

# DOES ANTI-PAPARAZZI MEAN ANTI-PRESS?: FIRST AMENDMENT IMPLICATIONS OF PRIVACY LEGISLATION FOR THE NEWSROOM

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*Armed with cameras and a general disregard for traffic laws, paparazzi stalk the streets in hopes of getting the “money shot” of the celebrity du jour. In 2010, a California law took effect with the aim of cracking down on celebrity photographers. The latest anti-paparazzi measure extends liability beyond the photographer to include the first publisher of a photo that was taken in violation of California’s privacy law. Paparazzi photos have created a multi-million dollar industry with buyers ranging from supermarket-stand tabloids to major newspapers and television networks. The Supreme Court has a long history of extreme reluctance to prevent the press from publishing information illegally obtained by a third party due to First Amendment concerns, and the new law is squarely at odds with current free speech jurisprudence. Another disturbing provision of the new law allows government attorneys to initiate civil lawsuits in order to collect penalties from photographers or media outlets who violate the privacy law. This Article examines the constitutional viability of the new law and the problems it could pose to newsrooms in California and across the nation.*

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## INTRODUCTION

They are ruthless, cunning and willing to stop at nothing to get what they want, even if it means chasing an ambulance.<sup>1</sup> No, they are not trial lawyers. They are the new generation of paparazzi.<sup>2</sup> Armed with cameras and a general disregard for traffic laws, they stalk the streets in hopes of getting the “money shot” of the celebrity du jour.<sup>3</sup> For example, Britney Spears required twelve police officers to escort her ambulance to a psychiatric hospital through a swarm of paparazzi.<sup>4</sup> The incident prompted Los Angeles City Councilman Dennis Zine to call for a “personal safety zone” ordinance for celebrities in 2008.<sup>5</sup> “I don’t want a repeat of what happened to Princess Diana with a celebrity in Los Angeles,” Zine remarked.<sup>6</sup>

The city of Los Angeles formed a task force to address the paparazzi problem, which critics argue threatens public

1. 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 5B (covering Britney Spears’ 2008 trip to UCLA Medical Center in an ambulance, escorted by a dozen police officers and surrounded by photographers).

2. Merriam-Webster’s online dictionary defines a “paparazzo” as “a freelance photographer who aggressively pursues celebrities for the purpose of taking candid photographs.” *Paparazzo*, in MERRIAM-WEBSTER ONLINE (2010), <http://www.merriam-webster.com/dictionary/paparazzi>. The term traces its roots to the 1959 Federico Fellini film *La Dolce Vita*, featuring a photographer of this sort whose last name was Paparazzo. *Id.*

3. *See, e.g.*, Dionne Searcey, *A New California Law Places Paparazzi Under the Spotlight*, WALL ST. J., Oct. 29, 2009, at A17 (discussing the “aggressive tactics” of paparazzi and presenting views of opponents and proponents of the new law).

4. *See* Blankstein & Winton, *supra* note 1.

5. *Id.*

6. *See id.* Diana, Princess of Wales, was being pursued by paparazzi when her driver crashed in a tunnel. Princess Diana’s death was later attributed to the driver’s intoxication, but not until after the photographers faced criminal charges. Her death spurred anti-paparazzi laws in Europe and California. *See, e.g.*, John-Thor Dahlburg, *Charges Dropped Against Paparazzi Implicated in Princess Diana Crash*, L.A. TIMES, Sept. 4, 1999, at 6A.

safety, causes undue economic hardship to law enforcement agencies and threatens personal privacy.<sup>7</sup> The task force proposed new laws to curb paparazzi excess, but Los Angeles Police Department Chief William J. Bratton erred on the side of celebrity accountability, quipping that “since Britney [Spears] started wearing clothes and behaving; Paris [Hilton] is out of town not bothering anybody, thank God; and, evidently, Lindsay Lohan has gone gay, we don’t seem to have much of an issue.”<sup>8</sup>

Despite Bratton’s dismissal of new laws as an answer to the paparazzi problem, the California Legislature deemed this approach a worthy solution, passing a law in 2009 simply titled “Privacy.”<sup>9</sup> The new law, signed by Governor Arnold Schwarzenegger in October 2009,<sup>10</sup> is the third of three law passed by California lawmakers to clamp down on aggressive celebrity photographers.<sup>11</sup> California had already established statutory<sup>12</sup> and constitutional rights<sup>13</sup> to privacy (in addition

7. See Blankstein & Winton, *supra* note 1. But Councilman Zine balked at the estimated \$25,000 it cost the city to escort Spears to the hospital. *Id.* “We had to have 12 officers escort [Spears] to the hospital that if not for paparazzi would have been used to prevent crime somewhere else,” Zine said. *Id.*

8. Jennifer Steinhauer, *Los Angeles Proposes Restraints on Paparazzi*, N.Y. TIMES, Aug. 1, 2008, at 12A.

9. Assem. B. 524, 2009-10 Leg., Reg. Sess. (Cal. 2009) (enacted).

10. See Schwarzenegger signs tougher anti-paparazzi law, ASSOC. PRESS, Oct. 14, 2009. Democrat Karen Bass, Speaker Emeritus of the Assembly, sponsored the bill. 2009 Legislation – Speaker Emeritus Karen Bass, <http://www.asmdc.org/members/a47/issues/itemlist/category/213-2009-legislation> (last visited Apr. 13, 2010). Bass’ Web site describes A.B. 524: “To curtail the potentially harmful situations and other problems created by out of control paparazzi, AB 524 extends the ‘invasion of privacy’ laws to persons that purchase, publish, and print images or recordings of individuals, if these persons knew that the images or recordings were obtained illegally.” *Id.* Neither Bass nor Schwarzenegger issued a press release upon passage or signing of the bill. The bill was listed last on Bass’ list of policy priorities. 2009 Assembly Speaker Policy Priorities, May 2009 e-Newsletter, [http://democrats.assembly.ca.gov/speaker/News\\_Room/E-Newsletters/May2009/policy\\_priorities.aspx](http://democrats.assembly.ca.gov/speaker/News_Room/E-Newsletters/May2009/policy_priorities.aspx) (last visited Feb. 25, 2010).

