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STOP THE ‘NAZZI’: WHY THE UNITED STATES NEEDS A FULL BAN ON PAPAZZI PHOTOGRAPHS OF CHILDREN OF CELEBRITIES

*Dayna Berkowitz**

“We must protect the children because they are our future” or some variation of that phrase is often heard, whether it be in relation to education, security measures, or in some clichéd apocalypse-type movie. This phrase carries substantial meaning mostly because of its truth, but also because it is a significant policy consideration in much of the legislation in the United States. Yet the legislature has overlooked a sub-sect of “the children of our future” numerous times when it comes to affording protections. That subsect is composed of the children of celebrities and they lack effective protections from paparazzi harassment.

This Note proposes the strong legislation that is needed to protect the children of celebrities from the paparazzi, or as the children of celebrities refer to them: nazzis.¹

My daughter doesn’t want to go to school because she knows ‘the men’ are watching for her. They jump out of the bushes and from behind cars and who knows where else, besieging these children just to get a photo.

–Halle Berry, speaking before the California Assembly
Committee on Public Safety in June 2013²

* The author would like to give special thanks to Professor Mary Dant for her advice and guidance in the drafting of this article and to her family for their constant support.

1. Nazi refers to the child’s pronunciation of ‘paparazzi’ and was the first word uttered by Lila Grace Moss, Kate Moss’s daughter. See Guy Trebay, *The Garbo of Fashion*, N.Y. TIMES (Nov. 2, 2012), http://www.nytimes.com/2012/11/04/fashion/a-few-words-with-kate-moss-fashions-garbo.html?pagewanted=all&_r=1.

2. *Halle Berry Describes Daughter’s Harassment Terror*, CBS NEWS (June 25, 2013, 5:29 PM), <http://www.cbsnews.com/news/halle-berry-describes-daughters-harassment-terror> [<http://perma.cc/PM9K-2ZC8>]; *Halle Berry’s Paparazzi Bill Passes, Protecting Children of Public Figures*, HUFFINGTON POST (Sept. 25, 2013, 5:24 PM),

I. INTRODUCTION

Halle Berry paints a grim picture of what the children of celebrities regularly experience. From the time they are born, the children of celebrities are followed around like spectacles, with paparazzi blocking off streets to obtain a picture of them merely drinking milk from a bottle.³ Flashes blind them as they try to exit restaurants and the oft-heard warning from parents that “this is a child” does little to stop the paparazzi.⁴

Indeed, no child of a celebrity is safe from this unique type of assault.⁵ Take Kate Moss. In 2008, she tried to leave Los Angeles International airport with her daughter, only to be swarmed by a sea of paparazzi and cameras.⁶ The paparazzi forced Moss into a corner, shoving their cameras not only into Moss’s face but also into the face of her seven-year-old daughter who cowered under the luggage carts.⁷ After the incident, both Moss and her daughter appeared on the verge of a nervous breakdown.⁸

Due to the constant barrage of paparazzi and camera flashes,⁹ celebrities like Kristen Bell, Halle Berry, and Jennifer Garner took a firm stand in 2013 against the paparazzi, urging the California legislature to do

http://www.huffingtonpost.com/2013/09/25/halle-berry-paparazzi-bill-passes_n_3991290.html [http://perma.cc/U7PY-V47Y].

3. Hollywood.TV, *Halle Berry Gets Angry with the Paparazzi at Barefoot*, YOUTUBE (May 2, 2009), <http://www.youtube.com/watch?v=bhQ2zk-HYWo> [http://perma.cc/QGP3-F6CQ].

4. *Id.*

5. That’s OMG!, *Kourtney Kardashian Tells Paparazzi “Shut the F*ck Up”*, YOUTUBE (Dec. 18, 2013), <http://www.youtube.com/watch?v=urizBsjGgjU> [http://perma.cc/8TLP-EQS9]; The Hollywood Fix, *Hilary Duff Goes off on Paparazzi While Out with Son Luca*, YOUTUBE (May 23, 2015), <http://www.youtube.com/watch?v=pmXrYmkTHR4> [http://perma.cc/359U-D4KW].

6. *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, HUFFINGTON POST (Sept. 9, 2010, 1:37 PM), http://www.huffingtonpost.com/2010/09/02/kate-moss-paparazzi-video_n_703737.html [http://perma.cc/2GPH-GS7P].

7. *Id.*

8. *Id.*

9. *See Kristen Bell and Dax Shepard Lead Campaign to Protect Kids from Paparazzi*, CBS NEWS (Feb. 28, 2014, 10:54 AM), <http://www.cbsnews.com/news/kristen-bell-and-dax-shepard-start-campaign-to-protect-children-from-paparazzi> [http://perma.cc/K8TH-NDFFP].

more to protect their children.¹⁰ Their movement was not revolutionary: anti-paparazzi laws have been around since the untimely death of Princess Diana.¹¹ With each anti-paparazzi law passed, the paparazzi have become more restricted in who and what they can photograph.¹² To many, this looks like an infringement of their First Amendment rights.¹³ To others, especially the celebrity mothers whose children are harassed on a daily basis, it is not enough.¹⁴ More can be done to protect celebrities' children from the damaging effects of the paparazzi while still respecting the paparazzi's First Amendment rights.

This Note will begin in Part II by detailing the history of the most significant anti-paparazzi legislation in the United States, with a specific emphasis on California paparazzi laws and anti-paparazzi laws that protect children. Part III will discuss the tensions between this legislation and the paparazzi's First Amendment rights. Part IV will argue for stronger paparazzi legislation in the form of a full ban on paparazzi photographs of children of celebrities.¹⁵ This proposed full ban balances the children's and the paparazzi's interests, with the scales tipping in favor of the children's right to privacy. Finally, in Part V, this Note will grapple with the potential issues that a full ban on photographs of children of celebrities will likely encounter but ultimately conclude that the children's right to privacy trumps the paparazzi's First Amendment rights and that a full ban is the best approach to this situation.

10. *Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures*, *supra* note 2.

11. See CAL. CIV. CODE § 1708.7 (West 2016); H.R. 3224, 105th Cong. (2d Sess. 1998); see also Gary Wax, *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, 134–35 (2009).

12. Wax, *supra* note 11.

13. *Id.* at 136–37.

14. See Susan Rohwer, *Kristen Bell and Dax Shepard's Scheme to Sideline Aggressive Paparazzi*, L.A. TIMES (Mar. 5, 2014), <http://articles.latimes.com/2014/mar/05/news/la-ol-kristen-bell-dax-shepard-aggressive-paparazzi-20140305> [<http://perma.cc/B7SC-VY6Y>].

15. What this article describes as a “full ban” on the photographs of children of celebrities will be discussed in Part IV, Section B. For clarity purposes, a brief definition of “full ban” is provided here. A full ban means that the paparazzi are not allowed to take photographs of celebrities' children in either private or public places unless (a) the parent consents to these photographs or (b) the child consents to these photographs.

II. ANTI-PAPARAZZI LEGISLATION

A. *Anti-Paparazzi Legislation Generally*

The paparazzi and tabloids have existed for decades, but only recently has the United States, and particularly, California, seen the need for paparazzi legislation due to an increase in celebrity and lawmaker complaints.¹⁶ Prior to the boom of Internet gossip websites, tabloid television, and star-oriented magazines, the need for paparazzi was minimal.¹⁷ However, as society became more obsessed with the everyday lives of celebrities, the paparazzi became more numerous, aggressive, and tenacious.¹⁸ Moreover, since certain photos are more profitable than others, competition amongst the paparazzi grew,¹⁹ causing many paparazzi to take extreme measures.²⁰ Lawmakers responded by enacting legislation to protect celebrities and their children.²¹ Most of this legislation focused on the acts of the paparazzi, and not on the celebrities themselves or their children.²² Only recently has paparazzi legislation focused specifically on the children of celebrities.²³

Anti-paparazzi laws first found substantial support after the death of Princess Diana because to many people, the paparazzi caused Diana's

16. Gary Wax, *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, 133 (2009).

17. *Id.*

18. *Id.* at 133–34.

19. Brian Dakss, *Paparazzi Going Too Far?*, CBS (June 10, 2005, 7:44 AM), <http://www.cbsnews.com/news/paparazzi-going-too-far/2> [<http://perma.cc/XZ5T-GYDN>]; see also Patrick J. Alach, Article, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 206–07, 210 (2008).

20. Examples include being attacked by a three-foot patio umbrella, being punched in the head by Mike Tyson, and climbing an eight-foot wall. Meg Butler, *15 of the Most Crazy Paparazzi Confrontations*, MADAME NOIRE (Aug. 22, 2013), <http://madamenoire.com/292713/15-crazy-paparazzi-confrontations/14> [<http://perma.cc/A9QH-P5PS>].

21. 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, 207 (2010).

