

Strict Liability and the Anti-Paparazzi Act: The Best Solution to Protect Children of Celebrities

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Celebrities faced with overly aggressive, and often dangerous, paparazzi behavior are left with only the Anti-Paparazzi Act as legal recourse in California. Although the public may accept such limited legal recourse due to the nature of celebrity, it is important to consider the fact that aggressive paparazzi behavior also affects those who have not chosen to be celebrities—the children of celebrities. To effectively protect celebrities' children, this Note advocates for a strict liability standard for media outlets that publish content displaying celebrities' children obtained as a result of overly aggressive paparazzi tactics. Others have suggested numerous remedial measures that include increased funding for police to restricting the areas in which paparazzi are permitted to go. These measures fail to address the cause of the problem, namely the fact that paparazzi are financially incentivized to obtain content displaying celebrities' children.

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TABLE OF CONTENTS

INTRODUCTION.....	7
I. THE HISTORY OF PAPARAZZI LAWS: A GENERAL OVERVIEW	10
A. LEGAL RECOURSE AVAILABLE PRIOR TO ANTI-PAPARAZZI LEGISLATION	11
B. THE ANTI-PAPARAZZI ACT AND THE CONTINUED LACK OF LEGAL RECOURSE FOR PAPARAZZI HARASSMENT	12
C. RECENT LEGISLATION INTENDED TO PROTECT CHILDREN OF CELEBRITIES: SENATE BILL 606.....	15
II. CALIFORNIA’S ANTI-SLAPP STATUTE AND THE FIRST AMENDMENT’S INTERSECTION WITH ANTI-PAPARAZZI LAW.....	16
A. CALIFORNIA’S ANTI-SLAPP STATUTE.....	16
B. THE FIRST AMENDMENT AND ANTI-PAPARAZZI LAWS.....	17
III. WHAT SHOULD BE DONE TO PREVENT AGGRESSIVE PAPARAZZI BEHAVIOR	19
A. POTENTIAL SOLUTIONS TO SOLVE THE PAPARAZZI PROBLEM.....	19
B. CIVIL STRICT LIABILITY FOR MEDIA OUTLETS THAT PUBLISH ILLEGALLY OBTAINED CONTENT: THE OPTIMAL SOLUTION	23
CONCLUSION	27

INTRODUCTION

The public has an insatiable appetite for celebrity gossip. For proof of this, one does not need to look further than to the number of magazine tabloids, gossip sites, and reality television shows.¹ The numerous “Desperate Housewives” shows, Internet obsession with Miley Cyrus’s “twerking,” and the public attention surrounding the birth of Kanye West and Kim Kardashian’s baby are proof that celebrity news has pervaded American pop culture.

As a result of the public’s demand for celebrity news, overly aggressive and often times dangerous paparazzi supply the large market that has developed.² Many people actively pursue celebrity status, and thus willingly subject themselves to dangerous paparazzi behavior. This cost/benefit tradeoff may lead the majority of Americans to accept the current legal landscape regarding celebrities and the paparazzi. In California, the Anti-Paparazzi Act is the primary means for celebrities to

1. See, e.g., Jill Goldsmith, *People Who Need People*, VARIETY (July 9, 2006), <http://variety.com/2006/film/news/people-who-need-people-1200340454/> (“People has a circulation of 3.73 million and its revenue is expected to top \$1.5 billion this year.”).

2. Maria Puente, *Are the Children of Stars Far Game for Paparazzi?*, USA TODAY, Aug. 14, 2012, at 1D (“‘If the demand weren’t there, no one would be supplying paparazzi shots,’ says Frank Griffin, co-owner of the photo agency Bauer-Griffin. Even if he agreed that the demand is ‘morally reprehensible,’ and he doesn’t, ‘we have to cater to it because business is business—it’s the bottom line.’”).

take legal recourse against the paparazzi and media outlets.³ However, it is important to consider those who have had no choice in their celebrity status, namely the children of celebrities.

Paparazzi have aggressively harassed children of celebrities on numerous occasions.⁴ “Take a picture of my baby instead,” [Suri Cruise] yelled during one encounter in New York [in the summer of 2011] as she held a doll over her face. The bodyguard who accompanied her ordered the photographers back; they kept shooting.⁵

Another recent incident involved actor Halle Berry in which Berry berated a paparazzo for waiting outside of her four-year-old daughter’s preschool.⁶ What did the paparazzo do in response? They continued to record Berry, of course.⁷ The video became viral on the Internet.⁸

Such incidents have left celebrity parents, such as actors Berry and Jennifer Garner, in an uproar.⁹ Berry and Garner brought their concerns to the California legislature, advocating in support of legal protection for them and their children.¹⁰ Garner said to legislators, “We’re moms here who are just trying to protect our children.”¹¹ Berry, also speaking to legislators, said, “These are little innocent children who didn’t ask to be celebrities. They didn’t ask to be thrown into this game, and they don’t have the wherewithal to process what’s happening. We don’t have a law in place to protect them from this.”¹²

Garner’s testimony to the California legislature included a depiction of what paparazzi behavior is like for children of celebrities.¹³ She said, “Every day there are as many as 15 cars of photographers waiting outside our home.”¹⁴ Garner continued, “In the course of our ordinary day—trips to school, pediatrician, ballet or the grocery store—paparazzi swarm. Large aggressive men swarm us, causing a mob scene, yelling, jockeying for a position, crowding around the kids.”¹⁵

In describing the effect of overly aggressive paparazzi on her children, Garner stated that her seventeen-month-old baby “is terrified and cries. My 4-year-old says, ‘Why do these men never smile? Why do

3. *See infra* Part I.

4. *See id.*

5. *Id.* Suri Cruise is the daughter of celebrities Tom Cruise and Katie Holmes.

