlets who knowingly obtain illegally captured images will have a

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196. *Id.*

197. *Id.* (“Photographs of and information about celebrities and public figures can still be gathered. These regulations just require that the information be gathered in a more decent, humane, and ethical manner.”).

198. *See, e.g.*, *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *Crisci, supra* note 156, at 238–39 (discussing the overbreadth and vagueness standards).

199. *See, e.g.*, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted); *NAACP v. Button*, 371 U.S. 415, 432–33 (1963) (discussing the overbreadth standard in the context of the First Amendment); *Crisci, supra* note 156, at 238–39.

200. *See City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *Kolender*, 461 U.S. at 358; *Baggett v. Bullitt*, 377 U.S. 360, 366 (1964).

201. *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987) (stating that a statute may be found unconstitutional “only if the overbreadth is ‘substantial’” (citations omitted)); *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

202. *Broadrick*, 413 U.S. at 612. Essentially, this second prong creates an exception to the usual rule of standing, which does not allow a person to whom a statute may be constitutionally applied to challenge a law before the court. *See id.* at 610.

203. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800–01, 810 (1984) (rejecting the argument that a regulation prohibiting posting signs on public property was overbroad because it “curtail[ed] no more speech than [was] necessary to accomplish its purpose”).

“chilling effect” on the freedom of speech.<sup>204</sup> They claim (and courts have expressed concern) that if the statute is vague and overbroad, the media will be unclear on what types of images will create liability for severe civil and punitive damages, and thus will abstain from publishing even legitimately captured images.<sup>205</sup>

The “chilling effect” argument fails for several reasons. First, section 1708.8 does not fall into the category of being unduly vague or overbroad. The statute clearly lays out the types of conduct that are prohibited—physical or constructive invasion of property, and assault—and describes the specific actions that constitute each type of violation.<sup>206</sup> The law is very clear in describing the circumstances under which paparazzi are liable for violations, and the high standard of liability for publishing images taken in violation of section 1708.8—requiring that publishers have “actual knowledge” that the images were taken in violation of the statute<sup>207</sup>—is well established and curbs any overbroad aspects of the statute in that it severely limits who can be held liable. Given the difficulty in proving that publishers had “actual knowledge” that a photograph was taken in violation of the statute, it is highly unlikely that media outlets will hesitate to obtain and publish images even if they have a slight suspicion that they were illegally captured. Further, considering the enormous profits publishers and paparazzi alike make for their exclusive images of celebrities, the small risk of being found liable for publishing an image in violation of the statute is unlikely to serve as a compelling financial deterrent when compared to the massive profits that could be made.

Additionally, although the First Amendment is broad reaching and protective of the freedom to disseminate information to the public, it does not provide protection for individuals who engage in dangerous or illegal conduct in order to obtain news and other information, regardless of the fact that the focus is on a public figure.<sup>208</sup> In *Turnbull v. ABC*, the court

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204. See, e.g., Becker, *supra* 118.

205. See *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“The threat of sanctions may deter their exercise [of freedom of speech] almost as potently as the actual application of sanctions.”). Though one California court has held that the First Amendment is not implicated by section 1708.8, there has been no thorough discussion to date, and there are still questions about whether a subsequent court would come to the same conclusion. See *Turnbull v. ABC*, No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351, at \*72 (C.D. Cal. Aug. 19, 2004) (finding that subsections (a) and (b) of California Civil Code section 1708.8 do not implicate the First Amendment).

206. CAL. CIV. CODE § 1708.8(a)–(c) (Deering Supp. 2010).

207. *Id.* § 1708.8(f).

208. See *Galella v. Onassis*, 353 F. Supp. 196, 223 (S.D.N.Y. 1972), *aff’d in relevant part*, 487 F.2d 986, 995 (2d Cir. 1973); Alach, *supra* note 168, at 232–33 (“[T]he protection [of the Constitution] does not extend to illegal newsgathering techniques.”); Madere, *supra* note 192, at 1645 (arguing that,

declared that because section 1708.8 is narrowly focused on capturing “photographs through means that infringe upon an individual’s right to privacy,” and because there is “no First Amendment protection for images . . . obtained [by stealth],” there was no First Amendment issue.<sup>209</sup> The district court in *Galella v. Onassis* also clearly articulated this when it stated that “[t]here is no general constitutional right to assault, harass, or unceasingly shadow or distress public figures.”<sup>210</sup> While media outlets may rightly be “chilled” from publishing images of celebrities taken in violation of the statute, the same concepts can be articulated by writing about the photographed circumstance.<sup>211</sup> The U.S. Supreme Court has supported this idea by suggesting that when alternative methods of disseminating speech are available, the tension between the First Amendment and a government regulation may be reduced.<sup>212</sup> Finally, there is an abundance of celebrity photographs that are taken *not* in violation of the statute, and there are many methods of capturing images of nearly any celebrity without committing physical or constructive trespass, or an assault.<sup>213</sup> Thus, the media’s ability to express itself and exercise its right to free speech and freedom of the press will remain regardless of the increased liability for violations of section 1708.8.