22. See generally CAL. CIV. CODE § 1708.8 (West 2016).

23. *Id.*; CAL. PENAL CODE § 11414 (West 2016).

death.²⁴ While this incident occurred in Europe, the United States House of Representatives, pioneered by California Representative Elton Gallegly, drafted H.R. 3224 to protect celebrities in the United States.²⁵ This novel bill would have imposed sanctions on those who “persistently follow[] or chase[] any individual . . . for the purpose of obtaining a visual image” in certain circumstances.²⁶ Among others, these circumstances included obtaining the image in order to resell it.²⁷ The bill was introduced into the House Judiciary Committee in 1998 for review, but ultimately remained in the Committee at the end of the session and was never passed into law.²⁸

The California Legislature also responded to Princess Diana’s death by drafting California Civil Code section 1708.8 (“section 1708.8”), which ultimately became law. Section 1708.8 was enacted in 1998 and contained several sections aimed at protecting celebrities.²⁹ Section 1708.8(a) states:

A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another person without permission or otherwise committed a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the physical invasion occurs in a manner that is offensive to a reasonable person.³⁰

This statute recognized a celebrity’s right, while on *private* property, to be free from paparazzi activities that would be offensive to a reasonable person.³¹ The statute’s broad test covered a significant amount of paparazzi activity. For example, a paparazzo would violate section 1708.8(a) if the

24. Cameron Danly, Article, *Paparazzi and the Search for Federal Legislation*, 38 W. ST. U. L. REV. 161, 169 (2011).

25. Paul McMasters, *California Enacts First ‘Paparazzi Law’; U.S. Congress Takes No Action on Bills, THE FIRST AMENDMENT AND THE MEDIA*, http://www.mediainstitute.org/ONLINE/FAM99/LPT_C.html [<http://perma.cc/W5NZ-RWTZ>].

26. H.R. 3224, 105th Cong. (2d Sess. 1998).

27. *Id.*

28. McMasters, *supra* note 25.

29. *See generally* CAL. CIV. CODE § 1708.8.

30. *Id.* § 1708.8(a).

31. *Id.* § 1708.8.

paparazzo, knowingly or without permission, walked onto Angelina Jolie's private property and took a picture of her through her kitchen window.³²

Importantly, the statute extends its protections to "familial activity" on private property,³³ thus reinforcing the policy of protecting the children of celebrities. For example, if a paparazzo walked onto Jolie's property to take a picture of her pushing her son Maddox on his swing set, the paparazzo would be liable for violating section 1708.8(a) since he or she trespassed onto Jolie's private property. However, if a paparazzo took a picture of Jolie pushing Maddox on a swing set in a public park, the paparazzo would not be in violation of the statute. Therefore, while celebrity children gained added protection in the private sphere under section 1708.8(a), the public sphere remained open to abuse.

Section 1708.8(b) adds another layer of protection to celebrities by prohibiting constructive trespassing.³⁴ Constructive trespassing is trespassing by non-physical means.³⁵ In the context of anti-paparazzi statutes, it refers to the ability to "shrink" the space between the paparazzi and celebrities through the use of technological advances such as extreme zoom cameras.³⁶ Section 1708.8(b) states:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if this image, sound recording, or other

32. It is always debatable whether a court would rule that a reasonable person would find this conduct offensive as the objective person can be an amorphous standard. See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 661 (2013). It is safe to say, for purposes of this example, that a court would deem offensive someone walking onto someone else's private property and playing "Peeping Tom," regardless of one's status as a celebrity.

33. CIV. § 1708.8.

34. *Id.*

35. Note, *Privacy, Technology, and the California "Anti-Paparazzi" Statute*, 112 HARV. L. REV. 1367, 1379 (1999).

36. *Id.*

physical impression could not have been achieved without a trespass unless the device was used.³⁷

Section 1708.8(b) thus expands celebrities' privacy by protecting them not just from actual trespass, but also from devices like telephoto lenses that enable paparazzi to capture images not otherwise available without a trespass.³⁸ For example, if Angelina Jolie was playing with Maddox on her private property far away from the sidewalk, a paparazzo standing on the public sidewalk could not use a telephoto lens to take this picture. The distance from Jolie to the paparazzi would require a physical trespass without the new-aged device and thus, section 1708.8(b) would prohibit the photo. This section protects celebrities from the paparazzi even when the paparazzi are a great distance away, thereby expanding celebrities' bubble of privacy. However, it is important to note that this statute ultimately only protects celebrities in private areas and does little to protect public areas.³⁹ Thus, celebrities still must grapple with the paparazzi in public areas.

Section 1708.8 was the first substantive piece of legislation to limit the paparazzi's interactions with celebrities and it also imposed civil punishments on paparazzi who violated it.⁴⁰ The statute imposed liability of up to three times the amount of any general and special damages proximately caused by the violation, in addition to punitive damages and disgorgement of any profits resulting from the violation.⁴¹ While the legislature hoped that this statute and the risk of monetary damages would deter the paparazzi's outrageous conduct and prevent another Princess Diana accident, the statute ultimately became symbolic.⁴² Section 1708.8(b) is ineffective because it only protects celebrities in the private

37. Civ. § 1708.8(b).

38. *Id.*

39. Alach, *supra* note 19, at 210.

40. Civ. § 1708.8.

41. *Id.* § 1708.8(b).

42. See *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, HUFFINGTON POST (Sept. 9, 2010, 1:37 PM), http://www.huffingtonpost.com/2010/09/02/kate-moss-paparazzi-video_n_703737.html [<http://perma.cc/2GPH-GS7P>]; *Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures*, HUFFINGTON POST (Sept. 25, 2013, 5:24 PM), http://www.huffingtonpost.com/2013/09/25/halle-berry-paparazzi-bill-passes_n_3991290.html [<http://perma.cc/U7PY-V47Y>].

sphere as opposed to the public sphere. Celebrities are easily able to protect themselves in the private sphere with tall gates, dense trees, security cameras, and guards.⁴³ However, they are unable to provide these protections for themselves in the public sphere, where protection is most needed. Thus, while section 1708.8(b) was a step in the right direction, it fell short of truly protecting celebrities.

While section 1708.8 was largely symbolic and ineffective, it was the first time the legislature recognized the need to protect “familial activities.”⁴⁴ The legislature thereby created a policy goal of protecting children of celebrities from paparazzi activity. This policy goal developed throughout time and ultimately manifested itself into the creation of statutes specifically targeted to protect celebrities’ children.⁴⁵ Thus, although section 1708.8 did little to hamper paparazzi actions, it laid the groundwork for stronger, more effective legislation.

In 2009, the California legislature expanded section 1708.8 to further protect celebrities. The new version of the statute extended liability to “any person in California who sells, transmits, publishes, or broadcasts a photograph with actual knowledge that the photograph was sold, or otherwise unlawfully obtained.”⁴⁶ Further, the amended statute increased the potential monetary fines for violating the statute and allowed the State to open a civil case against the violator in the name of the individual whose privacy had been violated.⁴⁷ However, even with the amendments, the statute did little to deter paparazzi from infringing on celebrities’ privacy interests.⁴⁸

The failure of the amendment can be explained in two ways. First, neither the State nor an injured celebrity is likely to bring a case against a paparazzo.⁴⁹ Second, the amendment does not comprehensively protect a

43. See Lauren A. E. Schuker, *The State of the Gate*, WALL ST. J. (Apr. 12, 2012, 6:27 PM), <http://www.wsj.com/articles/SB10001424052702303772904577335681997042756> (last visited Jan. 14, 2017).

44. CIV. § 1708.8 (categorizing “familial activities” in the private sphere as protected under the statute).

45. See *infra* Part II.B.

46. Wax, *supra* note 16, at 171.

47. *Id.*

48. *Id.* at 136.

49. See *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, *supra* note 42; *Halle Berry’s Paparazzi Bill Passes, Protecting Children of Public Figures*, *supra* note 42.

celebrity's right to privacy. It primarily protects celebrities in their homes or on private property where they have a reasonable expectation of privacy.⁵⁰ However, in public places, where the paparazzi most frequently photograph celebrities, it protects them only if the paparazzi's acts are offensive to a reasonable person.⁵¹ The reasonable person does not consider the massive invasion of privacy that occurs when a celebrity is photographed merely because the reasonable person cannot understand the extent of the intrusion since he or she has no experience with such an act. Unlike the reasonable person who takes a photograph for his or her own personal viewing or to share with friends, the paparazzi take these photographs for nationwide publication.⁵²

Moreover, being a celebrity removes any expectation that a paparazzo must get consent since being in the public eye is part of being a celebrity.⁵³ Compare this to the average person walking down the street—the average person must consent to publication of the photograph or consent to an appearance on television.⁵⁴ If consent is not given and the photograph is published, the person will be able to pursue legal recourse.⁵⁵ Since the reasonable person is likely to equate a celebrity's experience with his or her own mild, consent-based experiences, paparazzi activity is unlikely to be considered offensive conduct when in fact, it is very offensive to those who suffer through it. Therefore, the law provides little protection in public spaces.⁵⁶ As a result, paparazzi continue to inundate celebrities⁵⁷ and what little privacy rights exist in public are completely diminished.