6. *Id.*

7. *Id.*

8. *Id.*

9. Tina Daunt, *Jennifer Garner Joins Halle Berry in Fight for Tougher Anti-Paparazzi Laws*, HOLLYWOOD REP. (Aug. 14, 2013), <http://www.hollywoodreporter.com/news/jennifer-garner-joins-halle-berry-606141>.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

they never go away? Why are they always with us?”¹⁶ Garner’s husband, actor Ben Affleck, commented, “The tragic thing is, people who see those pictures naturally think it’s sweet . . . They don’t see the gigantic former gang member with a huge lens standing over a 4-year-old and screaming to get the kid’s attention.”¹⁷

Celebrities lobbying for more protection from the paparazzi is nothing new.¹⁸ Jennifer Aniston made similar efforts in the past, which eventually led to the passing of expanded civil liability for certain bad behavior that violates privacy laws.¹⁹ Celebrities’ continued efforts emphasize the failure of past legislation to adequately address paparazzi behavior. Public relations representatives share celebrity concerns about paparazzi behavior toward children.²⁰ The paparazzi’s behavior poses dangers not just to the children of celebrities, but also to the paparazzi themselves.²¹ For example, a paparazzo was killed in a dangerous car chase in which the paparazzo mistook an individual for Justin Bieber.²² The social issue of overly aggressive paparazzi requires appropriate and effective legislation to ensure the safety of the children of celebrities.

The purpose of this Note is to discuss the history of laws intended to prevent overly aggressive paparazzi behavior, the obstacles in creating new laws to prevent such behavior, and how a strict liability standard may remedy the failure of past laws. This Note will begin with a historical examination of laws addressing paparazzi behavior and why the law has fallen short of protecting the children of celebrities. The discussion will focus primarily on California law because of the prevalence of overly aggressive paparazzi behavior in the state that hosts Hollywood. Part I examines the history of laws addressing paparazzi behavior, namely the common law on invasion of privacy and anti-stalking statutes. Those laws provided essentially no recourse for celebrities attempting to protect their children because those laws were not intended to prevent aggressive paparazzi tactics.

16. *Id.*

17. Alan Duke, *Ben Affleck: Paparazzi Scare His Kids*, CNN (Dec. 10, 2013), <http://www.cnn.com/2013/12/10/showbiz/ben-affleck-paparazzi-children/>.

18. *Jennifer Aniston Gets Credit for New Paparazzi Crackdown*, L.A. Now (Dec. 30, 2009, 7:16 AM), <http://latimesblogs.latimes.com/lanow/2009/12/jennifer-aniston-gets-credit-for-new-paparazzi-crackdown-says-there-has-to-be-some-boundaries.html>.

19. *Id.* In 2009, Assembly Bill 524 expanded the civil liability imposed by section 1708.8 of the California Civil Code to media outlets and increased fines to \$50,000. Assemb. B. 524, 2009–10 Leg., Reg. Sess. (Cal. 2010).

20. Puente, *supra* note 2 (quoting Ken Sunshine, veteran public relations representative and longtime critic of the paparazzi, describing the behavior of some photographers as contemptible).

21. *Justin Bieber Calls for “Meaningful Legislation” After Paparazzo Death*, CBSNEWS (Jan. 2, 2013), <http://www.cbsnews.com/news/justin-bieber-calls-for-meaningful-legislation-after-paparazzo-death/> (discussing paparazzo killed in dangerous chase of a car the paparazzo thought Justin Bieber was driving).

22. *Id.*

Part II of this Note will discuss the Anti-Paparazzi Act, the California legislature's first attempt to prevent overly aggressive paparazzi behavior. This Part will track the multiple revisions to the Anti-Paparazzi Act and address why the Anti-Paparazzi Act continues to fail—because celebrities must demonstrate that media outlets had actual awareness that content of children of celebrities was obtained illegally. This Part will also treat the California legislature's most recent attempt to prevent aggressive paparazzi tactics by criminalizing harassment of a child on the basis of her parent's employment. This Part concludes, noting this attempt will likely fail because it only criminalizes paparazzi behavior without punishing media outlets.

There are obstacles to implementing any law intended to prevent overly aggressive paparazzi behavior. The main obstacles emanate from California's anti-SLAPP statute and the U.S. Constitution. Opponents of anti-paparazzi legislation argue that it threatens the freedom of the press protected by the First Amendment. This Note will discuss the merits of such arguments and explain why there is no threat to the and why California's anti-SLAPP statute is a surmountable obstacle. This Note does not discuss the tension between free speech and the right to privacy.²³

The final Part will first discuss what the academic community has suggested to solve the paparazzi problem. Academics have suggested measures including: (1) a right of publicity, (2) paparazzi-free zones; (3) federal legislation, and (4) narrowing what is deemed newsworthy, which would resolve issues involving the First Amendment. This Note recommends modifying the Anti-Paparazzi Act to a strict liability statute. The final Subpart discusses expected results and why such a solution is consistent with legal doctrine and theory.

I. THE HISTORY OF PAPARAZZI LAWS: A GENERAL OVERVIEW

This Part traces the history of anti-paparazzi law beginning with a discussion of available legal recourse prior to anti-paparazzi legislation—specifically, causes of action under the common law doctrine of invasion of privacy and anti-stalking statutes. This Part will then shift to California's Anti-Paparazzi Act and its multiple revisions. This Part will conclude with an analysis of the most recent legislative action designed

23. See generally Christina M. Locke & Kara Carnley Murrhee, *Is Driving with the Intent to Gather News A Crime?: The Chilling Effects of California's Anti-Paparazzi Legislation*, 31 LOY. L.A. ENT. L. REV. 83 (2011) (examining the constitutionality of Assembly Bill 2479, concluding it needlessly modifies existing law at the expense of the First Amendment guarantee of freedom of the press); Patrick J. Alach, Note, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205 (2008) (discussing American and European privacy rights and celebrities); Lauren N. Follett, Note, *Taming the Paparazzi in the "Wild West": A Look at California's 2009 Amendment to the Anti-Paparazzi Act and A Call for Increased Privacy Protections for Celebrity Children*, 84 S. CAL. L. REV. 201 (2010) (asserting that paparazzi-free buffer zones imposed to maintain adequate levels of privacy do not violate free speech rights).

to protect celebrity children through criminal law and explain why the California legislature's most recent measures will ultimately fail.

