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# RESTRICTIONS AGAINST PRESS AND PAPARAZZI IN CALIFORNIA: ANALYSIS OF SECTIONS 1708.8 AND 1708.7 OF THE CALIFORNIA CIVIL CODE

Joshua Azriel\*

## ABSTRACT

In 2014 the California legislature passed into law updates to two parts of the state’s civil code aimed at protecting the privacy rights of all residents, notably celebrities. Two sections of the state’s civil code were amended to place limits on how the paparazzi can intrude on celebrities’ lives. Section 1708.8 provides protection for anyone’s privacy. Section 1708.7 limits harassment activities of anyone—including paparazzi—who stalks victims. This article analyzes both laws from a First Amendment perspective. It argues that several of the laws’ restrictions on the press regarding invasion of privacy and harassment are constitutional. Yet, the specific provisions aimed at the publication rights of the media are content-based restrictions and presumptively unconstitutional. The article also argues that the state legislature and courts need to clarify 1708.7’s anti-harassment provisions for clarity.

## INTRODUCTION

In the 1960s and 1970s, self-claimed “paparazzo” photographer Ron Galella used a simple film camera to build a career around his obsessive photos of Jacqueline Kennedy Onassis and her family. Onassis and the Secret Service sued him for invasion of privacy after he physically placed himself in front of the former First Lady and her children to photograph them.<sup>1</sup> In two separate court cases, Galella unsuccessfully argued that he had a First Amendment freedom of the press right to photograph Onassis.<sup>2</sup> A federal appellate court judge granted a physical zone of privacy for Onassis and her children.<sup>3</sup>

The court order protected her from “any blocking of her movement in public places and thoroughfares,” and her children were guaranteed the right

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<sup>1</sup> Onassis filed a complaint in 1973 alleging Galella violated the New York Civil Rights Act §§ 50, 51 laws by violating her privacy.

<sup>2</sup> See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

<sup>3</sup> *Id.* at 998. Onassis was given a 25-foot protective zone from Galella and her children were provided 30 feet.

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to enter “the children’s schools or play areas.” Further, it protected Gallela from “taking any action which could reasonably be foreseen to harass, alarm, or frighten the children.”<sup>4</sup> This was a legal victory for Onassis in an earlier era, well before our current, online celebrity-obsessed culture. Today, paparazzi use advanced photo and video technology to obtain that one photo or video clip to sell for thousands of dollars. Despite Onassis’s legal victory, the paparazzi have found ways to continue to physically impede celebrities’ movements and stifle bystanders. While not often discussed, the public is also inconvenienced by paparazzi action in the quest for celebrity photos and video.

In retrospect, the plight of Jackie Onassis was merely a taste of what was to come with respect to paparazzi culture in the United States. In our modern day paparazzi culture, it is not just the one photographer celebrities need to fear but, instead, a hoard of them. There are numerous websites and magazines devoted to providing the public with photos of celebrities such as the Kardashian-Jenner family, Justin Bieber or Rebel Wilson.<sup>5</sup> The paparazzi are a million-dollar industry.<sup>6</sup> One photographer can earn tens of thousands of dollars from just one photo of an in-demand celebrity.<sup>7</sup> Websites such as *TMZ.com* pay informants around Hollywood to keep them apprised of celebrity whereabouts.<sup>8</sup>

Celebrities in California have testified before the state legislature in recent years requesting that officials pass laws protecting both their personal privacy interests, and those of their children, from the paparazzi’s physical intrusion on their lives. In 2013, Jennifer Garner and Halle Berry were instrumental in persuading the legislature to take action in tightening state privacy laws.<sup>9</sup> Both testified that the paparazzi should not be allowed to follow their children, who live out of the public eye. Berry stated her daughter feared going to school due to the daily presence of paparazzi.<sup>10</sup>

In 2016 Jennifer Aniston wrote a Huffington Post article about her daily encounters with “dozens of aggressive photographers” who stake out her home.

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<sup>4</sup> *Id.*

<sup>5</sup> See, e.g., Callie Mills, *The 20 Funniest Celebrity Paparazzi Pics of the Week That Will Make You LOL!*, CELEBUZZ (Nov. 28, 2015, 9:30 PM), <http://www.celebuzz.com/2015-11-28/the-20-funniest-paparazzi-pics-of-the-week-that-will-make-you-lol-11-28-15> [<https://perma.cc/6E2E-JBKC>].

<sup>6</sup> *The Paparazzi Industry*, THE PAPARAZZI REFORM INITIATIVE, <http://www.paparazzi-reform.org/industry> (last visited Apr. 14, 2017) [<https://perma.cc/8V2K-RVZR>].

<sup>7</sup> *Id.*

<sup>8</sup> Nicholas Schmidle, *The Digital Dirt: How TMZ Gets the Videos and Photos that Celebrities Want to Hide*, THE NEW YORKER (Feb. 22, 2016), <http://www.newyorker.com/magazine/2016/02/22/inside-harvey-levins-tmz>.

<sup>9</sup> Reuters, *California Bill Protecting Children of Celebrities from Paparazzi Signed into Law*, DAILY NEWS (Sept. 25, 2013 1:18 PM), <http://www.nydailynews.com/news/national/halle-berry-jennifer-garner-supported-california-bill-protecting-children-paparazzi-signed-law-article-1.1467192>.

