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IS DRIVING WITH THE INTENT TO GATHER NEWS A CRIME?

THE CHILLING EFFECTS OF CALIFORNIA'S ANTI-PAPARAZZI LEGISLATION

*Christina M. Locke & Kara Carnley Murrhee**

While celebrities may have a love-hate relationship with the photographers who give them red carpet publicity but also pursue shots of their most intimate moments, the California Legislature has little use for the paparazzi. The 2010 anti-paparazzi bill is the most recent in a string of legislative attempts to curb aggressive paparazzi. Assembly Bill 2479 makes two major changes. The first change penalizes those who capture images or audio recordings by false imprisonment, targeting paparazzi who swarm celebrities and prevent them from moving or driving freely. The second change enhances penalties for reckless driving if one has an intent to photograph or record. This Article examines the constitutionality of California's most recent anti-paparazzi law, concluding Assembly Bill 2479, like California's prior anti-paparazzi laws, needlessly modifies existing law at the expense of the First Amendment guarantee of a free press.

I. INTRODUCTION

They sit at the end of celebrities' driveways day and night. They follow relentlessly in cars,¹ waiting to catch that perfect moment on film so

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1. See Kelly Jane Torrence, *Shutterbugged: Paparazzi's Aggressiveness in Pursuit of Candid Celebrity Photos Risks Lives*, WASH. TIMES, Jan. 11, 2008, at D1 (describing some of the paparazzi's aggressive driving tactics that put lives at risk); see also *Schwarzenegger Terminates Paparazzi*, SYDNEY MORNING HERALD, (Oct. 23, 2009), <http://www.smh.com.au/lifestyle/people/Schwarzenegger-terminates-paparazzi-20091023-hc1s.html> ("Numerous Hollywood stars, including Paris Hilton, Nicole Richie and Halle Berry,

they can sell it for hundreds, thousands, or even millions of dollars.² They are the paparazzi.³ While celebrities may have a love-hate relationship with the photographers who give them publicity while chasing them all over Hollywood, the California Legislature has little use for the paparazzi. In 2010, California law once again placed these camera-brandishing, celebrity-stalking photographers in the limelight instead of the Hollywood superstars that are usually the focus of their snapshots.⁴ The 2010 anti-paparazzi bill, Assembly Bill (A.B.) 2479, is the most recent in a string of legislative attempts to curb aggressive paparazzi.⁵ The legislative attention to paparazzi tactics began in 1998, when invasion of privacy was codified in response to Princess Diana's death.⁶ In 2005, legislators amended the law to penalize photographers who sold photos taken during altercations with celebrities.⁷ Finally, in 2009, legislators targeted publishers of photos taken in the course of an invasion of privacy.⁸ That law also permits public prosecutors to pursue violations of the statute on behalf of celebrities.⁹

However, tougher penalties and increased opportunities for prosecution, which went into effect January 1, 2010, did not shutter the paparazzi's snapshots,¹⁰ as news stories detailing the latest celebrity-photographer run-

have been involved in traffic collisions in recent years that allegedly involved paparazzi or their chases.”).

2. *Schwarzenegger Signs Tougher Anti-Paparazzi Law*, CBSNEWS.COM, (Oct. 12, 2009), <http://www.cbsnews.com/stories/2009/10/12/ap/extras/main5380372.shtml> (“Tabloid magazines, TV shows and Internet sites sometimes pay millions of dollars for celebrity fodder.”); *see also Schwarzenegger Terminates Paparazzi*, *supra* note 1 (“Paparazzi are driven by prospects of big bucks—up to six-figure payoffs—for jaw-dropping images of tabloid stars from Angelina Jolie to Tom Cruise, Kristen Stewart and Taylor Lautner.”).

3. *Paparazzo Definition*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 840 (10th ed. 1993) (defining “paparazzo” as “a free-lance photographer who aggressively pursues celebrities for the purpose of taking candid photographs”).

4. *See Anti-Paparazzi Bill Ready for Governor's Blessing*, MALIBU TIMES, (Sept. 1, 2010), <http://www.malibutimes.com/articles/2010/09/02/news/news3.prt>.

5. *See* Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted).

6. *See Diana Death Brings Flash of Paparazzi Legislation*, ALLBUSINESS.COM, (Sept. 3, 1997), <http://www.allbusiness.com/services/motion-pictures/4893034-1.html> [hereinafter *Diana Death Brings Flash*] (“Paris car crash sparked outcries Tuesday from lawmakers seeking new legislation to better protect celebrities from the dogged pursuit of paparazzi.”); *see also* John-Thor Dahlburg, *Charges Dropped Against Paparazzi Implicated in Princess Diana Crash*, L.A. TIMES, Sept. 4, 1999, at A6 (“Widespread fury rose quickly at the idea that the paparazzi might have hounded the popular and beautiful princess to her death, coolly snapping photos as life ebbed from her.”).

7. *See Out of the Picture Now: Aggressive Paparazzi*, NEWSDAY, Jan. 1, 2006, at A13.