A. LEGAL RECOURSE AVAILABLE PRIOR TO ANTI-PAPARAZZI LEGISLATION

Before the enactment of anti-paparazzi legislation, Californian celebrities seeking to address paparazzi behavior could only pursue injunctive relief under California's anti-stalking statute or through claims based on the common law doctrine of invasion of privacy.²⁴ Continued legislative action demonstrates that these measures were inadequate.²⁵

According to the Restatement (Second) of Torts section 652A, an individual has a cause of action for invasion of privacy in four circumstances:²⁶

- (a) [U]nreasonable intrusion upon the seclusion of another . . . ; or (b) appropriation of the other's name or likeness . . . ; or (c) unreasonable publicity given to the other's private life . . . ; or (d) publicity that unreasonably places the other in a false light before the public²⁷

Based on the premise that anti-paparazzi laws are needed to protect the safety of celebrities, "unreasonable intrusion upon the seclusion of another" is perhaps the most likely circumstances in which the law may apply.²⁸ The other circumstances that are covered do not protect celebrities from overly aggressive driving, excessive flash photography, stalking, or other similar situation.

In order to prove common law invasion of privacy in California, a plaintiff must show "(1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person."²⁹ In the context of celebrities and, more specifically, the children of celebrities, one can clearly see why common law invasion of privacy would be ineffective as a potential means for recourse. A child of a celebrity walking to school, playing in the park, or walking in a mall would not be able to bring an action due to the first factor—none of this takes place in a *private* place.³⁰

24. Follett, *supra* note 23, at 208–09; Ann Loeb & Jonathan E. Stern, *Paparazzi Exposed to Expanded Liability*, L.A. LAW., May 2006, at 14 ("Until recently, celebrities targeted by the paparazzi have had to resort to injunctive relief—either under common law or California's antistalking statute—or claims for violation of traditional common law privacy rights.").

25. See CAL. CIV. CODE § 1708.8 (West 2015); A.B. 524, 2009-10 Reg. Sess. (Cal. 2010).

26. RESTATEMENT (SECOND) OF TORTS § 652A (1977).

27. *Id.* See also *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 678 (Ct. App. 1986) (asserting there are four categories of invasion of privacy).

28. See *id.*

29. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). See also *Miller*, 232 Cal. Rptr. at 678–82.

30. See RESTATEMENT (SECOND) OF TORTS § 652A (1977).

Similarly, anti-stalking statutes have been ineffective at protecting celebrities and their children.³¹ California's anti-stalking statutes have been codified in California Code of Civil Procedure section 527.6 and California Penal Code section 646.9.³² In relevant part, California Penal Code section 646.9 states:

Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking³³

Section 646.9's requirement of a "credible threat," a high standard of proof, oftentimes precludes the government from pursuing overly aggressive paparazzi. Section 527.6 of the California Code of Civil Procedure has similar limitations.³⁴

Assuming that a celebrity plaintiff could satisfy the elements required to bring a common law invasion of privacy or anti-stalking case against a paparazzo, there are glaring flaws in such remedial actions. First, these laws are reactive as opposed to proactive. In other words, these laws have no effect in preventing a situation in which a paparazzo runs a celebrity off the road, causing serious physical harm to the celebrity, the paparazzo, and others. Second, such laws are limited to the actions of an individual and thus do not cover dangerous paparazzi in general or the media outlets that incentivize their risky behavior. Part of the problem is that these laws were not designed to prevent dangerous paparazzi behavior, but courts have granted relief in certain exceptional cases.³⁵ California attempted to address the problem of paparazzi harassment by enacting the Anti-Paparazzi Act of 1998.

B. THE ANTI-PAPARAZZI ACT AND THE CONTINUED LACK OF LEGAL RECOURSE FOR PAPARAZZI HARASSMENT

In 1998, the California legislature enacted California Civil Code section 1708.8, the Anti-Paparazzi Act.³⁶ The original version of section 1708.8 provided:

A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another 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

31. See generally Loeb & Stern, *supra* note 24.

32. CAL. CIV. PROC. CODE § 527.6 (West 2014); CAL. PENAL CODE § 646.9 (West 2008).

33. CAL. PENAL CODE § 646.9.

34. Section 527.6 is similarly limited because of the high standard of proof—it requires willful or malicious intent. CAL. CIV. PROC. CODE § 527.6.

35. See, e.g., Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (granting Jacqueline Kennedy Onassis' request for a restraining order against a paparazzo who was harassing her and her children).

36. CAL. CIV. CODE § 1708.8 (West 2015).

image, sound 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.³⁷

This version of section 1708.8 also included a subsection discussing constructive invasion of privacy:³⁸

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 personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.³⁹

The most interesting addition version was a subsection creating liability for those who induce certain paparazzi behavior.⁴⁰ Thus media outlets that encourage paparazzi to violate the law could be subject to liability.⁴¹ The statute's requirement that the illegal behavior—entering the land of another without permission or committing a trespass—be done “knowingly” limits the statute's effectiveness.⁴² Under the Model Penal Code,

[a] person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.⁴³

As a result, the law did not have its intended impact, possibly because there are no criminal penalties, meaning no jail time.⁴⁴

37. S.B. 262, 1997-98 Reg. Sess. (Cal. 1998).

38. CAL. CIV. CODE § 1708.8(a) (West 1998).

39. *Id.* § 1708.8(b).

40. *Id.* § 1708.8(c) (“A person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate subdivision (a) or (b) or both is liable for any general, special, and consequential damages resulting from each said violation . . .”). The addition is interesting because it expanded the liability beyond the paparazzi to media outlets that cause any damage.

41. *Id.*

42. *See id.*

43. MODEL PENAL CODE § 2.02(b) (1962).

44. Nevertheless, section 1708.8(c) did, and still does, provide for civil remedies:

A person who [violates this statute] . . . is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294. If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section. A person who

In 2005, the California legislature passed Assembly Bill 381, which added subsection (c) to the Anti-Paparazzi Act.⁴⁵ Subsection (c) added assault to the list of crimes punishable under section 1708.8.⁴⁶ Some scholars expected the increased penalties to lead to self-policing among the paparazzi.⁴⁷ While the addition of subsection (c) may have created a greater deterrent effect, it still did not solve the problem of overly aggressive paparazzi behavior.

In 2009, the California legislature passed Assembly Bill 524.⁴⁸ This bill expanded the reach of section 1708.8 to media outlets, such as tabloids and gossip sites, that have “actual” knowledge that a photograph, recording, or other physical impression was obtained illegally.⁴⁹ Actual knowledge requires “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.”⁵⁰ The plaintiff must establish actual knowledge by clear and convincing evidence.⁵¹ The legislature seemed to be headed in the right direction based on the language of this version of section 1708.8 because it attempted to take a more proactive approach by expanding liability to media outlets. However, the clear and convincing standard of proof still limited the statute’s efficacy.⁵²

Academics, including Lauren Follett, have questioned the effectiveness of this version of section 1708.8.⁵³ Follett points out that the section’s scope and applicability are still limited and remain unclear in the context of the children of celebrities.⁵⁴ Commenting specifically on the expanded liability for media outlets, Follett predicted that media outlets would likely “just bury their heads in the sand in order to avoid

comes within the description of this subdivision is also subject to a civil fine of not less than five thousand dollars (\$5,000) and not more than fifty thousand dollars (\$50,000).

