

# BREAKING NEWS AND BREAKING THE LAW: REI CRIMINALIZATION OF PAPARAZZI AND THE INTENT TO PHOTOGRAPH

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## I. INTRODUCTION

Today's society is consumed by an unhealthy fascination with celebrities, more now than ever before.<sup>1</sup> Celebrity culture is pervasive;<sup>2</sup> the public wants to have a piece of celebrities and read about them again and again.<sup>3</sup> To feed society's insatiable appetite for celebrity stories, paparazzi<sup>4</sup> battle to meet the demand—and collect handsome paychecks for their

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1. See Jo Piazza, *Americans Have an Unhealthy Obsession with Celebrities*, HUFFINGTON POST (Mar. 28, 2012), [http://www.huffingtonpost.com/jo-piazza/americans-unhealthy-obsession-with-celebrities\\_b\\_1385405.html](http://www.huffingtonpost.com/jo-piazza/americans-unhealthy-obsession-with-celebrities_b_1385405.html).

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

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

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

*Id.*

4. Merriam-Webster defines "paparazzo" (plural: paparazzi) as "a freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs." *Paparazzo*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/paparazzo> (last visited Oct. 21, 2016). The term originated from the name of a tabloid photographer character in Federico Fellini's 1959 film *La Dolce Vita*. See PETER BONDANELLA, *THE FILMS OF FEDERICO FELLINI* 68 (2002);



determine individual negligence and liability, nine manslaughter charges against photographers in France were thrown out, although three photographers were fined “a symbolic amount” of one euro each for the invasion of privacy.<sup>17</sup>

Following Diana’s death, the public and celebrity outcry against paparazzi escalated.<sup>18</sup> In response, more legislation was enacted specifically to curb paparazzi.<sup>19</sup> Actor George Clooney condemned the media by proclaiming, “You’ve deflected responsibility. Yet I wonder how you sleep at night. You should be ashamed! I watch as you scramble for high ground, take your position on CNN saying there is a market for this and you are just supplying the goods.”<sup>20</sup> He urged the public, “Do not purchase your news. Do not use tabloids as a source. You define the difference between tabloid and legitimate news.”<sup>21</sup>

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

Despite the laudable intentions of anti-paparazzi legislation, we must also carefully balance those interests with the First Amendment of the United States Constitution. The First Amendment prohibits the government<sup>22</sup> from “abridging the freedom of speech, or of the press.”<sup>23</sup> Because of the value and benefits that free speech contributes to our society at large,<sup>24</sup> it is imperative to carefully consider and scrutinize laws that inhibit speech.

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









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

The only difference between committing an infraction under sections 21701, 21703, or 23103 and committing a misdemeanor under section 40008 is the intent to capture a photograph or recording of someone for a commercial purpose.<sup>62</sup> Focusing on the state of mind of paparazzi as the basis for punishment is a potentially fatal mistake in the statute.<sup>63</sup> A photographer rushing to the scene of a disaster or another newsworthy event for a commercial purpose would face harsher punishment for his reckless driving than would an average citizen who was driving recklessly with a more sinister intention, such as driving to or from a murder or bank robbery.<sup>64</sup>

The general concerns about safety and violations of traffic laws are already addressed through underlying legislation.<sup>65</sup> A person can be guilty of driving recklessly without taking photographs. A person can take photographs without violating section 40008. But a person cannot violate section 40008 without taking photographs<sup>66</sup>—and it is simply that intent to take photographs that makes all the difference between facing an infraction or facing a misdemeanor.

A photographer who violates traffic laws still faces liability for those actions, as would any private citizen who was not in pursuit of photographs for a commercial purpose.<sup>67</sup> The liability for the underlying reckless driving violations would nonetheless remain: the fact that someone is engaged in

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58. CAL. VEH. CODE § 40008(a)-(b) (West 2014) ("any person who violates Section 21701, 21703, or 23103").

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

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

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

62. See CAL. VEH. CODE § 40008 (West 2014).

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

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

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

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

67. See *supra* note 65.



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newsgathering does not excuse any crimes or torts committed during that newsgathering process.<sup>68</sup>

A. *The Press and the Law*

The press is not immune from regulation and prosecution, and a publisher “has no special immunity from the application of general laws.”<sup>69</sup> The Fourth Circuit case of *Food Lion, Inc. v. Capital Cities/ABC, Inc.*<sup>70</sup> is a popular illustration of the lack of newsgathering privilege. Reporters from television network ABC went undercover as job applicants (soon becoming employees) to get inside a Food Lion grocery store and investigate allegations of unsanitary meat-handling processes.<sup>71</sup> The reporters obtained about forty-five hours of hidden camera footage that revealed serious mishandling and treatment of meat for sale.<sup>72</sup>

requiring the press to act within the limits of the law.<sup>77</sup> A First Amendment problem arises, however, when a regulation is instead directed at suppressing free expression.