11. In 1998, California lawmakers adopted Civil Code section 1708.8, which provides for damages when physical or constructive invasion of privacy occurs. CAL. CIV. CODE § 1708.8 (Deering 1998). In 2005, the statute was amended by A.B. 381 (2005). The 2009 amendment, A.B. 524, extends penalties to publishers of images obtained in contravention of the statute. See also Larisa Pyk, *Legislative Update: Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills*, 9 DEPAUL-LCA J. ART & ENT. L. & POLY 187, 197-202 (1998) (discussing measures at state and federal levels to combat paparazzi tactics).

12. CAL. CIV. CODE § 1708.8.

13. See CAL. CONST. art. I, § 1 (2009). California’s Constitution states in relevant

to recognition of common law<sup>14</sup> privacy). The 2009 measure, California Assembly Bill 524,<sup>15</sup> amended Section 1708.8 of the California Civil Code<sup>16</sup> to allow for fines up to \$50,000 to be levied on *publishers* of photographic content taken in contravention of the privacy statute.<sup>17</sup> It also allows municipal attorneys to file civil actions on behalf of aggrieved celebrities.<sup>18</sup> Four years previously, in 2005, Governor Schwarzenegger signed an amendment to the same law toughening penalties for photographers and prohibiting profits from photos taken during altercations with celebrities.<sup>19</sup> The two Schwarzenegger-backed amendments

part:

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

*Id.* California is one of only ten states (Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington) to expressly recognize a right to privacy in its constitution. National Conference of State Legislatures, Privacy Protections in State Constitutions, <http://www.ncsl.org/default.aspx?tabid=13467> (last visited Feb. 25, 2010).

14. There is no express right of privacy in the U.S. Constitution. The cause of action originated in an 1890 *Harvard Law Review* article by then-law partners Samuel Warren and Louis Brandeis. See Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In 1960, University of California Law School (Berkeley) Dean William L. Prosser articulated four types of invasion of privacy: intrusion; public disclosure of private facts; false light in the public eye; and appropriation. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). These four torts were adopted by the *Restatement (Second) of Torts*, to which Prosser contributed. RESTATEMENT (SECOND) OF TORTS § 652A-E (1977).

15. Assem. B. 524, 2009-10 Leg., Reg. Sess. (Cal. 2009) (enacted).

16. CAL. CIV. CODE § 1708.8.

17. Cal. Assem. B. 524.

18. The new law permits municipal attorneys to bring civil actions to enforce the penalties in the statute, with the proceeds to be distributed equally among the prosecuting agency and an Arts and Entertainment Fund. Cal. Assem. B. 524. An earlier version of the bill called for a three-way split of the proceeds to the aggrieved person (i.e., the celebrity), the prosecuting agency, and arts funding. The enacted provision states:

(m) (1) A proceeding to recover the civil fines specified in subdivision (d) or (e) may be brought in any court of competent jurisdiction by a county counsel or city attorney.

(2) Fines collected pursuant to this subdivision shall be allocated, as follows:

(A) One-half shall be allocated to the prosecuting agency.

(B) One-half shall be deposited in the Arts and Entertainment Fund, which is hereby created in the State Treasury.

*Id.*

19. See also *Schwarzenegger Signs Law Aimed at Paparazzi Wallets*, N.Y. TIMES, Oct. 2, 2005, at 23 [hereinafter *Schwarzenegger*]. “The law comes as the Los Angeles

updated California's original anti-paparazzi statute, established in 1998.<sup>20</sup>

The 1998 law was passed in the wake of the death of Princess Diana in a Paris car crash while photographers chased her car.<sup>21</sup> Her death sparked legal reform in Europe<sup>22</sup> and the United States Congress also considered, but did not enact, new laws to combat the dangers associated with paparazzi.<sup>23</sup> While her passing is often pointed to as a lesson

authorities are trying to restrain aggressive photographers after altercations involving the actresses Reese Witherspoon, Lindsay Lohan and Scarlett Johansson, among others." *Id.*

20. Assem. B. 381, 2005-06 Leg., Reg. Sess. (Cal. 2005) (enacted). *See also* Michael Martinez, *Taking shots at stalkerazzi; Brazen photogs in California's sights*, CHI. TRIB., Nov. 28, 2005, at 1 (describing the law as "expand[ing] the state's invasion-of-privacy torts to include photographers who commit assault or threaten bodily harm in taking a picture. It will give celebrities and others a specific civil code to be better able to sue photographers for their profits on the photo, plus triple damages.").

21. *See, e.g.*, Dahlburg, *supra* note 6. Diana, Princess of Wales, had just left the Ritz Hotel on August 31, 1997 with her boyfriend, a bodyguard and a driver when the Mercedes-Benz they were riding in crashed into the pillar of a tunnel. *Id.* A French judge later ruled that the paparazzi pursuing the car were not responsible for the death of Princess Diana, Dodi Fayed and driver Henri Paul. *Id.* Instead, the judge found that Paul, who was legally drunk and taking anti-depressants, was at fault. *Id.* According to the *L.A. Times*:

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. Nine photographers and a press motorcyclist were detained by police on suspicion of manslaughter and failing to come to the aid of Diana and the other passengers.

*Id.*

22. In response to Princess Diana's death, the European Convention ratified Article 8, broadly defining individual 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>. *See also* Patrick J. Alach, Note & Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 219-20 (2008) (asserting that "[u]nlike American law, which subordinates privacy rights to the First Amendment, European law states privacy rights and freedom of expression 'are of equal value.'"). The European Court of Human Rights in *Von Hannover v. Germany* found that the privacy rights of Princess Caroline of Monaco were violated when photos were taken of her engaging in various recreational activities. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 41, 61. A concurring judge in *Von Hannover* stated that American courts have "made a fetish of the freedom of the press." *Id.* at 78.