CAL. CIV. CODE § 1708.8(c) (West 2015).

45. A.B. 381, 2005-06 Reg. Sess. (Cal. 2005).

46. CAL. CIV. CODE § 1708.8(c) (West 2006) (“An assault committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff is subject to subdivisions (d), (e), and (h).”).

47. See, e.g., Loeb & Stern, *supra* note 24, at 15; see also 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, 1351 (2006).

48. A.B. 524, 2009-10 Reg. Sess. (Cal. 2009).

49. *Id.*

50. *Id.*

51. *Id.*

52. See *id.*

53. Follett, *supra* note 23, at 216–20.

54. *Id.*

actually knowing whether there was a violation”—that is, act with willful blindness.⁵⁵

In 2010, the California legislature passed the latest amendment to section 1708.8, Assembly Bill 2479.⁵⁶ Assembly Bill 2479 added two provisions to the Anti-Paparazzi Act:⁵⁷ “The first change penalizes those who capture images or audio recordings by false imprisonment, targeting paparazzi who swarm celebrities and prevent them from moving or driving freely. The second change enhances penalties for reckless driving if one has an intent to photograph or record.”⁵⁸ Thus, the California legislature has demonstrated continued efforts to reduce the negative effects of the paparazzi on celebrities and their children. However, the latest change to section 1708.8 is still inadequate because it does not address the previously mentioned issues, including enforcement and liability for media outlets.

C. RECENT LEGISLATION INTENDED TO PROTECT CHILDREN OF CELEBRITIES: SENATE BILL 606

California Penal Code section 11414 criminalizes the intentional harassment of a child or ward of another person on the basis of that person’s employment.⁵⁹ Section 11414 originally stated, “Any person who intentionally harasses the child or ward of any other person because of that person’s employment, is guilty of a misdemeanor.”⁶⁰ In September 2013, the California legislature approved Senate Bill 606.⁶¹ Senate Bill 606 revised Penal Code section 11414 to indicate that “[a]ny person who intentionally harasses the child or ward of any other person because of that person’s employment shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment.”⁶²

While public policy reasons exist to protect children from certain paparazzi behavior, the California legislature’s most recent attempt at reform will undoubtedly fail yet again. The current version of California Penal Code section 11414 ignores the flaws in California Civil Code section 1708.8, and, in fact, is even more limited and toothless.⁶³ Penal Code section 11414’s most glaring flaw is that it does not include liability for media outlets, which presents similar problems to those posed by the

55. *Id.* at 220–21.

56. A.B. 2479, 2009-10 Reg. Sess. (Cal. 2010).

57. *Id.*

58. Locke & Murrhee, *supra* note 23, at 83.

59. CAL. PENAL CODE § 11414 (West 2014).

60. A.B. 3592, 1993-94 Reg. Sess. (Cal. 1994).

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

62. CAL. PENAL CODE § 11414.

63. *See* CAL. CIV. CODE § 1708.8 (West 2015).

earlier version of section 1708.8.⁶⁴ While the criminalization of unscrupulous paparazzi behavior specifically targeting children of celebrities is an ideal end, it is dubious at best that such an end will be met.

II. CALIFORNIA'S ANTI-SLAPP STATUTE AND THE FIRST AMENDMENT'S INTERSECTION WITH ANTI-PAPARAZZI LAW

Measures to prevent aggressive paparazzi behavior have been met with opposition. The opposition has based its arguments on California's anti-SLAPP statute and the First Amendment. This Part will examine the opposition's arguments and its intersection with anti-paparazzi laws.

A. CALIFORNIA'S ANTI-SLAPP STATUTE

California's anti-SLAPP statute provides another obstacle for celebrities attempting to ensure the safety of their children and themselves.⁶⁵ California Code of Civil Procedure section 425.16—the California anti-SLAPP statute—states:

The Legislature finds and declares that there has been 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. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.⁶⁶

Interpreting this statute, the California Supreme Court held that “whenever possible, [courts] should interpret the First Amendment and section 425.16 in a manner ‘favorable to the exercise of freedom of speech, not its curtailment.’”⁶⁷ To simplify, the California anti-SLAPP statute allows a defendant to strike an action against them that arises from her right of petition and/or right of free speech in connection with a

64. See CAL. PENAL CODE § 11414 (West 2014); S.B. 262, 1997-98 Reg. Sess. (Cal. 1998).

65. See Miles J. Feldman & Michael E. Weinstein, *Cases Decided Under Section 1708.8 and Issues for Future Litigation*, in ENTERTAINMENT LAW & LITIGATION § 11.17 (Charles J. Harder ed., 2013) (“Judge Allen Goodman of the Los Angeles Superior Court dismissed entertainer Barbara Streisand’s case against an aerial photographer who photographed her beachfront home as part of the California Coastal Records Project. The claims brought under Section 1708.8 were dismissed for, among other reasons, the fact that the images did not contain ‘personal or familial activity,’ and that there was no evidence the photographer (who was unaware that he was photographing Ms. Streisand’s home) attempted to photograph Ms. Streisand herself.”); *id.* § 11.17 n.193 (“The case was decided under California’s anti-SLAPP Statute and the court awarded attorney’s fees to defendants in excess of \$177,000.”).

66. CAL. CIV. PROC. CODE § 425.16 (West 2015).

67. *Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 572 (Cal. 1999) (quoting *Bradbury v. Super. Ct.*, 57 Cal. Rptr. 2d 207, 211 n.3 (Ct. App. 1996)).

public issue.⁶⁸ If a defendant can establish a prima facie case, the plaintiff must show a probability of winning on her claim.⁶⁹ A showing that “the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment” is required to demonstrate a probability of winning a claim.⁷⁰ If the plaintiff is unable to meet this burden, the case will be dismissed.⁷¹ Thus, California’s anti-SLAPP statute provides another challenge to celebrities attempting to protect themselves and their children under the Anti-Paparazzi Act. In other words, California’s anti-SLAPP statute may shift the burden of establishing improper behavior to the plaintiff. This burden shifting, in addition to the difficulty of successfully bringing a claim under section 1708.8, makes it difficult for celebrities to protect themselves and their children under the Anti-Paparazzi Act.