<sup>10</sup> *Id.*

In the piece, she described the daily activities undertaken by the paparazzi in the hopes of landing a photograph of her and her husband.<sup>11</sup> Aniston complained that since the paparazzi are often outside her home, they put both of their lives in danger as well as the lives of any “unlucky pedestrians” nearby.<sup>12</sup> Similarly, in 2014, actress Kristen Bell and her husband Dax Shepard pointed out how paparazzi were following them and their newborn daughter. Bell used her Twitter account<sup>13</sup> to voice her complaints, calling the paparazzi “hunters” and “predators.”<sup>14</sup> She staked a First Amendment argument against paparazzi by retweeting a follower’s support: “The Founding Fathers could never’ve [sic] anticipated such misuse of the #FirstAmendment. #PhotographersGoneWild #Pedorazzi.”<sup>15</sup>

However, while many celebrities say they are horrified by the actions of the paparazzi, the modern era has also seen the rise of those who embrace and even exploit the paparazzi in the pursuit of fame. For example, the Kardashian-Jenner family reflects a unique aspect of American culture, one in which anyone can aspire to fame. Some celebrities, such as those who appear on reality programs, rely on the paparazzi to promote their own brand as a celebrity. According to historian Charles Ponce de Leon, in early American history, individuals sought fame and notoriety: “Those aspiring to fame . . . could ‘author’ themselves, creating public personas. . . .”<sup>16</sup> The Kardashian-Jenner family is a modern-day reflection of Ponce de Leon’s analysis of fame-seekers as witnessed throughout American history; they are well aware that the paparazzi trail them, and the family has a symbiotic relationship with them. Paparazzo Gavin Von Karls believes Kim Kardashian’s full-time profession is appearing on the covers of celebrity magazines: “This is her job too. What is she in every week? The tabloids. She doesn’t act, she doesn’t sing. She has a reality show but what she is in every week is the tabloids.”<sup>17</sup>

Nevertheless, the Kardashian-Jenner family remains something of an anomaly. Overall, paparazzi activity is negatively portrayed and perceived in California. Beginning in 1998, the California legislature took an active approach by limiting the power of the paparazzi to invade peoples’ lives.<sup>18</sup> In the last few years, updated versions of these laws have focused on banning the

<sup>11</sup> Jennifer Aniston, *For the Record*, HUFFINGTON POST (July 12, 2016, 4:46 PM), [http://www.huffingtonpost.com/entry/for-the-record\\_us\\_57855586e4b03fc3ee4e626f](http://www.huffingtonpost.com/entry/for-the-record_us_57855586e4b03fc3ee4e626f).

<sup>12</sup> *Id.*

<sup>13</sup> Kristen Bell’s twitter handle is @IMKristenBell.

<sup>14</sup> Maria Puente, *Celebs Push Back Against the Paparazzi*, USA TODAY (Mar. 28, 2014, 4:01 PM), <http://www.usatoday.com/story/life/people/2014/03/22/celebs-push-back-against-the-paparazzi/6186163>.

<sup>15</sup> *Id.*

<sup>16</sup> CHARLES L. PONCE DE LEON, *SELF-EXPOSURE: HUMAN INTEREST JOURNALISM AND THE EMERGENCE OF CELEBRITY IN AMERICA 1890–1940*, 19 (2002).

<sup>17</sup> Morgan Spurlock, *Inside Man: Celebrity* (CNN television broadcast Apr. 13, 2014).

<sup>18</sup> See CAL. CIV. CODE § 1708.8 (1998).

use of drones and other advanced photo and video cameras in order to safeguard against the invasion of privacy of celebrities. These laws impose fines on both the paparazzi who sell the photos and the media companies who purchase them.

This article analyzes the 2014 updates to California's invasion of privacy laws, Sections 1708.8 and 1708.7 of the Civil Code, signed into law by Governor Jerry Brown.<sup>19</sup> It will examine whether the laws violate the First Amendment right to freedom of the press despite the California legislature and Governor's efforts to protect the privacy rights of individuals and their families, especially celebrities. This article will also analyze *Raef v. Superior Court of Los Angeles*, a California court decision that may provide legal guidance for implementing a safety zone from paparazzi.<sup>20</sup>

This article argues that the specific provisions of California's tort laws that focus on invasion of privacy and the use of technology are constitutionally permissible because they are content-neutral laws that focus on time, place, and manner restrictions. However, the elements of the laws that contain provisions against the media that include fines may not withstand First Amendment scrutiny. The parts of the laws directed specifically at the media could be interpreted as content-based and as an informal method of prior restraint, which would not pass the Supreme Court's strict scrutiny test, as delineated later in the article.

Part I of this piece will give a brief history of celebrity-protective privacy law in California, summarizing and analyzing scholarly theories proffered by everyone from Louis Brandeis to Tara Sattler. It will conclude with an explanation of current state of the law as it has been shaped by the 2014 amendments which gave us Sections 1708.7 and 1708.8, signed into law by Jerry Brown and referenced above. Part II will examine the constitutionality of these amendments. It will begin by analogizing California's privacy laws, as amended, to Section 40008 of the California Vehicular Code and *Raef v. Superior Court of Los Angeles*, which aims to limit media intrusions on drivers. It will look to the discussion of Section 40008 as a guide to discussing the constitutionality of Sections 1708.7 and 1708.8. It will then turn to a substantive analysis of the constitutionality of these amended sections.

## I. THE SCOPE OF CELEBRITY-PROTECTIVE PRIVACY LAW IN CALIFORNIA

### A. *Historical and Analytical Underpinnings*

The origin of privacy law dates back to 1890 when Samuel Warren and Louis Brandeis published an article urging the implementation of a right to privacy.<sup>21</sup> Warren and Brandeis pointedly criticized the media for encroaching

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<sup>19</sup> CAL. CIV. CODE, §§ 1708.7-08.7 (2014).

<sup>20</sup> *Raef v. App. Div. of Super. Ct.*, 193 Cal. Rptr. 3d 159 (2015).

