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Paparazzi law limits our First Amendment rights

By Andrew J. Thomas and Nary Kim

The state Legislature, it would seem, has a love-hate relationship with freedom of the press.

On one hand, it enacted one of the first, and broadest, anti-SLAPP statutes in the country, providing for early dismissals and attorney fee recoveries by media defendants and others who are forced to defend meritless lawsuits based on their speech about public issues. See Cal. Code Civ. Proc. Section 425.16. On the other hand, as soon as a few celebrities fly to Sacramento to complain about mistreatment by the media, the Legislature leaps to impose new penalties and restrictions on the activities of photographers who cover celebrities, regardless of the First Amendment consequences.

Labels, it would seem, also matter. Few would argue that reporters — including press photographers and photojournalists — deserve First Amendment protection in gathering news. As the U.S. Supreme Court has observed, the First Amendment's protection of freedom of the press would be illusory absent protection of an accompanying right to seek out the news. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

But tag freelance photographers with the label “paparazzi” and legislators’ reverence for press freedom quickly evaporates. Yet even the most scorned photographers have a First Amendment right to gather news in public places — a right that has been dialed back in California yet again, this time by the passage of Senate Bill 606, the “Halle Berry Law,” in September 2013.

The bill amends Section 11414 of the Penal Code to single out photographers for special punishment. Under the existing code, a person who “intentionally harasses the child or ward of any other person because of that person’s employment, is guilty of a misdemeanor.” “Harasses” is defined by the statute as “knowing and willful conduct directed at a specific child that seriously alarms, annoys, torments, or terrorizes the child, and that serves no legitimate purpose” where the conduct is “such as would cause a reasonable child to suffer substantial emotional distress, and actually cause[s] the victim to suffer substantial emotional distress.” See Cal. Penal Code Section 11414(b)(2).

Celebrity Special Pleading

SB 606 modifies the criminal harassment law in three significant ways: (1) it clarifies that the term “harasses” includes “conduct occurring during the course of any actual or attempted recording of the child’s or ward’s image or voice, or both, without the express

consent of the parent or legal guardian of the child or ward, by following the child’s or ward’s activities or by lying in wait”; (2) it enhances the punishment for the offense; and (3) it provides a derivative civil cause of action against the alleged harasser.

While the existing harassment law is designed to protect the children of persons engaged in high-profile or controversial occupations (e.g., lawyers and judges) from violence or retaliation by members of the public, the photography-specific amendments reflect a categorical hostility toward “paparazzi” photojournalists. It is no coincidence that the most vociferous backers of the bill were actresses Halle Berry and Jennifer Garner, who testified before the Assembly Judiciary Committee about their harrowing experiences as rich celebrities with children.

Despite the amendments’ clear design to target acts of recording and photography, the bill’s supporters maintain that the new language about attempts to record a child’s image or voice merely specifies one of the ways that harassment might occur. The fact that “harassing” conduct by a photographer would constitute an offense under either the existing or amended law, however, necessarily begs the question why the Legislature bothered to revise the law in the first place. Emphasizing that attempts to capture a child’s image or voice might result in criminal liability sounds an explicit warning to paparazzi that is likely to chill even benign attempts to photograph a celebrity who is out in public with his or her child. Opponents of the bill — including the National Press Photographers Association and the Reporters Committee for Freedom of the Press — have voiced concerns that the new language will more broadly deter other photographers and visual journalists from exercising their First Amendment rights to gather newsworthy information in public places.

The law’s pervasive reliance on vague language — such as “alarms,” “annoys,” “substantial emotional distress” and “no legitimate purpose” — is likely to create uncertainty that will dissuade photographers from engaging in standard journalistic activities, out of fear of getting swept into the law’s vast potential reach. Without further clarification of its pivotal terms, SB 606’s classification of news photography as a form of harassment is bound to make photographers wary. The law’s exemption for conduct that serves a “legitimate purpose” does little to alleviate such concerns. While all newsgathering activities by journalists ought to constitute a “legitimate purpose” exempted from the law, courts on occasion

have suggested that even taking pictures of public figures in public places might be illegitimate in some circumstances. Compare *Shulman v. Group W. Productions*, 18 Cal. 4th 200, 225 (1998) (broadly defining what is “newsworthy” for purposes of privacy torts) with *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) (holding a paparazzo photographer’s “harassment” and “obtrusive” “constant surveillance” of Jackie Onassis and her minor children was unreasonable in light of “the de minimis public importance of the daily activities of [a celebrity]”).

Related Legislation

Not surprisingly, California has long taken the lead in enacting aggressive anti-paparazzi legislation to safeguard its indigent celebrity population. The passage of SB 606 marks the most recent instance in a long tradition of celebrities wielding their star power to court legislative favors — frequently at the expense of First Amendment protections for the journalists whose attention celebrities simultaneously crave and pretend to loathe.

California was the first (and remains the only) state to pass anti-paparazzi legislation premised on the invasion of privacy, California Civil Code Section 1708.08. In the wake of Princess Diana’s death in 1997, the state Legislature sought to protect its own celebrities by enacting a law to curb the intrusive conduct of paparazzi. Under Section 1708.08, a person commits a constructive invasion of privacy if he attempts to capture a “physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device” if the “impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.” Earlier this year, Hawaii’s House of Representatives rejected Senate Bill 465 (nicknamed the “Steven Tyler Act”), which had been modeled after California’s invasion of privacy statute.

The state Legislature also passed a 2010 statute that raised the penalties faced by a person who violates specified reckless driving statutes “with the intent to capture any type of visual image, sound recording, or other physical impression of another person for a commercial purpose.” Cal. Vehicle Code Section 40008. The penalties for such driving with journalistic intent double if a violation causes a minor child to be endangered. In 2012, a Los Angeles County Superior Court judge declared that Section 40008 violates the First Amendment. First,

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the court found fault with the selective increase in penalties for newsgathering activities, rather than raising the penalties for all reckless driving across the board. Second, the court reasoned that the law was over-inclusive and could be used against people in non-media professions — for example, a wedding photographer or an amateur photographer en route to an event that might lead to photographs of commercial value.

The passage of SB 606 is only the latest example of the state Legislature bending too readily to the demands of heavyweight celebrities while short-changing First Amendment protections for newsgathering activities. While celebrities and their children are entitled to live their lives free from harassing behavior — the same as any other member of the general public — application of the criminal harassment law to a journalist engaged in the constitutionally protected act of newsgathering requires much narrower and clearer rules.

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