

Summer 1-1-2010

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Recommended Citation

Shelly Rosenfeld, *Lights, Camera, Sanction - Whether a Proposed Anti-Paparazzi Ordinance Would Limit Investigative Journalism in the News Business*, 7 HASTINGS BUS L.J. 483 (2010).

Available at: http://repository.uchastings.edu/hastings_business_law_journal/vol7/iss1/5

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LIGHTS, CAMERA, SANCTION? WHETHER A PROPOSED ANTI- PAPARAZZI ORDINANCE WOULD LIMIT INVESTIGATIVE JOURNALISM IN THE NEWS BUSINESS

*Shelly Rosenfeld**

I. INTRODUCTION

It's two o'clock in the morning and you're driving home from a friend's house. You notice there is a vehicle behind you that has no license plate and that has been following you for the last 15 minutes. The driver is so brazen that he or she has even taken to ignoring red lights just to stay behind you. As you begin to turn onto a small neighborhood street just blocks from where you live, you now realize this person has definite intentions of engaging you at your house.

The question I ask you is: Are you in danger?

The answer is YES. Not, "depends if you're on TV."¹

When pop star Britney Spears released her album *Blackout* in 2007,² one song seemed especially true to life. The lyrics to "Piece of Me" appeared to reflect the singer's struggles under intense media scrutiny by being constantly followed by the paparazzo's camera lens:

Well get in line with the paparazzi

Who's flippin' me off

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1. *Paparazzi Task Force Meeting: Hearing Before the L.A. City Council* [hereinafter *Testimony*] (July 31, 2008) (testimony of John Mayer), available at http://www.lacity.org/council/cd3/cd3press/cd3cd3press14254887_07312008.pdf.

2. MTV News Staff, *Britney Spears Plans An Early Blackout; Plus Diddy, Black Eyed Peas, Bobby Brown, Justin Timberlake & More. In For The Record*, Oct. 10, 2007, http://www.mtv.com/news/articles/1571557/20071010/spears_britney.jhtml.

Hopin' I'll resort to some havoc
And end up settlin' in court³

Spears was not the only artist who gave a voice to concerns by celebrities targeted by the media's watchful eye. The singer, Lady Gaga, released a song titled "Paparazzi" in 2008,⁴ which included the following lyrics:

But this photo of us
It don't have a price
Ready for those flashing lights
'Cause you know that baby I-

I'm your biggest fan
I'll follow you until you love me
Papa-Paparazzi⁵

Even before these songs hit the airwaves, the paparazzi treatment of celebrities like Britney Spears made national headlines. In early 2008, the pop star rode in an ambulance to a Los Angeles hospital to receive psychiatric care. In order to shield her from the paparazzi, police arranged for motorcycle, helicopter, and patrol car escorts—costing Los Angeles County taxpayers nearly \$25,000.⁶ As a result, Los Angeles City Councilmember Dennis Zine introduced a motion calling for stricter paparazzi regulation in February 2008.⁷

Zine assembled a group called the Los Angeles Regional Paparazzi Task Force comprised of representatives from Los Angeles, Beverly Hills, Calabasas, Malibu, and West Hollywood. He also gathered individuals from the entertainment industry and from county and state offices.⁸ The ordinance would include a minimum "personal safety zone" of several feet of clear space between paparazzi and the individuals they photograph.⁹ Additionally, larger vehicles that require additional space to navigate freely would receive additional room.¹⁰ An outpouring of support from celebrities

3. Britney Spears, Lyrics of *Piece of Me*, <http://www.azlyrics.com/lyrics/britneyspears/pieceofme.html> (last visited Apr. 9, 2009).

4. Discography - Lady GaGa, <http://www.billboard.com/bbcom/discography/index.jsp?aid=1197779&pid=1003999>, as of 4/9/09.

5. Lady Gaga, *Paparazzi Lyrics*, http://www.elyricsworld.com/paparazzi_lyrics_lady_gaga.html (last visited Apr. 9, 2009).

6. MSNBC.com, *Britney Spears inspires a new law*, ACCESS HOLLYWOOD, <http://www.msnbc.msn.com/id/23134171/> (last visited Apr. 9, 2009).

7. Press Release, City of Los Angeles, Zine to Introduce Motion Calling for Stricter Paparazzi Regulation, Jan. 31, 2008, <http://www.lacity.org/council/cd3/cd3press/cd3cd3press1425175301312008.pdf> [hereinafter *Proposal*] (last visited Apr. 9, 2009).

8. L.A. CITY COUNCIL, PUB. SAFETY COMM., MOTION OF COUNCILMAN DENNIS ZINE TO REGULATE PAPARAZZI ACTIVITY [hereinafter *Zine Motion*], Nov. 18, 2008, http://www.lacity.org/council/cd3/oldmotion08/cd3motions14356892_11182008.pdf.

