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### Privacy Issues and the Paparazzi

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## **PRIVACY ISSUES AND THE PAPARAZZI**

**Devan Orr\***

We live in an increasingly digital and invasive world, where privacy is being lessened with every Facebook post or Instagram hashtag. The ease of accessibility to technology, particularly camera equipment, has increased photography as both a hobby and a side profession, leading to an increase in paparazzi and disturbance of human lives. To combat these disturbances, several states have passed or proposed anti-paparazzi statutes that limit what the paparazzi can do and when. However, these statutes run up against First Amendment protections, even though they are protecting the very important privacy rights of celebrities and their children.

California recently made waves by passing three anti-paparazzi bills to amend criminal and civil statutes. The bills make changes that protect not only celebrities but also their children and protect privacy interests in the face of potential First Amendment opposition because of celebrities' status as public figures. However, the children may not be considered public figures, because they are not the actual celebrity. This means the childrens' privacy rights may not exist outside of their parents' profession, and so this law may not effectively protect their rights. This paper explores the three newest amendments to California statutes used mainly as a protection from paparazzi activity, statutes that protect celebrities and now their children from invasions of privacy, and argues the newest amendments are effective in protecting privacy interests regardless of the First Amendment implications.

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First, Senate Bill 606, supported by many celebrity parents, such as Halle Berry and Jennifer Garner,<sup>1</sup> amended Section 11414 of the California Penal Code, the title regarding child abuse and harassment fines and penalties.<sup>2</sup> Halle Berry supported the bill because she had multiple negative paparazzi interactions, both when alone and when with her child.<sup>3</sup> The statute was amended to increase punishment from the previous maximum of six months in jail to a maximum of one year for first and subsequent offenses.<sup>4</sup> The statute was also amended to create a civil course of action allowing celebrity parents to bring suit on behalf of “an aggrieved child or ward.”<sup>5</sup>

Second, Assembly Bills 1356 and 1256 amended the California Civil Code sections dealing with stalking and civil harassment.<sup>6</sup> The two assembly bills amended California Civil Code sections 1708.7, 1708.8, and 1708.9.<sup>7</sup> In passing Assembly Bill 1356, which amended Civil Code section 1708.7, regarding stalking, the California Legislature reasoned:

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1. Natalie Finn, *Halle Berry Thanks Jennifer Garner, Adele, & More Celeb Parents After Paparazzi-Deterrent Bill Passes*, E! ONLINE (Sept. 24, 2013, 5:00 PM), <http://www.eonline.com/news/462847/halle-berry-jennifer-garner-supported-law-to-protect-celeb-kids-from-paparazzi-passes-in-california>.

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

3. See, e.g., Andrea Watson, *A History of Violence: Celebrities vs. Paparazzi*, JET (Jul. 24, 2013), <http://www.jetmag.com/entertainment/a-history-of-violence-celebrities-vs-paparazzi/>.

4. CAL. PENAL CODE § 11414(c) (West 2014).

5. *Id.* at (d).

6. A.B. 1256, 2014 Legis., Reg. Sess. (Cal. 2014); A.B. 1356, 2014 Legis., Reg. Sess. (Cal. 2014).

7. A.B. 1256, 2014 Legis., Reg. Sess. (Cal. 2014); A.B. 1356, 2014 Legis., Reg. Sess. (Cal. 2014).

[t]he bill would permit the plaintiff to show, as an alternative to the plaintiff reasonably fearing for his or her safety or that of a family member, that the pattern of conduct resulted in the plaintiff suffering substantial emotional distress, and that the pattern of conduct would cause a reasonable person to suffer substantial emotional distress.<sup>8</sup>

Assembly Bill 1256, amending Civil Code sections 1708.8 and 1708.9, was also passed with a purpose. The Legislature wanted to:

recast these provisions to instead provide that a person is liable for a physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise commits a trespass 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 invasion occurs in a manner that is offensive to a reasonable person. The bill would define “private, personal, or familial activity,” as specified, and provide that this definition applies to physical and constructive invasion of privacy.<sup>9</sup>

Both bills seem to focus on safety of celebrities’ children as the top priority. This reinforces any current tort protections, while limiting potential arguments of over

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8. Assemb. B. 1356, 2013-14 Leg., Reg. Sess. (Cal. 2014), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1356&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=).

9. Assemb. B. 1256 2013-14 Leg., Reg. Sess. (Cal. 2013), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1256&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1256&search_keywords=).

breadth with definitions and specificity in drafting the amendments to the statutes.

The three bills are a significant development, because they represent the first time the law has established children's privacy rights based on their parents' professions. In order to understand the current statutes and their implication for privacy issues, Part I explores the history of the paparazzi and their invasion into the lives and privacy of celebrities as a safety concern. Part II reviews the history of both California Penal Code 11414 and California Civil Code 1708.8. Part III examines the text of California Penal Code 11414 and California Civil Code 1708.7, 1708.8, and 1708.9, as amended by the three bills. Part IV analyzes how the statutes as amended interact with the common law torts of intrusion and trespass and discusses how the statutes interact with the common law defenses of assumption of risk and waiver. Part V compares the current version of the California privacy statutes and how they compare to the developments taken in other states and countries. Part VI concludes the paper with a brief analysis of potential First Amendment arguments against the statute.