<sup>21</sup> Samuel D. Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

on individuals' privacy rights: "Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops."<sup>22</sup>

Even as they were writing in the 19<sup>th</sup> Century, Warren and Brandeis' concern of an intrusive media extended to publications that concerned themselves primarily with gossip. As illustrated by the excerpt below, these concerns parallel today's criticisms against paparazzi. As they wrote:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.<sup>23</sup>

The newspaper gossip columns of the Warren and Brandeis' era recall our modern-day celebrity-focused television networks, cable shows, websites, Twitter feeds, and Facebook postings. Where society's curiosity was once satisfied with public retellings of private stories in the paper, the primary fodder for gossip hounds today takes the form of celebrity paparazzi photos. For these images there exists a huge market, as evidenced by the unlimited amount of content available on the vast number of gossip websites, including TMZ.com, Celebuzz.com, and eonline.com"

As the landscape of privacy intrusions continued to expand with the advent of technology and celebrity culture, so too did the relevant law and scholarship. For instance, in 1960, William Prosser, an expert in privacy law, outlined four areas of the modern day invasion of privacy tort: (1) intrusion on an individual's physical solitude or seclusion; (2) appropriation of one's name or likeness for financial benefit or harm; (3) public disclosure of private facts; and (4) placing someone in false light before the public.<sup>24</sup> Prosser's theories are widely known as being highly influential on state laws, and while no evidence of a direct link exists, as it was originally drafted in 1998, California Civil Code Sections 1708.7<sup>25</sup> and 1708.8<sup>26</sup> focus on two of those torts: intrusion and disclosure of private facts. The laws' focus on the tort of intrusion is a means of limiting the disclosure of private facts about a celebrity's life and family.

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<sup>22</sup> *Id.* at 195.

<sup>23</sup> *Id.* at 195–96.

<sup>24</sup> See generally William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

<sup>25</sup> See CAL. CIV. CODE § 1708.7 (2014) (protecting the public from harassment.)

<sup>26</sup> See CAL. CIV. CODE § 1708.8 (2014) (updating the invasion of privacy laws to include the use of advanced technology such as camera lenses and drones to capture photos of private activities).

Since the writings of Warren, Brandeis and Prosser, most contemporary legal commentary focused on paparazzi and the apparent need for California laws to protect privacy were published before Governor Jerry Brown signed updated amendments to Sections 1708.8 and 1708.7 of the Civil Code into law in 2014. In 2010, Christina Locke analyzed California's anti-paparazzi laws as they have developed since 1998<sup>27</sup> and noted that an earlier version of Section 1708.8 prevented paparazzi from using enhanced cameras or video recorders to invade celebrities' privacy.<sup>28</sup> In 2005 the California legislature expanded 1708.8 to include fines for any photos sold that clearly were taken as a result of paparazzi assaulting celebrities.<sup>29</sup>

A provision for punishing media outlets with fines if they publish these photos was also included in the law.<sup>30</sup> Locke correctly noted that this runs afoul of the First Amendment because the Supreme Court ruled in *Bartnicki v. Vopper*<sup>31</sup> that media outlets are protected from liability when publishing information originally obtained illegally.<sup>32</sup> She noted that the *Bartnicki* Court relied on *Florida Star v. B.J.F.*<sup>33</sup> and *Smith v. Daily Mail*,<sup>34</sup> two cases in which the Court ruled that the media had a First Amendment right to republish information obtained legally even if that information invaded someone's privacy.<sup>35</sup>

Another legal perspective on paparazzi press rights was provided in 2011 by scholar Cameron Danly. She suggested a two part test to protect celebrity privacy while also respecting First Amendment rights of the press.<sup>36</sup> The first part of the test asks whether there is any overt interference with a person's independence, which is defined as their physical ability to conduct their lives.<sup>37</sup> The second part of the test determines whether the person's independent movements are a matter of public interest.<sup>38</sup> Danly notes that an invasion of privacy could be found when there is physical interference with someone's ability to conduct their day-to-day life, or if the celebrity's movements are not

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<sup>27</sup> Christina M. Locke, *Does Anti-Paparazzi Mean Anti-Press? First Amendment Implications of Privacy Legislation for the Newsroom*, 20 SETON HALL J. SPORTS & ENT. L. 227 (2010).

<sup>28</sup> *Id.* at 237.

<sup>29</sup> *Id.* at 240.

<sup>30</sup> *Id.*

<sup>31</sup> *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>32</sup> Locke, *supra* note 27, at 241.

<sup>33</sup> *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (upholding the right of the Florida Star newspaper to publish the identity of a sexual assault victim because the newspaper obtained her identity in a legal manner, from the newspaper's public file).

<sup>34</sup> *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (ruling that the media could publish the identity of a minor involved in a shooting even though the media obtained the name through investigative reporting of witnesses).

<sup>35</sup> Locke, *supra* note 27, at 242.

<sup>36</sup> Cameron Danly, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. U. L. REV. 161 (2011).

<sup>37</sup> *Id.* at 170.

<sup>38</sup> *Id.*

considered to be in the public interest. If a celebrity must use a back door of a restaurant to exit or enter, employ decoy vehicles to confuse the paparazzi, or wear a wig to move about in public, then there is interference with that person's independence.<sup>39</sup> It would only be acceptable to interfere if such interference would be in the public interest. Danly admitted that defining the "public interest" is not easy, but a photo of a celebrity buying coffee at Starbucks may not qualify as public interest.<sup>40</sup>

In addition to a legal test on celebrity privacy, the idea of a paparazzi "free zone" in California was proposed by Tara Sattler in 2010.<sup>41</sup> She argued it is a content neutral approach to protecting celebrities from the physical intrusion often associated with the hoard of paparazzi. Similar to the physical protection Jackie Onassis received from the courts in 1973, she proposes that California law guarantees a physical space of movement for everyone, creating a "personal safety zone" between anyone and paparazzi.<sup>42</sup> Sattler defines this personal safety zone as several feet of physical space between the celebrity and any ensuing photographer.<sup>43</sup> In this way, the California legislature could determine the actual zone of privacy for its constituents.