23. *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* Pyk, *supra* note 11; Randall Boese, *Redefining Privacy? Anti-Paparazzi Legislation and Freedom of the Press*, COMM'NS LAW. (Summer 1999).

of the dangers of paparazzi,<sup>24</sup> it may be better characterized as a lesson of the dangers of drunk driving. Princess Diana's chauffeur, who also died in the crash, was legally intoxicated and taking contraindicated antidepressants at the time of the accident.<sup>25</sup>

Regardless of where the blame lies in the Princess Diana incident, subsequent run-ins between paparazzi and celebrities continue to fuel calls for legal reform.<sup>26</sup> Prior to his election as governor, Schwarzenegger, his pregnant wife and young son were surrounded by photographers in their car.<sup>27</sup> Schwarzenegger, who was recovering from heart surgery at the time, pressed charges, and two photographers were convicted of false imprisonment and faced possible jail time.<sup>28</sup> In addition to Britney Spears' ambulance debacle, actresses Lindsay Lohan, Scarlett Johansson and Reese Witherspoon are also poster children of sorts for the dangers of paparazzi excess, with Lohan and Johansson involved in paparazzi-related car crashes and Witherspoon clashing with photographers at Disneyland.<sup>29</sup>

Although California's new law aims to keep the public safe and protect individual privacy, there is another interest at stake: the First Amendment guarantees of free speech and

24. See, e.g., *Privacy: Hearing on A.B. 524 Before the S. Comm. on the Judiciary*, 2009 Leg., 2009-10 Reg. Sess. (Cal. 2009) [hereinafter *Privacy*] (statement of Sen. Ellen M. Corbett, Chair, S. Judiciary Comm.), available at [http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0501-0550/ab\\_524\\_cfa\\_20090713\\_124145\\_sen\\_comm.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_cfa_20090713_124145_sen_comm.html). "In 1998, in response to the tragic death of Princess Diana, California became the first state in the nation to pass legislation to attempt to rein in overzealous and aggressive photographers and reporters, known as 'paparazzi.'" *Id.*

25. See Dahlburg, *supra* note 6.

26. See also Andrew Blankstein, *Kanye West faces misdemeanor charges in LAX scuffle with paparazzi*, L.A. TIMES, Mar. 19, 2009, at A5 (chronicling rapper Kanye West's arrest after an airport altercation with paparazzi); Andrew Blankstein, *Richie gets a restraining order against 2 paparazzi*, L.A. TIMES, Oct. 31, 2009, at A9 (reporting on the grant of restraining orders against two photographers "accused of stalking Nicole Richie and her children" following an Oct. 5, 2009 car crash).

27. See *Snap decision: Two photographers face jail terms for playing cat-and-mouse with the Schwarzeneggers*, PEOPLE, Feb. 16, 1998, at 181. Schwarzenegger, star of movies such as *Terminator* and *True Lies*, maintained his onscreen, tough-guy persona in court, testifying that, if he had not been under doctor's orders to stay calm, "[m]y reaction would have been quite different without the surgery, and neither of these two gentlemen would be sitting here today." *Id.*

28. See *id.*

29. See, e.g., Martinez, *supra* note 20. Lohan's car crash was reportedly the impetus for the 2005 legislative amendment. *Id.*

free press.<sup>30</sup> The Supreme Court ruled in *Bartnicki v. Vopper*<sup>31</sup> that, if information is illegally obtained by a third party but lawfully obtained by the press, it can be published.<sup>32</sup> Seeming in conflict with this holding, the new law places tough financial penalties on the press for publishing information it lawfully obtains.<sup>33</sup> Thus, it seems that California's new statute faces huge constitutional hurdles prior to any effective enforcement.<sup>34</sup> In addition, existing traffic laws and those against stalking, trespassing and the like provide safeguards against paparazzi misbehavior.<sup>35</sup> As

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30. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]" U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

31. *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The *Bartnicki* Court stated:

The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know--or at least had reason to know -- that the interception was unlawful. Accordingly, these cases present a conflict between interests of the highest order--on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech. The Framers of the First Amendment surely did not foresee the advances in science that produced the conversation, the interception, or the conflict that gave rise to this action. It is therefore not surprising that Circuit judges, as well as the Members of this Court, have come to differing conclusions about the First Amendment's application to this issue. Nevertheless, having considered the interests at stake, we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment.

*Id.* at 517-18. See also *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 109 (1979) (holding that the name of a youth charged as a juvenile offender, if lawfully obtained, could be published); *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989) (holding that the publication of a rape victim's name, if lawfully obtained, cannot be restricted under the First Amendment).

32. *Bartnicki*, 532 U.S. at 535.

33. 2005 Cal. A.L.S. 424, 2005 Cal. AB 381, Stats. 2005 ch. 424.

34. See Marc P. Misthal, *Reigning in [sic] the Paparazzi: The Human Rights Act, the European Convention on Human Rights and Fundamental Freedoms, and the Rights of Privacy and Publicity in England*, 10 INT'L LEGAL PERSP. 287, 305-08 (1998); Robert M. O'Neil, *Privacy and Press Freedom: Paparazzi and Other Intruders*, 1999 U. ILL. L. REV. 703, 706-07 (1999); Rebecca Roiphe, *Recent Legislation: Anti-Paparazzi Legislation*, 36 HARV. J. ON LEGIS. 250, 252-53 (1999); Samantha J. Katze, Note, *Hunting the Hunters: AB 381 and California's Attempt to Restrain the Paparazzi*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1349, 1368-80 (2006).

35. See Richard Winton & Andrew Blankstein, *Deputies arrest four in crackdown on paparazzi*, L.A. TIMES, Feb. 21, 2008, at B3.