## **I. THE HISTORY OF THE PAPARAZZI**

In order to understand why laws like this are so important, it is necessary to look at how celebrity culture has evolved in this country and how the paparazzi have gone from simple photographers to what can be construed as a menace to society, both for celebrities and normal people. "Paparazzi" is an Italian term coined by Federico Fellini, director of *La Dolce Vita*, or *The Sweet Life*.<sup>10</sup> The term

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10. *Paparazzi*, BREWER'S DICTIONARY OF PHRASE AND FABLE (2012), available at <https://login.ezproxy1.lib.asu.edu/login?url=http://literati.credoreference.com.ezproxy1.lib.asu.edu/content/entry/brewerphrase/paparazzi/0>.

started in an Italian travel journal<sup>11</sup> but also mimics the sound of the word mosquito in Italian.<sup>12</sup> The paparazzi started in the early 1950s in Rome<sup>13</sup> and followed the movie craze over to the United States, with one paparazzo in particular, Ron Galella, famously hounding celebrities and public figures such as Audrey Hepburn and Jackie Kennedy during the 1960s and 1970s.<sup>14</sup>

Galella's work illustrates why celebrities are worried for the safety and privacy of their children, and his work led to the amendment of the current California statutes. Galella chased down celebrities such as Richard Burton, Sean Penn, and Marlon Brando.<sup>15</sup> Galella and the celebrities were both terrified and injured at different points; Galella was beaten by bodyguards, and Marlon Brando broke Galella's jaw, resulting in Brando's hand getting infected.<sup>16</sup> Galella was not deterred, however. Instead, he took precautions, such as wearing a football helmet.<sup>17</sup> Jackie Onassis (formerly Jackie Kennedy) even filed a restraining order against Galella, even before the adoption of statutes to protect her privacy interests.<sup>18</sup>

Since the 1960s and 1970s, the interest in celebrity photos has only skyrocketed. An anonymous photographer gave potential prices for photos, ranging from mere cents as payment for pictures of common couples, all the way up to

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11. *Id.*

12. Gaby Wood, *Camera, Movie Star, Vespa... It All Began on the Via Veneto: The Origins of the Paparazzi and What a Hot Snap Fetches Nowadays*, THE GUARDIAN (Sept. 23, 2006, 7:39 PM), <http://www.theguardian.com/media/2006/sep/24/pressandpublishing1>.

13. Ray Murray, *Keeping the Paparazzi an Arm's Length Away*, 46 J. POPULAR CULTURE, 868, 869 (2013).

14. Wood, *supra* note 12.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*; *see also* Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

tens of thousands of dollars for big-ticket photos, such as those featuring George Clooney with his newest girlfriend.<sup>19</sup> In the past 10 years, there is a well-documented history of several celebrities having violent or dangerous run-ins with the paparazzi.<sup>20</sup> For example, a paparazzo died in 2013 in a chase after Justin Bieber.<sup>21</sup> This increase of violent interactions may be due to the uptick in modern technology, particularly with paparazzi able to use cell phones and more mobile equipment, rather than needing to set up giant cameras and stage everything. It may also be due to an increase in demand. The value of the shots has gone up in recent years as society has become more obsessed with celebrity culture. Even Halle Berry frustratingly yelled at paparazzi while carrying her daughter, and Ms. Berry's fiancé lunged at photographers in an attempt to protect the child.<sup>22</sup>

Because of these concerns, California made a legislative push to protect celebrities as well as their children. With two famous women, Jennifer Garner and Halle Berry, at the helm, the California Legislature came together and passed a bill extending coverage of several key provisions to the children of famous celebrities.

## II. PRIOR VERSIONS OF THE AMENDED STATUTES

Between the three recently passed bills, four separate statutes either were amended or will be amended soon. For purposes of clarity, only California Penal Code 11414 and

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19. *Id.*

20. See Watson, *supra* note 3.

21. Greg Risling, *Christopher James Guerra's Death Moves Justin Bieber to Call for Stronger Paparazzi Laws in California*, HUFF POST LOS ANGELES (Jan. 23, 2014 6:58 PM), [http://www.huffingtonpost.com/2013/01/03/christopher-james-guerra-justin-bieber\\_n\\_2403256.html](http://www.huffingtonpost.com/2013/01/03/christopher-james-guerra-justin-bieber_n_2403256.html).

22. See Watson *supra* note 3.

California Civil Code section 1708.8 will be discussed. California Penal Code 11414 will be discussed because it is the only penal code section that was amended to deal with paparazzi and was amended with these bills, and Civil Code section 1708.8 will be discussed because it has the most history and revisions over time.

### **A. California Penal Code 11414**

The original Code read largely the same as the new one. The old version penalized “any person who intentionally harass[ed] the child or ward of any other person because of that person's employment” with a misdemeanor.<sup>23</sup> Child or ward was defined as anyone under 16 years old, and harassment was defined as:

[the] knowing and willful conduct directed at a specific child that seriously alarms, annoys, torments, or terrorizes the child, and that serves no legitimate purpose.<sup>24</sup> The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress.<sup>25</sup>

The law also allowed for an increase in punishment for second and third offenders, but not as much of an increase as allowed for in the newest iteration of the statute.<sup>26</sup> While this original statute did not differ much from the new 2014 version, the 2014 version strengthened the punishments and allowed for further protection of children, making it seem radical and unenforceable to some.

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23. A.B. 3592, 1994 Leg., Reg. Sess. (Cal. 1994).

24. CAL. PENAL CODE § 11414(b)(1), (2) (West 2014).

25. *Id.* at (b)(2).

26. *Id.* at (c); A.B. 3592, 1994 Leg., Reg. Sess. (Cal. 1994).