Sattler argued this buffer zone would not violate the First Amendment.<sup>44</sup> It would be both content neutral and narrowly tailored to meet a specific public need (physical safety for all Californians), and not more restrictive than necessary.<sup>45</sup> She pointed out that the U.S. Supreme Court in *Hill v. Thomas* upheld a similar law 2000,<sup>46</sup> noting the Court's concern with the government's interest in public safety. This decision provides precedent for the California legislature to move forward with a physical zone of privacy law.

#### B. *Current Celebrity-Protective Privacy Laws In California—The Zone Of Privacy*

On September 30, 2014 Governor Jerry Brown signed into law two bills aimed at the paparazzi. While Section 40008 of the California Vehicle Code focused on keeping motorists safe from paparazzi activity, sections 1708.8 and

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See generally Tara Sattler, Comment, *Plagued by the Paparazzi: How California Should Sharpen the Focus on Its Not-So Picture Perfect Paparazzi Laws*, 40 SW. L. REV. 403 (2010).

<sup>42</sup> *Id.* at 415.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 416 (stating that the proposed law would be constitutional because: "(1) the paparazzi-free zone law is a content neutral law; (2) the paparazzi-free zone law is narrowly tailored to serve a significant government interest; and (3) the paparazzi-free zone law leaves open ample alternative means for communication").

<sup>45</sup> *Id.*

<sup>46</sup> See *Hill v. Thomas*, 530 U.S. 703 (2000) (ruling that a Colorado law that prohibited physical interference to any health clinic or hospital was constitutional because patients had eight feet of personal space on the property of a health care facility).



1708.7 of the state’s Civil Code were amended to enhance privacy protections of the state’s residents, including celebrities.

1. Section 1708.8

California Assembly Bill No. 2306 Section 1708.8, is aimed at the heart of paparazzi activities. It encompasses issues related to invasion of privacy stemming from the intrusion tort.<sup>47</sup> The law uses intrusion to criminalize capturing someone’s images (or images of that person’s family members) either in-person or with advanced photo technology; it also extends the tort of intrusion to employer-employee business relationships with regard to paparazzi.<sup>48</sup>

The law has two overall components: physical and constructive invasion of privacy. The physical invasion of privacy occurs when the “defendant commits a physical trespass in attempting to capture the image or recording.”<sup>49</sup> The constructive invasion is using technology when the in-person, physical intrusion is not possible, such as when “. . . the defendant captures the image or recording, without a physical trespass, through the use of a ‘visual or auditory enhancing’ device to capture an image or recording that could only have been obtained by a physical trespass in the absence of the device.”<sup>50</sup>

The constructive intrusion-based invasion of privacy crime occurs when victims are located on their property and engaged in “personal [or] familial activity.”<sup>51</sup> The law prohibits anyone—ostensibly the paparazzi—from using “any device” including drones to capture images from above private property. As the law states, it is illegal to violate one’s privacy “through the use of any device, regardless of whether there is a physical trespass . . .”<sup>52</sup>

<sup>47</sup> CAL. CIV. CODE § 1708.8 (2014).

<sup>48</sup> *Id.*

<sup>49</sup> CAL. CIV. CODE § 1708.8(1)(1) (2014). According to this part of the law, any form of advanced technology from telephoto lenses to heat-based infrared sensors to drones may not be used to impede on someone’s invasion of privacy on their property while engaged in “personal [or] familial activity.”

<sup>50</sup> *Id.*

<sup>51</sup> CAL. CIV. CODE § 1708.8(a) (2014) (“A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.”).

<sup>52</sup> CAL. CIV. CODE § 1708.8(1)(b) (2014). While not specifically mentioning the use of drone, this can be inferred because the law that

[a] person is liable for constructive invasion of privacy when the defendant 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 under circumstances in which the plaintiff had a reasonable expectation of privacy, *through the use of any device, regardless of whether there is a physical trespass, if this image, sound*

## 2. Section 1708.7

The second law that Governor Brown signed into law in 2014 was Assembly Bill No. 1356, Section 1708.7.<sup>53</sup> It does not have as many detailed provisions as Section 1708.8. On its surface, Section 1708.7 protects victims from harassment, but the law's verbiage could be interpreted to reduce the paparazzi's activities and their inherent First Amendment rights. Based on California's stalking tort, Section 1708.7 focuses on any alleged perpetrator who places a victim under near constant surveillance, as paparazzi often do.<sup>54</sup> Victims must provide evidence they were followed, harassed or placed under surveillance.<sup>55</sup> Additionally, victims must prove they feared for their own personal safety or their family's safety and, as a result, suffered from emotional distress.<sup>56</sup>

Meanwhile, the defendant must have made a "credible threat" either verbally or through actions such as reckless disregard for the victims or their family member's safety.<sup>57</sup> A credible threat is defined as a verbal, written or patterns of conduct via:

any action, method, device, or means, follows, harasses, monitors, surveils, threatens, or interferes with or damages the plaintiff's property, or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so

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*recording, or other physical impression could not have been achieved without a trespass unless the device was used.*

(Emphasis added.)

<sup>53</sup> CAL. CIV. CODE § 1708.7 (2014).