8. Assemb. B. 524, 2009–2010 Leg., Reg. Sess. (Cal. 2009) (enacted).

9. *Id.*

10. S. Judiciary Comm., B. Analysis, A.B. 2479, 2009-2010 Leg., Reg. Sess., at 1–2 (Cal. June, 22, 2010) (“Despite the enactment of these statutory remedies, there continues to be a flurry of news reports on the increasing tension between celebrities and photographers, which at times has escalated to the point of physical confrontations.”); *see also* Nicole LaPorte, *The Do-Nothing*

in continued to make headlines. In February 2010, state officials filed criminal charges against Sean Penn, who now faces 1.5 years in jail, for an alleged attack on a photographer.¹¹ In June 2010, *Mad Men* star January Jones alleged that she lost control of her car and collided with several parked cars because the paparazzi were following her.¹² That same month, a seventeen-year-old photographer accused Jodie Foster of assaulting him after he apparently tailed her and her children too closely as they left a theater.¹³ Although supporters of the 2009 bill believed it would help curb the abuses of paparazzi who stalk celebrities to catch candid photos, opponents questioned whether the law would be effective, create a flurry of lawsuits,¹⁴ or even be upheld if challenged in court.¹⁵

Paparazzi Law, THE DAILY BEAST.COM (Feb. 25, 2010), <http://www.thedailybeast.com/blogs-and-stories/2010-02-25/the-do-nothing-paparazzi-law>.

11. Penn was criminally charged with battery and vandalism for allegedly attacking a photographer in Los Angeles. Richard Winton, *Penn Is Charged in Battery Case: Officials Say the Actor Kicked a Photographer and Broke His Camera*, L.A. TIMES, Feb. 20, 2010, at A4.

12. *Mad Men Star January Jones Won't Be Investigated in Crash*, CARBONATED.TV (June 11, 2010, 6:50:56 PM), <http://www.carbonated.tv/entertainment/mad-men-star-january>.

13. Alan Duke, *Jodie Foster Is Suspect in Battery Against Teen*, CNN.COM (June 11, 2010), http://articles.cnn.com/2010-06-11/entertainment/jodie.foster.assault.probe_1_paparazzi-suspect-teen?-s=pm:showbiz.

14. *See Will California's New Anti-Paparazzi Law Unleash a Torrent of Law Suits?*, WALL ST. J. L. BLOG (Oct. 14, 2009, 8:35 AM), <http://www.blogs.wsj.com/law/2009/10/14will-california-new-anti-paparazzi-law-unleash-a-torrent-of-law-suits/>.

15. Indeed, in a letter from the Radio Television Digital News Association to California Assemblyperson Karen Bass (D-Los Angeles) (sponsor of both A.B. 524 and A.B. 2479), the organization insisted the first publication law “would, among other things, unduly chill important speech and contravene the established right of news organizations to publish or broadcast images that are newsworthy or otherwise of public concern.” Letter from the Radio Television Digital News Ass’n to Cal. Assemb. Karen Bass (Aug. 19, 2009), http://www.rtnda.org/pages/media_items/rtnda-opposes-california-legislation-restricting-news-gathering1835.php; see also Courtney Reimer, *California's New Anti-Paparazzi Bill Allows Celebrities to Sue Publications*, FIRST AMENDMENT COALITION (Oct. 13, 2009), <http://www.firstamendmentcoalition.org/2009/10/californias-new-anti-paparazzi-bill-allows-celebrities-to-sue-publications>. According to the Coalition:

While few would advocate the invasion of anyone’s privacy—celebrities or otherwise—this new law could be seen as an erosion of the First Amendment. Freedom of the press and libel laws thus far have been less restrictive of material concerning public figures, who are by nature of their business less subject to privacy laws.

See also Christina M. Locke, *Does Anti-Paparazzi Mean Anti-Press?: First Amendment Implications of Privacy Legislation for the Newsroom*, 20 SETON HALL J. SPORTS & ENT. L. 227, 247 (2010) (“Privacy laws like California’s 2009 amendment to section 1708.8 of its civil code threaten the First Amendment, waste taxpayer resources, and pander to wealthy and politically influential celebrities.”).

In September 2010, Governor Arnold Schwarzenegger¹⁶ signed the newest law, A.B. 2479, which makes two major changes.¹⁷ The first change penalizes those who capture images or audio recordings by false imprisonment.¹⁸ The law's ostensible goal is to target paparazzi who swarm celebrities and prevent them from moving or driving freely.¹⁹ The second change the law institutes is to add enhanced penalties for reckless driving if one has an intent to photograph or record.²⁰ The potential for these measures to violate the First Amendment by having a chilling effect on newsgathering is the focus of this Article.

This Article examines the constitutionality of California's most recent anti-paparazzi law, A.B. 2479. Part I discusses the history of California's anti-paparazzi laws and previous First Amendment challenges, including the latest legislative attempt to curb paparazzi by increasing penalties for false imprisonment and creating a new category of reckless driving with the intent to photograph. Part II analyzes A.B. 2479 from a First Amendment standpoint, using a variety of applicable First Amendment doctrines. Finally, Part III concludes that A.B. 2479, like the prior anti-paparazzi laws, needlessly modifies existing law at the expense of the First Amendment guarantee of a free press.

II. CALIFORNIA AND ANTI-PAPARAZZI LAWS

On August 31, 1997, news that Princess Diana had died in a car crash in a Paris tunnel, while photographers chased her car, spread quickly.²¹

16. Schwarzenegger, an actor prior to being elected governor of California, has had his own share of run-ins with the paparazzi. In 1998, two photographers were convicted of misdemeanor false imprisonment charges after an incident with Schwarzenegger and his family outside his son's preschool. Robert W. Welkos, *Paparazzi Guilty in Schwarzenegger Case*, L.A. TIMES, Feb. 3, 1998, at B1.

17. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted).

18. *Id.* (codified as amended at CAL. CIV. CODE § 1708.8 (West 2010)).