## B. California Civil Code 1708.8

The civil law version of the California paparazzi law, codified in California Civil Code 1708.8, was first passed in 1998, but has since been amended several times. California most recently expanded its legislation to cover the children of celebrities, as well, in an attempt to expand privacy rights and protect celebrity safety. The Legislature was concerned with new technology encroaching upon privacy beyond the ability of common law torts to suffice as a remedy.<sup>27</sup> Thus, the California State Legislature passed Senate Bill 262 to address the loss of privacy due to technology.<sup>28</sup> This statute was codified as California Civil Code § 1708.8; instead of protecting traditional privacy, it actually acts to protect non-legal regulation, to avoid problems of enforcement and constitutional rights infringement that come along with traditional privacy protections.<sup>29</sup> This statute also “allow[ed] individuals to sue for ‘constructive’ trespass, or trespass to obtain, by way of an electronic enhancing device of a visual or auditory nature, an image that the photographer could not have obtained otherwise without physically trespassing.”<sup>30</sup>

The law was amended in 2006 and lasted until 2009. The 2006 statute codifies assault. The statute says “an assault committed with the intent to capture any type of visual image, sound record, or physical impression of the plaintiff” is subject to general and special damages,

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27. See Note, *Privacy, Technology, and the California “Anti-Paparazzi” Statute*, 112 HARV. L. REV. 1367, 1377 (1999).

28. See *id.*

29. See *id.*

30. *New Anti-Paparazzi Law Broadens Tort Liability for “Trespass”*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (OCT. 19, 1988), <http://www.rcfp.org/browse-media-law-resources/news/new-anti-paparazzi-law-broadens-tort-liability-trespass#sthash.9WMcRhdA.dpuf>.

including punitive damages.<sup>31</sup> This law was targeted at the paparazzi and was written for the general population. It did not, however, address what occurs if paparazzi assault children or other people associated with the plaintiff.<sup>32</sup>

However, in 2010 California passed another law aimed at the paparazzi. This time, the law was directed at punishing the act of driving dangerously to obtain a photograph or other image of a celebrity. The statute protects celebrities by fining a “person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship, to violate any provision of subdivision (a), (b), or (c) is liable for any general, special, and consequential damages resulting from each said violation.”<sup>33</sup> This is broader than the 2006 version, because it extends liability beyond the person taking the photo.<sup>34</sup> The law also retains any other common law tort claims for the plaintiff, including defamation in either slander or libel form.<sup>35</sup> Even though this provision of the law was struck down for being overly broad,<sup>36</sup> there is a failsafe in that anyone needs actual knowledge prior to purchasing the paparazzi image before being persecuted. It also protects those who re-distribute or sell the photo.<sup>37</sup>

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31. Assemb. B. 381, 2005-06 Leg., Reg. Sess. (Cal. 2005), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200520060AB381&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB381&search_keywords=).

32. This extension was added in 2014 and has yet to be struck down, despite potential First Amendment arguments.

33. A.B. 524, 2009 Leg., Reg. Sess. (Cal. 2009).

34. See Assemb. B. 381, *supra* note 31.

35. See *id.* at (f).

36. Risling, *supra* note 21.

37. *Supra* note 31 at (3).

### III. THE AMENDED STATUTES

#### A. California Penal Code 11414

California Penal Code 11414 expands on the coverage of the original statute. It still designates child or ward as being under 16 years of age, which means that many famous celebrity siblings and children, such as Kylie and Kendall Jenner,<sup>38</sup> are beyond the scope of the statute.<sup>39</sup> The statute redefined harassment and employment. Harassment has been expanded to list various forms

including, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child's or ward's activities or by lying in wait.<sup>40</sup>

It also requires that "[t]he conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress."<sup>41</sup> Employment is also now defined as "job, vocation, occupation, or profession" of the caretaker of the child.<sup>42</sup> The statute allows the caretaker to bring a *civil* suit on behalf of the child or ward in the case of a child being harassed.<sup>43</sup> In order to limit a challenge on over breadth or false blame, the statute states "the act of

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38. This could be for several reasons. One may be that those older than 16 are probably able to bring their own suits without the help. Another may be that, at that age, the children either are celebrities in their own right who assume this risk with their jobs or are no longer of any interest to paparazzi trying to get exclusive pictures.

39. CAL. PENAL CODE § 11414(b)(1) (West 2014).

40. *Id.* at (b)(2).

41. *Id.*

42. *Id.* at (b)(3).

43. *Id.* at (d) (emphasis added).

transmitting, publishing, or broadcasting a recording of the image or voice of a child does not constitute a violation of this section,”<sup>44</sup> which arguably is a preemptive attempt to keep the law from infringing on any First Amendment rights.

## **B. California Civil Code**

Assembly Bill 1356 amends California Civil Code section 1708.7, the section on stalking.<sup>45</sup> As amended, the statute specifically allows celebrities to bring suit on behalf of their children against paparazzi (and magazines supporting those paparazzi) that are potentially endangering children.<sup>46</sup> The statute holds a person liable of stalking if the person engaged in a “pattern of conduct” causing a plaintiff to fear for his or her own safety or the safety of an immediate family member, including a child.<sup>47</sup>

Assembly Bill 1256 amends California Civil Code section 1708.8, the section regarding physical invasion of privacy. The bill amends the section to define physical invasion of privacy as when the defendant photographs private matters in addition to personal and familial matters.<sup>48</sup> It defines “private, personal, and familial activity” as “interaction with the plaintiff’s family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy.”<sup>49</sup> Assembly Bill 1256 also adds section 1708.9 to the Civil Code. Section 1708.9 makes it unlawful for any person to interfere, physically or nonphysically, with any person attempting to enter or exit a facility as defined in the code.<sup>50</sup> While the statute does not

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44. *Id.* at (e).