B. THE FIRST AMENDMENT AND ANTI-PAPARAZZI LAWS

Perhaps the greatest impediment to attaining safety for the children of celebrities is calibrating the law in a manner so as not to infringe on the First Amendment. There has been no lack of analysis of the First Amendment within the context of controlling the paparazzi. However, there has been little discussion about anti-paparazzi law in the specific context of the children of celebrities.⁷² Christina M. Locke, author of one such discussion, states that “[p]rivacy laws like California’s 2009 amendment to section 1708.8 of its civil code threaten the First Amendment, waste taxpayer resources, and pander to wealthy and politically influential celebrities.”⁷³ Locke argues that extending civil liabilities to media outlets creates the following two problems:

First, it burdens media outlets with the daunting task of determining not only if they will be the “first” publisher (which, considering the pace of online publication, will be a mere guess in some circumstances), but if the photo was taken in a manner “highly offensive to the reasonable person.”

...

68. See CAL. CIV. PROC. CODE § 425.16; *Navellier v. Sletten*, 52 P.3d 703 (Cal. 2002); *Dowling v. Zimmerman*, 103 Cal. Rptr. 2d 174 (Ct. App. 2001); see also *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733 (Cal. 2002) (stating that burden shifts to plaintiff after defendant establishes a prima facie case); *Ludwig v. Super. Ct.*, 43 Cal. Rptr. 2d 350 (Ct. App. 1995) (discussing burden shifting).

69. *Wilson*, 50 P.3d at 739.

70. *Id.*

71. See CAL. CIV. PROC. CODE § 425.16.

72. See 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, 247 (2010).

73. *Id.*

[Second], High Court cases have consistently held that, if the press obtains information lawfully, even if the information itself was illegally obtained by a third party, restraints on publication are unconstitutional.⁷⁴

According to Locke, “the Supreme Court has consistently refused to silence the press even if information was illegally obtained by a third party.”⁷⁵

Consistent with this analysis, Locke asserts in a later article co-authored with Kara Carnley Murrhee that legislative attempts at curbing overly aggressive paparazzi tactics have failed and continue to be unconstitutional.⁷⁶ Locke and Murrhee argue that Assembly Bill 2479 is invalid on the grounds that it violates the Constitution.⁷⁷ They suggested that Assembly Bill 2479 violates First Amendment rights because it is overbroad and vague, and it does not pass content-based strict scrutiny.⁷⁸

Other scholars have suggested that legislation such as the Anti-Paparazzi Act is constitutionally valid.⁷⁹ “[A]lthough 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”⁸⁰ Proponents of strengthened anti-paparazzi legislation assert that it does not necessarily chill free speech because the paparazzi can still take pictures of celebrities in ways that do not violate the statutes.⁸¹ Those proponents also argue that free speech is preserved because the paparazzi may still write about celebrity news.⁸² In other words, anti-paparazzi laws do not restrict what people may write about celebrities, only the means by which certain content—photos, for example—is obtained.⁸³

Furthermore, there is precedent for restricting paparazzi behavior.⁸⁴ For example, Jacqueline Kennedy Onassis obtained a restraining order

74. *Id.* at 240. *See generally* Bartnicki v. Vopper, 532 U.S. 514 (2001) (analyzing the validity of wiretapping statutes in the context of the First Amendment).

75. Locke, *supra* note 72, at 242.

76. Locke & Murrhee, *supra* note 23, at 100 (“These amendments, much like their predecessors, are inefficient and likely unconstitutional efforts to curb paparazzi. They do nothing more than existing, generally applicable laws to deter aggressive photographers *except* violate the First Amendment.” (emphasis added)).

77. *Id.* at 92–93.

78. *See id.* at 95–99. *See also* Gary Wax, Note, *Popping Britney’s Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 *LOY. L.A. ENT. L. REV.* 133, 146 (2009) (making similar arguments as Locke and Murrhee).

79. *See* Follett, *supra* note 23, at 225–35; Alach, *supra* note 23, at 237.

80. Follett, *supra* note 23, at 234.

81. *Id.* at 235; *see* Alach, *supra* note 23, at 232–33.

82. Alach, *supra* note 23, at 232–33 (stating free speech is not chilled because of safety concerns; free speech does not extend to illegal newsgathering means; and paparazzi may still write about incidents).

83. *Id.*

84. *See, e.g.*, Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973); *Turnbull v. Am. Broad. Cos.*, No. CV-03-3554-SJO(FMOX), 2004 WL 2924590 (C.D. Cal. Aug. 19, 2004).

to protect her and her family from harassment by a paparazzo.⁸⁵ Patrick J. Alach suggests that constitutional issues can be avoided and “intrusive paparazzi tactics can be curbed by eliminating the daily existence of American celebrities from a definition of ‘newsworthiness’ unless they are filling a public role which has made them famous.”⁸⁶ In other words, Alach suggests narrowing the scope of “newsworthiness” to exclude the daily routines of celebrities so that the paparazzi could not use the First Amendment as a defense to claims of harassment when “stalking” celebrities even when they are not filling the role that has made them famous.⁸⁷ Such a scope would not be overly narrow.⁸⁸ An actor, for example, appearing at “awards ceremonies, movie premier nights, and other activities related to screen acting” would still fall within the scope of “newsworthiness.”⁸⁹

III. WHAT SHOULD BE DONE TO PREVENT AGGRESSIVE PAPARAZZI BEHAVIOR

This Part will discuss solutions academics have suggested to address overly aggressive paparazzi behavior that affects celebrities and their children. I will then offer my suggestion for what should be done to prevent aggressive paparazzi tactics that affect children specifically. Finally, this Part will discuss the expected outcome and legal ramifications of my proposal.

A. POTENTIAL SOLUTIONS TO SOLVE THE PAPARAZZI PROBLEM

Academics have suggested various approaches to solving the paparazzi problem. These approaches include: (1) a right of publicity, (2) paparazzi-free zones, and (3) federal legislation. This Subpart will analyze each of these suggested measures in turn.