19. Assemb. Judiciary Comm., B. Analysis, A.B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 30, 2010). According to bill sponsor Assemblyperson Karen Bass:

[T]his bill is intended to curb the reckless and dangerous lengths that paparazzi will sometimes go in order to capture the image of celebrities. Of particular concern is the practice of surrounding a celebrity or the celebrity's vehicle in a manner that does not permit an avenue of escape. In addition, paparazzi have allegedly engaged in dangerous and high-speed chases on the public highways in their efforts to capture photographs. The author contends that this kind of behavior is especially a problem in Los Angeles, with its high concentration of stars and celebrities.

20. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at CAL. VEH. CODE § 23103 (West 2010)).

21. See, e.g., Craig R. Whitney, *Diana Killed in Car Crash in Paris*, N.Y. TIMES, Aug.

When a French judge declared seven paparazzi suspects in the investigation,²² celebrities and lawmakers in Europe²³ and the United States, namely California,²⁴ demanded new legislation to quell the dangerous paparazzi tactics.²⁵ Though Congress considered but did not enact any such legislation,²⁶ California moved very quickly to enact the first state anti-paparazzi law.²⁷ However, a judge eventually concluded that Diana's impaired driver, not the paparazzi, was responsible for the crash.²⁸

A. California's Previous Legislative Attempts at Curbing Paparazzi

California's 1998 law provided statutory causes of action for both physical and "constructive" invasion of privacy.²⁹ The "constructive" provision was aimed at preventing the use of "visual or auditory enhancing device[s]" to capture photos of celebrities engaging in "personal or familial

31, 1997 (Late Ed.) at A1; Ann O'Neill, *Paparazzi Pursuit Was a Constant for Diana*, L.A. TIMES, Aug. 31, 1997, at A9.

22. *Diana Death Brings Flash*, *supra* note 6.

23. After the death of Princess Diana, the Council of Europe modified the European Convention on Human Rights to broadly define privacy rights. Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13, Nov. 1, 1998, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>. In one notable case, *Von Hannover v. Germany*, the European Court of Human Rights found that Princess Caroline of Monaco's privacy rights were violated when she was photographed during recreational pursuits. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 44. A concurring judge in *Von Hannover* wrote that "courts have to some extent and under American influence made a fetish of the freedom of the press." *Id.* at 78 (Zupancic, J., concurring); see also Patrick J. Alach, Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 220 (2008) (arguing that American law prioritizes the First Amendment over privacy rights while European law puts the two on equal footing).

24. Todd S. Purdum, *Two Senators Propose Anti-Paparazzi Legislation*, N.Y. TIMES, Feb. 18, 1998, at A16 (quoting one of the bill's sponsors, Sen. Dianne Feinstein, as having said that the death of Princess Diana stimulated efforts to enact a law addressing the "increasingly aggressive cadre of fortune seekers with cameras").

25. *Diana Death Brings Flash*, *supra* note 6.

26. See Protection From Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998); Personal Privacy Protection Act, S. 2103, 105th Cong. (1998); see also Larysa Pyk, *Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 187, 193-97 (1998); Randall Boese, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press*, 17 COMM. LAW. 1, 23 (Summer 1999).

27. *California Passes Law to Rein in Paparazzi*, CNN.COM, (Oct. 1, 1998), <http://www.cnn.com/SHOWBIZ/Movies/9810/01/paparazzi.bill/index.html>.

28. Dahlburg, *supra* note 6.

29. CAL. CIV. CODE § 1708.8(a)-(b) (West 2009).

activity.”³⁰ The constitutional implications of the 1998 law raised concerns among the media law bar and the press.³¹ Opponents argued the law could violate constitutional protections for newsgathering and was vague and overbroad.³² The breadth of the statute and its target on the media prompted some media attorneys to lament that the “statute opens a Pandora’s box of issues that may take years to sort out.”³³

Far from sorting out the “Pandora’s box” of the initial statute, the California Legislature continued to pass more of the same constitutionally suspect laws. The first amendment to the 1998 invasion of privacy statute came in 2005 and was aimed at photos taken during altercations between celebrities and photographers.³⁴ The 2005 amendment called for photographers who had assaulted celebrities to forfeit profits from the publication of the resulting photos.³⁵ It also allowed for triple damages against the paparazzi in civil suits stemming from the altercations.³⁶ Assemblyperson Cindy Montanez (D-San Fernando) pointed to a recent incident involving actress Lindsay Lohan as evidence of the need for the law, which took effect in 2006.³⁷

Celebrity run-ins with paparazzi continued in the years following the passage of the 2005 amendment.³⁸ Thus, in 2009, California lawmakers

30. *Id.* § 1708.8(b). The statute was essentially a codification and expansion of Prosser’s common law tort of intrusion. The concept of an individual right of privacy originated in an 1890 *Harvard Law Review* article by Samuel Warren and Louis Brandeis. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Prosser, in a 1960 law review, articulated four types of invasion of privacy: intrusion; public disclosure of private facts; false light in the public eye; and appropriation. These were subsequently included in the *Restatement (Second) of Torts*. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); RESTATEMENT (SECOND) OF TORTS § 652A–E (1977).

31. See, e.g., Kelli Sager & Randall Boese, *Redefining Privacy in California? The “Anti-Paparazzi Legislation,”* MONDAQ.COM (July 13, 2001), <http://www.mondaq.com/unitedstates/article.asp?articleid=12654>.