#### IV. A LOOK AT PROPOSED SOLUTIONS AND INTERNATIONAL APPROACHES

##### A. HERE WE GO AGAIN: CALIFORNIA’S LATEST PROPOSAL TO REIN IN THE PAPARAZZI, ASSEMBLY BILL NUMBER 2479, BY EXTENDING THE REACH OF THE STALKING STATUTE

In February 2010, just over a month after the latest Anti-Paparazzi Act went into effect, the California State Legislature introduced another bill in an attempt to finally put a stop to outrageous paparazzi behavior. It took a new approach—expanding the definition of stalking under section 1708.7 of the Civil Code to target specifically the constant surveillance that paparazzi keep celebrities under, and adding liability for false

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regardless of whether a celebrity is a public figure, the aggressive behavior of the paparazzi is not constitutionally protected).

209. *Turnbull*, 2004 U.S. Dist. LEXIS 24351, at \*73–74.

210. *Galella*, 353 F. Supp. at 223.

211. *See* Alach, *supra* note 168, at 233 (“[S]peech is not chilled if a sufficient alternate forum remains available to disseminate the underlying message.”).

212. *Id.* (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 732–33 (1978)).

213. For instance, a paparazzo could photograph a celebrity from several yards away while the celebrity was not with family members and was walking in plain view on a public street.

imprisonment under section 1708.8.<sup>214</sup>

In addition to liability for physical or constructive invasion of privacy, or assault, the proposed bill would extend liability for violating the Anti-Paparazzi Act if false imprisonment is committed with the intent to capture an image.<sup>215</sup> “False imprisonment” is defined as “the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.”<sup>216</sup> Words or conduct that would reasonably lead one to believe that he or she is not free to leave a particular place are adequate to meet the standard, and there is no requirement of physical or forceful restraint.<sup>217</sup> One weakness in this approach, however, is the fact that the most likely instance when celebrities would feel they were confined without their consent involves a situation like the Kate Moss airport incident,<sup>218</sup> in which multiple paparazzi surround them to the point that they reasonably believe they cannot leave. In this situation, it would be somewhat difficult for each individual paparazzo to be identified,<sup>219</sup> and it is unclear whether a court would find the words or conduct of a single paparazzo (assuming one could be identified) adequate to instill the required reasonable belief. Further, the procedural obstacles for successfully bringing a claim against an anti-SLAPP motion still remain. Thus, adding false imprisonment as an additional approach to proving a violation under section 1708.8 might deter a small amount of aggressive conduct by paparazzi, but it likely will not have any major effect on the safety of celebrities and their children.

#### B. THE INTERNATIONAL APPROACH

The United States is not alone in its fight against invasive paparazzi and harassment of celebrities—the United Kingdom, Scandinavia, and the Netherlands all have been cited as having seen “a recent shift toward invasive journalism.”<sup>220</sup> Despite the fact that there is no explicit right to privacy in English law, and thus no cause of action for breach of an

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214. See Assemb. B. 2479, 2009–10 Leg., Reg. Sess. (Cal. 2010).

215. *Id.* § 1(c).

216. *City of Newport Beach v. Sasse*, 88 Cal. Rptr. 476, 480 (Ct. App. 1970) (citing RESTATEMENT (SECOND) OF TORTS § 35 (1965); 1 HARPER & JAMES, TORTS 226 (1956)).

217. *Schanafelt v. Seaboard Fin. Co.*, 239 P.2d 42, 43 (Cal. Ct. App. 1951).

218. See PRI, *supra* note 19.

219. In order to identify the photographers, the celebrity would likely have to do extensive discovery to obtain images and other records.

220. Sara Haenggi, Comment, *The Right to Privacy Is Coming to the United Kingdom: Balancing the Individual's Right to Privacy from the Press and the Media's Right to Freedom of Expression*, 21 HOUS. J. INT'L L. 531, 558 (1999).

individual's privacy,<sup>221</sup> it appears that the United States, a country renowned for its protection of human rights, is lagging behind the European Union with regard to protecting the privacy of its citizens.<sup>222</sup>

Many countries in Europe have adopted the Articles drafted by the European Convention on Human Rights.<sup>223</sup> Specifically, Article 8 sets out a broad right of respect for one's "private and family life, his home and his correspondence," except as limited by "the interests of national security, public safety or the economic well-being of the country, . . . the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>224</sup>

In *Von Hannover v. Germany*, a landmark ruling for international privacy rights, the European Court of Human Rights ("ECHR") held that photographs of Princess Caroline Louise Marguerite Grimaldi of Monaco violated Article 8 and breached her right of privacy, regardless of the fact that the Princess was a newsworthy public figure.<sup>225</sup> The photographs were taken without her consent and depicted aspects of her daily life, including shopping, horseback riding, and walking outside.<sup>226</sup> Although the German government contended that its lower level of privacy protection for public figures such as Princess Caroline was compatible with the European Convention on Human Rights, the court found otherwise.<sup>227</sup>

The court applied a balancing test to weigh the competing interests of the individual's right to privacy and the freedom of expression.<sup>228</sup> In its analysis, the court determined that although freedom of expression includes the publication of photographs, the case at hand did not involve the dissemination of ideas, but rather concerned personal and intimate

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221. See *id.* at 532–34 (discussing the early history of privacy laws in England).