The right of publicity is defined as the “appropriation of [a] name or likeness in which the interest involved is proprietary or commercial.”⁹⁰ “The right of publicity has come to be recognized as . . . a tool to control the commercial use and, thus, protect the economic value of one’s . . . photograph”⁹¹ Keith D. Willis argues in favor of using the right of publicity to restrain the paparazzi.⁹² Willis asserts that “[l]egislation

85. *Onassis*, 487 F.2d at 991–92.

86. Alach, *supra* note 23, at 237.

87. *Id.*

88. *Id.* at 235.

89. *Id.*

90. 5 WITKIN SUMMARY OF CALIFORNIA LAW § 676 (10th ed. 2005).

91. *KNB Enterprises v. Matthews*, 92 Cal. Rptr. 2d 713, 717 (Ct. App. 2000). See CAL. CIV. CODE § 3344 (West 2014).

92. Keith D. Willis, Note, *Paparazzi, Tabloids, and the New Hollywood Press: Can Celebrities Claim a Defensible Publicity Right in Order to Prevent the Media from Following Their Every Move?*, 9 TEX. REV. ENT. & SPORTS L. 175, 202 (2007).

which limits the publication of such photography would simultaneously prevent unjust enrichment and create a much needed buffer in which celebrities can more privately enjoy their lives.”⁹³

Sara Kimball argues for an extension of the right of publicity to children of celebrities to protect the child’s economic interest from her parents.⁹⁴ Kimball argues that the right of publicity should remain distinct from labor laws, meaning the right of publicity should not be based on the child’s employment.⁹⁵ The right of publicity is “limited by the First Amendment, creating tension in the courts. Generally, public figures cannot exercise their publicity rights in ‘news stories, biographical presentations, parodies or satires that use their identities’ but may be able to if these efforts are for purely commercial reasons.”⁹⁶ Thus, although allowing the children of celebrities or the celebrities themselves to assert right of publicity claims against the paparazzi and media outlets may provide a solution to the paparazzi problem, historically, the right of publicity has been precluded from claims involving news stories and biographical presentations—the main mediums for displaying pictures of children of celebrities.

Academics have also suggested a “paparazzi-free zone.”⁹⁷ Although paparazzi-free zones would provide some benefit, they are fundamentally flawed. Follett’s version of a paparazzi-free zone is what she calls a “buffer zone.”⁹⁸ Follett explains buffer zones as “created by injunctions that prohibit a particular free-speech activity within a certain distance of a particular person or location.”⁹⁹ Follett states that such buffer zones should be implemented “in typically family- and child-oriented locations,

93. *Id.*

94. Sara Kimball, Comment, *A Family Affair: Extending the Right of Publicity to Protect Celebrity Children*, 18 SETON HALL J. SPORTS & ENT. L. 181, 205 (2008). (“The existing right of publicity laws should be expanded to accommodate the needs of celebrity children by utilizing aspects of current child entertainer protection laws. Because existing child entertainer laws are more closely tied with labor law and affect a specific class of children, they should remain separate from this aspect of the right of publicity.”).

95. *Id.*

96. *Id.* at 191.

97. See, e.g., Follett, *supra* note 23, at 244; 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, 415 (2010).

98. Follett, *supra* note 23, at 244.

99. *Id.* at 245. Cf. Sattler, *supra* note 97, at 416 (“[A paparazzi-free zone is] a ‘personal safety zone’ of space into which paparazzi could not invade when photographing celebrities. A personal safety zone will consist of ‘several feet of clear space between paparazzi and the individuals they are photographing.’ The paparazzi-free zone is a content neutral proposition that aims to place appropriate restrictions on the taking of commercial photography around certain sensitive locations.” (internal citations omitted)). But see Follett, *supra* note 23, at 245 (“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*.” (citing *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377, 380 (1997))).

such as schools, parks, and medical facilities.”¹⁰⁰ Follett contends that buffer zones avoid constitutional issues.¹⁰¹ “Regulations imposing buffer zones around schools, parks, and medical facilities satisfy the intermediate scrutiny requirements.”¹⁰² Follett addresses issues regarding enforcement in her assertion that buffer zones should be implemented on a local level.¹⁰³

Assuming such zones are constitutionally valid, there are potential issues with and limitations to the implementation of buffer zones. First, in order to survive constitutional scrutiny, buffer zones must be limited in scope. In other words, buffer zones cannot encompass all areas where the children of celebrities may be located. Further, buffer zones do not reduce the demand for pictures of children of celebrities. Thus, there is the likely possibility that the paparazzi will concentrate in unprotected non-buffer zones, which may create even more dangerous situations. That is, instead of having the paparazzi dispersed, buffer zones may lead to a funneling effect, which would cause even more chaos. Admittedly, such zones would allow for a sort of public sanctuary for children of celebrities, and would give celebrities and their children some discretion as to which areas to visit—celebrities could choose to exclusively bring their children only to the buffer zones. This would still restrict the type of life a child can live.

Another potential solution is to increase funding for law enforcement in order to enforce existing laws. Locke and Murrhee assert, “Rather than haphazardly pass stopgap measures in order to draw praise from a powerful sect of constituents (and in the process open the

100. Follett, *supra* note 23, at 244–45.

101. *Id.* at 248 (“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. 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.”).

102. *Id.* (“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.”).

103. *Id.* at 247–48 (“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 implemented on a more local (rather than federal) level.”).

government to costly First Amendment challenges), lawmakers might consider other measures, such as increased funding for law enforcement to properly enforce existing laws.”¹⁰⁴ Locke and Murrhee assert that this would be a way of “protecting public safety (whether for celebrities on the sidewalk or motorists on the highways) while preserving the First Amendment.”¹⁰⁵

Simply throwing more money at a problem is not always the most efficient means (if at all effective) of solving a problem. Increasing funds for law enforcement to protect a powerful group of constituents would undoubtedly be unpopular. Additionally, it ignores the problem that the demand for pictures of celebrities and their children will persist, and that it will not prevent media outlets from publishing ill-gotten pictures of celebrities and their children. This solution seems even less palatable considering budget issues (or at least the perception of such issues) in California and other states.