45. A.B. 1356, 2014 Leg., Reg. Sess. (Cal. 2014).

46. *Id.* at § 1, 1708.7.

47. *Id.*

48. A.B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

49. *Id.*

50. *Id.*

specifically name children, it does imply that situations such as children trying to get into or out of schools or other public and private places could bring suit against paparazzi who effectively trap them with intimidation tactics.

#### IV. HOW THE STATUTES ADDRESS TORT LAW

Both the criminal statute, California Penal Code 11414,<sup>51</sup> and the California Civil Code sections, 1708.7-1708.9, address two torts: the tort of intrusion and the tort of trespass.

##### A. The Tort of Intrusion, or Invasion of Privacy

In order to understand the newest bill, this paper first looks at the general tort of intrusion and how the statute interacts with the current requirements for the common law tort. The tort of intrusion is considered the typical “invasion of privacy” claim.<sup>52</sup> Invasion of privacy is considered to encompass an intrusion on seclusion and an appropriation of the person’s name or likeness.<sup>53</sup> In *Shulman v. Group W. Productions*, the plaintiffs, Ruth and Wayne, were injured when their car went off the highway and overturned, trapping them inside.<sup>54</sup> A rescue helicopter crew came to help the plaintiffs.<sup>55</sup> Along with the rescue crew, however, was a video camera operator, told to follow the helicopter crew and record everything.<sup>56</sup> The cameraman catalogued the scene and the rescue before being placed in the

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51. While crimes are not the same as torts, the statute is grounded in tort principles and criminalizes similar behavior.

52. *Shulman v. Grp. W. Prods., Inc.*, 955 P.2d 469, 474 (Cal. Super. Ct. 1998).

53. Karl A. Menninger, II, J.D., *Media Outrage: Privacy Torts (D)*, AM. JUR. PROOF OF FACTS 3d.

54. *Shulman*, 955 P.2d at 474.

55. *Id.*

56. *Id.* at 475.

helicopter, and he continued the filming on the roof of the hospital when the helicopter carrying Ruth landed.<sup>57</sup> The nurse had a wireless microphone on that captured her conversations with Ruth and other rescue workers.<sup>58</sup> In capturing the sounds, the cameraman picked up various snippets of conversations with Ruth.<sup>59</sup> When the show aired, Ruth felt her privacy was violated, because of the things she said and the parts of her body that were seen.<sup>60</sup> Ruth and Wayne sued the producers of the television program for invasion of privacy due to unlawful intrusion by videotaping the rescue.<sup>61</sup>

The court used a reasonable person standard to determine whether at the various stages of the incident the plaintiffs had an “objectively reasonable expectation of privacy”: when in the car at the time of the accident, during transportation to the hospital, and upon arrival at the hospital.<sup>62</sup> The court explicitly found that the cameraman’s mere presence was not enough to create an invasion of privacy.<sup>63</sup> Rather, the court distinguished the scene of the accident, where media coverage may be expected, from the actual rescue and transport of the plaintiffs, stating that it was “aware of no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient’s consent.”<sup>64</sup> The court also held that the plaintiff had a reasonable expectation of privacy in not having the conversations regarding medical information recorded.<sup>65</sup> Again, the court made sure to distinguish

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57. *Id.*

58. *Id.*

59. *Id.*

60. *See id.* at 476.

61. *Id.*

62. *Id.* at 490.

63. *See id.*

64. *Id.*

65. *See id.* at 491.

between the cameraman as a bystander and the cameraman as a hired videographer for this program, reasoning that it would have been acceptable if the cameraman had just picked up some audio as a result of filming the scene.<sup>66</sup> However, because he hooked up the nurse with a microphone and purposefully captured audio with sensitive medical information, he invaded the plaintiffs' privacy.<sup>67</sup>

1. The tort of intrusion as dealt with under California Penal Code 11414

Technically, the penal code deals with crimes, rather than civil tort actions. This section of the code is unique, because it was amended to allow guardians of children affected to bring a civil case against anyone who gained "any compensation from the sale, license, or dissemination of a child's image or voice received by the individual who, in violation of this section, recorded the child's image or voice."<sup>68</sup> When a photographer violates this section of the code, in addition to criminally harassing a child, he is also committing the civil tort of intrusion, because he is capturing images or recordings of the child that are within a reasonable person's expectation to privacy.

2. The tort of intrusion as dealt with under California Civil Code section 1708.7

*Shulman*, as discussed above, is a departure from the subject matter of the California celebrity statute on several levels. It is distinguishable from the case of celebrities and the statutes discussed here, however, on several grounds. First, *Shulman* deals with private people and a matter of

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66. *See id.*

67. *See id.*

68. CAL. PENAL CODE § 11414(d) (West 2014).



private concern, rather than celebrities who may be considered public figures. Second, *Shulman* deals with invasion of privacy when dealing with sensitive medical information, which does not seem to be at issue specifically in the statutes being examined here. Despite this, the case still serves as a good example of what the typical tort of intrusion, or invasion of privacy, looks like in California.