50. CAL. CIV. CODE § 1708.8 (West 2016).

51. *Id.* (using a “reasonable person” standard to determine offensive conduct).

52. Leah Hoffman, *Pennies for Paparazzi*, FORBES (June 16, 2005, 6:00 PM), http://www.forbes.com/2005/06/16/paparazzi-celebrity100-hollywood-cx_lh_0616paparazzi.html [<http://perma.cc/SKV8-J3F7>].

53. See *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, *supra* note 42; *Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures*, *supra* note 42.

54. See Jeffrey F. Ghent, Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, 83 (1974) (discussing how consent is a complete affirmative defense to the publication of a layperson's photograph in a suit for false light invasion of privacy).

55. See *id.* (discussing how a photograph of a widow taken without her consent could not be used by a magazine).

56. Wax, *supra* note 16, at 140.

57. Hoffman, *supra* note 52.

In 2010, California modified Civil Code section 1708.7 (“section 1708.7”) to extend the tort of stalking to include “a pattern of conduct intended to place the victim under surveillance.”⁵⁸ By categorizing some paparazzi conduct as stalking, the amended statute gave victims greater remedies and protections, such as the ability to obtain restraining orders.⁵⁹ Simultaneously, the state modified section 1708.8 by increasing the monetary damages for false imprisonment of an individual because of another individual’s intent to capture his or her visual image.⁶⁰ These two amendments, while not expanding privacy interests per se, afforded celebrities greater means of protection and recovery.

Four years later, California again modified section 1708.7 by extending liability for stalking. A person is liable for the tort of stalking if the plaintiff reasonably feared for his or her safety or that of a family member and subsequently suffered objectively substantial emotional distress.⁶¹ This change furthered the protections afforded to children since the standard was expanded to include those fearing for the safety of a family member, and also lowered because from the perspective of a child, the paparazzi are a terrifying and distress-inducing occurrence.⁶² However, children may have difficulty proving they reasonably feared for their safety since children fear many things, but these fears may not be objective.⁶³ Thus, while an adult might not perceive multiple cameras being shoved in his or her face as a safety threat, a child may easily cower in fear from the single flash of a camera.⁶⁴ Even so, the amendment does create the ability to bring a case against a paparazzo for causing substantial emotional

58. CAL. CIV. CODE § 1708.7(a)(1) (West 2016).

59. *Id.* § 1708.7(d).

60. *Id.* § 1708.8(c).

61. *Id.* § 1708.7(a)(2).

62. *Id.* § (a)(2)(A).

63. See Reshma Memon Yaqub, *Monsters under the Bed: Understanding Kid Fears*, PARENTS (Sept. 2008), <http://www.parents.com/kids/development/behavioral/understanding-kid-fears> [<http://perma.cc/RT4Z-FWNX>] (describing how children are fearful of harmless objects such as a vacuum cleaner).

64. Alan Duke, *Ben Affleck: Paparazzi Scare His Kids*, CNN (Dec. 10, 2013, 3:06 PM), <http://www.cnn.com/2013/12/10/showbiz/ben-affleck-paparazzi-children> [<http://perma.cc/AQ9A-P6N7>] (discussing how Affleck’s kids are “freaked out” by photographers who follow them in public).

distress to a child.⁶⁵ This concept was unheard of in the past and has the potential to provide a semblance more of protection to children of celebrities.

Sean Burke of the Paparazzi Reform Initiative elaborated on this concept: “‘It’s about the conduct of the paparazzi at the time they’re taking a photo, yelling at a child or saying demeaning things or offensive language’ that causes emotional distress or trauma to the child.”⁶⁶ Thus, the paparazzi could cause emotional distress when they wait alongside the fence of the child’s school or when they badger the child with questions about his or her parents’ divorce.⁶⁷ Moreover, the above examples of distress are objectively reasonable: a reasonable person would suffer substantial distress from the flashes of cameras and the constant badgering. This change in legislation was a big step in the right direction to fully protecting children by expanding the protections afforded to children of celebrities more than any anti-paparazzi legislation before it. By enacting this change, legislators openly recognized that more protections were needed for children, thus paving the way for stricter protections in the future.

The most recent anti-paparazzi legislation concerns the use of drones. Drones provide paparazzi with potentially unlimited ability to take photographs.⁶⁸ If the paparazzi cannot reach the celebrity due to massive crowds, a drone hovering above the crowd will easily solve that problem and afford the paparazzi the opportunity to obtain their “perfect” photograph. While section 1708.8 protected the physical property of celebrities,⁶⁹ prior to 2015, the airspace above the celebrities’ private property was fair game for the paparazzi. Miley Cyrus, Selena Gomez, and

65. Civ. § 1708.7(a)(2).

66. Maria Puente, *Celebs Push Back against the Paparazzi*, USA TODAY (Mar. 28, 2014, 4:56 PM), <http://www.usatoday.com/story/life/people/2014/03/22/celebs-push-back-against-the-paparazzi/6186163> [<http://perma.cc/U62U-5JJR>]; see also *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, *supra* note 42.

67. See, e.g., Lesley Messer, *Halle Berry: Paparazzi Told My Daughter, ‘You May Not See Your Father Again’*, ABC NEWS (Aug. 13, 2013), <http://abcnews.go.com/blogs/entertainment/2013/08/halle-berry-paparazzi-told-my-daughter-you-may-not-see-your-father-again> (last visited Jan. 14, 2017).

68. Carter Evans, *Paparazzi Now Using Drones to Hunt Down and Photograph Stars*, CBS NEWS (Aug. 23, 2014, 8:02 PM), <http://www.cbsnews.com/news/paparazzi-take-to-the-skies-to-pursue-stars-with-drones> [<http://perma.cc/6KDU-4Y3H>].

69. Civ. § 1708.8.

North West all had their privacy invaded by the paparazzi's use of drones: Cyrus commented that the drones terrified her dogs, Gomez was interrupted while she was shooting an Adidas commercial, and West was prevented from enjoying her day at the pool.⁷⁰

The rise in the use of drones led California Governor Jerry Brown to sign into law another amendment to section 1708.8 to expand the definition of a "physical invasion of privacy."⁷¹ A physical invasion of privacy now occurs when a drone is used in the airspace above someone's land for the purposes of photographing that individual or his or her property.⁷² The use of a drone in photographing a celebrity could technically also be considered constructive trespassing and thereby fall within the original language of section 1708.8(b).⁷³ But with the new legislation, the use of a drone is classified as a physical trespass.⁷⁴ Operating a drone over private property thus has increased consequences as compared to using a telephoto lens to take a picture of a celebrity on private property.⁷⁵ While expanding the protections afforded to celebrities, this legislation again falls short because it does not protect celebrities from drones in the public arena, which is where drones potentially pose the greatest danger to celebrities and the public.⁷⁶ Stronger drone legislation has been drafted, but none have passed

70. Peter Sheridan & Caroline Graham, *Attack of the Drones: Hollywood Celebrities are Besieged by Paparazzi Spies in the Sky. Worried? You Should Be . . . Because They'll Soon Be a Regular Fixture over Your Home*, DAILY MAIL (Sept. 8, 2014, 6:24 AM), <http://www.dailymail.co.uk/news/article-2746231/Attack-drones-Hollywood-celebrities-besieged-paparazzi-spies-sky-Worried-You-ll-soon-regular-fixture-YOUR-home.html> [<http://perma.cc/U9XZ-9Q2U>].

71. See CIV. § 1708.8, amended by Assemb. B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

72. *Id.* § 1708.8(a); Chris Megerian, *Gov. Jerry Brown Approves New Limits on Paparazzi Drones*, L.A. TIMES (Oct. 6, 2015, 4:30 PM), <http://www.latimes.com/local/political/la-pol-sac-brown-drones-paparazzi-20151006-story.html> [<http://perma.cc/5WEM-Y9KD>].

73. CIV. § 1708.8(b); Megerian, *supra* note 72.

74. See CIV. § 1708.8, amended by Assemb. B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

75. See *id.*

76. Sheridan & Graham, *supra* note 70 (discussing how Tina Turner was fearful that paparazzi operated drones flying over her wedding would collide with the helicopters she had arranged to drop rose petals over her ceremony).

or become law due to the government's desire to allow for the police's use of drones.⁷⁷

B. Anti-Paparazzi Legislation Specific to Children of Celebrities

Until 2013, anti-paparazzi legislation focused on protecting the targets of paparazzi activities. Accordingly, much of the anti-paparazzi legislation enacted exclusively protected celebrities, as opposed to their families and friends.⁷⁸ It focused on "familial activities" but did not focus on increasing the protections for young children, even though it was obvious they were affected by the constant media attention.⁷⁹ However, this changed when Halle Berry and Jennifer Garner decided to support SB 606, a bill introduced to the California Senate by Representative Kevin De León that was designed to increase protections for children under California Penal Code section 11414 ("section 11414").⁸⁰

Section 11414 makes it a misdemeanor if someone "intentionally harasses the child or ward of any other person because of that person's employment . . . punishable by imprisonment in a county jail not exceeding six months, or by a fine not exceeding ten thousand dollars (\$10,000), or both."⁸¹ The 2013 amendment to this provision increased the fines for violation of this statute significantly, in addition to increasing fines and sentences for each subsequent violation.⁸² Most importantly, the amendment significantly broadened what it means to harass a child:

'Harasses' means knowing and willful conduct directed at a specific child or ward that seriously alarms, annoys, torments, or terrorizes the child or ward, and that serves no legitimate purpose, including, but not limited to, that conduct occurring

77. Jeff Stone, *California Passes New Paparazzi Drone Law to Protect Celebrity Children*, INT'L BUS. TIMES (Oct. 1, 2014, 9:04 AM), <http://www.ibtimes.com/california-passes-new-paparazzi-drone-law-protect-celebrity-children-1697688> [<http://perma.cc/797T-RBVC>].