Chief Bratton put it: “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.”<sup>36</sup>

This Article examines the constitutional viability of California’s new law, noting that, if California is successful in enforcing the updated version of its anti-paparazzi statute, other states and possibly the federal government could follow suit. Part I examines the history of the new anti-paparazzi statute, from the evolution of the common law right to privacy to the latest celebrity-versus-photographer snafus. Using case law from both the United States and California Supreme Courts, Part II analyzes the new California law from a First Amendment standpoint. Finally, Part III of this Article concludes that the newest anti-paparazzi law chills speech protected by the First Amendment: traditional news publications must often include celebrity coverage to meet reader demand; also, so-called “tabloid” publications are not completely devoid of social value and still merit First Amendment protections. Further, this Article concludes that the government should not fund litigation in defense of highly-paid celebrities’ privacy rights.

#### I. WEDDINGS, WALES AND WALL-CLIMBING SNAPPERS: THE EVOLUTION OF PRIVACY LAW

Weddings have long been fodder for tabloid journalists. In 1890, the daughter of Samuel D. Warren married, attracting press coverage of the event “in highly personal and embarrassing detail.”<sup>37</sup> In 2009, paparazzi snapped photos of

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36. Blankstein & Winton, *supra* note 1. For example, as part of the LAPD’s stance of using existing law to rein in paparazzi, four photographers were arrested in February 2008 for blocking sidewalks while waiting for Britney Spears to leave a salon and Lindsay Lohan a nightclub. The arrests were made in the weeks following Spears’ hospitalization. Winton & Blankstein, *supra* note 34. The LAPD’s “tools include anti-loitering ordinances, traffic laws and rules targeting infractions such as illegally tinted windows or paper license plates.” *Id.*

37. Prosser, *supra* note 14, at 383. “Prosser, of course, famously identified the inspiration of the Warren and Brandeis article as the unwanted publicity given the wedding of Mr. Warren’s daughter shortly before the article was written. While often repeated, this view has been effectively discredited.” David W. Leebron, Symposium, *The Right to Privacy One Hundred Years Later: The Right to Privacy’s Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 775 (1991).



the Costa Rican wedding of supermodel Gisele Bündchen and football player Tom Brady, only to be shot at as they fled the scene of the nuptials.<sup>38</sup> The Brady-Bündchen incident is illustrative of the modern trend towards the high value placed upon glimpses into the most intimate moments of celebrities' lives.<sup>39</sup> The Warren wedding is suspected to be the impetus for the current body of law that protects celebrities from invasive photographers.<sup>40</sup> The story, as Dean William Prosser told it in 1960, is that the attention surrounding his daughter's wedding prompted Warren to team up with law partner Louis D. Brandeis to write *The Right to Privacy*.<sup>41</sup>

The collaboration appeared in the 1890 issue of *Harvard Law Review* and spurred a new body of tort law that continues to be debated and refined to this day.<sup>42</sup> The reaction to Warren and Brandeis' proposition that individuals hold a "right to be let alone" was slow to develop, but by the 1930s, a common law right of privacy had taken hold.<sup>43</sup> This new right sought to protect "individuals against the outrageous and unjustifiable infliction of mental distress";<sup>44</sup> in other words, violations of personal dignity were now actionable legal rights.

When Prosser endeavored to establish his own take on privacy law in 1960, he called the Warren and Brandeis article "the outstanding example of the influence of legal periodicals upon the American law."<sup>45</sup> The same can be said of Prosser's 1960 *California Law Review* article, entitled *Privacy*.<sup>46</sup> One court has gone so far as to posit "[t]he law in its present form was conceived almost entirely by Professor William Prosser, who, in a 1960 law review article in the

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38. See, e.g., *Brady mum on shotgun nups*, BOSTON HERALD, Apr. 7, 2009, at 19. The window of the photographers' vehicle was shot out, but no one was hurt. *Id.*

39. See, e.g., Donna Freydkin & Karen Thomas, *Secret celebrity weddings*, USA TODAY, May 16, 2005, [http://www.usatoday.com/life/people/2005-05-16-secret-celeb-weddings\\_x.htm](http://www.usatoday.com/life/people/2005-05-16-secret-celeb-weddings_x.htm) (discussing the tactics celebrities use to avoid paparazzi at weddings).

40. Prosser, *supra* note 14, at 383.

41. *Id.* See generally Warren & Brandeis, *supra* note 14. See also *supra* note 37.

42. *Id.* As one court concluded, "The genesis of the right to privacy is traceable to" the Warren & Brandeis article. *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1278 n.9 (Nev. 1995). See generally Warren & Brandeis, *supra* note 14.

43. Prosser, *supra* note 14, at 384; Warren & Brandeis, *supra* note 14.

44. Prosser, *supra* note 14, at 384.

45. *Id.* at 383.

46. *Id.*

*California Law Review*, expounded that the right of privacy gave rise not to one but to four different tort actions, sometimes called ‘Prosser’s Four Torts of Privacy.’<sup>47</sup> The four invasion of privacy torts—intrusion, public disclosure of private facts, false light in the public eye, and appropriation—were adopted by *The Restatement (Second) of Torts* just a few years after Prosser’s article and have been adopted in various ways by the majority of states.<sup>48</sup>

While it has been argued that the development of privacy law has been a low point “of logic and clarity in American law,”<sup>49</sup> it is here to stay, with ten states going so far as to incorporate a right to privacy in their state constitutions.<sup>50</sup> It is this foundation of privacy law upon which California first sought to build, when in 1998 it enacted an anti-paparazzi law.<sup>51</sup>

That law was passed in the wake of Princess Diana’s death and created a cause of action for constructive invasion of privacy, aiming to prevent paparazzi from using “visual or auditory enhancing device[s]”—such as telescopic lenses or infrared cameras—to obtain photos of celebrities in vulnerable states.<sup>52</sup> It also provided a statutory cause of action for physical invasion of privacy.<sup>53</sup> The statute was essentially a codification and expansion of Prosser’s common

47. *People for the Ethical Treatment of Animals*, 111 Nev. at 628.