9. See *Proposal*, *supra* note 7.

10. See *Proposal*, *supra* note 7.

such as John Mayer helped bolster and bring attention to the proposal.¹¹

Regulating the paparazzi won't bring an end to modern day media coverage, just as the newly enforced hands-free law hasn't stopped people from talking on cell phones while they drive. It's only an adaptive measure put in place to respond to some of the ways that living in a technological free-market can compromise personal safety.¹²

The proposed ordinance, however, encountered stiff opposition. Los Angeles Police Chief Bill Bratton spoke out against the proposal, arguing that current speeding and assault laws were better suited to regulate paparazzi. Furthermore, the proposed law would "create an inequitable and ambiguous code that would likely be unenforceable."¹³

While the ordinance did not pass, Zine, himself a former police officer,¹⁴ decided to give the matter another push later that year. He proposed another motion, this time more narrowly tailored to completely limit paparazzi activity in school zones and around hospitals.¹⁵ Action on the proposed law remains uncertain, as the city council has yet to announce a voting date.

Given the profitability of celebrity snapshots, paparazzi have every incentive to stick around.¹⁶ There are roughly 450 paparazzi in Los Angeles, and their photographs can earn from as little as \$250 to as much as \$500,000 for a highly prized snapshot.¹⁷ In one case, CBS reported that a photographer received \$500,000 for photos of Brad Pitt and Angelina Jolie.¹⁸ Such high prices may explain why a paparazzo pushes the limits of safety to get a better photograph.

At stake is not just *celebrity* news coverage, but general news coverage as well. Paparazzi may be rouge journalists, but they are journalists nonetheless. It is wrong to single them out based on the subject of their reports. To do so would set a dangerous precedent. Regulating a paparazzo's newsgathering tactics can easily lead to limitations on even more aggressive tactics currently utilized by investigative journalists.

A very important point to remember is that the topic of this note is not the content of celebrity news, such as whether it is truthful or not. This note does not address the tort of defamation. Comparing the content of paparazzi stories to news reports is not relevant here. This note addresses

11. See *Testimony*, *supra* note 1.

12. See *Proposal*, *supra* note 7.

13. Jill Serjeant, *L.A. police chief says paparazzi law unenforceable*, REUTERS, Apr. 8, 2008, <http://www.reuters.com/article/idUSN0836699420080408>.

14. *Id.*

15. See *Zine Motion*, *supra* note 8.

16. Paparazzi Primer, <http://www.cbc.ca/doczone/parishiltoninc/primer.html> (last visited Feb. 3, 2010).

17. *Id.*

18. *Civil Assault: Liability: Hearing on AB 381 Before the Assemb. Comm. on Judiciary*, 2005-2006 Sess. 3 (Cal. 2005), available at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0351-0400/ab_381_cfa_20050908_094509_asm_comm.html, (last visited Apr. 9, 2009).

the newsgathering process: how investigative journalists and paparazzi amass information, both employing aggressive and unconventional strategies at times.

While the value of paparazzi-driven journalism is low, regulations limiting paparazzi tactics could be a detriment to society. Since paparazzi are journalists, all rules applying to them will apply the rest of the journalism profession. Creating stricter limitations on paparazzi will inherently restrict the performance of other investigative reporters and may have a chilling effect on the acquiring and reporting of valuable investigative news. Certain newsgathering torts permit one to consider the newsworthiness, and hence public interest of the stories in question in evaluating the claim. However, just as a driver who runs a red light on the way to visit a sick relative in the hospital has still broken the law, investigative reporters with virtuous motivations will be liable for violating anti-paparazzi statutes if they employ aggressive, paparazzi-like tactics even if these tactics were essential to their investigation.

This note will discuss torts such as trespass and intrusion upon seclusion. In addition, it will evaluate how successfully case law has drawn a line between paparazzi and investigative journalism efforts.¹⁹ Lastly, the note will consider and compare proposed statutes such as Zine's proposed "Motion to Protect School Zones and Sensitive Use Facilities from Intrusive Paparazzi," with the current California law on paparazzi: Civil Code section 1708.8, the California Anti-Paparazzi Statute ("section 1708.8").²⁰

II. BACKGROUND OF PAPARAZZI REGULATION: WHAT'S BEHIND THE SHUTTER

The California Legislature amended section 1708.8 in 2006 in an effort to further to further discourage and penalize paparazzi. It imposed harsher civil liability for members of the paparazzi who overstepped their bounds while following celebrities. However, some argue that the "anti-stalkerazzi"²¹ law introduces confusion into the law and has no visible diminution in the aggressiveness of tabloid press. According to the statute, someone is liable for "physical invasion of privacy" when he trespasses on the plaintiff's property "with the intent to capture" a picture or recording "of the plaintiff engaging in a personal or familial activity" and the entry is

19. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Miller v. NBC*, 187 Cal. App. 3d 1463 (1986); *Shulman v. Group W Prod., Inc.*, 18 Cal. 4th 200 (1998); *Sanders v. ABC*, 20 Cal. 4th 907 (1999); *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973).