Some scholars have suggested federal legislation as a possible solution because the federal government is in a better position to enforce laws intended to curb paparazzi behavior across the country.¹⁰⁶ Cameron Danly suggests that federal legislation should be used to curb paparazzi tactics under the right of privacy.¹⁰⁷ Danly proposes a test that would consider two elements: “(1) is there an interference with a person’s independence; and (2) is the person’s independent act a matter of public interest. An invasion of privacy will occur when there is an interference with a person’s independence and the independent act was not of public interest.”¹⁰⁸ Such a measure seems overly broad and lacking direction. Danly acknowledges that such a measure presents unanswered questions, especially regarding the definition of “a matter of public interest.”¹⁰⁹

Jennifer R. Scharf suggests that Congress should act to limit the tactics by which the paparazzi can obtain pictures and video.¹¹⁰ Scharf argues that Congress should pass privacy laws that extend to media outlets.¹¹¹ Similar to Danly, Scharf asserts that such legislation could be based on the right of privacy laws.¹¹² The problem with Scharf’s Note is

104. Locke & Murrhee, *supra* note 23, at 100. *See also* Wax, *supra* note 78, at 172–73 (“Los Angeles and Malibu do not need additional laws; the police simply need to write the paparazzi the tickets they deserve. Frankly, the First Amendment does not countenance any further government action.”).

105. Locke & Murrhee, *supra* note 23, at 100.

106. Cameron Danly, Note, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. U. L. REV. 161, 170 (2011); Jennifer R. Scharf, Note, *Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities’ Privacy Rights*, 3 BUFF. INTELL. PROP. L.J. 164 (2006).

107. Danly, *supra* note 106, at 170.

108. *Id.*

109. *Id.* at 170–71.

110. *See generally* Scharf, *supra* note 106.

111. *Id.* at 188.

112. *Id.* at 186–87.

that it does not address the problem of similar state legislation intended to curb aggressive paparazzi behavior, particularly because of the high standard of proof.¹¹³ Casting a wider net with the same holes will not solve deficiencies of laws intended to prevent overly aggressive paparazzi tactics.

B. CIVIL STRICT LIABILITY FOR MEDIA OUTLETS THAT PUBLISH ILLEGALLY OBTAINED CONTENT: THE OPTIMAL SOLUTION

This Note proposes imposing a strict liability standard for California Civil Code section 1708.8. This Subpart will briefly discuss strict liability in a general sense. This Subpart will also discuss how strict liability can be implemented effectively. Furthermore, this Subpart will discuss the benefits of imposing civil strict liability as opposed to criminal strict liability.

The biggest problem with past civil measures aimed at curbing overaggressive paparazzi behavior is that the current proof threshold, requiring “actual knowledge” of the inappropriate act, is too difficult to prove.¹¹⁴ As mentioned above, scholars have predicted that media outlets will simply feign ignorance in order to avoid violating section 1708.8.¹¹⁵

Creating a strict liability standard would solve such proof problems. “The term strict liability is sometimes used in California to describe certain torts for which there is no available defense. For example, conversion is a strict liability tort, imposing liability on all whom obtain possession of the converted property. The knowledge and the intent of the defendant are irrelevant.”¹¹⁶ Strict liability creates an absolute duty on a potential tortfeasor.¹¹⁷ The Restatement (Second) of Torts, in addressing strict liability, states:

(1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.

(2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.¹¹⁸

“California case law has applied the doctrine of strict liability mainly in cases involving defendants engaged in abnormally dangerous or ultrahazardous activities”¹¹⁹

113. See *supra* Part I.

114. See A.B. 524, 2009-10 Reg. Sess. (Cal. 2009).

115. See Follett, *supra* note 23, at 220-21.

116. CALIFORNIA CIVIL PRACTICE TORTS § 2:3 (2014).

117. See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 494 (Cal. 1990).

118. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

119. CALIFORNIA CIVIL PRACTICE TORTS § 2:3 (2014).

An obstacle in imposing strict liability on media outlets is that the act of publishing is not an ultrahazardous act—the ultrahazardous act is not the publishing of the content, but rather the means used to obtain such material (aggressive driving, assault tactics, and so on). This obstacle could be overcome with the realization that ex post liabilities imposed on media outlets would lead to ex ante effects on paparazzi. Removing the incentive for media outlets to publish content containing children of celebrities, and in turn removing the compensation and incentives for paparazzi to obtain such content, would likely affect paparazzi and media outlet behavior. Imposing a strict liability standard would prevent media outlets from purposefully ignoring the sources and means used to obtain content depicting the children of celebrities. In other words, removing the prospect financial gain resulting from the publication of images or other material pertaining to celebrities' children would stop media outlets from paying for such content. For example, a media outlet would not pay and publish a picture of Suri Cruise if it would lead to fines in excess of its profits.

Additionally, the strict liability standard I propose should apply only to content involving the children of celebrities, and would thus be narrower scope than section 1708.8.¹²⁰ The scope of such action could also be limited to only for-profit media outlets. Such a limitation would focus penalties on those encouraging such tactics—media outlets that pay paparazzi. This would assuage the critics of imposing regulations on paparazzi behavior out of fear of chilling free speech.¹²¹ Free speech would not be chilled because individuals that take pictures of the children of celebrities for personal (as opposed to financial) purposes would not be at risk for civil fines under section 1708.8.¹²² The danger and problems of taking pictures of the children of celebrities is caused by the paparazzi specifically, not all people with cameras.

Undoubtedly, media outlets, particularly smaller ones, would be reluctant to post material relating to the children of celebrities if they risked a \$50,000 penalty.¹²³ That is, media outlets would likely adopt the copyright adage, “when in doubt, leave it out,” in the context of publishing content relating to the children of celebrities. This should lead to a lower media outlet demand for such material due to the increased risk of being fined. That is, media outlets will no longer find publishing content pertaining to children of celebrities to be lucrative given the risk of being fined. Thus, high statutory damages destroy the market for providing content displaying children of celebrities.