32. *Id.*

33. *Id.*

34. Assemb. B. 381, 2005–2006 Leg., Reg. Sess. (Cal. 2005) (enacted).

35. *Id.*; see CIV. § 1708.8(d).

36. Assemb. B. 381, 2005–2006 Leg., Reg. Sess. (Cal. 2005) (enacted); see CIV. § 1708.8(d).

37. See Steve Lawrence, *Governor Signs Paparazzi Bill*, LONG BEACH PRESS-TELEGRAM, Oct. 1, 2005, at A18; Sandy Cohen, *Anti-Paparazzi Law Raises Constitutional Concerns*, SAN JOSE MERCURY NEWS, Dec. 31, 2005, at B5.

38. See, e.g., Harriet Ryan, *Paparazzo, Actor Keanu Reeves Testify in Court*, L.A. TIMES, Oct. 29, 2008, at B5; Andrew Blankstein, *At LAX, Celebs Deal with Excess Baggage: Paparazzi; Kanye West Lands in Jail After a Scuffle With Two Photographers*, L.A. TIMES, Sept. 12, 2008, at A1; Ari B. Bloomekatz, *Paparazzo Says Surfers Accosted Him in Malibu: Photographer Trying to Get Shots of Matthew McConaughey at the Beach Says a Camera was Tossed into the Ocean*, L.A. TIMES, June 23, 2008, at B3; Richard Winton, *Paparazzo Fails to Come to Court: Warrants are Issued for Todd K. Wallace, Who is Wanted in a Child Endangerment and Battery Case In-*

once again sought new ways to protect celebrities. This time, they set their sights higher up the editorial food chain. The new law, A.B. 524, established penalties of up to \$50,000 for first publishers of photos obtained in contravention of California's privacy statute.³⁹ The bill's sponsor, Assemblyperson Karen Bass (D-Los Angeles), "hoped to remove the financial incentive for paparazzi to continue pursuing and photographing celebrities."⁴⁰ Considering that prime photos can fetch more than a million dollars, this seems unlikely. Nonetheless, first publishers with "actual knowledge"⁴¹ that the photo was taken in a way "that is offensive to a reasonable person" would be subject to the penalties.⁴² This portion of the statute seems squarely in conflict with a line of U.S. Supreme Court holdings that have turned down attempts to punish the press for publishing lawfully obtained information.⁴³

The 2009 legislation also authorized government attorneys to move forward with civil actions based on the harms suffered by celebrities.⁴⁴ Prosecutors may pursue civil actions against publishers and photographers for violations of the privacy statute.⁴⁵ Proceeds would be distributed among the prosecuting agency itself, as well as an Arts and Entertainment Fund.⁴⁶ These prosecutions could open taxpayers to the possibility of footing expensive legal bills on behalf of celebrities and subject the press to the high costs of defending such lawsuits.

B. A.B. 2479: Driving with the Intent to Commit Journalism?

Just months after the privacy amendment targeting first publishers of photos went into effect on January 1, 2010, yet another anti-paparazzi bill was introduced to the California Assembly.⁴⁷ An early legislative analysis of the bill noted:

volving Reese Witherspoon, L.A. TIMES, Jan. 5, 2006, at B3.

39. Assemb. B. 524, 2009–2010 Leg., Reg. Sess. (Cal. 2009) (enacted).

40. S. Rules Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 27, 2010).

41. CIV. § 1708.8(f)(1).

42. *Id.* § 1708.8(a).

43. See *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001); *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *Landmark Comm. v. Virginia*, 435 U.S. 829, 843 (1978); *N.Y. Times v. United States*, 403 U.S. 713, 714 (1971).

44. Assemb. B. 524, 2009–2010 Leg., Reg. Sess. (Cal. 2009) (enacted).

45. *Id.*

46. *Id.*

47. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Feb. 19, 2010) (enacted).

Despite the enactment of [previous] statutory remedies, there continues to be a flurry of news reports on the increasing tension between celebrities and photographers, which at times has escalated to the point of physical confrontations. Defenders of the paparazzi allege that the problem is not the paparazzi, but rather the public's appetite to learn about even the most mundane details of the celebrities' lives. Some also assert that celebrities themselves want the best of both worlds, seeking out the cameras when they want to bask in the limelight, and smashing those same cameras on the ground when they find them annoying.⁴⁸

As first introduced, the bill incorporated "the tort of stalking" into the privacy statute, looking to "impose liability when the defendant engaged in a pattern of conduct intended to place the victim under surveillance"⁴⁹ Surveillance was defined as "that pattern of conduct [that] caused the plaintiff to reasonably suffer substantial emotional distress."⁵⁰ Assemblyperson Karen Bass, who also introduced the 2009 anti-paparazzi bill,⁵¹ sought to amend both the civil anti-stalking and privacy statutes in "an effort to curb the often aggressive tactics used by paparazzi to capture images and recording of celebrities and their families in order to satiate a public that clamors for the intimate details of the lives of Hollywood stars."⁵² The "surveillance" version was later amended "in order to craft language that will address the issue of unlawful and dangerous surveillance without limiting constitutionally protected activities."⁵³ The surveillance and anti-stalking aspects of the bill were replaced with new provisions addressing false imprisonment and reckless driving.⁵⁴

A.B. 2479, as enacted in fall 2010, ostensibly targets two problematic situations that occur when photographers seek photos of celebrities: 1) paparazzi follow celebrities in their cars in an effort to track the celebrities'

48. S. Rules Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 27, 2010).

49. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. 2010) (as amended Apr. 28, 2010).