20. CAL. CIV. CODE § 1708.8(b) (Deering 2005).

21. Christine Lagorio, *Law Aims To Curb 'Stalkerazzi'*, CBS NEWS ENTERTAINMENT, Dec. 30, 2005, <http://www.cbsnews.com/stories/2005/12/30/entertainment/main1172318.shtml>.

done “in a manner that is offensive to a reasonable person.”²² This is different than trespass law, which does not require any proof of intent to do anything. Also, unlike the tort of intrusion, the entry need not be offensive to anyone.

Moreover, “personal or familial activity,” as defined, does not include “illegal” activity. This means that a blatant trespass to photograph a plaintiff celebrity doing something illegal is not prohibited by the law.²³ This would be a positive step for investigative journalism, which often attempts to catch someone—who may or may not have celebrity status—engaging in unlawful conduct. Additionally, other provisions attempt to strengthen the statute by providing for treble damages,²⁴ disgorging profits from the invasion, placing injunctions against repeating the conduct, and making editors and employers liable for publishing photos gained through illegal means. However, the statute would also salvage some of the “virtues” of paparazzi and investigative reporting. It expressly states that it does not limit attempts to photograph or record violations of “any administrative rule or regulations,” any “fraudulent conduct,” or any pattern of business practices adversely affecting the public health or safety.”²⁵ This safe harbor gives the news media a considerable amount of journalistic freedom.

The Supreme Court, in *Cohen v. Cowles Media Co.*, held that the freedom of the press does not exempt journalists from laws applicable to the general public²⁶ The Court reasoned, “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.”²⁷ Yet, the issue remains whether the California Civil Code will replace, rather than supplement, existing privacy and trespass rules, and whether there is anything left for Councilman Zine to regulate.

III. PRESSING THE PRESS: LESSONS FROM CASE LAW INVOLVING INVESTIGATIVE REPORTING

Due to his intrusive tactics when photographing Jacqueline Kennedy Onassis and her children, many consider photographer Ron Galella to be the first paparazzo in the United States.²⁸ Galella often trespassed onto private property and used aggressive measures to photograph John F. Kennedy, Jr. After Onassis caused Galella to be arrested, he sued her for violation of his civil rights. In response, Onassis filed for injunctive relief

22. § 1708.8(a).

23. § 1708.8(f).

24. § 1708.8(d).

25. § 1708.08(g).

26. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991).

27. *Id.* at 669.

28. MARC A. FRANKLIN ET AL., *MASS MEDIA LAW, CASES AND MATERIALS* 506 (7th ed. 2009).

to prevent Galella from intruding into her family's private life. In *Galella v. Onassis*, the court ruled that Galella was liable for harassment, intentional infliction of emotional distress, assault and battery, commercial exploitation of defendant's personality, and invasion of privacy.²⁹ The court defined paparazzo as a "kind of an annoying insect; perhaps roughly equivalent to the English 'gadfly.'"³⁰

The court also issued an injunction that prohibited Galella from coming within 30 feet of the Onassis' children or from entering their schools and recreational areas.³¹ Interestingly, however, the court of appeals decided that the lower court's original injunction, which would have prevented Galella from coming within 50 yards of Onassis's family, was too strict and "unnecessarily infringe[d] on reasonable efforts to 'cover' [Onassis]."³² In addition to Onassis's status as a political public figure, she was also somewhat of a celebrity, and it was noteworthy that the court's decision recognized the value in news coverage about her.

The court, however, did not want news coverage of Onassis to foster harmful activities as reporters followed her and her family.³³ Some of the restrictions in Zine's newest proposed ordinance on paparazzi went farther than the decision in *Onassis*. They completely prohibited the photography and recording of a school or hospital for a commercial purpose.³⁴ In order to determine whether Zine's proposal should be adopted, it is helpful to determine how courts have ruled in cases of investigative journalism, which involve some of the strongest arguments in favor of risky newsgathering tactics.

A. INTRUSION INTO SECLUSION

The Second Restatement of Torts defines "intrusion into seclusion" as "unconsented-to physical intrusion into the home, hospital room, or other place the privacy of which is legally recognized," as well as "unwarranted sensory intrusions, such as eavesdropping, wiretapping, and visual or photographic spying."³⁵ Even when the news-gatherer is not a paparazzo, the intrusion cases' decisions could still have important implications. In some investigative journalism contexts, the one on whom the report is being conducted feels intruded upon as much as the paparazzo's target. In some instances, an investigative journalist violates someone's privacy to the same extent as a paparazzo.

Through litigation over privacy and newsgathering torts, courts helped

29. *Galella v. Onassis*, 487 F.2d 986, 994 (2nd Cir. 1973).