120. See CAL. CIV. CODE § 1708.8 (West 2015).

121. See *supra* Part II.B.

122. See CAL. CIV. CODE § 1708.8.

123. *Id.*

Strict liability in the context of limiting paparazzi behavior requires a constitutional analysis because of First Amendment concerns.¹²⁴ When applying “the test for content-neutral time, place, or manner restrictions . . . the government is not concerned with the message being conveyed, but rather with the method in which the message is conveyed.”¹²⁵ Since strict liability would have an incidental effect on First Amendment rights, intermediate scrutiny is appropriate.¹²⁶ “A law satisfies intermediate scrutiny if it (1) is supported by a significant government interest; (2) is narrowly tailored to that interest; and (3) leaves open ample alternative channels of communication.”¹²⁷

Imposing a strict liability standard in section 1708.8 would survive intermediate scrutiny. There is a significant government interest involved—protecting children.¹²⁸ This measure would be narrowly tailored, as previously discussed.¹²⁹ Finally, there are other means for alternative channels of communication.¹³⁰ Thus, strict liability in the context of taking pictures of children of celebrities would survive intermediate scrutiny.

The limited scope of the strict scrutiny standard would avoid issues with California’s anti-SLAPP statute.¹³¹ The California legislature, in enacting section 425.16, asserted, “it is in the public interest to encourage continued participation in matters of public significance”¹³² Taking pictures and videos of children of celebrities hardly qualifies as “matters of public significance.”¹³³ While California’s legislature has not directly spoken on this matter, it seems farfetched to conclude that the legislature would assert that such tabloid fodder is of public significance. Supreme Court Justices Warren and Brandeis have described such gossip as

124. See *supra* Part II.B.

125. Sharon A. Madere, Comment, *Paparazzi Legislation: Policy Arguments and Legal Analysis in Support of Their Constitutionality*, 46 UCLA L. REV. 1633, 1661 (1999).

126. *Id.* at 1661–62 (stating a court will apply intermediate scrutiny when determining constitutionality of a content-neutral law if law has an incidental effect on First Amendment rights).

127. *Id.* at 1662. See also *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 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.”).

128. *Jonathan L. v. Super. Ct.*, 81 Cal. Rptr. 3d 571, 594 (Ct. App. 2008) (“There can be no dispute that the child’s safety is a compelling governmental interest.”).

129. Madere, *supra* note 125, at 1662 (asserting that paparazzi-free zones are narrowly tailored because they do not place a “blanket ban” on taking photographs). Strict liability would only ban photograph of children of celebrities.

130. *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.”).

131. See *supra* Part III.A.

132. See CAL. CIV. PROC. CODE § 425.16 (West 2015).

133. See generally Alach, *supra* note 23.

having minimal social value.¹³⁴ Additionally, for a defendant to bring a claim under section 425.16, the defendant must establish a prima facie case.¹³⁵ The ability of defendants to do so in the context of obtaining content relating to the children of celebrities seems questionable at best. In other words, California's anti-SLAPP statute is probably inapplicable under the circumstances of a celebrity asserting a civil strict liability claim against a media outlet.

Criminal vicarious liability is not a viable solution for solving the paparazzi problem. Nevertheless, it is worth discussing the possibility of vicarious liability in the criminal context in lieu of the recent revision of California Penal Code section 11414.¹³⁶ Some states have imposed vicarious liability in the criminal context.¹³⁷ Some courts have found that an act does not need to be "knowingly, willfully or intentionally" committed based on an interpretation of legislative intent.¹³⁸ Thus, some courts have imposed criminal vicarious liability that would essentially impose a strict liability standard in certain contexts.¹³⁹ Imposing a strict liability standard here would be excessive, especially when civil penalties are likely to be sufficient. Other courts have agreed with this logic and have found that criminal vicarious liability violates substantive due process.¹⁴⁰ "A due process analysis of a statute involves a balancing of the public interests protected against the intrusion on personal liberty while taking into account any alternative means by which to achieve the same end."¹⁴¹ Without predicting the result of constitutional scrutiny or the outcome of imposing vicarious liability, it is likely that the backlash in response to a state imposing criminal vicarious liability over something that overlaps with the realm of free speech and the First Amendment would be great. In sum, extending the scope of criminal punishments to include vicarious liability is not a viable option so long as imposing strict liability in the civil context remains an available alternative.

134. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-15 (1890); see Alach, *supra* note 23, at 237.

135. See *supra* Part III.A.

136. CAL. PENAL CODE § 11414 (West 2014).

137. See, e.g., *Commonwealth v. Koczvara*, 155 A.2d 825 (Pa. 1959) (upholding a criminal vicarious liability statute regarding the sale of alcohol to minors).

138. *Id.* at 829.

139. *Id.*

140. See, e.g., *State v. Guminga*, 395 N.W.2d 344 (Minn. 1986) (finding that an employer was not liable for an employee selling alcohol to minor because it violated the Due Process Clause of the Minnesota State Constitution).

141. *Id.* at 346. See also *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961); *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 715 (Minn. 1978) ("[T]he requirements of due process must be measured according to the nature of the government function involved and whether or not private interests are directly affected by the government action.").

CONCLUSION

In conclusion, the problems posed by the paparazzi have persisted despite numerous legislative attempts to solve such problems. While celebrity status is often actively sought, the children of celebrities have no choice in whether to accept the burdens that come with such status. Dating back to the limited remedies of anti-stalking statutes and common law privacy, celebrities have been unable to protect their children from the dangers posed by the paparazzi. The enactment of the Anti-Paparazzi Act was an admirable attempt to provide meaningful recourse for celebrities seeking some sort of protection. The multiple revisions and additions to section 1708.8 and eventual revision of California Penal Code section 11414 have failed to effect significant change due to a high standard of proof and a narrow scope.

Opposition to measures intended to curb overly aggressive paparazzi tactics has been mainly grounded in California's anti-SLAPP statute and the First Amendment. Concerns rooted in California's anti-SLAPP statute and the First Amendment can be assuaged by this Note's proposition to impose a strict liability standard on media outlets that publish content relating to the children of celebrities that was gained through questionable means.

This Note has suggested that imposing strict liability on media outlets would solve the problems of the Anti-Paparazzi Act without offending California's anti-SLAPP statute and the First Amendment. By limiting strict liability to content containing children of celebrities that for-profit media outlets publish, the scope and effect of imposing strict liability would be narrowly tailored to influence the conduct of overly aggressive paparazzi toward the children of celebrities. Furthermore, for the reasons discussed above, civil strict liability is superior to criminal strict liability and other measures suggested by other academics. Good public policy has always put the concerns and welfare of children first, regardless of the social status of the children's parents. In this regard, my recommendation remains consistent with the spirit of the law and pragmatic considerations.