50. *Id.*

51. *Legislation*, THE PAPARAZZI REFORM INITIATIVE, <http://www.paparazzi-reform.org/legislation/> (last visited Jan. 9, 2011).

52. Assemb. Floor, B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 3 (Cal. May 13, 2010) (noting that according to Bass, the bill would "prevent paparazzi from loitering outside of a celebrity's home or place of work").

53. S. Rules Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 6–7 (Cal. Aug. 26, 2010).

54. *Id.* at 4–5.

whereabouts, which sometimes leads to high-speed chases and collisions; and 2) paparazzi crowd a celebrity in such a manner that makes it difficult or impossible for him or her to move freely.⁵⁵ To combat the first problem, A.B. 2479 amended the California Vehicle Code, establishing additional criminal and financial penalties for reckless driving if one does so “with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.”⁵⁶ Existing law punishes reckless driving with an infraction and jail time of 5 to 90 days or a fine between \$145 and \$1,000.⁵⁷ However, the new anti-paparazzi law punishes those driving recklessly with the intent to record with a misdemeanor, jail time up to six months, *and* a fine up to \$2,500.⁵⁸ The penalties are harsher if a child is “placed in a situation in which the child’s person or health is endangered” due to reckless driving with the intent to record someone for a commercial purpose.⁵⁹ In those instances, the penalties include up to a year in jail *and* a fine up to \$5,000.⁶⁰

The second major change brought by A.B. 2479 sought to curb instances where paparazzi “surround stars and their families so that they have no possible means of escape.”⁶¹ To accomplish this, the bill incorporated false imprisonment into the existing privacy statute, allowing for extra damages for false imprisonment committed with intent to capture a visual or audio impression of another person.⁶² Though the new law did not provide a definition of false imprisonment, the legislative analysis noted that “presumably it would have the same meaning that it has at common law: that is, the intentional infliction of ‘confinement,’ with confinement defined as restricting a person to a confined physical space without any path of escape.”⁶³

The City of Los Angeles, Screen Actors Guild, and Paparazzi Reform Initiative all offered support for the bill.⁶⁴ Supporters offered several ex-

55. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at CAL. VEH. CODE § 40008 (West 2010)).

56. *Id.*

57. CAL. VEH. CODE § 23103(c) (West 2010).

58. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at VEH. § 40008(a)).

59. *Id.* (codified as amended at VEH. § 40008(b)).

60. *Id.*

61. Assemb. Comm. on Judiciary, B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 1 (Cal. Aug. 30, 2009).

62. *Id.* at 2.

63. *Id.* at 4.

64. S. Rules Comm., B. Analysis, *supra* note 53, at 5–6.

amples of why the new legislation was needed:

Celebrities are routinely boxed-in when paparazzi (1) horde around an entranceway to a public facility to snap photographs; (2) park their cars in such a manner as to block-in a celebrity's vehicle; (3) ram their cars into a celebrity's car; (4) surround a celebrity in an airport or other public transportation facility; or (5) generally engage in aggressive conduct to significantly limit a celebrity's freedom of movement.⁶⁵

Opposing the bill was the California Newspaper Publishers Association (CNPA), arguing against the "extreme criminal penalties" that could face the "mainstream press."⁶⁶ The CNPA feared a chilling effect on traditional newsgatherers due to the broad language of the bill.⁶⁷ Further, the CNPA argued that A.B. 2479 unfairly targeted journalists for heightened penalties related to reckless driving.⁶⁸

Although A.B. 2479 transformed from a stalking and surveillance bill to a false imprisonment and reckless driving bill,⁶⁹ the constitutional concerns that prompted that transformation were not assuaged. The next section of this article discusses one potential First Amendment analysis of A.B. 2479.

III. FIRST AMENDMENT ANALYSIS OF A.B. 2479

As with the previous legislative efforts to combat aggressive paparazzi, A.B. 2479 once again falls short of the constitutional protections established by the First Amendment to the U.S. Constitution. This section considers the First Amendment implications of A.B. 2479 using a variety of potentially applicable doctrines: constitutional protections for news-gathering; overbreadth; vagueness; and strict scrutiny for content-based regulations.

65. *Id.* at 6.

66. Assemb. Comm. on Judiciary, B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 30, 2010).

67. *Id.*

68. *Id.* at 5–6. In a letter of opposition to Assemblyperson Bass, the CNPA stated that "[t]he chilling impact of this proposed language is palpable" and warned that it "would create the potential for extreme criminal penalties for members of the mainstream press in transit to any number of emergency scenes or any scene in which news is happening." *Late Amendment Would Criminalize Normal Newsgathering*, CNPA (Aug. 23, 2010) http://www.cnpa.com/full_story.cfm?id=2225.

69. See S. Rules Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 27, 2010).

A. Constitutional Protection for Newsgathering

The First Amendment provides explicit protections for a free press.⁷⁰ Does this mean the media gets special treatment? It depends. As a general rule, the U.S. Supreme Court has held that the press' right of access is no greater than that of the general public.⁷¹ However, newsgathering does warrant some degree of First Amendment protection, with the Supreme Court noting in *Branzburg v. Hayes* that "news gathering is not without its First Amendment protections"⁷² In his dissenting opinion in *Branzburg*, Justice Stewart noted that "[n]ews must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist."⁷³ Justice Stewart's view of the press clause of the First Amendment emphasized the media's watchdog role, which he described as "precisely the function it was intended to perform by those who wrote the First Amendment of our Constitution."⁷⁴

Generally applicable laws, such as laws against reckless driving, are usually considered within the bounds of the First Amendment, even if their enforcement against the press might incidentally impact newsgathering.⁷⁵ The seminal case in this area is *Cohen v. Cowles Media Co.*⁷⁶ In *Cohen*, the *Minneapolis Star-Tribune* sought to prevent enforcement of a promissory estoppel judgment for breaching a promise of confidentiality to a source.⁷⁷ The U.S. Supreme Court held in favor of Cohen, drawing on the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."⁷⁸ In holding that the newspaper could not avoid liability on First

70. U.S. CONST. amend. I.

71. See, e.g., Margaret Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 290 (1978) (analyzing the rejection of Justice Powell's theory that the press' right to information should be greater than the public's right to access).

72. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972).

73. *Id.* at 728 (Stewart, J., dissenting); see also *Nicholson v. McClatchy Newspapers*, 223 Cal. Rptr. 58, 63 (App. Ct. 1986).

74. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975).

75. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

76. *Id.*

77. *Id.* at 665.

78. *Id.* at 669; see also *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (supporting the proposition that the First Amendment does not "accord newsmen immunity from torts or crimes committed during the course of newsgathering"); *Galella v. Onassis*, 487 F.2d 986, 995-96 (2d Cir. 1973) (stating that the First Amendment does not create a "wall of immunity pro-

Amendment grounds, the Court noted that promissory estoppel was a generally applicable law that did not “target or single out the press.”⁷⁹

California’s law, however, takes a law of general applicability—reckless driving—and uses it to specifically single out the press for enhanced penalties.⁸⁰ While paparazzi are arguably not members of the “mainstream press,”⁸¹ they are still engaged in the gathering and dissemination of information—visual images—and in many cases these photos are distributed by the mainstream media. Thus, if newsgathering is not protected from laws of general applicability but does indeed deserve some measure of First Amendment protections, it seems that the California law impermissibly targets the press’ newsgathering activities. California’s amended Civil Code specifically targets information gatherers (whether visual, audio, or other media).⁸² This is inconsistent with the paltry First Amendment protection there is for newsgathering. Moreover, California’s law is patently unfair, especially considering the multitude of absurd scenarios that could result. For example, a photographer rushing to the scene of a disaster could conceivably receive harsher punishment than someone driving recklessly with the intent to murder someone, rob a bank, or worse. The potential for such results raises serious concerns about the chilling effects on the press and its ability to gather news.

The false imprisonment provision of A.B. 2479, which provides enhanced damages if someone commits the tort of false imprisonment in the course of an invasion of privacy,⁸³ also has the potential to chill newsgathering efforts. What if, for example, a crowd of television reporters surrounds a politician on the courthouse steps to question him about a “personal or familial matter”? If the politician is accused of sexually harassing a nanny, would this be a “personal or familial matter” wherein he should expect privacy protections? Although California’s invasion of privacy statute carries an exception that would apply to some investigative reporting—allowing public or private employees with “an articulable suspicion” of “illegal activity or other misconduct” or other activities “adversely affecting the public welfare, health or safety”—it is not clear whether this

tecting newsmen from any liability for their conduct while gathering news”).

79. *Cohen*, 501 U.S. at 664.

80. See Assemb. B. 2479, 2009-2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at CAL. VEH. CODE § 40008(a)–(b) (West 2010)).

81. Assemb. Comm. on Judiciary, B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 30, 2010).

82. *Id.* (codified as amended at CAL. CIV. CODE § 1708.8(a)–(c) (West 2009)).

83. *Id.* (codified as amended at CIV. § 1708.8(c)–(d)).

would apply to the scenario just described, leaving open the potential to chill newsgathering.⁸⁴

B. Overbreadth

The broad sweep of the new provisions of A.B. 2479 and their potential chilling effects on the press, mainstream or otherwise, may be so broad that they could be declared facially invalid under the First Amendment doctrine of overbreadth, “whereby a law may be invalidated as overbroad if ‘a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”⁸⁵ An overbreadth analysis consists of construing the statute to determine how far it might reach.⁸⁶ In the case of the reckless driving provision, photojournalists on their way to a disaster or emergency scene could be impacted by this law. Although the new law specifies that the intent to capture an image or recording must be done for “a commercial purpose,” this exception will not apply to newsgatherers, as most media outlets are for-profit.⁸⁷ The false imprisonment provision also poses risks for newsgathering not envisioned by lawmakers, such as the courthouse-steps scenario from the prior section.⁸⁸

The paparazzi are a small segment of the population, creating the possibility for “a substantial number” of the law’s applications to be unconstitutional.⁸⁹ A Senate Judiciary Committee Analysis of the bill noted that “AB 2479, while laudable in its goals, could potentially have the effect of deterring the reporting of matters of genuine public importance or concern

84. CIV. § 1708.8(g).

This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, the suspected violation of any administrative rule or regulation, a suspected fraudulent insurance claim, or any other suspected fraudulent conduct or activity involving a violation of law or pattern of business practices adversely affecting the public health or safety.

85. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)).

86. *See id.* (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)).

87. *See* Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at VEH. § 40008(a)–(b)).

88. *See supra* Part III.A.

89. *Stevens*, 130 S. Ct. at 1587.

simply by potentially exposing reporters to increased liability and penalties during the newsgathering process.”⁹⁰ Thus, the potential for a significant number of the applications of A.B. 2479 to be unconstitutional makes the law particularly susceptible to invalidation under the overbreadth doctrine.