30. *Id.* at 991-92.

31. *Id.* at 999.

32. *Id.* at 998.

33. *Id.* at 995.

34. *Zine Motion*, *supra* note 8.

35. *Cited by Shulman*, 230-31, (*See Rest.2d Torts*, §652B, com.b., pp. 378-379, and illustrations).

define the boundaries of investigative journalism reporting. In *Dietemann v. Time, Inc.*, the plaintiff was a disabled veteran with a limited education. He practiced holistic healing, utilizing natural materials such as clay and herbs.³⁶ He did not advertise nor did he charge for his diagnosis or prescriptions.³⁷ Two *Life* employees went to the plaintiff's home and lied about their referral in order to gain entry into the plaintiff's home.³⁸ After a "medical" examination, plaintiff told defendant that she had a lump in her breast, caused by ingesting rancid butter years ago.³⁹ During the "examination," the other *Life* employee took photos of plaintiff and eventually published the report.⁴⁰ Additionally, the Los Angeles District Attorney's Office had been a part of their investigation the entire time. The District Attorney employees remained outside of the home while one of the *Life* employees surreptitiously recorded their conversation with the plaintiff.⁴¹ Eventually police arrested the plaintiff for practicing medicine without a license.⁴²

The Ninth Circuit acknowledged that one who invites another into his home risks that the person is not who they purport to be.⁴³ However, the court also recognized that a homeowner should not have to assume the risk that what is heard or seen in his den would be broadcast on television or printed in the mass media.⁴⁴ Just because someone is suspected of a crime, does not mean that news media have a license to intrude by electronic methods: "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."⁴⁵ The court held that the First Amendment is not adversely affected if damages for intrusion are heightened because a publisher sent to print improperly acquired information.⁴⁶ There is nothing in the case law, the court reasoned, that permits the use of "calculated misdeeds" in pursuit of a story.⁴⁷

This decision speaks to the complex tension between reporting on truly important stories and reporting on less newsworthy and more sensationalized stories. Investigative tactics can invade someone's privacy, even if the right of privacy is not absolute. The *Dietemann* court made an effort to unearth the fundamental right to privacy: "[t]he claim is not so much one of total secrecy as it is of the right to define one's circle of

36. *Dietemann v. Time, Inc.*, 449 F.2d 245, 246 (9th Cir. 1971).

37. *Id.* at 246.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 249.

44. *Id.*

45. *Id.*

46. *Id.* at 250.

47. *Id.*

intimacy—to choose who shall see beneath the quotidian mask.”⁴⁸ Losing control “over which ‘face’ one puts on may result in literal loss of self-identity and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.”⁴⁹ The principle here is that if investigative journalism can secretly intrude into someone’s home, then a person can never act freely in private because they will never know when they are being recorded.

There are some situations, Zine would argue, where people are so vulnerable, such as when they visit a hospital, that they deserve absolute privacy. In his motion, Zine cited the the Los Angeles Regional Paparazzi Task Force’s conclusion that, in certain sensitive use locations, much like the home of the “doctor” mentioned in *Dietemann*, people have a reasonable expectation of privacy.⁵⁰ “Due to the special public safety interests surrounding our schools, hospitals, and medical facilities, additional regulations are needed to establish appropriate time, place and manner restrictions for commercial photography around these sensitive use locations.”⁵¹ While Zine does not go any further in his motion to illustrate how the time, place, and of manner restrictions would be further determined, it is interesting that Zine focuses on public safety rather than the privacy issues, which are normally referred to in newsgathering tort case law.

In *Sanders v. ABC*, a telepsychic filed an intrusion claim against ABC.⁵² The defendant, Stacy Lescht, an ABC network reporter, got a job as a telepsychic at Psychic Marketing Group (“PMG”), which also employed plaintiff, Mark Sanders.⁵³ She wore a small video camera hidden in her hat and covertly videotaped conversations with several coworkers, including Sanders.⁵⁴ Sanders sued Lescht and ABC for invasion of privacy by intrusion.⁵⁵ The issue for the court to decide was whether a workplace interaction that might be witnessed by others on the premises prevents any reasonable expectation of privacy that participants have against a journalist’s covert videotaping.⁵⁶

The California Supreme Court held that the plaintiff had a valid intrusion claim against ABC.⁵⁷ The court said that in an office or workplace where the general public does not have uninterrupted access,

48. *Dietemann*, *supra* note 36, at 1023 (citing Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 COLUM.L.REV. 1003 (1966)); cf. Fried, *Privacy*, 77 YALE L.J. 475 (1968).

49. *Id.*

50. *Zine Motion*, *supra* note 8.

51. *Id.*

52. *Sanders v. Am. Broad. Cos., Inc.*, 20 Cal. 4th 907, 911 (1999).

53. *Id.* at 912.