*Shulman* explains the framework for the law in California, creating an objectively reasonable expectation of privacy standard. The law also takes into account what the reasonable expectation is in light of changes in technology and culture.<sup>69</sup> This means that even though Jackie Onassis successfully limited Galella and got a restraining order against him when he jumped out of the bushes and followed her to a nightclub,<sup>70</sup> a celebrity today may not be able to get a restraining order for the same activities.

California Civil Code 1708.7 builds off of the *Shulman* framework and codifies stalking, which is a form of the tort of intrusion. To be liable for the tort of stalking, the plaintiff must prove that the defendant “engaged in a pattern of conduct the intent of which was to follow, alarm, place under surveillance, or harass the plaintiff.”<sup>71</sup> Because of the conduct, one of several events must occur, one of which is “the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family

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69. See 2 RIGHTS AND LIABILITIES IN MEDIA CONTENT § 7:9 (2d ed. 2014).

70. See *id.* (discussing *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973), where Jacqueline Kennedy Onassis was successful in limiting the activities of Galella, a freelance photographer who had fashioned himself as a so-called paparazzo).

71. Assemb. B. 1356, at 1708.7(a)(1), 2013-14 Leg., Reg. Sess. (Cal. 2014), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1356&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=).

member.”<sup>72</sup> The statute has a large definition section that creates clarity.<sup>73</sup> The statute also allows for general, special, and punitive damages, and allows the court to grant equitable relief when necessary.<sup>74</sup> The amended statute codifies the reasonable expectation of privacy discussed in *Shulman* by ensuring that celebrity parents have a way to bring suit based on paparazzi actions that the celebrities feel put their children in danger. It is also likely easier to bring suit under the statute rather than at common law, because of the specific definitions that make it easier for the plaintiff to build a full case. One helpful definition is “substantial emotional distress,” because the requirements as defined are not as high of a burden to meet as the standard for the separate tort of intentional infliction of emotional distress.<sup>75</sup>

## **B. Trespass**

Trespass falls under two categories: real property and chattels. Trespass to real property is defined as interference with possession of property by entering it, and liability may be imposed for intentional, reckless, negligent, or extremely dangerous activity.<sup>76</sup> Trespass against personal property, or chattels, occurs when intentional interference with personal property caused injury.<sup>77</sup> Trespass to chattels differs from conversion because conversion requires “substantial exercise of dominion or control” over the personal property, and trespass is merely “any wrongful interference or exercise of dominion.”<sup>78</sup>

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72. *Id.* at (a)(3)(A)(i).

73. *See id.* at (b)(1)-(b)(7).

74. *See id.* at (c)-(d).

75. *Id.* at (b)(7).

76. *See* 59 KIMBERLY C. SIMMONS, CALIFORNIA JURISPRUDENCE 3d § 1 (2014).

77. *See* 14A LESLIE LARSON, CALIFORNIA JURISPRUDENCE 3d § 74 (2014).

78. *Id.*

1. Trespass under California Penal Code 11414

California Penal Code 11414 as amended by Senate Bill 606 does not mention trespass specifically but implicates it when it defines harassment as “following the child’s or ward’s activities or by lying in wait.”<sup>79</sup> This behavior can be analogous to trespass to land, because the photographers may be waiting somewhere, such as outside the child’s school or home, in order to snap a photo. With that, celebrities can bring suit on behalf of their children, particularly if the trespass causes a child severe emotional harm, or if the child fears the photographers because of what is occurring. However, the civil action stemming from Section 11414 of the Penal Code has more to do with the emotional distress of the child when the trespass is occurring rather than the actual trespass. But the harassment and cause of action would not be possible without the photographer trespassing into the child’s personal space to the point where the child feels scared or threatened, and so this law serves to make that invasion of personal privacy not only into a criminal harassment action, but also into a civil tort of trespass.

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79. CAL. PENAL CODE § 11414(b)(2) (West 2014).

2. Trespass under California Civil Code 1708.8

The first version of the Civil Code that dealt with the paparazzi specifically highlighted trespass, and it has only been strengthened with the new sections. Implemented in 1998 after the Screen Actors Guild (SAG) lobby was influenced by Princess Diana's death in 1997, this version of the Civil Code made

photographers liable for invasion of privacy when an individual trespasses on private property with "the intent to capture any type of visual 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."<sup>80</sup>

The 2014 California Assembly Bill 1356, one of two bills passed to amend the California Civil Code titles dealing with paparazzi activity, showcases a shift from privacy interests to fear of physical injury. This comports with the escalating violence between paparazzi and celebrities in the news. The California Assembly extended the coverage that was previously only available for celebrities to their family members, especially their children. The Assembly said:

This bill would include a pattern of conduct intended to place the plaintiff under surveillance within those elements defining the tort of stalking. The bill would permit the plaintiff to show, as an alternative to the plaintiff reasonably fearing for his or her safety or that of a family member, that the pattern of conduct resulted in the plaintiff suffering substantial emotional

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80. *New Anti-Paparazzi Law Broadens Tort Liability for "Trespass"*, *supra* note 30.

distress, and that the pattern of conduct would cause a reasonable person to suffer substantial emotional distress. The bill would require the plaintiff to show that the person has either made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or that of an immediate family member, or, reckless disregard for the safety of the plaintiff or that of an immediate family member. The bill would relieve the plaintiff, under exigent circumstances, as specified, of the requirement to demand that the defendant cease his or her behavior. The bill would also define the terms “follows,” “place under surveillance,” and “substantial emotional distress” for purposes of these provisions.<sup>81</sup>

This proposed amendment to California Civil Code 1708.7 aimed to extend stalking to persistent unauthorized surveillance,<sup>82</sup> such as when paparazzi are camped outside of a celebrity’s home for days, waiting for him or her to make an appearance with a new child.