222. *American Liberty and Princess Diana's Death*, PRI BLOG (Aug. 31, 2009, 1:00 PM), <http://www.paparazzi-reform.org/journal/2009/8/31/american-liberty-and-princess-dianas-death.html> (describing the irony of our nation's attempt "to be the beacon of human rights" while lagging behind the European Union with regard to privacy protections).

223. See Haenggi, *supra* note 220, at 537 & n.26. The European Convention on Human Rights went into force in 1953 "with the goal to protect, at an international level, human rights from violations by a State and to provide collective international enforcement of these rights." *Id.* at 536.

224. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter Human Rights Convention].

225. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. ¶¶ 9–17, 80, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699729&portal=hbk&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

226. *Id.* ¶¶ 9–17, 68.

227. *Id.* ¶¶ 78–80.

228. *Id.* ¶ 60. Article 10 protects the freedom of expression. Human Rights Convention, *supra* note 224, art. 10.

information about the Princess for the “sole purpose of . . . satisfy[ing] the curiosity of a particular readership regarding the details of the applicant’s private life.”<sup>229</sup> Thus, it was not justified by public concern or general importance.<sup>230</sup> Further, the court emphasized that the “decisive factor” was that the facts reported through the images did not contribute to any public debate, given that the images related exclusively to details of the Princess’s private life and had nothing to do with any political role.<sup>231</sup> It also noted that the photographs involved an element of harassment by photographers.<sup>232</sup>

When compared to the strict requirements and practical barriers that celebrities in the United States face in obtaining an injunction against a paparazzo, Europe appears to be significantly more protective of celebrities’ privacy rights. In another European privacy case, *Campbell v. MGN Ltd.*, the House of Lords granted supermodel Naomi Campbell damages for the publication of photographs of her outside of a Narcotics Anonymous meeting, stressing the private nature of such meetings.<sup>233</sup> The British High Court also recognized the importance of privacy in a case involving Ewan McGregor.<sup>234</sup> After the Court issued injunctions against an agency for publishing images of actor Ewan McGregor’s children without parental consent while on a family vacation, McGregor said, “[I]t’s my right to protect my children.”<sup>235</sup>

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229. *Von Hannover*, 2004-VI Eur. Ct. H.R. ¶ 65.

230. *Id.* ¶ 76.

231. *Id.* The Court noted that the Princess does not in fact “exercise any function within or on behalf of the State of Monaco or any of its institutions.” *Id.* ¶ 62. This can be contrasted with the ruling in a case involving Elton John, who was denied an injunction to prevent the publication of pictures of him walking with his driver from his car to his home in London, despite his claims that the image showed he was balding and it was not of public interest. Rosanna Cooper, *Media Law—Privacy—Elton John—Failed Injunction*, EZINEARTICLES.COM (Nov. 15, 2006), <http://ezinearticles.com/?Media-Law-%96-Privacy-%96-Elton-John-%96-Failed-Injunction&id=360614> (describing Sir Elton John’s attempt to prevent the Daily Mail from publishing his photograph).

232. *Von Hannover*, 2004-VI Eur. Ct. H.R. ¶¶ 59, 68.

233. See *Campbell v. MGN Ltd.*, [2005] UKHL 61, [2]–[3] (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051020/camp.pdf>. Other celebrities who obtained injunctions against the paparazzi from London courts include singers Lily Allen and Amy Winehouse, and actress Sienna Miller. See Emine Saner, *Have Celebrities Finally Snapped?*, THE GUARDIAN, May 4, 2009, available at <http://www.guardian.co.uk/media/2009/may/04/celebrities-paparazzi> (discussing the United Kingdom’s recent injunctions against paparazzi).

234. See *Ewan McGregor Wins Injunction over Snatched Paparazzi Photos*, IMDB (Nov. 13, 2003), <http://www.imdb.com/news/ni0063880/>.

235. *Id.* See also Louise Prince, *Celebrity and Privacy: “It’s My Right to Protect My Children,”* THE IN-HOUSE LAW., Dec. 2006–Jan. 2007, at 42, available at <http://www.harbottle.com/hnl/upload/documents/Celebrity%20and%20Privacy.pdf>. The U.K. courts, however, have not always been so protective of celebrity children’s privacy rights. Celebrities Alex Kingston and Kate Beckinsale’s complaints about their children being photographed while walking along a street were rejected because

## V. SOLUTIONS AND RECOMMENDATIONS

Given the difficulty of proving a violation of section 1708.8, the broad newsworthy standard, and the practical barriers to successfully bringing a cause of action, it is unlikely that the 2009 amendment to the Anti-Paparazzi Act, or the proposed assembly bills, will have a significant impact on aggressive and invasive paparazzi behavior. Thus, in order to increase safety for celebrities, their families, and members of the public who may get in the way of a determined paparazzo, California must move forward to implement additional, more effective solutions to the paparazzi problem.