54. *Id.*

55. *Id.*

56. *Id.* at 914.

57. *Id.*

employees may enjoy a limited expectation that their conversations will not be secretly videotaped by a TV reporter, even though the conversations may not have been completely private from other coworkers.⁵⁸ The court concludes that the reasonableness of someone's expectation of privacy depends on the identity of the "claimed intruder and the means of intrusion."⁵⁹ The court refused to consider the value of the journalistic effort; a factor that other courts may have relied upon to decide whether someone is liable.⁶⁰ Interestingly, however, the case seems to promote anti-surveillance principles, irrespective of the value of the content or whether the story is publicized at all. It seems to be a case more about regulating technique than of regulating content.

In contrast, Zine's proposed ordinance stated that it would "prohibit an individual from entering the access zone of a school, hospital, or medical facility with the intent of taking photographs or other visual recordings for a *commercial purpose*"⁶¹ (emphasis added). He defined "commercial purpose" as the "expectation of a sale, financial gain, or other remuneration."⁶² Zine defined "access zone" as "any area within 20 feet of any point of public access to a public or private preschool, elementary school, middle school, junior high school, or high school; or any hospital or medical facility."⁶³

Even if journalists do not publish or broadcast their story, they could still be liable for invasion of privacy for intruding into the plaintiff's solitude. In *Shulman v. Group W Productions*, plaintiff Ruth Shulman and her son Wayne were injured in a car accident.⁶⁴ Their car flew off the highway and landed upside down in a ditch.⁶⁵ The situation was so serious that a medical team arrived via helicopter to cut Ruth and Wayne from the vehicle.⁶⁶ In addition to the medical team, there was also a production team, Group W Productions, on board because they were taping a rescue operation to be used for a future broadcast.⁶⁷ The nurse wore a wireless microphone, and parts of her conversation with Ruth were eventually broadcasted on television.⁶⁸

The court held a plaintiff who claims intrusion must first prove that the defendant intruded into a place, conversation, or matter in which the plaintiff had a reasonable expectation of privacy.⁶⁹ Additionally, the

58. *Id.* at 923.

59. *Id.*

60. *Id.*

61. Zine *Motion, supra* note 8.

62. *Id.*

63. *Id.*

64. *Shulman v. Group W Prods.*, 18 Cal.4th 200, 210 (1998).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 231.

defendant must have acted in a matter that was highly offensive to a reasonable person.⁷⁰ To evaluate the offensiveness, a court considers both the intruder's motive and the newsgathering method.⁷¹ An intrusion could be justified by looking at the intruder's motive, which for example, could be explained by the interest of pursuing stories of public interest under the First Amendment.⁷² "Method" is defined as a journalistic practice, which would be more likely to be justified as non-offensive if it were a more traditional method of gathering news, such as asking questions, as opposed by using hidden cameras or other concealed recording devices.⁷³

Consent also plays a role in Zine's most recent proposed ordinance. As part of the proposal, he argued that the prohibition against photos at a sensitive-use facility does not apply if such activity is "requested or permitted by the school, hospital, or medical facility; if the targeted individual consents to being photographed or recorded; or if such activity is within the lawful duties of a law enforcement official or other government agent."⁷⁴ However, perhaps conveniently, Zine's motion does not define "consent," which may lead courts to consider tort case law's previous interpretations of the term.

B. TRESPASS

Another relevant issue concerning the regulation of newsgathering tactics of paparazzi is the tort of trespass, which is the unauthorized entry onto the property of plaintiff.⁷⁵ Trespass presents an interesting dilemma: sometimes people restrict access to their property because they have something to hide—but sometimes that is precisely when the public most has a right to know. The Court of Appeals for the Fourth Circuit dealt a serious blow for undercover reporting in *Food Lion, Inc. v. Capital Cities/ABC, Inc.* The court upheld a trespass verdict against ABC when *Prime Time Live* did an undercover expose of the Food Lion grocery chain. The court found liability, not in resume misrepresentation, but rather in breaching their duty of loyalty to Food Lion, by filming non-public areas.⁷⁶ The court rejected a fraud argument because there was no detrimental reliance and because it was an at-will employment.⁷⁷

Although the court held that misrepresenting one's qualifications on a resume does not turn "a successful job applicant into a trespasser,"⁷⁸ the

70. *Id.*

71. *Id.* at 236.

72. *Id.*

73. *Id.* at 237.

74. Zine *Motion*, *supra* note 8.

75. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999).

76. *Id.* at 517.

77. *Id.* at 514.

78. *Id.* at 518.

court found that the new Food Lion “employees” breached a duty of loyalty to their “employer” after they started working there. In *Food Lion*, the court reasoned that even if the grocery store was unaware of the time that the ABC producers/Food Lion employees were shooting a story, the very act of filming in a non-public area negated Food Lion’s consent for them to be on the premises because it was “directly adverse to the interests”⁷⁹ of Food Lion. Thus, a reporter or producer can be liable for trespass if, while working undercover, he works for the company he is reporting on.