<sup>54</sup> CAL. LEG. COUNS. DIG. AB 1356 (2014). As discussed earlier in this article, celebrities such as Jennifer Aniston and Kristen Bell accused the paparazzi of constant surveillance.

<sup>55</sup> CAL. CIV. CODE § 1708.7(a)(1) (2014).

<sup>56</sup> CAL. CIV. CODE § 1708.7(a)(2)(A)-(B) (2014).

(A) The plaintiff reasonably feared for his or her safety, or the safety of an immediate family member. For purposes of this subparagraph, 'immediate family' means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household.

(B) The plaintiff suffered substantial emotional distress, and the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.

<sup>57</sup> CAL. CIV. CODE § 1708.7(a)(3)(A) (2014).

The defendant, as a part of the pattern of conduct specified in paragraph (1), made a credible threat with either (i) the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member, or (ii) reckless disregard for the safety of the plaintiff or that of an immediate family member. In addition, the plaintiff must have, on at least one occasion, clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct unless exigent circumstances make the plaintiff's communication of the demand impractical or unsafe.

as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.<sup>58</sup>

## II. PART II: ANALYZING THE CONSTITUTIONALITY OF CALIFORNIA'S CELEBRITY-PROTECTIVE PRIVACY LAWS

### A. *Raef V. Superior Court of Los Angeles and Section 40008—An Analytical Guide*

Since there have been no court decisions to date regarding sections 1708.8 and 1708.7 of the California Civil Code, the only state jurisprudence available on the legal limits placed on the media in pursuit of a photos and videos comes from the *Raef* decision. In 2015 in *Raef v. Superior Court of Los Angeles*, a state appeals court had to review the arrest of paparazzo photographer Paul Raef who was charged with violating Section 40008 of the California Vehicle Code for endangering motorists by pursuing a celebrity in a high speed vehicle chase to obtain a photo while driving.<sup>59</sup> Section 40008 of the California Vehicle Code is similar to Sections 1708.8 and 1708.7 because it targets potential physical actions by anyone, including the paparazzi.<sup>60</sup> The law criminalizes any reckless driving aimed at capturing an image for a commercial purpose.<sup>61</sup>

A California appeals court ruled that Section 40008 of California's Vehicle Code was constitutional and not an infringement of Raef's First Amendment rights.<sup>62</sup> Raef violated the law by driving recklessly in 2012 to capture images of singer Justin Bieber, who was also speeding on a California highway. He was arrested for willfully driving in disregard for the safety of other motorists with the intent of capturing a photo of Bieber for a "commercial purpose."<sup>63</sup> Raef argued that Section 40008 abridged his First Amendment rights as a member of the media disputing the court's ruling that the law was a content-based restriction. In 2012 a California trial court ruled for Raef, but the Appellate Division of the Los Angeles County Superior Court reversed in 2013 and convicted him.<sup>64</sup>

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<sup>58</sup> CAL. CIV. CODE § 1708.7(b)(2) (2014).

<sup>59</sup> See *Raef v. App. Div. of Super. Ct.*, 193 Cal. Rptr. 3d 159, 163 (2015).

<sup>60</sup> CAL. VEH. CODE § 40008 (2010).

[A]ny person who violates Section 21701, 21703, or 23103, with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose, is guilty of a misdemeanor and not an infraction and shall be punished by imprisonment in a county jail for not more than six months and by a fine of not more than two thousand five hundred dollars (\$2,500).

<sup>61</sup> *Id.*

<sup>62</sup> See *Raef*, 193 Cal. Rptr. 3d at 163.

<sup>63</sup> *Id.* at 162–63.

<sup>64</sup> *Id.*

In a second appeal by Raef, the Court of Appeal for California's Second Appellate District upheld the Los Angeles County Superior Court's decision. The court's three judge panel agreed that Section 40008 is not an infringement of press rights. They concluded that it is a time, place and manner law that focuses on the safety of California drivers and; therefore, not a content-based speech or press restriction.<sup>65</sup> In the decision, Judge Norman Epstein wrote the law is not aimed specifically at any media, including the paparazzi: "On its face, section 40008 is not limited to paparazzi chasing celebrities or reporters gathering news. Instead, the statute targets 'any person' who commits an enumerated traffic offense with the intent to capture the image, sound, or physical impression of 'another person' for a commercial purpose."<sup>66</sup> Epstein noted that the law's intent was not aimed at newsgathering activities.<sup>67</sup> The law applies to anyone who attempts to disrupt traffic to obtain images for commercial or private use.<sup>68</sup>

Raef also argued that Section 40008 burdens speech rights including members of the media who may speed on the roads to attend a breaking news story. The court disagreed. Judge Epstein stated that the law is narrowly tailored to keep drivers safe from anyone who may try to obtain photos while driving recklessly.<sup>69</sup> It is the physical act of taking photos or videos while driving that is a safety concern, and not the idea of gathering images.<sup>70</sup> The decision by the appeals court in 2015 provides some legal analysis of the constitutionality of Sections 1708.8 and 1708.7 of California's civil code and implementing a safety zone for pedestrians including limits on paparazzi.

#### B. *Analyzing Section 1708.8*

As noted above, Section 1708.8 is the newly-enacted section of the code that is aimed at the heart of paparazzi activities. It criminalizes the capture of someone's images undertaken via either a physical in-person intrusion or a constructive intrusion wherein the image or voice has been captured from private property without physical trespass but rather via the use of "any device," including drones. It extends this protection to family members of the targeted subject by specifying that constructive intrusion occurs when victims are located on their property and engaged in "personal or familial activity." Finally, it imputes liability on both individual paparazzi as well as in the context of an employer-employee relationship, such as when an individual paparazzo freelances for a celebrity gossip media outlet.