48. See RESTATEMENT (SECOND) OF TORTS §§ 652A-I.

49. Don R. Pember & Dwight L. Teeter Jr., *Privacy and the Press Since Time, Inc. v. Hill*, 50 WASH. L. REV. 57, 57 (1975) (borrowing from author and *New Yorker* cartoonist James Thurber from WRITERS AT WORK: THE PARIS REVIEW INTERVIEWS 86 (M. Cowley ed., 1959) in calling privacy an area of law as “disorderly as a whore’s top drawer”). See also Harry Kalven Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 327 (1966) (arguing that “tort law’s effort to protect the right of privacy seems to me a mistake”).

50. See Privacy Protections in State Constitutions, *supra* note 13.

51. See S.B. 262, 1997-98 Leg., Reg. Sess. (Cal. 1998) (enacted).

52. CAL. CIV. CODE § 1708.8(b) states:

A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a 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, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

53. *Id.* at § 1708.8(a).

law tort of intrusion.<sup>54</sup> The *Los Angeles Times* called it “overkill, an intolerable limitation on legitimate news-gathering operations protected by the 1st Amendment.”<sup>55</sup> But according to then-State Senator Tom Hayden, “[a]nything that attacks the paparazzi is good for democracy.”<sup>56</sup>

The 1998 law apparently did not meet expectations of anti-paparazzi advocates, because in 2005 the law was expanded.<sup>57</sup> By this time, action star Schwarzenegger, whose run-in with paparazzi sent two photographers to jail in 1999,<sup>58</sup> was the governor of California. The amendment targeted photos stemming from paparazzi assaults on celebrities, forcing the photographer to forfeit profits from such photos and subjecting him to triple damages in a civil action.<sup>59</sup> “This bill hits the paparazzi where it hurts—the wallet,” said its sponsor, Assemblyperson Cindy Montanez (D-San Fernando).<sup>60</sup> “Money is their motivation, so taking their money will be the solution,” she stated.<sup>61</sup> Montanez cited a recent car crash involving actress Lindsay Lohan as one “of a growing number of incidents where paparazzi [took] their profession in a disturbing direction by assaulting a celebrity or threatening an assault, to capture a reaction on tape.”<sup>62</sup> Gov. Schwarzenegger signed the law, which took effect on January 1, 2006.<sup>63</sup>

The top-dollar value of candid photographs, which Montanez and Schwarzenegger hoped to dampen, is part of an industry driven by America’s obsession with celebrities.<sup>64</sup> It is “one of the most powerful and lucrative forces driving...

54. See Prosser, *supra* note 14.

55. Editorial, *Anti-Paparazzi Overkill*, L.A. TIMES, Aug. 5, 1998, at B6.

56. Andrew Gumbel, *Hollywood Stars Gain Legal Right to Privacy*, INDEPENDENT (LONDON), Jan. 2, 1999, at 11. Incidents cited at the time the 1998 bill went into effect included Princess Diana’s death, Arnold Schwarzenegger and family being run off the road and Alec Baldwin punching a photographer for allegedly harassing his wife and child. *Id.*

57. Assem. B. 381, 2005-06 Leg., Reg. Sess. (Cal. 2005) (enacted).

58. See *Snap Decision*, *supra* note 27.

59. Cal. Asse. B. 381; CAL. CIV. CODE § 1708.8 (Deering 2009).

60. Press Release, Assemblyperson Cindy Montanez, <http://democrats.assembly.gov/templates/default.aspx?a=293&template=print-article.htm>.

61. *Id.*

62. *Id.*

63. See *Schwarzenegger*, *supra* note 19.

64. David Samuels, *Shooting Britney*, THE ATLANTIC, April 2008, at 38.

American news-gathering.<sup>65</sup> For example, photo agency X17 (responsible for most of the photos chronicling Britney Spears' downward spiral) employs between sixty and seventy photographers, paying each of them \$800-\$3,000 per week plus bonuses.<sup>66</sup> Also on X17's payroll are "dedicated tipsters" and "parking-lot attendants, club kids, and shop girls in and around L.A."<sup>67</sup> The photos that result from X17's multi-faceted approach are then sold to magazines, websites, and major television news networks such as CNN, ABC, NBC and CBS.<sup>68</sup> In 2007, the agency made approximately \$3 million from Britney Spears photos alone.<sup>69</sup>

The 2005 statute targeting the lucrative paparazzi industry was also insufficient in the minds of lawmakers to tame aggressive photographers, because in 2009 yet another measure was introduced to fix the paparazzi problem.<sup>70</sup> Assembly Bill 524 extended California's existing privacy laws to hold liable the first publisher of a photo obtained in contravention of state law.<sup>71</sup> The bill, which Schwarzenegger signed in October 2009 and took effect on January 1, 2010, "[s]eeks to deter the most egregious activities of so-called 'paparazzi' by cutting off at the source the financial incentives that often presumably drive the worst and sometimes extremely dangerous behavior."<sup>72</sup> To accomplish this goal, the law targets the market for paparazzi photos, exposing those who first publish illegally obtained photos to fines up to \$50,000.<sup>73</sup> In addition, taxpayers will be responsible for enforcing these civil penalties on behalf of high-paid celebrities by way of litigation brought by municipal

65. *Id.*

66. *Id.* at 37.

67. *Id.*

68. *Id.*

69. *Id.* at 38. A 2007 study by Pew Research Center for People and the Press suggests that the public thinks the media was to blame for excess coverage of celebrity scandals. Pew Research Center for People and the Press, *Public Blames Media for Too Much Celebrity Coverage: Summary of Findings*, <http://people-press.org/report/346/public-blames-media-for-too-much-celebrity-coverage>.

70. *See, e.g.*, Patrick McGreevy, *Bill aims to curb paparazzi activity*, L.A. TIMES, July 15, 2009, at A6.

71. Assem. B. 524, 2009-10 Leg., Reg. Sess. (Cal. 2009) (enacted).

72. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary).