“The Food Lion case, at its core, is really about the extent to which journalists must be candid about who they are. Thus, it has potential implications for any journalist, print or broadcast, attempting an Upton Sinclair—temporarily taking a job inside an organization to flush out deplorable conditions and practices, corruption, or other malfeasance.”⁸⁰ Zine’s position, as articulated in his motion, is that, “[t]he ensuing frenzy of photographers crowding building entrances causes severe disruptions to facilities’ normal operations, negatively impacting celebrities and the general public alike.”⁸¹

Just because someone does not object to another’s presence, it does not mean they consent to it, either. In *Miller v. National Broadcasting Co.*, a television news crew accompanied paramedics as they administered help to a patient suffering through heart attack.⁸² The crew filmed the paramedics entering the home and administering help. While neither the husband nor the wife were identified in the broadcast, the crew walked by the plaintiff in the hall and did not request permission to enter. She did not object to their presence or ask them to leave.⁸³ The court held the defendants liable for trespass, regardless of whether there was damage to the property or what motivated the entry. The wrong was the unauthorized entry; it did not make a difference whether the video was eventually broadcasted. Zine expressed a similar concern in writing about paparazzi, “[t]aking advantage of the fact that high-profile individuals must do things like send their children to school, visit hospitals, and go to medical facilities, unscrupulous paparazzi frequently stake out these locations in order to capture the perfect photograph.”⁸⁴

C. THE FIRST AMENDMENT AS A DEFENSE

Even if a court does not think a story is newsworthy, the First Amendment may still provide a defense for journalists. In *Florida Star v.*

79. *Id.* at 519.

80. Russ Baker, *Damning Undercover Tactics as ‘Fraud’: Can Reporters Lie About Who They Are?*, COLUM. JOURNALISM REV., Mar. 13, 1997, at 19-20.

81. See Zine Motion, *supra* note 8.

82. *Miller v. NBC*, 187 Cal. App. 3d 1463, 1469 (1986).

83. *Id.* at 1476.

84. See Zine Motion, *supra* note 8.

B.J.F., the Supreme Court held that the First Amendment allowed a newspaper to publish a rape victim's name without liability.⁸⁵ The paper lawfully obtained truthful information from the police report, and the information was a matter of legitimate public concern.⁸⁶ The court reasoned that, if the state interest of protecting a rape victim's identity was so high, then it could protect her privacy by not releasing her identity through the police report.⁸⁷ Zine offers a similar stance in his proposal, "[w]hile the First Amendment protections granted to news gatherers must be defended and upheld, the City of Los Angeles must also protect the safety of the general public."⁸⁸ His view is that safety, not only of celebrities, but also of the general public, is in danger because of paparazzi, and that while the First Amendment's guarantees are important, they must be balanced with the interest of public safety.

IV. ANALYSIS: HOW TO RESOLVE THE ISSUE OF PAPAZZI/STALKERAZZI

The information that journalists and paparazzi may use to write or broadcast may be completely true. This Note focuses on regulating the method of newsgathering. The critical question is whether there is an absolute expectation of privacy, and whether celebrities, who profit from publicity, deserve one. It is a violation of California Penal Code §632 for someone to intentionally record someone else without their permission.⁸⁹ The guilty party can be fined up to \$2,500 or receive a year's worth of jail time.⁹⁰ The statute is very weak since it requires an expectation of no verbal repetition. A reporter will be liable under the statute only if the subject of the news story expected the reporter to refrain from recording or repeating the conversation. This is a good standard of liability. A reporter should not have the burden of informing their subject that they plan to disseminate the statements. Unless the subject of the news report specifically says their statements would be "off the record," they should expect their statements to be repeated. The reason a reporter interviews someone is to share the information with the public. Thus, the statute forces a celebrity to presume that whatever they say will be released to the public.

Recently, certain members of the press corps known as "paparazzi" have taken their profession of capturing the images of celebrities in a dangerous direction: assaulting the celebrity in order to either capture the victim's reaction to the assault on film or tape, or to use the threat of assault to

85. *Florida Star v. B.J.F.*, 491 U.S. 524, 527 (1989).

86. *Id.* at 541.

87. *Id.* at 525.

88. *Zine Motion*, *supra* note 8.