*B. First Amendment Scrutiny*

The *O'Brien*<sup>78</sup> test is one standard with which to gauge the constitutionality of anti-paparazzi statutes.<sup>79</sup> This test states that, in the case of “speech” and “nonspeech” elements being combined in the same conduct, a “sufficiently important” governmental interest in regulating nonspeech elements can justify “incidental” limitations on free speech.<sup>80</sup>

The *Minnesota Star*<sup>87</sup> test requires that differential treatment of the press be justified by a compelling interest that cannot be achieved without this differential treatment.<sup>88</sup> Justice O'Connor stated for the majority in *Minnesota Star* that "differential treatment, *unless justified by some special characteristic of the press*, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."<sup>89</sup>

The Court of Appeal noted that "the legislative history confirms that the Legislature was primarily concerned with regulating the paparazzi's conduct" by focusing on "the special problems caused by the aggressive, purposeful violation of traffic laws while targeting particular individuals for personal gain."<sup>90</sup> However, "it is irrational to suggest that a more compelling need exist to prohibit harassment by individuals working for profit than harassment by an overly zealous or obsessive fan."<sup>91</sup> Indeed, fan-led pursuits and harassment—done for personal desires, not commercial or financial gain—pose a serious, som



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protect the overriding public interest.”<sup>107</sup> The public interest in and importance of the daily activities of Onassis, a public figure who was frequently the subject of news coverage, was *de minimis*.<sup>108</sup> The court found that Galella’s actions “went far beyond the reasonable bounds of news gathering,”

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

Celebrity parents have been vocal with their concerns about the

## 2. Civil Liability

On September 30, 2014, the California governor signed two additional paparazzi reform bills into law: Assembly Bill 1356 and Assembly Bill 1256.<sup>124</sup> These were followed by another bill about a year later.<sup>125</sup>

### *a. Stalking Reform Bill*

California Assembly Bill 1356 (hereinafter referred to as the Stalking Reform Bill) amended the California Civil Stalking Law.<sup>126</sup> The previous version of the law held a defendant liable for stalking when

he or she engaged in a pattern of conduct intended to follow, alarm, or harass the plaintiff, that resulted in the plaintiff reasonably fearing for his or her safety, or the safety of an immediate family member, and the defendant has either made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or that of an immediate family member or has violated a restraining order, as specified.<sup>127</sup>

The assembly bill proposed adding the concept of “surveillance” to the law’s proscribed conduct.<sup>128</sup> The bill would also permit, as an alternative to a plaintiff reasonably fearing for his or her safety, a showing that the conduct reasonably resulted in the plaintiff reasonably suffering “substantial emotional distress.”<sup>129</sup> The Stalking Reform Bill amended section 1708.7 of the Civil Code.<sup>130</sup>

### *b. Buffer Zone Bill*

California Assembly Bill 1256 (hereinafter referred to as the Buffer Zone Bill) created privacy buffer zones by expanding the definition of “physical invasion of privacy.”<sup>131</sup> The previous version of the law provided that a person was liable for physical invasion of privacy when that person

knowingly enters onto the land of another person without permission or otherwise commits a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound

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

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

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

127. *Id.*

128. *Id.*

129. *Id.*

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

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

recording, or other physical impression of the plaintiff engaging in a personal or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.<sup>132</sup>

The assembly bill proposed removing the language “in order to physically invade the privacy of the plaintiff” and proposed including the plaintiff’s “private” activities in addition to the “personal or familial activit[ies]” for both physical and constructive invasions of privacy.<sup>133</sup> The Buffer Zone Bill amended section 1708.8 of the Civil Code.<sup>134</sup>

*c. Drone Amendment*

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

A physical invasion of privacy is now defined as the knowing entry “onto the land *or into the airspace above the land* of another person without permission . . . in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity”<sup>138</sup> when the invasion “occurs in a manner that is offensive to a reasonable person.”<sup>139</sup> A constructive invasion of privacy occurs

when the person attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, *regardless of whether there*

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132. *Id.*

133.



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

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