78. *Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures*, *supra* note 42.

79. *See* Puente, *supra* note 66.

80. CAL. PENAL CODE § 11414 (West 2016); *Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures*, *supra* note 42.

81. PENAL § 11414.

82. *Id.*

during the course of any actual or attempted recording of the child's or ward's image or voice without the written consent of the child's or ward's parent or legal guardian, by following the child's or ward's activities or by lying in wait.⁸³

The updated California Penal Code is the most comprehensive protection the legislature has awarded to the children of celebrities. Unlike section 1708.8, section 11414 applies to public property and provides fairly specific guidelines for what constitutes an inappropriate interaction by the paparazzi.⁸⁴ It does not require that the plaintiff's distress be deemed objectionably reasonable.⁸⁵ Additionally, the threshold for harassment under the updated Penal Code is fairly easy to meet.⁸⁶ For example, a paparazzo can "seriously annoy" a child merely by calling out the child's name repeatedly to get his or her attention for a photograph. The paparazzo could also be liable for harassment for waiting quietly outside the child's school to take a photograph of the child during recess—this could easily be deemed "lying in wait." Notably, the updated Penal Code could be interpreted to cover paparazzi drone use in the public sphere: a drone used to follow Penelope Disick on Rodeo Drive could "seriously alarm" her enough that Kourtney Kardashian could sue the paparazzi for harassment. Thus, the updated California Penal Code, in theory, provides significant protection for the children of celebrities.

However, section 11414 does not do enough to protect the children. It is unlikely that a paparazzo would engage in harassment such that a court would deem him or her in violation of the Penal Code. In principle, the legislation provides protection, but it is difficult to "seriously alarm" or "terrorize" a child when the interactions between the paparazzi and the children are generally brief.⁸⁷ Thus, either stricter legislation or broader definitions of harassment are needed to fully protect the children.

In addition to amending the Penal Code, the Legislature enacted further restrictions in 2014 by expanding California Civil Code section

83. *Id.*

84. *See id.*

85. *See id.*

86. *See* PENAL § 11414.

87. *Id.*

1708.8⁸⁸ to add further protections to public and private places by creating buffer zones around entrances and exits⁸⁹ at specified locations, specifically schools and medical facilities.⁹⁰ This amendment was enacted largely in response to Jennifer Garner's interactions with a stalker.⁹¹ Steven Burkey stalked Garner for several years and "followed [her] around the country" and his "obsessive and harassing behavior ha[d] escalated to the point of becoming dangerous and threatening."⁹² The interactions culminated in Burkey threatening to cut Garner's babies "out of [her] belly," and in 2009, Burkey was arrested outside of a preschool for violating the restraining order Garner had obtained against him in 2008.⁹³ Burkey had been immersed in a crowd of paparazzi at that time.⁹⁴ The 2014 amendment thus created a larger zone of protection for the children of celebrities to avoid future Burkey-like situations. This "buffer zone" ultimately served two purposes: it created a shield from crazed fans of the children's parents and it afforded the children a greater privacy interest in public.

Given that these statutes were enacted only a few years ago, it is still too early to determine their effect on the paparazzi's behavior. Nevertheless, it is unlikely that these amendments will stop the paparazzi from following and harassing children. The multiple amendments to

88. It is important to note that while Senator Kevin de León drafted the legislation, it garnered attention largely due to the immense amount of celebrity support behind the bill. Jennifer Garner and Halle Berry both testified before the California Assembly Committee on Public Safety and both became very emotional during their testimony. It is unknown whether their support played a role in the decision to adopt the legislation, but one can speculate that it likely did, not only because of the power celebrities wield given their status, but also because of the emotional appeal received by the court. CAL. CIV. CODE § 1708.8 (West 2016).

89. The Legislature made it a crime to intentionally injure, intimidate, interfere with, or attempt to injure, intimidate, or interfere with any person attempting to enter or exit a facility. It provided for civil liability for both violent physical obstruction and nonviolent physical obstruction. *Id.*, amended by Assemb. B. 1256, 2014 Leg., Reg. Sess. (Cal. 2014).

90. *Id.*

91. See Corinne Heller, *OTRC: Jennifer Garner Gets Emotional, Talks Stalker Scare, Paparazzi*, ABC EYEWITNESS NEWS, <http://abc7.com/archive/9205262> [<http://perma.cc/6TYJ-VRZ4>].

92. Cristina Everett, *Jennifer Garner's Alleged Stalker Arrested Near Her Daughter Violet's Nursery School*, DAILY NEWS (Dec. 15, 2009, 1:58 PM), <http://www.nydailynews.com/entertainment/gossip/jennifer-garner-alleged-stalker-steven-burkey-arrested-daughter-violet-nursery-school-article-1.435315> [<http://perma.cc/62DE-MX49>].

93. *Id.*; Heller, *supra* note 91.

94. Heller, *supra* note 91.

section 1708.7 and 1708.8 attempted to stifle the paparazzi with little effect⁹⁵ and it is likely that the 2013 amendments to the California Penal Code and the more recent drone legislation will likewise do little to solve the problem. Thus, the Legislature should take a stronger stand against the paparazzi to protect the children of celebrities. A bright line rule of a complete ban⁹⁶ on the photographs of celebrity children must be enacted.

C. Case Law Involving the Paparazzi

Almost no case law concerning the paparazzi exists. Few celebrities sue the paparazzi because bringing a claim against the paparazzi can be difficult due to the protections afforded to the paparazzi.⁹⁷ In fact, a paparazzo is more likely to sue a celebrity since the paparazzo's grievance is commonly either battery or assault, both of which are easier to establish than infringement of privacy.⁹⁸ That being said, some celebrities have won lawsuits against the paparazzi, while others have recovered settlements.⁹⁹ More commonly, however, the success stories against the paparazzi arise

95. See Halle Berry's Paparazzi Bill Passes, Protecting Children of Public Figures, *supra* note 42; Jordan Weissmann, Kanye West is Totally Right to Worry about Paparazzi Drones, SLATE (Aug. 7, 2014, 1:01 PM), http://www.slate.com/blogs/future_tense/2014/08/07/kanye_west_fears_paparazzi_drones_that_s_totally_reasonable.html [<http://perma.cc/34F5-KNXP?type=image>].

96. A "complete ban" means that the paparazzi are not allowed to take photographs of a celebrity's children in either private or public places unless (a) the parent consents to these photographs or (b) the child consents to these photographs. For the sake of brevity, this is referred to as a "complete ban."

97. See Alach, *supra* note 19, at 224; see also *infra* Part III.

98. See Shakeitta McCord, 15 Celebrities Who Were Sued by the Paparazzi, STYLEBLAZER (Sept. 30, 2013), <http://styleblazer.com/185664/15-celebrities-sued-by-the-paparazzi> [<http://perma.cc/E3AB-YFS7>]. This point is especially poignant when considering the lyrics to Britney Spears's extremely popular "Piece of Me." Spears sings "Well get in line with the paparazzi/ who's flippin' me off/ hopin' I'll resort to some havoc/ and end up settlin' in court." BritneySpearsVevo, *Britney Spears – Piece of Me*, YOUTUBE (Oct. 25, 2009), <http://www.youtube.com/watch?v=u4FF6MpcsRw> [<http://perma.cc/UR8P-HJ6R>].

99. See generally *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973) (holding that an injunction requiring a photographer to stay away from Jacqueline Onassis and her children was proper); *Sienna Miller Wins Paparazzi Suit*, HOLLYWOOD REPORTER (Nov. 21, 2008, 10:40 AM), <http://www.hollywoodreporter.com/news/sienna-miller-wins-paparazzi-suit-123401> [<http://perma.cc/B98A-XY4P>]; see also Alyssa Toomey, *Adele's 1-Year-Old Son Wins a Five-Figure Sum in Lawsuit Against Paparazzi*, E! NEWS (July 23, 2014, 9:20 AM), <http://www.eonline.com/news/562323/adele-s-1-year-old-son-wins-five-figure-sum-in-lawsuit-against-paparazzi> [<http://perma.cc/A4XM-ABNE>] (discussing a settlement against the paparazzi that took place in Britain).

out of cases decided in Europe, where the paparazzi are much more restricted and governed.¹⁰⁰ Moreover, celebrities have generally been more successful in suing the publisher of the photographs rather than the individual paparazzo.¹⁰¹ Thus, while the legislative history of anti-paparazzi law is ample, albeit ineffective, the case law is practically non-existent. This then leaves little precedent for celebrities to rely on not only in protecting themselves, but also in protecting their children.