89. CAL. PENAL CODE § 632(a) (2009).

90. *Id.*

impede the mobility of a celebrity so that an image may be taken.⁹¹

In 2004, actor Ewan McGregor won approximately \$75,000 in damages against Britain's *Daily Record* and *The Sun*.⁹² The publications used photos of him and his family on vacation after he requested his children not be photographed.⁹³ According to McGregor, paparazzi "shouldn't be shot, but they should be severely beaten up."⁹⁴ More recently, actress Lindsay Lohan had a run in with paparazzi after she claimed that their pursuit caused her to crash her car. Police said that a paparazzo "rammed his minivan" against Lohan's Mercedes on a crowded street.⁹⁵ The trend, police say, is that paparazzi will use multiple cars to surround a celebrity's car and then run them off the road or chase them at high speeds if they try to escape their grasp.⁹⁶ For example, Justin Timberlake's lawyer obtained a restraining order in 2004 against a paparazzo who tried to do just that.⁹⁷

According to Zine,

[t]he actions of overly aggressive paparazzi have grown from being a simple nuisance to posing a serious public safety threat. [Nowhere] is this more evident than in the City of Los Angeles, the entertainment capital of the world. When swarms of photographers converge on public sidewalks, roadways, and vital facilities such as schools and hospitals, the risk of serious injury or even violence becomes very real.⁹⁸

The first California case that addressed the tort of invasion of privacy was in 1931. The court, in *Melvin v. Reid*, said that the right of privacy "does not exist in the dissemination of news and news events."⁹⁹

While, perhaps there is some level of a right of privacy that is legitimate in the dissemination of news, in order to have a robust press, there may be a benefit in making people fearful that if they have something to hide, the press will unearth it. While celebrity-driven news coverage may risk overexposure, it may encourage celebrities to lead more responsible lives, which will not arouse the paparazzo's interest as much. Moreover, celebrities are hardly considered a vulnerable population. They, of everyone else in the population, are the most-well equipped to handle the media scrutiny.

91. See *Civil Assault*, *supra* note 18.

92. Stephen M. Silverman, *Ewan McGregor Wins London Paparazzi Case*, PEOPLE, July 6, 2004, <http://www.people.com/people/article/0,,661071,00.html>.

93. *Id.*

94. *Id.*

95. David M. Halbfinger & Allison Hope Weiner, *As Paparazzi Push Harder, Stars Try to Push Back*, N. Y. TIMES, June 9, 2005, available at http://www.nytimes.com/2005/06/09/movies/09pap.html?_r=1&pagewanted=print.

96. *Id.*

97. *Id.*

98. Zine *Motion*, *supra* note 8.

99. *Melvin v. Reid*, 112 Cal. App. 285, 290 (1931).

A. PROPOSAL: PAPARAZZI AND THEIR PREY – CAN ANYTHING BE DONE?

Last year, when Los Angeles City Councilman Dennis Zine pushed for an ordinance that would create a minimum “personal safety zone” around individuals targeted by the media, his aim was primarily to promote safety. This would potentially curb aggressive behavior, such as car pursuits. In February of 2008, Zine proposed a controversial anti-paparazzi “Personal Safety Law” for Los Angeles to ensure a personal safety zone for celebrities inundated by hordes of photographers that gather around them.¹⁰⁰ The measure was in direct response to several incidents within Los Angeles where celebrities were hindered from entering medical facilities or caught in dangerous pursuits on the freeways to escape paparazzi. The strongest arguments come from celebrities themselves, such as singer John Mayer, who concede that they accept the public’s increased interest in their lives, but that they feel that paparazzi threaten their safety: “I don’t sit before you today to ask that you ban the paparazzi. I’m asking you to regulate it. Officialize it. Tax it. Legitimize it. A big white P on a yellow license plate says the driver works for an accredited photo agency. Press credentials worn in plain sight do the same.”¹⁰¹

The argument is that as the paparazzi employ new tactics, the government should respond with new regulations to control the paparazzi’s most grave abuses. Help can also come from the other media outlets. For example, certain entertainment magazines, such as *US Weekly*, have ceased accepting photos if they were collected using dangerous methods.¹⁰² The magazine said it formalized the guideline they had already had in place, banning shots taken by photographers who “violated traffic laws, trespassed on private property or invaded the privacy of children at school.”¹⁰³

While Zine’s first proposal was unsuccessful, Zine responded with a second proposal to regulate paparazzi. Although the breadth of his second ordinance is more limited because it only refers to sensitive use facilities like hospitals and schools, it would completely prohibit paparazzi from going to these locations. As long as a celebrity remained within these protected zones, could a paparazzo be restricted from covering a celebrity on a story with news value? Moreover, would a news journalist assigned to cover a celebrity also be prevented from pursuing their story?

My opposition to any new protection is both a reflection of my

100. See *Proposal*, *supra* note 7.

101. See *Testimony*, *supra* note 1.

102. *US Weekly to ban reckless paparazzi shots. Staff and Agencies*, THE GUARDIAN, Jun. 14, 2005, available at <http://www.guardian.co.uk/film/2005/jun/14/privacy.pressandpublishing>.

103. *Id.*

satisfaction with the current California statute, which significantly increases damages for trespass, as well as my satisfaction with the current development of common law privacy protection, particularly the torts of intrusion upon seclusion. I would be hesitant to support any new restrictions, because there are already enough limitations on paparazzi.