73. *See* Cal Assem. B. 524; *see also* CAL. CIV. CODE § 1708.8(d) (Deering 2009).

attorneys.<sup>74</sup>

California's newest anti-paparazzi statute marks another attempt by that state's lawmakers to crack down on aggressive photographers.<sup>75</sup> The ostensible goal is to reduce the financial awards available to paparazzi and therefore reduce the aggressiveness of photo-taking tactics. While the previous legislative measures tread heavily on First Amendment ground, the newest law just might be the straw that breaks the camel's back. The next section of this Article examines the constitutional implications of the new law.

## II. SHIELDING CELEBRITIES FROM AGGRESSIVE PHOTOGRAPHERS: LOOKING THROUGH A FIRST AMENDMENT LENS

California's newest anti-paparazzi statute contains two major provisions that are of significant concern: 1) it extends liability to first publishers of illegally obtained photos;<sup>76</sup> and 2) it authorizes the government to pursue civil actions based on private individuals' mental distress. This section analyzes these issues separately.<sup>77</sup>

### *A. Civil Penalties for First Publishers*

A major addition to California's cadre of anti-paparazzi legislation is the new provision that extends liability from photographers to include media outlets.<sup>78</sup> The law targets

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74. See Cal. Assem. B. 524; see also CAL. CIV. CODE § 1708.8(m)(1).

75. See generally CAL. CIV. CODE § 1708.8; Assem. B. 381 2005-06 Leg., Reg. Sess. (Cal. 2005) (enacted); Cal. Assem. B. 524.

76. Cal. Assem. B. 524.

77. *Id.*

78. The new law states that:

(f) (1) The transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of subdivision (a), (b), or (c) shall not constitute a violation of this section unless the person, in the first transaction following the taking or capture of the visual image, sound recording, or other physical impression, publicly transmitted, published, broadcast, sold or offered for sale, the visual image, sound recording, or other physical impression with actual knowledge that it was taken or captured in violation of subdivision (a), (b), or (c), and provide compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained visual image, sound recording, or other physical impression.

*Id.*

first publishers of photos taken in the course of physical or constructive invasion of privacy “in a manner that is offensive to a reasonable person” or during an assault with the intent to capture an image.<sup>79</sup> If these publishers have “actual knowledge”<sup>80</sup> that the photo was taken in a way that violated the subject’s privacy or during an assault by the photographers, the publishers are subject to fines up to \$50,000.<sup>81</sup>

This presents a twofold problem. First, it burdens media outlets with the daunting task of determining not only if they will be the “first” publisher (which, considering the pace of online publication, will be a mere guess in some circumstances), but if the photo was taken in a manner “highly offensive to the reasonable person.”<sup>82</sup> From a jurisdictional standpoint, this raises preliminary questions of how the California law will apply to media outlets based in, for example, New York. If it applies at all, who exactly is “a reasonable person?” A “reasonable” Californian might differ from a reasonable New Yorker, and a Mississippian might have a standard of reasonableness altogether different from either California or New York. The new law is silent as to these scenarios, making it vague and overbroad on its face.

Perhaps more troubling than the jurisdictional concerns raised by the latest anti-paparazzi statute is the apparent conflict of the California law with existing Supreme Court precedents. High Court cases have consistently held that, if the press obtains information lawfully, even if the information itself was illegally obtained by a third party, restraints on publication are unconstitutional.<sup>83</sup>

79. *Id.*

80. The law defines “actual knowledge” as:

actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the visual image, sound recording, or other physical impression, that the visual image, sound recording, or other physical impression was taken or captured in violation of subdivision (a), (b), or (c). The plaintiff shall establish actual knowledge by clear and convincing evidence.

*Id.*

81. *Id.*

82. *Id.* It should be noted that some contracts between publications and photographers would include provisions for first publication.

83. *See, e.g.,* *Bartnicki v. Vopper*, 532 U.S. 514, 517-18 (2001); *Fla. Star v. B. J. F.*, 491 U.S. 524, 541 (1989); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

In *Bartnicki v. Vopper*, the Court addressed the issue of “what degree of protection, if any, the First Amendment provides to speech that discloses the contents of an illegally intercepted communication.”<sup>84</sup> In *Bartnicki*, a cell phone conversation about school board collective bargaining was illegally intercepted by an unknown third party.<sup>85</sup> A tape of that conversation was anonymously passed along to Vopper, who played the tape on his public affairs talk show.<sup>86</sup> Bartnicki, a union negotiator who engaged in the illegally intercepted conversation, argued that Vopper and other members of the media “knew or had reason to know” that the recording was illegally obtained, and therefore, were liable to him for damages.<sup>87</sup>

The Court framed its question as: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government punish the ensuing publication of that information based on the defect in a chain?”<sup>88</sup> The answer was no, given the facts of the case, because to do so would violate the First Amendment.<sup>89</sup>

The *Bartnicki* Court’s decision relied in part on its previous ruling in *Florida Star v. B.J.F.*<sup>90</sup> In *Florida Star*, a newspaper lawfully obtained the name of a sexual assault victim (by way of the sheriff’s office’s mistaken release of the name) and subsequently published the victim’s name.<sup>91</sup> A Florida law made it illegal to publish the name of a rape victim.<sup>92</sup> The Court held that imposing damages on the

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84. *Bartnicki*, 532 U.S. at 517.

85. *Id.* at 518.

86. *Id.* at 519.

87. *Id.* at 519-20. *Bartnicki* relied on federal and state (Pennsylvania) criminal wiretapping statutes. *Id.* at 520. See also 18 U.S.C. § 2511(1) (2000).

88. *Bartnicki*, 532 U.S. at 528 (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.D.C. 1999) (Sentelle, J., dissenting)).

89. See *id.* at 535. The Court noted its “repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment” and emphasized that individual fact circumstances are key. *Id.* at 529.

90. *Id.* at 529 (citing *Fla. Star v. B.J.F.*, 491 U.S. 524, 532-33 (1989)).

91. *Fla. Star*, 491 U.S. at 526-27.