D. Why Current Anti-Paparazzi Legislation is Ineffective

As discussed above, anti-paparazzi legislation has been ineffective in curbing the paparazzi.¹⁰² This is largely due to the nominal punishments imposed on the paparazzi.¹⁰³ Violations of anti-paparazzi laws carry fines of up to \$50,000,¹⁰⁴ which theoretically should deter paparazzi from violating the law. However, with the possibility of a huge payday for a single photograph, paparazzi are willing to risk such large fines.¹⁰⁵ The same holds true for the jail time punishments¹⁰⁶ associated with anti-paparazzi laws: the large payouts justify the potential of jail time. Hence, paparazzi are willing to engage in illegal activities because the potential benefits greatly outweigh the potential punishments.

Moreover, the law affords little protection for celebrities in public. Much of the protections afforded to celebrities pertain to private property as evidenced by the focus on “trespassing” in the legislation’s plain language.¹⁰⁷ The law protects celebrities and their children only where they

100. See Wax, *supra* note 16, at 157–58.

101. *Id.* at 158.

102. See generally E! NEWS, <http://www.eonline.com> [<http://perma.cc/XH7Y-9NDK>]; STAR MAGAZINE, <http://starmagazine.com> [<http://perma.cc/J76D-Y8VM>].

103. See Section II (discussing generally anti-paparazzi legislation and the repercussions associated with violating anti-paparazzi legislation).

104. Follett, *supra* note 21, at 215.

105. Hoffman, *supra* note 52 (describing how a picture of Andre Agassi’s newly shaved head can bring in \$30,000, while a picture of newborn Apple Paltrow raked in an estimated \$300,000 to \$500,000).

106. CAL. PENAL CODE § 11414 (West 2016); Irene L. Kim, *Defending Freedom of Speech: The Unconstitutionality of Anti-Paparazzi Legislation*, 44 S.D. L. REV. 275, 316 (1999).

107. See CAL. CIV. CODE § 1708.8 (West 2016).

have a “reasonable expectation of privacy.”¹⁰⁸ Thus, public areas like parks, sidewalks, and shopping malls are all fair game for the paparazzi. While shielding children from the paparazzi in their homes and limited private places is important, it is simply not enough. Celebrities cannot be asked to avoid public areas merely so they can avoid interactions between their children and the paparazzi. Thus, the legislation currently in place is ineffective since it does not cover a substantial part of celebrities’ and their children’s daily lives.

Finally, these punishments occur only if celebrities bring a claim against the paparazzi, which they often fail to do.¹⁰⁹ Celebrities are unlikely to sue the paparazzi for a multitude of reasons. First, the paparazzi are awarded great protection under the First Amendment and the Anti-SLAPP Statute in California.¹¹⁰ These protections will be discussed below, but in short, they make it difficult for a celebrity to sue the paparazzi unless the paparazzi violated the law.¹¹¹ Moreover, celebrities are reluctant to sue the paparazzi.¹¹² In the few cases where celebrities do sue, it is a long, arduous process that is generally not worth the time or money.¹¹³ Moreover, the paparazzi have many protections so the likelihood of winning is slim unless the paparazzi acted egregiously.¹¹⁴

In her law review article focusing on the unconstitutionality of anti-paparazzi laws, Irene Kim argues that celebrities have had great success, at least in the 1990s, in enjoining the paparazzi.¹¹⁵ However, Ms. Kim’s limited examples of “success stories” against the paparazzi are anything but successful. Ms. Kim cites examples of celebrities enjoining stalkers, as opposed to paparazzi hungry for photographs, and further cites examples of filing police reports as opposed to actual litigation.¹¹⁶ In the two paparazzi-

108. *See id.*

109. *See supra* Section C (discussing how celebrities rarely sue the paparazzi).

110. Follett, *supra* note 21, at 222.

111. *Id.* at 222, 226.

112. The author based this conclusion on the lack of case law and news stories regarding celebrities suing the paparazzi.

113. *See Galella v. Onassis*, 487 F.2d 986, 996 (2d Cir. 1973).

114. Follett, *supra* note 21, at 222–25.

115. Kim, *supra* note 106, at 315–17 (describing how in the 1990s, celebrities had great success suing the paparazzi).

116. *Id.*

specific examples she does cite, the punishments for the paparazzi were minimal: a ninety-day sentence in jail and a \$500 fine.¹¹⁷ These minimal punishments may not be enough to justify the high costs of litigation, thus deterring celebrities from bringing such actions at all. While Ms. Kim wrote her article before the amendments to section 1708.8, it is significant that her examples focus more on stalkers than on the paparazzi. The paparazzi are even more aggressive today, but celebrities have a history of avoiding litigation against the paparazzi that is likely to continue even with the added legal protections.¹¹⁸

III. THE PAPARAZZI'S RIGHTS VERSUS CELEBRITIES' RIGHTS

A. *The Paparazzi's First Amendment Rights and Other Protections*

The First Amendment of the Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."¹¹⁹ Legal scholars have debated whether the paparazzi truly fall within the definition of "press" as used in the Constitution.¹²⁰ Given that the simplest definition of press is "individuals and entities who gather, report, and publish news and opinions for the benefit of the public or some segment of the public as a whole,"¹²¹ this Note will assume the paparazzi fall within the definition of press because they aid in gathering news and opinions for the benefit of the public. Under this assumption, paparazzi are afforded the same First Amendment

117. *Id.* at 316.

118. The author based this conclusion on the lack of case law and the lack of Internet results when searching for celebrity lawsuits filed against the paparazzi.

119. U.S. CONST. amend. I.

120. Gary Wax, *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, 136-37 (2009).

121. THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION 2144 (Stephen Michael Sheppard ed., 2012) (referring specifically to the section called "Bouvier Law Dictionary Press (Member of the Press), which provides the definition of a "member of the press").

protections as more “legitimate” forms of the press, such as the New York Times or the Washington Journal.¹²²

This protection guaranteed by the First Amendment allows paparazzi to photograph celebrities so long as their conduct does not violate any federal or state laws.¹²³ Thus, so long as a paparazzo does not trespass on Katie Holmes’s property or wait directly outside of Suri Cruise’s school, a paparazzo is within his or her First Amendment rights to take photographs. Further, the First Amendment precludes anti-paparazzi laws¹²⁴ from being overbroad or vague.¹²⁵ The laws are then evaluated on whether they are content based¹²⁶ or content neutral; if the law is content based, it is subject to strict scrutiny and therefore is harder to be deemed constitutional.¹²⁷ The First Amendment thus provides significant protection not only to paparazzi activity by allowing the paparazzi to exercise their freedom of press, but also by prohibiting anti-paparazzi legislation from being overbroad.

The paparazzi also receive significant protection under California Code of Civil Procedure section 425.16, otherwise known as the Anti-SLAPP statute. This statute allows a paparazzo to seek injunctive relief based on his or her free speech rights that relate to a public issue.¹²⁸ The statute “permits a defendant, in appropriate circumstances, to obtain a resolution on the merits at the pleading stage and can be a useful tool to force the plaintiff to represent all of his or her evidence at the outset of the

122. See U.S. CONST. amend. I; THE WOLTERS KLUWER BOUVIER LAW DICTIONARY: DESK EDITION, *supra* note 121.

123. 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, 231 (2010).

124. *Id.*

125. *Id.*

126. To be content based, courts look to whether the legislation is “viewpoint neutral” or “subject-matter neutral.” Viewpoint neutral means that the legislation does not restrict the ideology of the message. Thus, anti-paparazzi legislation cannot only sanction paparazzi activity that reflects favorably on Kim Kardashian. Subject-matter neutral means that the legislation cannot restrict the topic of the speech. Thus, anti-paparazzi legislation cannot ban only inebriated photographs of celebrities. If legislation is not viewpoint neutral and not subject-matter neutral, then it is unconstitutional *unless there are compelling reasons for restricting these actions*. *Id.* at 231–32.

127. *Id.* at 232.