The American legal system has been referred to as a “reactive instrument of social adjustment” through which “[n]ew laws are enacted and precedents set usually after an incident or situation arises that is deemed too destructive to society. Sometimes it takes decades of damage before our laws catch up with the needed change.”<sup>236</sup> It seems as though our society is reaching this breaking point. Even with the continued strengthening of antipaparazzi laws in California, almost weekly there is another paparazzi-involved car accident in the news, or a paparazzo becomes so aggressive toward a celebrity and his or her family that the celebrity feels obligated to get physical in order to maintain some semblance of personal space and sanity. Further, although the media industry makes some attempts at self-regulation,<sup>237</sup> the fact that no license is required to be a paparazzo makes it difficult to set standards for their behavior.<sup>238</sup>

Since it is clear that voluntary public figures (which includes most celebrities) waive their right to at least some degree of privacy protections,<sup>239</sup> the first significant changes beyond the continued strengthening of the Anti-Paparazzi Act should not be focused on protecting celebrities themselves. Instead, the changes should concentrate on increasing privacy protections for those whose actions have in no way

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they had been taken in a public place and did not seem to have affected the children’s welfare. *Id.* at 43.

236. *Legal*, PRI, <http://www.paparazzi-reform.org/legal/> (last visited Nov. 10, 2010).

237. For an example of an attempt to encourage paparazzi and media organizations to adopt a code of conduct providing celebrities with privacy and other protections in various situations, including when there are children or individuals in distress being photographed, see *Human Privacy and Respect in the Media: A Mutually Agreed upon Code of Conduct*, PRI, available at [http://www.paparazzi-reform.org/storage/PAP\\_REFORM\\_CODE.pdf](http://www.paparazzi-reform.org/storage/PAP_REFORM_CODE.pdf) (last visited Nov. 14, 2010).

238. In fact, with the increase in use of digital cameras and camera phones, almost anyone can be a paparazzo.

239. See 62A AM. JUR. 2D *Privacy* § 203 (2005).

led to a waiver of privacy rights—children of celebrities who have become “accidental players in the Hollywood tug of war between paparazzi and real celebrities,”<sup>240</sup> and are currently hounded to nearly the same degree as their celebrity parents for their circumstantial positions as the offspring of a well-known individual.

This Note proposes the best ways to ensure privacy rights and safety for celebrity children. First, it recommends adopting the European model of more equally balancing the right to privacy against the First Amendment, and narrowing the waiver of the right to privacy and newsworthiness aspects of the analysis with regard to celebrity children to afford them stronger protections. Second, it recommends creating protective buffer zones around places such as schools, parks, and medical facilities. Finally, it discusses the social and policy issues that must be addressed before any significant change in paparazzi and privacy laws can be made.

A. SHIFTING THE BALANCE BETWEEN THE RIGHT TO PRIVACY AND THE FIRST AMENDMENT: AN ARGUMENT IN FAVOR OF THE INTERNATIONAL APPROACH TO PAPARAZZI ISSUES AND A CALL FOR NEW DEFINITIONS OF NEWSWORTHINESS

In most areas of life, children under the age of eighteen are required to obtain parental consent for everything from field trips to medical procedures to television appearances.<sup>241</sup> Yet, when it comes to the tabloid coverage of celebrities’ children, the requirement for parental consent disappears. A paparazzo can hang from a tree to photograph a celebrity’s toddler at a park with friends, with the toddler’s famous parent nowhere in sight;<sup>242</sup> a magazine can publish the child’s picture on its front cover, including critical and insensitive captions, and place it front and center at checkout stands across the country without any form of parental consent or waiver.<sup>243</sup> While this may seem strange to the outside world, it is the result

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240. Carla Hall, *Paparazzi “Buffer Zone” Around Santa Monica Preschools Is Considered*, L.A. TIMES, June 11, 2009, available at <http://articles.latimes.com/2009/jun/11/local/me-preschool-paparazi11>.

241. See, e.g., Ann Maradiegue, *Minor’s Rights Versus Parental Rights: Review of Legal Issues: Exemptions from Parental Consent for Minors*, MEDSCAPE, [http://www.medscape.com/viewarticle/456472\\_5](http://www.medscape.com/viewarticle/456472_5) (last visited Nov. 14, 2010) (noting that federal law gives parents the right to control the disclosure of their minor child’s education records).

242. See Amelia McDonnell-Parry, *Two Little Afflecks*, THE FRISKY (Mar. 30, 2010, 9:40 AM), <http://www.thefrisky.com/post/246-two-little-afflecks/> (picturing Ben Affleck and Jennifer Garner’s two young daughters on a park bench while out with a nanny).

243. For instance, a recent magazine cover headline read, “Why Is Angelina Turning Shiloh into a Boy?,” LIFE & STYLE, Mar. 4, 2010, available at <http://www.lifeandstylemag.com/2010/03/large-1011-cover.html>. The cover story referred to the three-year-old daughter of Angelina Jolie and Brad Pitt.

of the innocent child's parent being a public figure.<sup>244</sup>

The idea of constant surveillance and reckless behavior to capture images of individuals engaged in private activities would have been unimaginable to the Framers of the Constitution and stands in stark contrast to the concepts of freedom and personal liberty that this country was founded on over two centuries ago. Although the First Amendment was drafted broadly at its outset, it was done so in order to “lay[] down a foundation of law that could then be amended and adjusted as the nation grew and advanced in ways the Founding Fathers could not predict.”<sup>245</sup> The drafters of the Constitution could not have foreseen a world in which clear images of individuals could be captured in an instant in any location, even without the subjects' knowledge that they are under surveillance, and then immediately uploaded onto a forum where billions of people worldwide have visual access to them.