The other bill, California Assembly Bill 1256, also shows an expansion of privacy interests for safety reasons. It amended existing law to extend privacy and buffer zones around the children of celebrities by expanding trespass on property, such as private and public school grounds or health facilities.<sup>83</sup> California Civil Code 1708.8 holds a person

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81. Assemb. B. 1356, 2013-14 Leg., Reg. Sess. (Cal. 2014), available at [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1356&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=).

82. See *California Assembly Bill 1356 (AB 1356) – Stalking Reform*, THE PLAN (Apr. 18, 2013), <http://wertheplan.wordpress.com/2013/04/18/california-assembly-bill-1356-ab-1356-stalking-reform/>.

83. See Assemb. B. 1256, 2013-14 Leg., Reg. Sess. (Cal. 2013), available at

liable for “physical invasion of privacy when the defendant knowingly . . . committed a trespass to capture any type of . . . impression of the plaintiff engaging in a private, personal, or familial activity.”<sup>84</sup> That has been defined to mean “interaction with the plaintiff’s family or significant others under circumstances in which the plaintiff has a reasonable expectation of privacy” or any other aspects of the plaintiff’s life where the plaintiff can have a “reasonable expectation of privacy.”<sup>85</sup> The Legislature reasoned:

This bill would provide that it is unlawful for any person, except a parent or guardian acting toward his or her minor child, to, by force, threat of force, or physical obstruction that is a crime of violence, intentionally injure, intimidate, interfere with, or attempt to injure, intimidate, or interfere with any person attempting to enter or exit a facility, or to, by nonviolent physical obstruction, intentionally injure, intimidate, interfere with, or attempt to injure, intimidate, or interfere with any person attempting to enter or exit a facility. The bill would define “facility” for purposes of these provisions as any public or private school grounds, or any health facility. The bill would authorize a person aggrieved by a violation of these provisions to bring a civil action to enjoin the violation, for compensatory and punitive damages, for injunctive relief, and for the cost of suit and reasonable attorney’s and expert witness’ fees, or with respect to compensatory damages, to elect, in lieu of actual damages, an award of statutory damages, as specified. The bill would also authorize the Attorney General, a district attorney, or a city attorney to bring a civil action

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[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1256&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1256&search_keywords=).

84. CAL. CIV. CODE § 1708.8(a) (West 2014).

85. *Id.* at (B).

to enjoin a violation of these provisions, for compensatory damages to persons and entities aggrieved by the violation, and for the imposition of a civil penalty, as specified.<sup>86</sup>

While this bill did not get as much publicity as SB 606, it did more regarding torts of trespass. Even though the statutes framed out stalking, they really represent a course of action for trespass on celebrities' land. Even though this bill may not comport with traditional common law trespass to land, as the act can potentially occur on public property, the law extends that trespass definition while still protecting the First Amendment rights of the photographer.

## **V. DEFENSES: ASSUMPTION OF RISK AND WAIVER**

Valid defenses to the civil cause of action under this statute may exist in the common law defenses of assumption of risk and waiver. Celebrities and their children, simply by being out and about running errands, may be held responsible for an implied assumption of risk. An implied assumption of risk can occur when voluntarily entering into a relationship with a defendant and "being fully aware that the defendant will not be responsible for protecting [the person assuming risk] from known future risks."<sup>87</sup> For example, the primary assumption of risk may occur when a celebrity voluntarily engages with paparazzi taking pictures of him or her outside a restaurant. There is also a primary assumption of risk that exists when the plaintiff assumes future risks "inherent in a particular activity or situation . . . [and t]he risks assumed are not those created by defendant's

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86. A.B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

87. 1 COMPARATIVE NEGLIGENCE MANUAL § 1:37 (3d ed. 2014).

negligence, but rather by the nature of the activity itself.”<sup>88</sup> This can be risk from a sport or from employment.<sup>89</sup> This could be, for example, when the celebrity knows there are going to be paparazzi at an event and goes to it anyway.

While both the primary assumption of risk model and the implied assumption of risk may be relevant in the paparazzi and celebrity situation, neither defense is likely to be successful. First, the primary assumption of risk will not be applicable to celebrities, because the employment of a celebrity neither is inherently dangerous nor does it carry the risk of harassment. The real employment of a celebrity is whatever he or she does as a job, whether it is acting or singing; celebrity is just a perk or drawback to being an actor or musician. A celebrity’s contract with a studio or record company is to act or sing; that is how celebrities make money. Part of being a celebrity may be endorsement deals, either individually or as part of a contract with an employer. Endorsement deals may include public appearances, such as when Kim Kardashian goes to 1Oak in Las Vegas and gets paid to host the party. This brings in business to the club, and it creates a place for Kim Kardashian to go and make sure that her brand does not get diminished. If paparazzi take pictures of her there, then they are well within their rights to use the assumption of risk defense and actually win. Even if she were to bring her child and then sue under this new statute, the paparazzi might still prevail, because, again, she was going to the club to be seen and photographed for money and publicity. The primary assumption of risk is not generally applicable, however, because it would only relate to instances where the celebrity is certain the paparazzi will be there but brings a child anyway. If the celebrity did not expect the paparazzi to be present, and the paparazzi takes

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88. *Id.*

89. *Id.*



pictures of the celebrity's child, then the statute would protect the celebrity and the primary assumption of risk defense would not be valid.