92. *Id.* at 541. The Court clarified its holding by noting:

We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press, or even that a State may never punish publication of the name of a victim of a sexual offense. We hold only that where a newspaper publishes truthful information which it has

newspaper for publishing the name violated the First Amendment.<sup>93</sup>

The Supreme Court has on other occasions addressed the issue of information legally obtained by the press but illegally obtained by a third party. In *Smith v. Daily Mail Publishing Co.*, the media published the name of a minor accused of killing another youth.<sup>94</sup> The minor's name was lawfully obtained by the media by asking authorities and witnesses to the shooting, which had taken place at a junior high school.<sup>95</sup> The Court held that truthful publication of the youth's name, lawfully obtained, could not be restricted.<sup>96</sup> In *New York Times Co. v. United States*, also known as the Pentagon Papers case, the Court refused to enjoin publication of a series of articles about the Vietnam War based on documents stolen from the Pentagon by a government consultant.<sup>97</sup>

Thus, the Supreme Court has consistently refused to silence the press even if information was illegally obtained by a third party. Why, then, would California legislators pass a law that penalizes publication of photos taken in contravention of the anti-paparazzi statute? A bill analysis by the California Senate Judiciary Committee characterized *Bartnicki* as standing for the proposition "that laws that prohibit the disclosure of unlawfully obtained information, where the one disclosing knows or has reason to know that it was unlawfully obtained, are not necessarily facially unconstitutional, but may be found to be unconstitutional as applied."<sup>98</sup> An Assembly analysis noted that "the bill would [not] necessarily, on its face, violate the First Amendment."<sup>99</sup>

lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order..."

*Id.*

93. *Id.*

94. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 (1979).

95. *Id.* at 98.

96. *See id.* at 102. The Court pointed out that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.*

97. *See N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). *See also* William R. Glendon, Symposium, *The Day the Presses Stopped: A History of the Pentagon Papers Case: The Pentagon Papers – A Victory for a Free Press*, 19 CARDOZO L. REV. 1295, 1295, 1305 (1998) (discussing the background of the Pentagon Papers case).

98. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary).

99. *Invasion of Privacy: Hearing on A.B. 524 Before the Assem. Comm. on the Judiciary*, 2009 Leg., 2009-10 Reg. Sess. (Cal. 2009) [hereinafter *Invasion of Privacy*] (statement of Assem. Mike Feuer, Chair, Assem. Comm. on the Judiciary), available at



It appears, then, that California lawmakers were quite aware of the First Amendment implications that *Bartnicki* imposed on the new anti-paparazzi law, but favored enacting a law that was “not necessarily facially unconstitutional,”<sup>100</sup> deferring a true constitutional analysis to lower courts and litigators.

### *B. Government-funded Civil Legislation*

The litigators testing the new law’s First Amendment implications will do so in litigation that the California Newspaper Publishers Association calls “excruciatingly expensive.”<sup>101</sup> Who will foot the bill? According to a measure in the latest privacy amendment, taxpayers will.<sup>102</sup> The law authorizes public prosecutors to pursue civil actions against photographers and publishers who violate the privacy statute.<sup>103</sup> Proceeds from these actions (which might easily cost more to litigate than the \$50,000 maximum fine for publication) are to be distributed equally among the prosecuting agency and an Arts and Entertainment Fund.<sup>104</sup> Thus, public resources in a state facing a \$21 billion budget deficit<sup>105</sup> will be used to “protect the private property and personal moments” of celebrities.<sup>106</sup> If paparazzi actions are a problem of such proportion as to warrant the newest restrictions, it would seem that there will be innumerable opportunities for enforcement.

Conceptually, this provision is similar to victim compensation statutes that authorize the government to initiate civil actions to seize funds from criminals on behalf of

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[http://info.sen.ca.gov/pub/09-10/bill/asm/ab\\_0501-0550/ab\\_524\\_cfa\\_20090511\\_105624\\_asm\\_comm.html](http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_524_cfa_20090511_105624_asm_comm.html).

100. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary).

101. *Id.*

102. Assem. B. 524, 2009-10 Leg., Reg. Sess. (Cal. 2009) (enacted).

103. *Id.*

104. *Id.*

105. Shane Goldmacher, *California’s budget woes will continue for years, report says*, L.A. TIMES, Nov. 19, 2009, available at <http://articles.latimes.com/2009/nov/19/local/me-budget-deficit19>.

106. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary) (discussing the California Newspaper Publishers Association’s opposition to A.B. 524).

victims or their survivors.<sup>107</sup> For example, proceeds from Salvatore “Sammy the Bull” Gravano’s book about his experience in the mob were seized by the government and the \$420,000 was then distributed to his victims’ families.<sup>108</sup> These types of victim compensation statutes are a far cry from the anti-paparazzi provision, however. The financial penalties are related to *criminal* wrongdoing and apply after guilt has been determined; however, the financial penalties pursued by the government in California’s new law are related to *civil* wrongdoing and the burden of litigation will apply prior to a determination of whether an invasion of privacy has occurred.

As a Senate Judiciary Committee analysis pointed out, consideration should be given to “whether there is a compelling public interest that justifies authorizing city attorneys or county counsels to litigate a tort action pursuant to the statute, and why the remedies already available to private parties are not sufficient.”<sup>109</sup> While the use of government resources to seize funds for crime victims and their families seems to serve a compelling public interest, allocating scarce resources to defend the privacy rights of high-paid celebrities does not.

### III. IS ANTI-PAPARAZZI ANTI-PRESS? THE CHILLING EFFECT OF CALIFORNIA’S LATEST PRIVACY LAW

To celebrities, paparazzi are no doubt much like their “swarming insect” namesakes—annoying and at times even dangerous.<sup>110</sup> But, between Point A of the aggressive

107. Florida, for example, has a victim compensation statute that allows the state (as well as victims and other aggrieved parties) to pursue civil restitution liens against the current and future assets of criminals. FLA. STAT. § 960.29 (2010). See also Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 TUL. L. REV. 167 (2004) (analyzing both state compensation schemes and the 9/11 Fund).

108. Greg B. Smith, *Kin of Gravano’s Victims Get 420G in Payback*, N.Y. DAILY NEWS, July 22, 2004, at 3. See also *Arizona v. Gravano*, 204 Ariz. 106, 108 (2000).

109. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary).

110. The Paparazzi Reform Initiative, founded in 2009 by a former Hollywood bodyguard to “educate the public on the paparazzi industry,” voiced its support of A.B. 524 during the legislative process. See Paparazzi Reform Initiative, <http://www.paparazzi-reform.org/about/http://www.paparazzi-reform.org/about/> (last visited Feb. 25, 2010). Legislative history contains this description of the danger submitted by the Paparazzi Reform Initiative to the Assembly Committee on Judiciary:

First and foremost, it utterly stuns me that no one else has been killed -

photographer and Point B of sweeping restrictions on speech, there lies a broad spectrum of existing remedies for hazardous behavior. The Los Angeles Chief of Police, as experienced with the paparazzi problem as one can be, has warned against unconstitutional privacy laws when existing laws can achieve the same goal.<sup>111</sup> Laws against reckless driving, loitering, sidewalk blocking, trespassing, false imprisonment, stalking and driving a vehicle without a tag are only a few of those used by law enforcement to rein in the paparazzi.<sup>112</sup> These laws are in addition to the civil remedies available to celebrities. These laws are sufficient for the man charged with protecting Hollywood from paparazzi-associated safety hazards, but apparently not for California lawmakers.

Instead, they have enacted a law that punishes publication of lawfully obtained information, a move that the U.S. Supreme Court has not “categorically” rejected<sup>113</sup> but has consistently disapproved in a variety of contexts. These cases involved information much more sensitive than celebrity photos, such as classified Pentagon documents<sup>114</sup> and a rape victim’s name.<sup>115</sup> Legislative history indicates a position on the part of California legislators that the law “is not necessarily facially unconstitutional,”<sup>116</sup> and its viability will vary depending on the factual context. This forces the media into taking a huge risk with the publication of every photo from an independent source. An editor must consider whether to publish a photo (while simultaneously vetting the

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paparazzo, pedestrian or celebrity. With high speed car chases shooting through the streets of Los Angeles with no regard for street lights or other laws, it is only a matter of time before disaster strikes again.

But on another level, a more basic human level, no individual deserves to be treated the way the paparazzi treat most of their “subjects”. Like packs of wolves, they literally hunt their victims, surrounding them in vehicles or on foot, following them and taking photos hoping to get something they can sell. Whether the celebrity wants it or not, whether child involved or no, the paparazzi persist. With cameras flashing and video running, they endanger pedestrians, drivers, the celebrity and even themselves.

*Invasion of Privacy*, *supra* note 99 (statement of Assem. Mike Feuer, Chair, Assem. Comm. on the Judiciary).

111. See Winton & Blankstein, *supra* n. 34.

112. *Id.*

113. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).

114. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714(1971).

115. *Fla. Star v. B.J.F.*, 491 U.S. 524, 541(1989).

116. *Privacy*, *supra* note 24 (statement of Sen. Ellen M. Corbett, Chair, S. Comm. on the Judiciary) (emphasis added).

photo for offensiveness and whether anyone else has published) or risk getting slapped with a civil suit by the government. As newsrooms and budgets shrink, the answer might increasingly be to suppress information. For some bloggers or alternative publications, a lawsuit by the government could result in a total shutdown.

Of course, some argue that the photos snapped by paparazzi have no social value and are not “news” anyway. This is, however, irrelevant to the legal analysis of the constitutionality of the latest amendment to section 1708.8 because the law is written so broadly that it has the potential to punish publication of photos of public officials engaging in newsworthy activities. Also, regardless of the cultural problems a national obsession with celebrity scandals (and ignorance of political issues) raises, there is a demand for these photos. Newspapers and other media outlets must fulfill their “Fourth Estate” watchdog function, but must also meet consumer demand. If meeting this consumer demand means publishing celebrity photos, thus enabling it to also conduct investigative reporting on pressing political and social issues, then the press should be permitted to do so without prior restraint. In other words, if celebrity fodder helps pay the bills, it is also providing the much-needed resources to promote traditional investigative pieces.

Newsrooms are not the only ones trimming budgets in reaction to economic woes. Governments, including California’s, are also facing the daunting task of doing more with less. Despite this fact, the California Legislature passed a law that will result in “excruciatingly expensive”<sup>117</sup> First Amendment litigation. Public lawyers are now charged with pursuing civil actions for the privacy violations of individuals.<sup>118</sup> These individuals, though, can already avail themselves of existing tort (and sometimes criminal) remedies.<sup>119</sup> The provision of California’s new law allowing for

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117. *Id.* (statement of California Newspaper Publishers Association).

118. See CAL. CIV. CODE § 1708.8 (Deering 2009).

119. See *id.* See also *Galella v. Onassis*, 487 F.2d 986, 995 (1972) (modifying a lower court’s injunction against photographer Ron Galella from coming within a certain distance of Jacqueline Kennedy Onassis and rejecting Galella’s argument that the First Amendment was “a wall of immunity protecting newsmen from any liability for their conduct while gathering news”). *Galella* is the focus of the documentary film “Smash His Camera,” appearing at the 2010 Sundance Film Festival. Posting of Roger Ebert to Roger Ebert’s Journal,

public funds to be used to right the wrongs of aggrieved celebrities is an irresponsible use of taxpayer money.

While California's newest anti-paparazzi measure will have the most impact in that state, it might still pose a danger for publications and news outlets outside of California. Although the civil procedure and jurisdictional issues raised by the new law are beyond the scope of this Article, it seems that, if a parent company has ties to California, the publication of photos by its non-California based subsidiaries might expose the company to liability. Also, the success of the latest anti-paparazzi law (or perhaps its passage alone) could prompt other states or the federal government to enact similar measures at the cost of stifling the press.

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. Newsrooms burdened with dwindling budgets and the pressure to be "first" in an environment of instant publication via the Internet should not be further shackled by a law that calls on the media to make determinations that are simply not realistic.