Due to the increasing prevalence of digital media and advancing technology, today's society is facing a major issue with personal privacy, and the balance of constitutional protections must be shifted to respond to this change in situation.<sup>246</sup> In order to ensure that all individuals, regardless of their notoriety, maintain some aspect of privacy while engaged in nonnewsworthy events, the government must continue to take action to strengthen privacy protections.<sup>247</sup> Even in 1947, before the recent surge in aggressive media and celebrity frenzy began, the Commission on Freedom of the Press advocated that

everyone concerned with the freedom of the press and with the future of democracy should put forth every effort to make the press accountable, for, if it does not become so of its own motion, the power of government will be used, as a last resort, to force it to be so.<sup>248</sup>

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Although Shiloh is arguably too young to be affected by such gender identification criticism now, this is nothing for which parents would want to have the entire country criticizing their innocent child.

244. Christine Apostolina, Letter to the Editor, *Paparazzi Go Away*, L.A. TIMES, May 31, 2008, at 4, available at <http://articles.latimes.com/2008/may/31/entertainment/et-letters31.S2> (“If we as a society can determine that someone under 21 is too young to drink, then we should be able to decide that stalking/photographing children by paparazzi is also illegal. No child, whether a celebrity, the child of a celebrity or the classmate of a celebrity, should be subjected to paparazzo intrusion.”).

245. *Legal*, *supra* note 236.

246. These personal privacy issues do not affect only celebrities. With the rise of the Internet, “anyone who is unfortunate enough to be the subject of a photograph” can be a victim of intrusive photography on a blog, Facebook, or other social media Web site. Kelly, *supra* note 29 (quoting Sean Burke, discussing who will benefit from antipaparazzi laws).

247. *See id.*

248. COMM'N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES AND BOOKS 80 (Robert D. Leigh ed., 1947).

While the First Amendment protections for freedom of speech and freedom of the press are part of the major ideals on which the United States was founded, it does not mean that the press should have free reign to behave in whatever manner it wishes to capture profitable photographs.

In order to effectively protect celebrity children, U.S. courts should adjust the balance between the right to privacy and the protections of freedom of speech, press, and expression, by following an approach similar to that of the ECHR. As discussed in Part IV.B, the ECHR has adopted a method of weighing these competing rights on a more evenly balanced scale<sup>249</sup> (as opposed to the United States' current approach of weighing First Amendment protections more heavily than the right to privacy), allowing celebrities to obtain injunctions that protect them from being photographed while they are engaged in day-to-day activities unrelated to their source of notoriety, and while they are with their families.<sup>250</sup>

Courts in the United States have not clarified exactly what constitutes "newsworthy" information,<sup>251</sup> and furthermore, the courts that initially set the broad standard were not facing the same kind of invasive paparazzi conduct that occurs today. Thus, newsworthiness and legitimate public concern standards should be raised with regard to celebrity children.<sup>252</sup> Although information is considered to be of "legitimate concern to the public" in the United States even when it is solely for purposes of "amusement or enlightenment,"<sup>253</sup> courts should not allow paparazzi freedom to engage in aggressive behavior in order to capture images of celebrity children (who have involuntarily become public figures) purely for the public's amusement. Instead, courts should follow the ECHR approach in holding that invading the privacy of a public figure for "the sole purpose of . . . satisfy[ing] the curiosity of a particular readership" is not justified by public concern or general importance.<sup>254</sup>

In determining whether a photograph is "newsworthy" or of

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249. See *supra* text accompanying notes 228–32.

250. See Alach, *supra* note 168, at 224–25 (describing the ECHR's more equal balance of privacy and freedom of speech).

251. Kapellas v. Kofman, 81 Cal. Rptr. 360, 370 (Cal. 1969) (en banc) ("[T]he courts still have only hesitantly sketched the boundaries of the 'newsworthy' category . . .").

252. One scholar has suggested that the narrow definition of privacy and the broad definition of newsworthiness "have taken the bite out of" the intrusion torts and thus must be changed, or a new approach must be adopted. Crisci, *supra* note 156, at 215.

253. RESTATEMENT (SECOND) OF TORTS § 652D cmt. j (1977). See also Loeb & Stern, *supra* note 36, at 14 (discussing the low standard for newsworthiness).

254. Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. ¶65, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?.action=html&documentId=699729&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

“legitimate concern to the public,” and thus protected by the First Amendment, the U.S. courts should again follow the ECHR and take into account all circumstances surrounding the image, including but not limited to the following<sup>255</sup>: whether the celebrity is with a significant other or child, the age of the child, whether the child was emotionally distraught by the photographing, whether the celebrity was able to go about his or her activities without being obstructed by the photographer, whether the celebrity is involved in day-to-day activities unrelated to his or her position as a public figure, where the photographs were taken, whether the conduct of the photographer was harassing or rude, and whether the celebrity parent has voluntarily placed the child in the public eye in the past. This approach would allow the courts to make more careful privacy determinations, thus avoiding the risk of unnecessarily burdening the right to free speech and press, while also valuing the privacy rights of celebrities and their children while engaged in personal or familial activities.