C. Vagueness

Closely related to the overbreadth doctrine is the vagueness doctrine, which analyzes the First Amendment validity of a regulation based on clarity and how well it puts the public on notice that a particular action will be subject to the penalties prescribed by the regulation.⁹¹ The U.S. Supreme Court has noted that “[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions.” . . . The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against⁹² If a statute is so vague that parties potentially subject to its provisions are unsure of its applicability, it may be struck as facially invalid under the First Amendment.⁹³

California’s invasion of privacy laws, particularly A.B. 2479, are subject to invalidation due to vagueness. It is unclear whether the press, in serving its traditional function as information-gatherer for the rest of the public, would fall under the purview of the new statutory provisions. The Vehicle Code amendments of A.B. 2479 do not have the “safeguards” of the privacy statute in that they do not even include the limiting provisions of “personal or familial activity” contained in the privacy section of the Civil Code.⁹⁴ While the “commercial purpose” language could potentially have been intended to distinguish between the paparazzi and the “mainstream press,”⁹⁵ the plain language interpretation would not appear to lend itself to such distinction.⁹⁶ Further, the U.S. Supreme Court recently cautioned against “the danger in putting faith in government representations of prosecutorial restraint.”⁹⁷

90. S. Judiciary Comm., B. Analysis, Assemb. B. 2479, 2009-2010 Leg., Reg. Sess., at 7–8 (Cal. June 22, 2010).

91. *See, e.g.,* *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603–04 (1967) (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963) and *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

92. *Id.* at 604 (quoting *N.A.A.C.P.*, 371 U.S. at 433).

93. *See, e.g., id.*

94. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at VEH. § 40008(a)–(b)); *c.f.* CIV. § 1708.8(a)–(b), (l).

95. Assemb. Comm. on Judiciary, B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 30, 2010).

96. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at VEH. § 40008(a)–(b)).

97. *Stevens*, 130 S. Ct. at 1591 (invalidating a federal statute banning depictions of animal

Again, the throng of television news cameras and reporters on the courthouse steps, arguably an iconic image of the American press, is helpful in illustrating the potential chilling effects of the false imprisonment provision of A.B. 2479. The statute on its face does a poor job of putting people on notice of its application and, therefore, is susceptible to invalidation under the void for vagueness doctrine.

D. Content-Based Strict Scrutiny

Another potential basis for invalidating the provisions of A.B. 2479 on First Amendment grounds is the doctrine of using strict scrutiny to analyze content-based regulations on speech. “[A] law is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face.”⁹⁸ In passing A.B. 2479, as well as the previous legislative attempts at targeting paparazzi, California lawmakers have, in effect, unilaterally decided that photos and recordings of celebrities not engaged in their work is low-value speech. It is with disdain that lawmakers view “the public’s appetite to learn about even the most mundane details of the celebrities’ lives.”⁹⁹ The impetus behind A.B. 2479 was clearly to target specific types of newsgatherers, and implicit in the legislation is the understanding that celebrity news is not *news*.¹⁰⁰ Thus, the Legislature has decided what is newsworthy and valuable, not the press. Yet, as the U.S. Supreme Court noted in a 2010 decision:

*Most of what we say to one another lacks “religious, political, scientific, educational, journalistic, historical, or artistic value” (let alone serious value), but it is still sheltered from government regulation. Even “wholly neutral futilities . . . come under the protection of free speech as fully as do Keats’ poems or Donne’s sermons.”*¹⁰¹

cruelty and noting that it “would not uphold an unconstitutional statute merely because the Government promised to use it responsibly”).

98. *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 958 (9th Cir. 2009) (quoting *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep’t*, 533 F.3d 780, 787 (9th Cir. 2008)).

99. S. Rules Comm. B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 26, 2010).

100. *See, e.g.*, Assemb. Judiciary Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 30, 2010).

101. *Stevens*, 130 S. Ct. at 1591 (citing *Cohen v. California*, 403 U.S. 15, 25 (1971)).

So while it might be tempting to dismiss all paparazzi activities as unimportant, they, too, deserve First Amendment protections.

Assuming the government has indeed targeted speech of specific content (in this case, “even the most mundane details of the celebrities’ lives”¹⁰²), the next step in the First Amendment analysis is to determine whether the law is “narrowly tailored to promote a compelling Government interest.”¹⁰³ This analysis is undertaken bearing in mind that laws that are content-based “are presumptively invalid.”¹⁰⁴

California’s statutory scheme relating to privacy, and, now, reckless driving, was enacted “to attempt to rein in overzealous and aggressive photographers and reporters”¹⁰⁵ The false imprisonment provision is aimed at limiting conduct that “significantly impairs a celebrity’s personal liberty and freedom of movement.”¹⁰⁶ The reckless driving provisions are presumably efforts to curb paparazzi-celebrity chases, speeding, and other aggressive driving behaviors on public highways.¹⁰⁷ Thus, it appears that the state has three interests: inhibiting the behavior of celebrity photographers, discouraging the false imprisonment of celebrities, and protecting both celebrities and the general public from reckless driving.¹⁰⁸ The U.S. Supreme Court has not recognized a compelling interest in either limiting the behaviors of photographers or protecting celebrities, and is highly unlikely to do so. The Court has, however, recognized a compelling government interest in public safety, which is an interest promoted by the government in passing A.B. 2479.¹⁰⁹