128. MILES J. FELDMAN & MICHAEL E. WEINSTEIN, ENTERTAINMENT LAW & LITIGATION § 11.26 (Charles J. Harder ed., 2014).

case prior to any hearing.”¹²⁹ Thus, if Kim Kardashian sues a paparazzo for invading her privacy by sitting at the end of her driveway, the paparazzo could defend his or her suit by utilizing the Anti-SLAPP statute, thereby claiming that Kardashian’s suit infringes on his constitutional right of freedom of the press. The burden would then shift to Kardashian to prove that her suit will probably succeed on the merits,¹³⁰ i.e. that she had a reasonable expectation of privacy at the edge of her driveway such that the paparazzo was in fact “trespassing.” This is a heavy burden to meet¹³¹ and therefore provides a paparazzo’s conduct with substantial protection. The statute was originally intended to deter frivolous lawsuits brought by the more “powerful” celebrities against the “weaker” paparazzi, but it ultimately made it quite difficult for celebrities to bring an action under section 1708.8.¹³² Most courts will ultimately find that so long as a paparazzo’s conduct is not egregious, the First Amendment or the Anti-SLAPP statute protects his or her conduct.¹³³

B. Celebrities’ Right to Privacy

Just as the paparazzi are afforded protections against celebrities, celebrities too are afforded protections against the paparazzi. As discussed above, celebrities have protections under state laws.¹³⁴ However, their primary source of constitutional protection arises from the “right to privacy.” This right stems from a judicially created doctrine based on the premise that “various guarantees in [the Bill of Rights] create zones of privacy.”¹³⁵ The right to privacy is also grounded in the Third, Fourth, and Ninth Amendments.¹³⁶ Case law provides no concrete definition of the “right to privacy,” but it broadly encompasses “intrusion into one’s

129. *Id.*

130. Follett, *supra* note 123, at 223.

131. *Id.* at 222–23.

132. *Id.*

133. *Id.* at 223.

134. *See supra* Part II.

135. Follett, *supra* note 123, at 225–26; *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

136. Follett, *supra* note 123, at 226.

seclusion or solitude, or into one's private affairs."¹³⁷ This right applies to both children and adults and generally conflicts with the paparazzi's First Amendment rights.¹³⁸ Generally, when a celebrity's right to privacy conflicts with a paparazzo's First Amendment rights, courts have found in favor of the paparazzo.¹³⁹ Not only does this undermine a celebrity's right to privacy, it consequently provides less protection to his or her children. Therefore, action is needed to fully safeguard the children of celebrities.

The privacy rights of celebrities are also limited due to their status as public figures. Once an individual becomes a general public figure,¹⁴⁰ his or her privacy rights are waived with respect to that matter for which he or she is a public figure. Thus, a television star and singer like Gwen Stefani¹⁴¹ has waived her right to privacy because she is a general public figure. Stefani can no longer claim her right to privacy extends to the same degree it did before No Doubt became famous. In short, the more famous a celebrity is because of his or her profession, the less reasonable his or her expectation of privacy is in public.¹⁴²

Importantly, the children of celebrities may be involuntary public figures and thus, their right to privacy is waived too.¹⁴³ Involuntary public figures are those who "become a public figure through no purposeful action of his own."¹⁴⁴ Courts have found that waiver can extend to celebrities' family members, including their children, merely because of their

137. *Id.* at 227.

138. *Id.* at 226.

139. *Id.*; *Griswold*, 381 U.S. at 484; *see also* Camrin L. Crisci, Note, *All the World is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 207, 211 (2002).

140. Follett, *supra* note 123, at 228 ("In order to qualify as a general public figure (meaning a public personality for all aspects of one's life), there must be 'clear evidence of general fame or notoriety in the community,' including 'pervasive involvement in the affairs of society.'"); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). For purposes of this article, there is no debate that a celebrity is a public figure given that he or she has garnered extreme notoriety in the United States due to his or her profession.

141. Gwen Stefani was the lead singer of the popular band "No Doubt" and is currently a judge on the reality television show, *The Voice*. *See* GWEN STEFANI, <http://www.gwenstefani.com> [<http://perma.cc/84GP-4JAU>].

142. *See* Follett, *supra* note 123, at 228–30.

143. *Id.* at 228–29.

144. *Id.* at 229; *Gertz*, 418 U.S. at 345.

association to the celebrities.¹⁴⁵ This means that there is little protection in the public sphere since the child has “waived” his or her right to privacy, subsequently leaving the child to rely on ineffective state-specific statutes for protection. Moreover, even assuming a child has not “waived” his or her right to privacy, there is a general lessened expectation of privacy in public spheres.¹⁴⁶ Thus, because the children knowingly and willingly expose themselves to the public, it is difficult to establish a right to privacy claim. Given that the “right to privacy” does little to protect the children of celebrities and further, that enacted legislation provides no significant deterrent to the paparazzi, more must be done to safeguard the children of celebrities.

IV. THE NEED FOR STRONGER ANTI-PAPARAZZI LEGISLATION TO PROTECT THE CHILDREN OF CELEBRITIES

A. Why Stronger Protections Are Needed for the Children of Celebrities

Many law review articles, newspaper articles, and Internet blogs have discussed the tensions between the First Amendment rights of the paparazzi and celebrities’ right to privacy and many have focused on the need to expand celebrities’ protections.¹⁴⁷ Like this Note, some have even focused on the need to expand protection to celebrities’ children.¹⁴⁸ However, few, if any, have addressed why stronger legislation for the children of celebrities is needed.¹⁴⁹ This is likely due to the little research that has been conducted on the effects of the paparazzi on children.¹⁵⁰ However, there is

145. Follett, *supra* note 123, at 229; *Carlisle v. Fawcett Publications, Inc.*, 20 Cal. Rptr. 405, 415 (Ct. App. 1962).

146. *See generally* *Katz v. United States*, 389 U.S. 347 (1967).

147. *See* Robin Sax & Carmela Kelly, *New Law Jails Paparazzi—Now What? (Part 1)*, HUFFINGTON POST (Dec. 30, 2010, 3:55 PM), http://www.huffingtonpost.com/robin-sax/new-law-jails-paparazzi-n_b_802846.html [<http://perma.cc/3D39-VKZM>]. *See generally* Lisa Vance, Note, *Amending its Anti-Paparazzi Statute: California’s Latest Baby Step in its Attempt to Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99 (2006).

148. *See generally* 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).

149. *See* Lecia Bushak, *Celebrity Moms Fight against Paparazzi’s Emotional Effects on Kids: Halle Berry, Jennifer Garner Push for Tougher Law*, MEDICAL DAILY (Aug. 14, 2013, 9:05 PM), <http://www.medicaldaily.com/celebrity-moms-fight-against-paparazzis-emotional-effects-kids-halle-berry-jennifer-garner-push> [<http://perma.cc/9UZS-QNL3>].

150. *Id.*

no need to resort to research to justify stronger protections for children of celebrities. Instead, the emotional reactions from the children justify these expanded protections. In short, an equity argument is all that is needed.

The following are examples of the daily emotional challenges that children of celebrities face when they venture into the public.

Suri Cruise gets out of a black SUV and immediately runs to her friend's side for safety.¹⁵¹ One cannot even catch a glimpse of her face because Cruise has buried her head so far under her blankets that it is a wonder she can walk without bumping into anything.¹⁵² Earlier in 2012, Cruise clings to her mother as she is carried into a store.¹⁵³ Over the flashes of what looks like fifty cameras, one can hear a faint "Guys, stop it!" escape from Cruise's mouth.¹⁵⁴ In 2012, Halle Berry's daughter, Nahla, is tormented by the paparazzi during Berry's custody battle with Nahla's father, Gabriel Aubrey.¹⁵⁵ Questions are thrown at her: "How do you feel Nahla? You may not see your father again. How do you feel about that?"¹⁵⁶ Berry commented that Nahla does not want to attend preschool anymore because the paparazzi trail her so frequently.¹⁵⁷

These children deserve to lead "normal lives." They deserve to play on the public playgrounds without the flashes of cameras and men lurking behind trees. They deserve not to have panic attacks in airports¹⁵⁸ or have

151. 247paps.tv, *Katie Holmes & Suri Cruise at Alice's Tea Cup in New York City*, YOUTUBE (July 5, 2012), <http://www.youtube.com/watch?v=ZdYSIRITbVs> [<http://perma.cc/WK9R-3LZG>] [hereinafter 247paps.tv, *Katie Holmes*].

152. *Id.*

153. StarFeine, *Suri Cruise Yells at Paparazzi While with Mom Katie Holmes in NYC*, YOUTUBE (Mar. 21, 2012), <http://www.youtube.com/watch?v=FuR11TwwRgA> [<http://perma.cc/H7HC-7YGG>].

154. *Id.*

155. Lesley Messer, *Halle Berry: Paparazzi Told My Daughter, 'You May Not See Your Father Again'*, ABC NEWS (Aug. 13, 2013), <http://abcnews.go.com/blogs/entertainment/2013/08/halle-berry-paparazzi-told-my-daughter-you-may-not-see-your-father-again> (last visited Jan. 14, 2017).