Despite the fact that it is reasonable for public figures to waive their families’ rights to privacy to a certain extent, the press should not be given absolute freedom to invade the privacy of celebrities’ children (who have not volunteered to become public figures) in every situation and at all times.<sup>256</sup> Instead, the lower privacy protections should be limited more strictly to when celebrities are engaged in conduct or an activity related to their source of notoriety, as suggested by the ECHR.<sup>257</sup> Given that most celebrities are not famous for any reason related to their children,<sup>258</sup> it is illogical to expose their children to lower levels of privacy in situations which do not relate to the celebrities’ reasons for being public figures.

For example, if an actor is famous for his theatrical performances, the waiver of his right to privacy should be extended only to situations that relate to the notoriety regarding his acting skills and promotion of his performances. Thus, if a celebrity attends a film premiere, press junket, or other activity related to the source of his fame, then there should be a more generous waiver of privacy for both his life and his child’s life while in attendance. When the actor is pushing his child in a stroller in Central Park,

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255. California courts already use a balancing test to determine newsworthiness, looking at the social value of the information and the degree of privacy intrusions. *See Crisci, supra* note 156, at 242. Thus, the courts only need to adjust the factors they already balance and include these additional factors in their analysis.

256. *See* 62A AM. JUR. 2D *Privacy* § 203 (2005) (stating that carelessly applying the waiver concept can lead to unjust results).

257. *Von Hannover*, 2004-VI Eur. Ct. H.R. ¶ 69.

258. Exceptions to this statement include Octo-Mom and Jon and Kate Gosselin (of *Jon and Kate Plus Eight*), who have become famous only because of their children.

however, there is nothing about the activity that he is engaged in that is related to his profession or the source of his fame. In fact, his activity is arguably one of the most personal and familial of all. Consequently, he should be found to be in a private domain where his child is not susceptible to being photographed by a paparazzo for profit.

Furthermore, increasing the breadth of personal privacy for celebrities by strengthening the protections for their children will not curtail the freedoms provided by the First Amendment because images of celebrity children are best characterized as low-value speech, and thus protection is not absolute.<sup>259</sup> The U.S. Supreme Court has stated that utterances of low-value speech are not an “essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>260</sup> The Court used this analysis in declaring that “fighting words,” words that cause emotional harm and are likely to cause a violent response, are unprotected by the First Amendment.<sup>261</sup> Similarly, paparazzi-obtained images of celebrity children engaged in normal conduct in ordinary circumstances unrelated to their parents’ sources of fame can be classified as low-value, because society’s interest in protecting the safety and privacy of children who have not chosen to be public figures outweighs the insignificant social value of information gathered by the paparazzi.<sup>262</sup>

#### B. IMPLEMENTING FIXED BUFFER ZONES AROUND AREAS THAT SHOULD BE SAFE AND FRIENDLY, EVEN TO CELEBRITY FAMILIES: SCHOOLS, PARKS, AND MEDICAL FACILITIES

Perhaps one of the simplest and most effective steps toward keeping celebrity children out of harm’s way, allowing them to maintain a level of normalcy throughout their childhoods and protecting their privacy interests, is to implement “buffer zones” in typically family- and child-oriented

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259. Madere, *supra* note 192, at 1656 (arguing that information gathered by the paparazzi should be considered low-value speech, and as such is of slight social value when weighed against the strong interests in protecting safety and privacy). *But see id.* at 1656 n.107 (citing a contradictory case, *Stephano v. News Group Publications, Inc.*, 64 N.Y.2d 174 (1984), which held that the newsworthiness exception “applies not only to reports of political happenings and social trends . . . , but also to news stories and articles of consumer interest including developments in the fashion world”).

260. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569–70, 572–73 (1942) (holding that a Jehovah’s Witness’s speech denouncing other religions as a “racket” and calling one listener “a damned Fascist” and “damned racketeer” consisted of “fighting words” that were not protected by the First Amendment).

261. *Id.* at 572.

262. *See* Madere, *supra* note 192, at 1656 (applying similar reasoning in concluding that all information gathered by the paparazzi should be considered low-value speech).

locations, such as schools, parks, and medical facilities. Buffer zones are created by injunctions that prohibit a particular free-speech activity within a certain distance of a particular person or location. Although the Supreme Court has struck down floating buffer zones (which “float” along with a moving object such as a person or vehicle) as unconstitutional, it upheld the use of fixed buffer zones (which surround a stationary, permanent location) in *Schenck v. Pro-Choice Network*.<sup>263</sup>

In determining the constitutionality of the speech-free buffer zones in *Schenck*, the Court used a balancing test to weigh “whether the challenged provisions . . . burden no more speech than necessary to serve a significant government interest,”<sup>264</sup> and decided that with regard to fixed buffer zones, the government interests outweighed those of the First Amendment. The government interests the Court emphasized included “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services.”<sup>265</sup>

Similarly, in the case of paparazzi and photographing celebrity children, the government interest in keeping schools, parks, and medical facilities safe for families and children seems to outweigh the interest in freedom of the press and free speech. Like in *Schenck*, the government has an interest in maintaining public safety and order by ensuring that parents and their children (regardless of notoriety) are kept out of harm’s way while they are at these important, family-oriented locations—walking their children through school parking lots to their classrooms, helping them down slides at the park, or taking them to medical appointments. This goes hand in hand with an interest in promoting the free flow of traffic, which is impeded by paparazzi in their cars and on sidewalks and crowding in herds at these locations to snap close-ups of celebrities with their children, which often causes paparazzi to be unaware of noncelebrity bystanders who they are shoving aside to get these valuable shots. Further, the Court’s emphasis

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263. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377, 380 (1997). *Schenck* resulted from a challenge to a federal district court injunction restricting antiabortion protestors from approaching people or demonstrating outside of an abortion clinic. *Id.* at 366–67, 370. Although the Court declared that the injunction could not prohibit protestors from approaching individuals or vehicles outside of the clinic through floating buffer zones, it upheld a fifteen-foot fixed buffer zone surrounding the clinic. *Id.* at 377, 380. The Court reasoned that the restriction was too broad because it restricted “classic forms of speech,” such as handing out material and commenting on a matter of public concern on public sidewalks, which is a traditional public forum. *Id.* at 377.