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<sup>65</sup> *Id.* at 167–68.

<sup>66</sup> *Id.* at 164–65.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 178.

<sup>70</sup> *Id.* at 179.

While the goal of protecting the privacy of families is laudable, this provision is problematic because the term “any device” is extremely vague, potentially encompassing technologies that the state does not have the right to regulate. For instance the California Assembly’s Floor Analysis prior to passage of the law referred to the potential use of a drone as a means of invading a subject’s privacy, stating that “a drone with a standard (as opposed to “enhanced”) camera or microphone could achieve the same (or even more detailed) images than could an enhanced device used from afar.”<sup>71</sup> However, California cannot legislate drone usage rules, even to protect someone’s privacy. The Federal Aviation Administration is the only federal agency that has jurisdiction over air space used for commercial purposes, and this includes the use of drones.<sup>72</sup> Additionally, any media organization in California that may want to use a drone must contract with a company who is licensed with the FAA<sup>73</sup> or seek a Section 333 exemption with from FAA to fly a drone.<sup>74</sup>

Section 1708.8’s definition of personal or familial activity is also problematic because it is vague and overbroad. It defines personal or family activity as any intimate details of a subject’s personal life, interactions among the subject’s family where there is a “reasonable expectation of privacy,” activities on the subject’s property, and “other aspects” of the subject’s private affairs.<sup>75</sup> Per-

<sup>71</sup> AB 2306, Assemb. Reg. Sess. 2013–2014 (Cal. 2014)

<sup>72</sup> See *Sovereignty and Use of Airspace*, 49 U.S.C. 40103 (2015) (stating that the United States Government has exclusive sovereignty of airspace of the United States, and the FAA has the authority to prescribe air traffic regulations on the flight of aircraft, including unmanned aircraft system, drones).

<sup>73</sup> FEDERAL AVIATION ADMINISTRATION, *Unmanned Aircraft Systems (UAS) Frequently Asked Questions* (2017), <https://www.faa.gov/uas/faqs/#fwb>.

<sup>74</sup> UAVUS, *Unmanned Aircraft Systems (UAS) FAQ* (2017), <http://uavus.org/unmanned-aircraft-systems-uas-faq>. Section 333 exemption:

allows the Secretary to determine which types of UAS, as a result of their size, weight, speed, operational capability, proximity to airports and populated areas, and operation within visual line-of-sight, do not pose a hazard to NAS users or to national security, and whether an airworthiness certificate or COA is required for operation. A Section 333 grant of exemption is required for any civil UAS operation that is not for hobby or recreational purposes.

*Id.*

<sup>75</sup> *Id. supra* note 52. For the purposes of this section, “private, personal, and familial activity” includes, but is not limited to:

- (A) Intimate details of the plaintiff’s personal life under circumstances in which the plaintiff has a reasonable expectation of privacy.
- (B) Interaction with the plaintiff’s family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy.
- (C) If and only after the person has been convicted of violating Section 626.8 of the Penal Code, any activity that occurs when minors are present at any location set forth in subdivision (a) of Section 626.8 of the Penal Code.
- (D) Any activity that occurs on a residential property under circumstances in which the plaintiff has a reasonable expectation of privacy.
- (E) Other aspects of the plaintiff’s private affairs or concerns under circum-

sonal activities and other aspects are not defined. Are *all* activities on personal property included in the law? Does this include activities that could be considered public and/or newsworthy such as a political event or neighborhood crime watch activity? What does “other aspects” of a subject’s private affairs mean? Is it an activity? These questions illustrate that 1708.8 is vague and may not withstand First Amendment scrutiny..

Section 1708.8’s punishment for invasion of privacy by using technology to gather images, commit assault, or use false imprisonment based on a “commercial purpose” is a fine between \$5,000 and \$50,000.<sup>76</sup> The commercial purpose provision of the law is problematic given the First Amendment’s prohibition on abridging the freedom of press. Under Section 1708.8, a commercial purpose is defined as “any act done with the expectation of a sale, financial gain, or other consideration.”<sup>77</sup> A commercial purpose can also include anyone who “directs, solicits, actually induces, or actually causes another person” to violate the first parts of the law.<sup>78</sup> This clearly implicates members of the paparazzi who sell their photographs to media outlets. Essentially, if a member of the paparazzi works full time for a media firm or is hired on a freelance basis, their production and sale of images for publication becomes a commercial purpose within the meaning of the statute. In this way, the statute ends up abridging the freedom of the press as media outlets become financially liable for the fines associated with the actions of the paparazzi, who are acting as their contracted employees.

The commercial purpose section of 1708.8 (1)(e) could be interpreted as content-based, where a court would then apply the strict scrutiny test to determine if it violates the First Amendment. The U.S. Supreme Court defines a content-based law as one where the government (local, state or federal) censors content it views unfavorably.<sup>79</sup> Laws that pass strict scrutiny must use the least restrictive means possible to ban the speech and advance a compelling government interest.<sup>80</sup> Section 1708.8’s imposition of fines on the media might not pass the strict scrutiny test as a less restrictive means of censoring speech. Punishing media companies with a financial fine based on what was published or broadcast based on the unknown actions of its employees or freelancers is a content-based restriction. The law imposes a restriction on media firms for publishing material that it has a constitutional right to receive and use.

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stances in which the plaintiff has a reasonable expectation of privacy.

<sup>76</sup> CAL. CIV. CODE § 1708.8(d) (2014).

<sup>77</sup> CAL. CIV. CODE § 1708.8(k) (2014).