California Civil Code section 1708.8 ensures that paparazzi will be punished if they trespass onto someone's property if they intend to photograph someone engaging in a personal activity, and if the means of entry would offend reasonable person. Unlike Zine's proposal, which regulates paparazzi access to specific locations, the California statute restricts paparazzi from photographing certain types of personal situations. At the same time, the California statute protects news journalists who aim to catch someone engaged in an unlawful activity.

My proposal is that in order to maintain investigative journalism that is both vibrant and viable, it is imperative not to regulate how paparazzi conduct their newsgathering operations any further. If either a journalist or a paparazzo break the law, whether they commit a tort or violate California Civil Code section 1708.8, then they will be held liable. The newsgathering torts of intrusion upon seclusion (*Dietemann, Shulman, and Sanders*) and trespass (*Food Lion and Miller*) provide enough protection if a paparazzo or an investigative journalist becomes too aggressive in his tactics. Moreover, if a paparazzo commits a criminal act while pursuing a story, he will be punished like anyone else who breaks the law. It is a better policy not to restrict journalists in their work.

The current level of regulation of journalistic news gatherers is optimal. Currently, there is sufficient protection for celebrities pursued by paparazzi and others who are targeted by investigative journalists. For example, if someone does not want to be followed by paparazzi, perhaps they should rethink working in a profession that has led to such high levels of media scrutiny. If a celebrity is popular enough to be hounded by paparazzi, surely they are better equipped financially to pay for security than the average person. Moreover, if the paparazzi hover over a celebrity, who is in a better position to negotiate with them? Is there anything stopping Britney Spears from entering into contracts with these photographers? If a paparazzo violates his end of the deal, could he not be sued for breach of contract? Finally, celebrities could use the same star power that convinces patrons to watch their movies in order to create public service announcements or undertake efforts to encourage the public to boycott magazines that publish photos procured through aggressive means. In 1997, Princess Diana died in a car crash while trying to flee from paparazzi. This led celebrities to call for a boycott of supermarket tabloids.¹⁰⁴ Paparazzi only do their jobs because it's profitable; if their

104. Halbfinger & Weiner, *supra* note 95.

efforts ever cease to be profitable, they may reconsider their aggressive approaches.

V. CONCLUSION: WHAT'S IN STORE FOR "PAP PACKS"¹⁰⁵

Last month at Los Angeles International Airport, forty men, holding no tickets to fly and with nobody to pick up, swarmed an arriving female passenger inside the terminal, shouting at her, disorienting her and denying her a safe exit. Does that sound like something that should be allowed? Should the fact that forty men were holding cameras change that answer?¹⁰⁶

In 1890, amidst the burgeoning use of photos in newspapers and the development of "yellow journalism," Louis D. Brandeis and Samuel D. Warren supported a right to sue for invasion of privacy.¹⁰⁷ Simply, they argued, there should be "a right to be let alone."¹⁰⁸ Justices Brandeis and Warren wrote that "the details of sexual relations are spread broadcast in the columns of the daily papers."¹⁰⁹ Their writings seemed remarkably prescient: "Gossip is no longer the resource of the idle and the vicious, but has become a trade which is pursued with industry as well as effrontery."¹¹⁰ What once was a "trade" has now become a global industry of celebrity news; the most aggressive employees include paparazzi.

The trick would be to navigate between two competing interests: individual privacy weighed against publishing information which is of public importance. Despite all of the developments in news media, such as the radio, television, online news, as well as the 24-hour news cycle, someone who goes about collecting information is likely to encounter challenges. So, over the years, tort law has adapted to account for violations such as intrusion into seclusion and trespass. Some states like California have gone even further, incorporating advanced provisions of tort issues into their penal and civil codes.

Councilman Zine's intent appears to be noble: allowing tabloid journalism to cover celebrities as long as it respects certain safe zones, such as schools and hospitals. As he stated, "[l]ocal law enforcement has expressed concern for innocent third parties, including children and bystanders, who could be seriously injured or killed in such situations."¹¹¹

Given the extensiveness of existing newsgathering restrictions, however, it seems that Councilman Zine's proposed ordinance would be unnecessarily restrictive. Instead, we need solid, investigative journalism

105. Carol Costello, Ken Starr Helping Lawmakers Fight Paparazzi, <http://www.cnn.com/2008/POLITICS/06/10/starr.paparazzi/index.html> (last visited April 3, 2010)

106. See *Testimony*, *supra* note 1.

107. Samuel D. Warren, et al., *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

108. *Id.* at 193.

109. *Id.* at 196.

110. *Id.*

111. *Civil Assault*, *supra* note 18.

more than ever. As politicians and companies find more and more technological ways to remain mysterious, it behooves the public to trade celebrities' inconvenience for the increased possibility of transparency and accountability.