264. *Id.* at 372 (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994)).

265. *Id.* at 376. Regarding public safety, the Court noted that the district court properly considered the public safety concerns arising from the interactions between cars and protestors creating a dangerous situation. *Id.* at 375.

on protecting one's ability to seek pregnancy-related medical services without interference can be applied to buffer zones around medical facilities. All individuals, whether celebrities or not, should be free to seek medical services without aggressive paparazzi getting in their way. On the First Amendment side of the scale, paparazzi have alternative ways of capturing images of celebrities in other public locations, and if celebrities choose to bring their children with them to these non-buffer zone locations, the paparazzi may be able to take their pictures.

In 2009, the City of Santa Monica, home to many Los Angeles-based celebrities and their families, began discussions through its city council regarding the implementation of buffer zones around the city's medical facilities, hospitals, and schools, including the First Presbyterian Nursery School, attended by Meg Ryan's son and by the three-year-old daughter of actress Jennifer Garner and her husband, actor Ben Affleck.<sup>266</sup> A video posted on the Paparazzi Reform Initiative's Web site makes it clear that the paparazzi have created a dangerous, circus-like environment not only for the celebrities and their pupil children, but also for other parents and their children who attend the school.<sup>267</sup> Parents have complained of feeling trapped, being verbally and physically assaulted, having their children nearly trampled by the paparazzi, and seeing paparazzi climb up a fence to take pictures of celebrity children on the playground.<sup>268</sup>

While fixed buffer zones in these locations should be upheld, it is unlikely that the paparazzi could be prohibited from using image- and sound-enhancing devices from outside of a buffer zone to photograph celebrities and their children within the bounds of this zone, or that floating buffer zones would be found constitutional, based on a *Schenck* balancing test. The main government interests that could be balanced against the

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266. See Hall, *supra* note 240; Melody Hanatani, *Council to Examine Protecting Children from Paparazzi*, SANTA MONICA DAILY PRESS, June 9, 2009, available at [http://www.smdp.com/Articles-c-2009-06-08-59873.113116\\_Council\\_to\\_examine\\_protecting](http://www.smdp.com/Articles-c-2009-06-08-59873.113116_Council_to_examine_protecting). This problem with paparazzi invading the areas surrounding schools attended by celebrity children is not limited to California. Golfer Tiger Woods and his then-wife were compelled to issue an apology letter to the parents of children who attended their daughter's school in Florida after intense media scrutiny following his infidelity scandal led the paparazzi to swarm around the school on a daily basis. *Tiger Woods Apologizes to Pre-School Parents*, TMZ (Feb. 23, 2010, 8:17 AM), <http://www.tMZ.com/2010/02/23/tiger-woods-apologizes-to-pre-school-parents/>.

267. *Featured Video: Santa Monica City Councilman Working to Protect Kids from Paparazzi*, PRI (June 10, 2009), <http://www.paparazzi-reform.org/video/> (describing the "intolerable situation" at the Santa Monica preschool as described by noncelebrity parents).

268. See Hall, *supra* note 240 (quoting one parent whose son was nearly trampled, and another who had to file a police report against a paparazzo who hit him in the face with a camera); Hanatani, *supra* note 266 (describing the scene at the preschool and detailing parental complaints).

burden on free speech with regard to buffer zones around schools, parks, and medical facilities would be ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks surrounding the areas, protecting property rights, protecting access to medical services, and protecting the privacy of celebrity children (although the extent of this protection given their status as a public figure's child has not been clearly defined). Thus, in order to pass the constitutional analysis the Court used in *Schenck*, the relevant government interests would need to outweigh the burden on free speech. The use of telephoto lenses to capture images of a celebrity child playing over fifteen feet away would likely alleviate many of the safety concerns the government would focus on, such as running over children as they walk to meet their parents, pushing, shoving, harassing, crowding, and paparazzi screaming profanities at them in order to get their attention. Furthermore, given the Court's unwillingness to allow "broad" floating buffer zones because the government interests were less important when weighed against the First Amendment, a floating buffer zone protecting a particular celebrity or a particular celebrity's child from being photographed by the paparazzi would likely be struck down (and found impractical).<sup>269</sup>

A school, park, or medical facility's ability to enforce the buffer zone may also present practical problems. Hiring security or involving local law enforcement could prove not only costly, but also would likely be challenged by individuals who do not agree with what they see as a wasteful use of limited government resources.<sup>270</sup> Further, how would a media outlet be able to tell whether the photographs were taken in the prohibited buffer zone? Given the high level of involvement that would be required by local governments to meet the unresolved challenges of enforcing the buffer zones, these restrictions should be created and