156. *Id.*

157. *Id.*

158. See, e.g., *Kate Moss Paparazzi Video Used as Key Exhibit in California Case*, HUFFINGTON POST (Sept. 9, 2010, 1:37 PM), http://www.huffingtonpost.com/2010/09/02/kate-moss-paparazzi-video_n_703737.html [<http://perma.cc/2GPH-GS7P>].

to hide behind their blankets everywhere they go.¹⁵⁹ The paparazzi can be a toxic drug that can cause even the strongest to break.¹⁶⁰ Of course, some children of celebrities have little trouble with the paparazzi,¹⁶¹ but that is no excuse for doing nothing. These children are all ultimately affected by the paparazzi because even those who do not show it still understand that the paparazzi are following them everywhere they go.¹⁶² Equity dictates that we must protect these children before the paparazzi cause irreparable damage.

B. A Call for a Full Ban on the Photographs of Children of Celebrities

In early 2014, Kristen Bell, along with her husband Dax Shepard, started a Twitter campaign against the paparazzi utilizing the hashtag “No Kids Policy.”¹⁶³ In an attempt to stop paparazzi who stalk and harass their children, Bell and Shepard called for a complete ban on the paparazzi photographing celebrities’ children.¹⁶⁴ The couple asked their famous friends to avoid talking to any media outlet that bought photos or videos from paparazzi who target celebrities’ children.¹⁶⁵ Further, Bell and Shepard called for readers to boycott magazines that run photos of celebrities’ children and for media outlets to stop publishing these

159. See, e.g., 247paps.tv, *Katie Holmes*, *supra* note 151.

160. See Michelle Singer, *Timeline: Britney’s Meltdown*, CBS NEWS (Feb. 20, 2007, 3:24 PM), <http://www.cbsnews.com/news/timeline-britneys-meltdown> [<http://perma.cc/U2LG-8N9L>].

161. 247paps.tv, *Angelin [sic] Jolie and Kids Go to Market in New Orleans*, YOUTUBE (Aug. 19, 2012), http://www.youtube.com/watch?v=1o_9yK5F72I [<http://perma.cc/UJ4R-R86D>].

162. See The Ellen Show, *Kristen Bell’s Stand against Paparazzi*, YOUTUBE (Apr. 17, 2014), <http://www.youtube.com/watch?v=JzzfHG-YjHU&feature=youtu.be> [<http://perma.cc/3AU2-NNWN>].

163. *Kristen Bell and Dax Shepard Lead Campaign to Protect Kids from Paparazzi*, CBS NEWS (Feb. 28, 2014, 10:54 AM), <http://www.cbsnews.com/news/kristen-bell-and-dax-shepard-start-campaign-to-protect-children-from-paparazzi> [<http://perma.cc/K8TH-NDFF>].

164. See Emma Bazilian, *People Magazine is Joining Entertainment Tonight in Banning Paparazzi Photos of Celeb Kids*, ADWEEK (Feb. 25, 2014, 4:20 PM), <http://www.adweek.com/news/press/people-just-jared-ban-paparazzi-photos-celeb-kids-155960> [<http://perma.cc/KM57-AMQX>].

165. *Kristen Bell and Dax Shepard Lead Campaign to Protect Kids from Paparazzi*, *supra* note 163.

photos.¹⁶⁶ It worked for some news outlets: Entertainment Tonight, followed by People magazine, celebrity gossip site Just Jared, The Insider, and BuzzFeed all agreed to adhere to the “No Kids Policy.”¹⁶⁷ These publications now only publish “sanctioned” photographs of celebrity children, which means they publish “exclusive baby pictures taken with the cooperation of celebrity parents, and photos of stars posing with their kids at events (like a red carpet) where they are expecting and willing to be photographed.”¹⁶⁸ According to Jess Cagle, the Editorial Director of People, “exceptions may also be made depending on the ‘newsworthiness of the photos.’”¹⁶⁹

While several media outlets have joined the ban, many have not.¹⁷⁰ Thus, further action must be taken. This Note calls for new legislation¹⁷¹ that would support a full ban on the photographs of children of celebrities. The paparazzi would not be able to photograph celebrities’ children in public or in private spheres unless the parent consented to the photograph or the child knowingly and voluntarily consented to the photograph. Requiring the child’s knowing and voluntary consent to the photograph protect the child protected from accidentally uttering “yes” to a photographer’s repeated and hostile requests. For purposes of this ban, the consent of a parent would last forever and could not be rescinded, while the consent of the child would only constitute consent for that specific occasion. Lastly, the punishment for violating this law would be similar, yet significantly stronger, than that of section 1708.8.¹⁷² Stronger

166. Dodai Stewart, *Kristen Bell’s Anti-Paparazzi Campaign Actually Worked*, JEZEBEL (Sept. 24, 2014, 9:32 AM), <http://jezebel.com/kristen-bells-anti-paparazzi-campaign-actually-worked-1638509915> [<http://perma.cc/DUW8-7F8F>]; Bazilian, *supra* note 164.

167. *Kristen Bell and Dax Shepard Lead Campaign to Protect Kids from Paparazzi*, *supra* note 163.

168. Bazilian, *supra* note 164.

169. *Id.*

170. *See id.*; *Kristen Bell and Dax Shepard Lead Campaign to Protect Kids from Paparazzi*, *supra* note 163.

171. California’s congressional representative would need to draft the legislation and the legislation would likely need widespread celebrity support in order for the legislature to accept it. Senator Kevin de León drafted SB 606 and the bill was passed largely due to the testimony from celebrities regarding their interactions with the paparazzi. Thus, this article calls upon California’s representatives to draft a full-ban anti-paparazzi bill. It would then be the duty of celebrities to commit to the passage of the bill by testifying in support of the bill.

172. The punishment would likely start at a fine of \$100,000, along with imprisonment of anywhere between 90 days and one year. Additionally, punishment could include injunctive

punishments than what is currently in place will hopefully encourage paparazzi to adhere more closely to the law because fewer benefits will exist if the payout for the photograph is equivalent to the fine.

V. ISSUES POSED BY A COMPLETE BAN ON THE PHOTOGRAPHS OF CELEBRITIES' CHILDREN

A. Age

One potential issue with the legislation is the age to which the legislative ban should extend. To fully protect these children, the ban should extend to any person under the age of 18. This limitation is justified because it protects children during their formative years and thus allows them to experience some semblance of “normalcy” while they navigate puberty and high school. Moreover, 18 is a pivotal age for young adults as it is the point where the government deems them competent enough to make their own decisions—at 18, the Constitution grants the right to vote,¹⁷³ federal law allows for the purchase of cigarettes,¹⁷⁴ and federal law allows for the purchase of guns.¹⁷⁵ In keeping with this trend, the proposed legislation will only extend to those under the age of 18.

B. Children Who Want to Promote Their Own Celebrity

Another issue that must be addressed in relation to this proposed legislation is how to handle children who *want* to be in the limelight. In situations where the child is trying to promote his or her own celebrity, no consent is needed; the child will be treated under the same regulations as adult celebrities. Thus, the paparazzi will adhere to section 1708.8¹⁷⁶ when dealing with these types of child celebrities. For example, if Kylie Jenner, a reality television star, were still under the age of 18, she would not fall

relief in the form of enjoining the photographer from coming near the child of the celebrity for a period of time to be determined based upon the egregiousness of the offense.

173. U.S. CONST. amend XXVI.

174. Mike Males, *Why a 'Smoking Age' of 21 is a Bad Idea*, L.A. TIMES (Mar. 11, 2016, 5:34 PM), <http://www.latimes.com/opinion/op-ed/la-oe-0313-males-teen-smoking-20160313-story.html> [HTTP://PERMA.CC/B2T5-SQLL].

175. *Federal Law on Minimum Age to Purchase & Possess*, LAW CENTER TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/federal-law/people-prohibited-from-firearm-possession/minimum-age-to-purchase-possess> [HTTP://PERMA.CC/6N5F-FSNH].

176. CAL. CIV. CODE § 1708.8 (West 2016).

under this complete ban. Moreover, Disney Channel stars like Rowan Blanchard,¹⁷⁷ 15, and Skai Jackson,¹⁷⁸ 14, would not fall under this ban either because they are promulgating their celebrity by starring in television shows and movies. Thus, children who specifically put themselves in the public sphere through acting or other celebrity-like professions will not be protected by this ban since they have chosen to make themselves public figures.

C. How Will Society Get News on Celebrities' Children?

The proposed legislation will likely be controversial due to consumer's demands to see photographs of celebrities' children.¹⁷⁹ Consumers likely feel entitled to watch these children grow up purely due to their obsession with the celebrity parents. However, merely because consumers want to see these photographs does not mean these photographs should be taken or published. Instead, a solution is already in place to fulfill the demand from consumers: sanctioned photographs.¹⁸⁰ This bill would allow for "sanctioned" photographs of children: press events, movie premieres, and the like would be fair game for photographs of celebrities' children. Celebrities would be free, and in fact, encouraged, to submit photographs of their children to media outlets. However, in contrast to Jess Cagle's proposition,¹⁸¹ the legislation would include no exceptions for "particularly newsworthy events." Thus, only sanctioned events, consent, and photographs sent in by parents would be allowed. These photographs would thereby fulfill consumers' demands to see the children of celebrities.