Second, an implied assumption of risk is not applicable, because the celebrity is not voluntarily entering into any relationship with a paparazzo photographer. The theory of liability is that the celebrity is being pursued, harassed, and photographed without his or her consent. The lack of consent extends to the celebrity's child, who is being harassed because of the parent and who legally cannot enter into a consenting relationship, anyway. Because the parent can bring civil suit for the child under the California Penal Code 11414 as amended by SB 606, it is reasonable to argue that the child cannot assume any of the risk on his or her own.

Waiver is usually considered as an express assumption of risk. In these cases, a person would sign a waiver, or contract, releasing the other party from wrongdoing, should harm come to the plaintiff. Express waiver is not available here, unless celebrities are at press releases or other events where they are aware cameras will be present and either they or their agents have signed documents releasing the photographers of liability. For example, an express waiver may occur at a children's film premiere, where a celebrity brings his or her child onto a red carpet and knows photographers will be cataloguing the event. More often than not, however, the argument from defendants under these statutes will be an implied waiver because the celebrity is out in public and knows he or she is notable and likely to get photographed. This defense likely cannot be applied to children, especially in mundane or ordinary situations, such as when the celebrity is merely walking a child to school or out and about running errands. While the photographer may want to rely on a waiver that exists solely because of the celebrities publicity

requirements in order to maintain their status, that certainly can't relate to the children.

The language in the statutes also precludes waiver. In California Penal Code 11414, the language of the statute accounts for express waiver, defining covered conduct to include "conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward."<sup>90</sup> This takes away an argument of implied waiver linked to the children and allows for express waiver as a defense. More often than not, however, these photographers will not have the direct consent or express waiver of celebrities, because of the almost guerilla tactics of photography they employ.

Regardless of the defenses available to photographers, public policy will dictate against allowing assumption of risk or a waiver. Assumption of risk will not be available or preferred, because of the children. With the issues that occurred with Princess Diana<sup>91</sup> or Jacqueline Kennedy,<sup>92</sup> it is highly unlikely that any judge would strike down the law, based on the strong public policy interests. It is in the state's best interest to protect children. It is especially important to protect children who may be harassed because of their parents, particularly when that harassment can create lasting impressions. Because of that public policy, both the Penal Code and the Civil Code appear to extend protection to the children of celebrities and adequately protect privacy interests without offending the

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90. CAL. PENAL CODE § 11414(2) (West 2014).

91. See Craig B. Whitney, *Diana Killed in a Car Accident in Paris*, N.Y. TIMES (Aug. 31, 1998), <http://www.nytimes.com/learning/general/onthisday/big/0831.html>.

92. Wood, *supra* note 12.

First Amendment interests of the photographers and tabloids.

## VI. CALIFORNIA STATUTES VERSUS OTHER STATES AND COUNTRIES

In the United States, California has done the most to protect celebrity rights. The federal government attempted to pass a law to protect celebrities after Princess Diana's tragic death in a car chase with paparazzi in Paris.<sup>93</sup> Hawaii also recently attempted to pass a law protecting celebrities, but it was unsuccessful.<sup>94</sup>

While many criticize the California statute as too restrictive and as offensive to First Amendment rights and freedom of the press, it does not go nearly as far as laws in the European Union. Generally, privacy laws in the EU are much stricter than those in America; some feel this is a legacy of the Holocaust, while others say it is because Europeans actually trust their government more. In some cases, paparazzi even come to America from Europe because they have criminal records there, due to stricter paparazzi restrictions.<sup>95</sup> Whatever the case, this is helping countries like France pass anti-paparazzi laws that can protect more broadly than their American peers.<sup>96</sup> France offers much stricter protections than any state can in the

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93. See Privacy, Technology, And The California "Anti-Paparazzi" Statute, 112 Harv. L. Rev. 1367.

94. Anita Hofschneider, *Steven Tyler Act Stalls in Hawaii as Lawmakers Say Privacy Bill Has "Zero Support"*, HUFF POST ENTERTAINMENT (May 21, 2013, 5:12 AM), [http://www.huffingtonpost.com/2013/03/21/steven-tyler-act-stalls-hawaii\\_n\\_2924542.html](http://www.huffingtonpost.com/2013/03/21/steven-tyler-act-stalls-hawaii_n_2924542.html).

95. Murray, *supra* note 13.

96. Bob Sullivan, *"La Difference" is Stark in EU, U.S. Privacy Laws*, NBCNEWS.COM (Oct. 19, 2006, 11:19 AM), [http://www.nbcnews.com/id/15221111/ns/technology\\_and\\_science-privacy\\_lost/t/la-difference-stark-eu-us-privacy-laws/#.VDtR0kv4vwI](http://www.nbcnews.com/id/15221111/ns/technology_and_science-privacy_lost/t/la-difference-stark-eu-us-privacy-laws/#.VDtR0kv4vwI).