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269. When a similar idea coined the "Britney Law" (after performer Britney Spears) was proposed in Los Angeles in 2008, both local law enforcement and paparazzi questioned the city's ability to enforce the floating, six-foot personal safety zone. *L.A. Police Chief Disses Proposed "Britney Law,"* CNN.COM (Aug. 1, 2008), <http://edition.cnn.com/2008/CRIME/08/01/paparazzi.crackdown/index.html> (quoting Los Angeles Police Chief William Bratton arguing that the law would be difficult to enforce, and quoting paparazzo Nick Stern suggesting that every celebrity would need a police officer chaperone with a six-foot tape measure to enforce the law). As effective as a floating buffer zone around a celebrity and his or her child might be in preventing harassment and invasion of personal space and privacy by the paparazzi, it is neither a practical and enforceable solution, nor one that we are likely to see anytime soon. See Loeb & Stern, *supra* note 36, at 14 n.19 (explaining that imposing floating buffer zones to solve the paparazzi problem is unlikely to survive First Amendment scrutiny).

270. See Typical, Comment to *Paparazzi "Buffer Zone" Around Preschools Is Considered*, L.A. TIMES (June 10, 2009, 8:52 PM), <http://latimesblogs.latimes.com/lanow/2009/06/paparrazi-buffer-zone-at-santa-monica-preschools-considered.html> (arguing that celebrities should move out of Los Angeles "instead of draining government resources to service [their] needs").

implemented on a more local (rather than federal) level.

Buffer zone regulations can be considered content-neutral laws that have only incidental effects on First Amendment freedoms. Thus, as long as they pass intermediate scrutiny under the content-neutral time, place, or manner test, they will be found constitutional.<sup>271</sup> To satisfy intermediate scrutiny, the buffer zones must (1) be supported by a significant government interest, (2) be narrowly tailored to that interest, and (3) leave open ample alternative channels of communication.<sup>272</sup>

Regulations imposing buffer zones around schools, parks, and medical facilities satisfy the intermediate scrutiny requirements. First, they are supported by significant government interests in maintaining public safety and order, property rights, freedom to seek medical services, and individual rights to privacy. Second, they are narrowly tailored to serve these interests because they affect only a small area (such as fifteen or twenty feet surrounding a particular location) and a very narrow category of locations. The buffer zones do not prohibit photographs of celebrity children from being taken anywhere outside of the limited radius surrounding a school, park, or medical facility. They do not prohibit anyone from entering the buffer zone; they prohibit only the conduct of capturing an image within this area. Third, the buffer zones leave open ample alternative channels of communication, given that paparazzi may still take photographs in many other public locations. These restrictions require only that images be gathered away from these very familial establishments where the risks of endangering families and children are highest. Thus, since buffer zones pass intermediate scrutiny, they should be upheld as reasonable regulations on the ways that the paparazzi may gather information and photographs, and should be implemented in paparazzi-infested geographical areas, such as Los Angeles.

## VI. CONCLUSION

Only time will tell whether California's 2009 amendment to the Anti-Paparazzi Act has enough bite to create a sufficient financial deterrent and rein in the wild paparazzi. Although the new legislation is a step in the right direction, it may not break down all of the barriers that celebrities face in proving violations of the statute and holding the paparazzi liable for their "aggressive intimidation-style tactics."<sup>273</sup> Ultimately, the government

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271. See Madere, *supra* note 192, at 1661–62.

272. See *supra* note 188.

273. See Vance, *supra* note 26, at 118.

should approach the persistent paparazzi problem from a new angle. By applying the ECHR approach—adopting an equitable balance between the right to privacy and freedom of expression in assessing a paparazzo’s liability for photographing familial situations, and narrowing the newsworthy standard with regard to celebrity children—courts can more adequately protect important government interests, such as maintaining safety and order for some of the most vulnerable members of society, children. Additionally, implementing fixed buffer zones around schools, parks, and medical facilities (locations where neither celebrities nor noncelebrities should have to fear for their physical safety) will promote these governmental and societal interests.

Although many of us find paparazzi actions abhorrent and almost inhumane, most of us would admit that this is a “moral shroud under which we try to hide our guilty pleasures.”<sup>274</sup> Considering that significant financial gain serves as the major incentive for paparazzi to stalk and hound celebrities and their children, it seems likely that if there were no longer a public demand for photos of celebrity children, there would no longer be a problem.<sup>275</sup> As individuals who value our own privacy rights and the ability to keep our own families safe, we must ultimately acknowledge the personal and societal costs of paparazzi activities, and expunge the value and attention we place on images taken through intimidating and frightening conduct, especially with regard to images of children. If we do not collectively take action to protect all citizens, then we may have to face the reality that we as a society are responsible for yet another preventable tragedy for a beloved celebrity, or for an unknown blameless bystander.

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274. HOWE, *supra* note 2, at 18.

275. See Madere, *supra* note 192, at 1657 (arguing that “[t]he paparazzi’s central purpose is . . . to ‘make a buck’”); Legal, *supra* note 236 (arguing that if the public took away the paparazzi’s opportunity for financial gain, they would stop hanging in trees trying to take pictures of a celebrity mother carrying her newborn baby).