Assuming the government can establish a compelling interest in enacting A.B. 2479, in protecting public safety, it would need to prove that the reckless driving and false imprisonment measures were the least restrictive means of accomplishing its goal.¹¹⁰ Stated another way, there must be “no less restrictive alternatives that would further” the interests protected

102. S. Rules Comm. B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 26, 2010).

103. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

104. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

105. S. Rules Comm. B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 4 (Cal. Aug. 26, 2010).

106. S. Judiciary Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. June 22, 2010).

107. *Id.*

108. *See id.*

109. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“[T]hat primary concern of every government—a concern for the safety and indeed the lives of its citizens”); *see, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

110. *See, e.g., Playboy Entm’t Grp., Inc.*, 529 U.S. at 813.

by the provisions of A.B. 2479.¹¹¹ The least restrictive alternatives by which the state could accomplish its objectives are easily found in existing law, which already punishes reckless driving¹¹² and allows for civil¹¹³ and criminal¹¹⁴ actions based on the tort of false imprisonment. In addition, other laws of general application, both statewide and local ordinances in the Hollywood area, already exist to curb the aggressive behaviors of some paparazzi, such as laws against sidewalk blocking, loitering, and traffic laws.¹¹⁵ Perhaps Chief William J. Bratton of the Los Angeles Police Department put it best: “We already have appropriate laws within the constitutional guidelines and we intend to do that whether it is erratic driving, trespassing on private property or any action that goes beyond the constitutional rights to cover a story.”¹¹⁶ Thus, even if a compelling interest could be found by a court considering the law, the provisions of A.B. 2479 are likely to fail strict scrutiny due to the existence of less restrictive alternatives.

IV. CONCLUSION

The concerns of a small but powerful group of constituents prompted California lawmakers to enact several pieces of legislation aimed at protecting the privacy of celebrities. Some of these measures are also aimed at preventing the general public from harm if caught in a paparazzi car chase. But, are the privacy rights of a select few properly elevated above the First Amendment guarantee of a free press? This question goes to the heart of the concerns surrounding California’s “anti-paparazzi” statutory scheme, which includes enhanced damages for photos and recordings obtained in a manner offensive to a reasonable person, stiff fines for first publishers of such photos, authorization for government attorneys to pursue civil privacy actions for wrongs to celebrities, and harsher fines and increased jail time for reckless driving with the intent to photograph.¹¹⁷

111. *Video Software Dealers Ass’n*, 556 F.3d at 958 (citing *Playboy Entm’t Grp., Inc.*, 529 U.S. at 813).

112. CAL. VEH. CODE § 23103 (West 2010).

113. *See, e.g.*, *City of Newport Beach v. Sasse*, 88 Cal. Rptr. 476, 482 (Ct. App. 1970); *Scofield v. Critical Air Med., Inc.*, 52 Cal. Rptr. 2d 915 (Ct. App. 1996).

114. CAL. PENAL CODE §§ 236-237 (West 2010).

115. *See* Richard Winton & Andrew Blankstein, *Deputies Arrest Four in Crackdown on Paparazzi*, L.A. TIMES, Feb. 21, 2008, at B3.

116. Andrew Blankstein & Richard Winton, *Zine Seeks to Shield Stars: Reacting to the Need for a Police Escort for Britney Spears, the Councilman Wants a “Personal Safety Zone,”* L.A. TIMES, Feb. 2, 2008, at B5.

117. *See* CAL. CIV. CODE § 1708.8(a) (West 2009); Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. Sept. 30, 2010) (enacted) (codified as amended at CAL. VEH. CODE § 40008(a)–

A.B. 2479, passed in 2010, is the third measure in five years aimed at paparazzi, despite little to no success of the previous enactments, which date back to 1998. The latest anti-paparazzi laws provide enhanced damages in false imprisonment suits related to privacy violations and tougher penalties (including increased fines and jail time) for reckless driving if the driver has “the intent to capture . . . any type of visual image, sound recordings, or other physical impression of another person for a commercial purpose”¹¹⁸ These amendments, much like their predecessors, are inefficient and likely unconstitutional efforts to curb paparazzi. They do nothing more than existing, generally applicable laws to deter aggressive photographers *except* violate the First Amendment.

Applying a variety of First Amendment jurisprudential doctrines—constitutionally protected newsgathering, overbreadth, vagueness, and strict scrutiny—California’s latest anti-paparazzi measure falls short. It singles out celebrity photographers whose tactics, most would agree, are unwarranted and should be stopped. Existing laws, if properly enforced, can achieve this goal. Reckless driving, loitering, sidewalk blocking, and stalking are all laws of general applicability that can curb paparazzi. In taking steps further than these general laws, lawmakers seek to save the people from their “appetite to learn about even the most mundane details of the celebrities’ lives”¹¹⁹ and, in the process, trample on the First Amendment.

Rather than haphazardly pass stopgap measures in order to draw praise from a powerful sect of constituents (and in the process open the government to costly First Amendment challenges), lawmakers might consider other measures, such as increased funding for law enforcement to properly enforce existing laws. This could help achieve the commendable interest of protecting public safety (whether for celebrities on the sidewalk or motorists on the highways) while preserving the First Amendment.

(b) (West 2010)).

118. Assemb. B. 2479, 2009–2010 Leg., Reg. Sess. (Cal. 2010) (enacted) (codified as amended at CAL. VEH. CODE § 40008(a)–(b)).

119. S. Rules Comm., B. Analysis, Assemb. B. 2479, 2009–2010 Leg., Reg. Sess., at 5 (Cal. Aug. 26, 2010).