<sup>78</sup> CAL. CIV. CODE § 1708.8(e) (2014).

<sup>79</sup> See *e.g.* *Texas v. Johnson*, 491 U.S. 397 (1989); *U.S. v. Eichman*, 496 U.S. 310 (1990). In both cases, the Supreme Court ruled that state and federal laws prohibiting the desecration of the American flag were content-based, an unconstitutional violation of the First Amendment’s free speech clause.

<sup>80</sup> ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION*, 71 (4th ed. 2014).

Previous U.S. Supreme Court decisions protect the media from publishing or transmitting any material that is initially collected illegally.<sup>81</sup>

Section 1708.8(1)(e) may also be an informal form of prior restraint. Fundamentally, prior restraint means that government determines certain materials cannot or should not be published. By imposing fines on the media for publishing images or audio recorded from a suspected invasion of privacy scenario, the California legislature chilled free speech and press coverage. While not an outright, overt form of prior restraint, California is endorsing, through a levying of fines, the kind of content it believes the public has the right to receive. This is a form of government restriction over the media.<sup>82</sup>

Under Section 1708.8(2) any plaintiff would have to prove “actual knowledge” that the media firm directed the paparazzi employee to break the law to capture a photo or record video.<sup>83</sup> In order for the media company to be fined, the law requires that the plaintiff show proof of actual knowledge by proving “awareness, understanding, and recognition,” obtained prior to the time the photo or video was sold to a media company.<sup>84</sup> In addition to actual knowledge, the plaintiff would have to prove that the paparazzi were compensated for the materials that are published.<sup>85</sup>

<sup>81</sup> See e.g. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

<sup>82</sup> See *Near v. Minnesota*, 283 U.S. 697 (1931) (outlining the components of government imposed prior restraint: government oversight of speech or publication; government chooses what speech or content is acceptable; and provides government with power to ban the content; and ruling that prior restraint is presumptively invalid except in an unusual circumstance such as war).

<sup>83</sup> CAL. CIV. CODE § 1708.8(f)(1) (2014).

The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold, or offered for sale the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subdivision (a), (b), or (c), and provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.

<sup>84</sup> CAL. CIV. CODE § 1708.8(f)(2) (2014). Actual knowledge means:

actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subdivision (a), (b), or (c).

The plaintiff shall establish actual knowledge by clear and convincing evidence.

<sup>85</sup> *Id.* The victim must prove that paparazzi were “provided compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.”



Overall, 1708.8(2) is a basic restriction against press activities conducted by any paparazzo and any media organization they work with. Punishment in the forms of financial fines reflect government displeasure over certain content. This section of the 1708.8 is a clear example of a content-based law restricting press-based speech.

C. *Analyzing Section 1708.7*

Meanwhile, as stated above, Section 1708.7 is ostensibly presented as an anti-harassment law but may end up targeting paparazzi's First Amendment rights through its specific verbiage. It is premised on California's anti-stalking law, and requires that victims provide evidence that they were followed, harassed, or placed under near constant surveillance, to the extent that they feared for their personal safety, the safety of their families, and suffered from emotional distress as a result. It also requires that the defendant has made a "credible threat" to the victim. The definition of "credible threat," delineated above, includes such actions as following, monitoring, and surveilling the victim via verbal, written, or electronic communication.

Paparazzi actions often include following, monitoring, and surveilling celebrities. Celebrity victims may view these actions as harassment, but a counter argument is that the paparazzi are simply reporting on the comings and goings of their subjects, even from a distance. Given this perspective, the law may be unconstitutional because it is overbroad and not narrowly tailored to physical threats of violence.

The law's prohibition against stalking someone using electronic communications includes cell phones and video cameras, the very devices often used by paparazzi.<sup>86</sup> However, celebrity-focused media operations such as *TMZ.com* could launch a First Amendment challenge to this aspect of the law by arguing that they have a right to keep tabs on celebrities whose lives are already in the public eye. *TMZ.com* founder, Harvey Levin, has stated that he believes the constant monitoring of celebrities is a newsworthy activity.<sup>87</sup> Previous court rulings often protect the media when it publishes a newsworthy story despite any perceived invasions of privacy by the media.<sup>88</sup>

The "Harvey Levins" of the world may also find another aspect of the law problematic. Section 1708.7 defines what it means to follow a subject. The law states it means to move "in relative proximity" to the victim and cannot

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<sup>86</sup> CAL. CIV. CODE § 1708.7(b)(3) (2014) ("Electronic communication device" includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers.").

<sup>87</sup> Nicholas Schmidle, *The Digital Dirt: How TMZ Gets the Videos and Photos that Celebrities Want to Hide*, THE NEW YORKER (Feb. 22, 2016), <http://www.newyorker.com/magazine/2016/02/22/inside-harvey-levins-tmz>.

<sup>88</sup> See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail* 443 U.S. 97 (1979); *Cox Broad. v. Cohn*, 420 U.S. 469 (1975).



include any “newsgathering conduct connected to a newsworthy event.”<sup>89</sup> In the 1960s and 1970s, Ronald Galella moved within proximity to Jackie Onassis and her family even after the court-approved restrictions against him.<sup>90</sup> Section 1708.7 does not provide a definition of newsworthy events and this adds a vague area to the law.

Another vague part of Section 1708.7 is the term “harass.” Per the statute, the term has been defined to encompass such actions as annoying, alarming, tormenting, or terrorizing the victim.<sup>91</sup> Moreover, with respect to any of these actions, the victim must prove that emotional distress resulted in order to reach the definition of harassment.<sup>92</sup> This presents a vague evidentiary standard for potential victims. For example, the actions of the paparazzi certainly “annoy” their subjects at times. But how would a celebrity victim prove emotional distress from being annoyed? This portion of the law is vague in that it does not provide a definition to terms such as annoy or alarm, creating an undue evidentiary burden on victims of such behaviors.