United States. The laws protect celebrities and their children, like California's. However, France is very strict with the children, and French tabloids "regularly blur out the faces of celebrities' children or simply pull the photos" to avoid lawsuits.<sup>97</sup>

Recently, the European Union also ruled on Google searches. In May, the European Court of Justice, the highest court in Europe, ruled that internet users have the right to be forgotten and have their information taken down from Google after a certain amount of time "unless there are 'particular reasons' not to."<sup>98</sup> The court reasoned that search engines such as Google should play an active role as information controllers, rather than just be pipelines to information.<sup>99</sup> The court also reasoned that protecting the privacy of citizens should be more important than any access to information,<sup>100</sup> an idea that is impossible to implement in the United States. In compliance with that ruling, Google set up a department within its legal team to review requests to decide if links meet the privacy requirements.<sup>101</sup> Should the requests meet Google's standards, links will be removed from searches in 28 countries in Europe — but only from the

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97. Angela Doland, *French Paparazzi Laws Favor Celebrities; Jolie, Pitt Latest Couple to Benefit*, THE SEATTLE TIMES (June 11, 2008, 12:00 AM), [http://seattletimes.com/html/nationworld/2004470054\\_brangelina11.html](http://seattletimes.com/html/nationworld/2004470054_brangelina11.html).

98. David Streitfield, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), <http://www.nytimes.com/2014/05/14/technology/google-should-erase-web-links-to-some-personal-data-europes-highest-court-says.html>.

99. See Mark Scott, *Google Ready to Comply with "Right to be Forgotten" Rules in Europe*, N.Y. TIMES (June 18, 2014, 12:42 PM), [http://bits.blogs.nytimes.com/2014/06/18/google-ready-to-comply-with-right-to-be-forgotten-rules-in-europe/?\\_r=0](http://bits.blogs.nytimes.com/2014/06/18/google-ready-to-comply-with-right-to-be-forgotten-rules-in-europe/?_r=0).

100. See Streitfield, *supra* note 98.

101. See Scott, *supra* note 99.

domain links specific to those countries.<sup>102</sup> Experts argue over the severity of this ruling and how much it affects already common practices in Europe,<sup>103</sup> but in America this would be unheard of, because of how much American jurisprudence favors freedom of information and protecting the right to free speech. Given the worry over the newest California paparazzi statutes infringing upon First Amendment rights, something like this decision would never stand in an American court.

## VII. CONCLUSION

The most recent iteration of the California paparazzi statutes protects privacy interests for both celebrities and their children. First, these laws were necessary because of the history of paparazzi intrusion into privacy and the physical safety concerns in California and elsewhere. The statutes extend the torts of intrusion and stalking to apply to scenarios where celebrities and their children are out in public and the child is being harassed or frightened by paparazzi actions. The statutes adequately provide privacy support and actionable language for celebrities, because they deal with assumption of risk and waiver by implicitly and explicitly waiving those defenses. While they do not protect celebrities as much as privacy laws in the European Union, and specifically France, they protect enough, especially given the parameters of the First Amendment. The California paparazzi statutes, in all of their iterations, protect the privacy interests of celebrities without being too intrusive on the First Amendment and while dealing with waiver, assumption of risk, and trespass in a manageable way.

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102. *Id.* For example, Google in Germany will remove links from the google.de domain but not from the general google.com page. *Id.*

103. *See id.*

Many critics are skeptical of the protections the statutes can actually afford, because of expansive First Amendment coverage in this country. One problem is that the statutes use vague and overbroad terms to limit the freedom of the press in taking pictures of these children.<sup>104</sup> For example, California Penal Code 11414 requires that one “seriously alarm” a child to violate the code, but it does not explain how to apply that term in comparison to an annoyance or other actions where the value of the speech outweighs the potential harm as an invasion to privacy that the child may face.<sup>105</sup> Further, it may be overbroad because it keeps paparazzi from photographing the newsworthy adults when they are with children, thus severely limiting speech.<sup>106</sup> While those issues are important, they are not discussed in this paper, because this paper focuses solely on the privacy protections. Given the extent of Photoshop and computer technology, however, it is safe to assume the paparazzi could find a way around the children’s faces in a shot, such as pixelating or blurring the image, and then paparazzi may not feel as though their First Amendment rights are being infringed, because their work is being seen.

Furthermore, both the civil and criminal statutes have explicit restrictions that attempt to ensure the state cannot infringe upon the First Amendment rights of paparazzi. First, California Civil Code 1708.7 affirmatively states that the statute “shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly,”<sup>107</sup> or all enumerated

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

105. *Id.*

106. *Id.*

107. Assemb. B. 1356, at 1708.8(f), 2013-14 Leg., Reg. Sess. (Cal. 2014), available at

rights of the First Amendment. While private actors cannot infringe upon First Amendment rights, section 1708.7 allows the state to perform an act of “police power . . . for the protection of the health and welfare of the people” of California. If the state acts for a private actor under the civil statute, the language above keeps it from violating free speech principles in punishing those who allegedly stalk celebrities. Second, California Penal Code 11414 prevents those who publish or broadcast the image from being punished under that section,<sup>108</sup> which means news outlets can facilitate free speech without fear of individual criminal liability under the statute.

Additionally, coverage must be newsworthy in order to be protected by the First Amendment.<sup>109</sup> Newsworthiness is defined as current events, commentary on public affairs, information about human activity, and information “appropriate so that individuals may cope with the exigencies of their period.”<sup>110</sup> However, while most celebrities are intriguing and fascinating, and it is nice to see how the rich live, that does not fall into the “exigencies of their period” and this does not mean that the celebrities’, or their children’s, activities are newsworthy. As such, California Penal Code 11414 and California Civil Code sections 1708.8 and 1708.9 all protect the privacy interests of celebrities and their children, known in common law as the tort of intrusion and trespass to land and chattels, without materially infringing upon the First Amendment rights of paparazzi.

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[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1356&search\\_keywords=](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1356&search_keywords=).

108. CAL. PENAL CODE § 11414(c) (West 2014).

109. *See Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980).

110. *Id.*