177. *Rowan Blanchard*, IMDB, <http://www.imdb.com/name/nm3688576> [<http://perma.cc/W4BW-N2QZ>].

178. *Skai Jackson*, IMDB, http://www.imdb.com/name/nm2857655/?ref_=nv_sr_1 [<http://perma.cc/66DT-2BYL>].

179. See Richard Pérez-Peña, *How Much for Those Baby Photos?*, N.Y. TIMES (May 5, 2008), http://www.nytimes.com/2008/05/05/business/media/05tabloid.html?_r=0 (describing how much magazines are willing to pay for pictures of newborn celebrity children presumably because it will increase their sales for that issue).

180. See Emma Bazilian, *People Magazine is Joining Entertainment Tonight in Banning Paparazzi Photos of Celeb Kids*, ADWEEK (Feb. 25, 2014, 4:20 PM), <http://www.adweek.com/news/press/people-just-jared-ban-paparazzi-photos-celeb-kids-155960> [<http://perma.cc/KM57-AMQX>].

181. *Id.* (Cagle, the editorial director of Time Inc., implemented a policy wherein the "People [staff] would not publish photos of celebs' kids taken against their parents' wishes, in print or online.").

D. Will the Ban Substantially Affect Media Outlet's Profits?

While this type of ban through legislation is unprecedented, it has been proven to work based on Bell's campaign. People Magazine agreed to Bell's "No Kids Policy" in 2013¹⁸² and in 2014, after adhering to the ban for about a year, it was listed as number eight out of the Top 25 U.S. Consumer Magazines, beating out all similar gossip-oriented publications.¹⁸³ Moreover, the publication had only seen a 0.9% decrease in its consumer base, a minimal decrease compared with other publications¹⁸⁴ that is likely due to consumers using the Internet in their search for news as opposed to magazines.¹⁸⁵ Thus, while the ban is strict, it does not severely affect media outlets' returns or readership.

E. Is it an Infringement of the Paparazzi's First Amendment Rights?

It is undeniable that a complete ban is an infringement of the paparazzi's First Amendment rights. The paparazzi are entitled to their fundamental right to freedom of the press¹⁸⁶ because their job is to report the news of the entertainment world.¹⁸⁷ They report their news via photographs instead of print, but nevertheless, they are protected under the First Amendment and any legislation that seriously impedes upon their right to take photographs automatically implicates their First Amendment rights.¹⁸⁸ So then the question remains: if the ban impedes upon a constitutional right, can it still stand and should we allow it? The answer is simple—yes.

182. *Id.*

183. Neal Lulofs, *Top 25 U.S. Consumer Magazines for June 2014*, ALLIANCE FOR AUDITED MEDIA (Aug. 7, 2014), <http://archive.is/i12V0> (last visited Apr. 4, 2017).

184. *Id.*

185. See Christopher Zara, *Heard the Latest? Gossip Magazines Are Tanking*, INT'L BUS. TIMES (Feb. 7, 2013, 6:07 PM), <http://webcache.googleusercontent.com/search?q=cache:http://www.ibtimes.com/heard-latest-gossip-magazines-are-tanking-1070666> [<http://perma.cc/9SQQ-5NJU>].

186. U.S. CONST. amend. I.

187. Gary Wax, *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, 148–50 (2009).

188. *Id.*

The United States is constantly balancing competing powers¹⁸⁹ and determining whether the paparazzi's rights should prevail over the children's rights is merely another example of this. While the paparazzi are entitled to their constitutionally protected First Amendment rights, the children of celebrities are entitled to their judicially created right to privacy.¹⁹⁰ More importantly, the children of celebrities are entitled to the policy behind the right to privacy. There are certain rights that our society considers sacred enough to provide protection: among those rights is an "average" child's right to privacy when he or she is photographed for purposes beyond memories. The requirement of consent to photograph the "average" child is the manifestation of this policy. Since this requirement recognizes the importance of protecting "average" children's right to privacy, society should expand that policy to include the children of celebrities as well since the policy of the rule has nothing to do with *who* the children are and more to do with *protecting children as a whole*. Ultimately, the policy behind the right to privacy outweighs the right to freedom of the press. Paparazzi interference can be very damaging to a child's mental state and ability to grow.¹⁹¹ Compare that with restricting the paparazzi marginally more in who they photograph and it is obvious that equity and policy dictate that the children's rights should trump the paparazzi's rights.

Since the children are not actively diminishing their right to privacy by promoting their own celebrity, we must consider the two rights as if they are equally guaranteed and balance them accordingly. When doing so, it is apparent that the balance tips in favor of protecting the children. The

189. AARON H. CAPLAN, AN INTEGRATED APPROACH TO CONSTITUTIONAL LAW 109 (Robert C. Clark et al. eds., 2015) (describing the conflicting powers of the federal government and state governments).

190. See generally *Katz v. United States*, 389 U.S. 347 (1967).

191. See Alan Duke, *Lindsay Lohan's Troubled Timeline*, CNN (Mar. 29, 2012, 1:56 PM), <http://www.cnn.com/2012/03/28/showbiz/lohan-troubled-timeline> [<http://perma.cc/6MKG-LYZC>]; see also Mary Elizabeth Williams, *The Miley Cyrus Revolution is Here: The Former Teen Queen Shows How Pop Provocation is Really Done*, SALON (June 10, 2015, 8:18 AM), http://www.salon.com/2015/06/10/the_miley_cyrus_revolution_is_here_the_former_teen_queen_shows_how_pop_provocation_is_really_done [<http://perma.cc/GQ7A-7S9T>]; Daniel Hubbard, *Here's Every Time Miley Talked about Sex and Drugs at the VMAs*, SLATE (Aug. 31, 2015, 12:50 AM), http://www.slate.com/blogs/browbeat/2015/08/31/miley_cyrus_video_music_awards_drug_references_host_gig_involves_endless.html [<http://perma.cc/ZM3P-F2YP>]; Diego Jones, *This is Your Brain on Drugs: Orlando Brown Rants about Kim Kardashian, Prince and the Devil*, BET (Nov. 7, 2016), <http://www.bet.com/celebrities/news/2016/11/07/orlando-brown.html> [<http://perma.cc/3QT7-VCKK>].

children of celebrities did not choose their lifestyle—they were born into it. Due to their parents' celebrity, they may become involuntary public figures and thereby have a lower expectation of privacy,¹⁹² but merely because they are associated with a celebrity should not mean that the paparazzi can intrude upon their formative years or ignore their judicially guaranteed right to privacy. Moreover, while exposing themselves to the public automatically creates a lower expectation of privacy,¹⁹³ it does not in any way strip the children of their guarantee to that basic right since there is still some expectation of privacy in the public sphere. The paparazzi's First Amendment rights might make the children's right to privacy less effective, but it cannot eliminate it. Therefore, because the children of celebrities maintain their right to privacy, the balancing test ultimately rests on which right the legislature should view as more important. Again, the answer is obvious: the children's right. The children of celebrities must be protected from the paparazzi's harassment so that they can grow into mature, levelheaded, and mentally stable adults.

Finally, the paparazzi's First Amendment rights are not entirely infringed upon by the complete ban. The paparazzi still can take photographs of the children so long as the child or the parent consents. The paparazzi can continue to take photographs of the children at red carpet events and similar occasions. Additionally, they are able to take photographs of celebrity children whenever it is legal to do so. Most importantly, this ban does not affect the paparazzi in taking photographs of adult celebrities. So long as the adult celebrity is without his or her child, the paparazzi may take as many photographs as they please. Thus, the ban is not a complete infringement on the paparazzi's First Amendment rights. They still maintain their freedom of the press with some limitations, similar to most constitutionally guaranteed rights.¹⁹⁴ Since their First Amendment rights are not completely diminished, the complete ban should be able to withstand constitutional scrutiny.

192. See 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, 203 (2010).

193. See generally *Katz*, 389 U.S. 347.

194. Michael Tomasky, *There are 'No' Absolute Rights*, CONSTITUTIONAL ACCOUNTABILITY CENTER (May 5, 2013), <http://theconstitution.org/news/there-are-no-%E2%80%98absolute%E2%80%99-rights> [HTTP://PERMA.CC/G5FU-M2FA].

VI. CONCLUSION

This Note proposes legislation that would severely restrict the paparazzi's right to photograph the children of celebrities. While it has considered several obstacles the legislation would likely encounter, this Note does not claim to have solved all of the potential problems, especially with respect to constitutional challenges. However, given the ineffective attempts to stunt paparazzi antics in the past, this legislation might be the strong action needed to make a difference in the lives of the children of celebrities. With enough celebrity and legislative support, this legislation can become law, as witnessed by the successful expansion of section 1708.8 in 2013.¹⁹⁵ With such a law in place, the children of celebrities could finally walk through the streets without human shields, blankets covering their faces, or moms screaming protectively over the chorus of cameras flashing. Now that would be a nice world.

195. CAL. CIV. CODE § 1708.8 (West 2016).