Section 1708.7 requires victims to prove they communicated with the plaintiff to stop these different forms of harassment.<sup>93</sup> This makes sense for anyone threatening physical harm to a victim. Yet, in the case of paparazzi, they are often told to stop their harassment. One way to address the harassment complaints is to determine once and for all whether paparazzi are considered reporters and, therefore, are reporting and producing newsworthy stories as defined by this statute. Harassment may then not apply to paparazzi activities.

It should be noted that California’s legislation includes a shield law in the state’s constitution. This law recognizes a member of the media as: “a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service. . . .”<sup>94</sup> A California appellate court even recognized the shield law as including online media sources who produce content.<sup>95</sup> If state courts recognize the works of *TMZ.com* and *celebuzz.com* as media, then Section

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<sup>89</sup> CAL. CIV. CODE § 1708.7(b)(4)(2014).

<sup>90</sup> *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

<sup>91</sup> CAL. CIV. CODE § 1708.7(b)(5)(2014).

‘Harass’ means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

<sup>92</sup> *Id.*

<sup>93</sup> CAL. CIV. CODE § 1708.7(a)(3)(A) (2014) (“the plaintiff must have, on at least one occasion, clearly and definitely demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct”).

<sup>94</sup> CAL. CONST. Art. 1 § 2(b) (2017).

<sup>95</sup> *O’Grady v. Super. Ct.*, 139 Cal. App. 4th 1423 (2006).

1708.7's anti-harassment measure simply may not apply to paparazzi. Clarification of 1708.7 is needed by either the state legislature or courts.

## CONCLUSION

*TMZ.com*'s founder, Harvey Levin, says that he runs a news operation, not a paparazzi firm.<sup>96</sup> If that is the case, his reporters, who often act as stereotypical paparazzi in how they pursue celebrity stories, could not be prosecuted under parts of Sections 1708.8 and 1708.7 of California's Civil Code discussed in this article. He could even argue that the laws are unconstitutional as written since they bar the physical activities his reporters engage in: recording, monitoring, and conducting surveillance on celebrities' activities. *TMZ* hires personnel to conduct these activities and pays informants who assist in gathering information.<sup>97</sup> If *TMZ* is considered a news operation, then these informants are the equivalent of paid freelance staff and are exempt under portions of these two laws.

As the analysis in the article shows, the specific provisions of California Civil Code Sections 1708.8 and 1708.7 that focus on the intrusion tort within privacy law are legal because they are content neutral focusing on time, place and manner regulations. The laws do not violate First Amendment rights of the press in a similar manner to how Section 40008 of California's Vehicle Code is also a time, place and manner restriction on the physical activities of the press.<sup>98</sup> Yet, the elements of the laws that do contain provisions against the media's publication rights may not withstand First Amendment scrutiny. Celebrity-focused media operations could argue that their conduct is based on celebrity news and, therefore, have a First Amendment right to pursue these stories.

Any attempt to place limits on the media poses a burden on the First Amendment's guarantee of free speech and press. Any law that restricts these rights must pass the Supreme Court's strict scrutiny test. The law must ban as little speech as possible while advancing a compelling government interest. Portions of Section 1708.8 of the California's Civil Code are content-based, and courts often strike down content-based laws.<sup>99</sup> It punishes the media with a fine for publishing a photo, video, or audio clip of a celebrity taken by someone (possibly paparazzi) who may or may not have invaded that celebrity's privacy via physical or technological means.<sup>100</sup> As previously noted, the media is protected when it publishes and broadcasts information it receives from third parties whether or not that third party obtained the information legally.

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<sup>96</sup> Schmidle, *supra* note 87.

<sup>97</sup> *Id.*

<sup>98</sup> Raef v. App. Div. of Super. Ct., 193 Cal. Rptr. 3d 159 (2015).

<sup>99</sup> TRAGER, *supra* note 80, at 71.

<sup>100</sup> CAL. CIV. CODE § 1708.8(f)(1) (2014).

If the California legislature and governor want to protect celebrities' privacy, the best and most solid legal approach may be imposing time, place and manner restrictions on the paparazzi similar to Tara Sattler's proposal of a "safe zone" for the public.<sup>101</sup> A time, place and manner law would focus on physical safety similar to California's Vehicle Code, Section 40008. If individuals on the road must be protected from the threat reckless drivers, it can be argued that pedestrians on the sidewalk, including celebrities, should be protected from the threat of invasive photographers. Sattler advocated for physical space within public access areas such as sidewalks and streets where anyone, including celebrities, can physically move about without physical interference. This "safe zone," whether it's ten to twenty feet or some other measured space, could guarantee a zone of privacy as the state's civil code seeks to do. While not a perfect solution for protecting one's personal and family's privacy, it is a start. Paparazzi could still execute their jobs without literally placing themselves in front of a subject.

The safe zone does not solve the harassment struggle that many celebrities complain about, but it does provide a sense of personal physical space and the ability to conduct one's life without physical interference. The safe zone would also apply to children of celebrities as well. As minors and private figures, these children would have greater privacy protections than their well-known parents have. Celebrities and other public figures often conduct themselves within the public eye and whether it is fair or not, the press, including the paparazzi, do have a right to publish and broadcast their stories. Yet, time, place and manner restrictions would not impede paparazzi activities since they would not be focused on the gathering of photos and videos but would provide a sense of physical safety for their subjects.

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<sup>101</sup> Sattler, *supra* note 41.