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Hunting the Hunters: AB 381 and California's Attempt to Restrain the Papparazzi

Samantha J. Katze
Fordham University School of Law

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Hunting the Hunters: AB 381 and California's Attempt to Restrain the Paparazzi

By Samantha J. Katze*

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INTRODUCTION

Take a quick glance at the magazine racks in any supermarket or convenience store, and the faces of celebrities, smiling or not, will stare right back at you. Sign online and you will see these same faces on numerous gossip websites and blogs, which appear to be updated with new stories and photographs almost every two seconds.¹ In 1890, Louis Brandeis and Samuel Warren observed, “[t]he press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.”² Never in their wildest dreams, or, more appropriately, nightmares, could Warren and Brandeis have imagined how large the gossip “trade” would grow.

Today, the paparazzi go to unprecedented lengths to obtain photographs of celebrities that may be sold to the tabloids for an increasingly hefty compensation.³ In an effort to restrain the

¹ See, e.g., US Weekly Online, <http://www.usmagazine.com/blog/>.

² Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890).

³ See *infra* Part I.

paparazzi⁴ following recent incidents,⁵ California passed AB 381. California lawmakers justified the enactment of the new law on the ground that it is the only way to protect celebrities and the public from the paparazzi. AB 381 would do this by eliminating the paparazzi's economic incentive to go to extraordinary lengths to obtain photographs of celebrities.⁶ However, the United States Supreme Court has held laws that single out the press for differential treatment and target a specific portion of the media to be presumptively unconstitutional.⁷ The presumption may only be overcome by a showing that the law serves a compelling state interest that cannot be protected in the absence of the regulation.⁸ The question therefore becomes: Are the protections of celebrity privacy and safety, as well as public safety, compelling state interests that justify the enactment of AB 381, a law that on its face subjects the press to differential treatment and specifically targets the paparazzi?

This Note addresses the relationship between celebrity privacy rights, the press's right to gather news, and the government's ability to regulate this relationship through the enactment of legislation prohibiting so-called newsgathering torts. Part I examines the history and policy surrounding celebrity privacy rights and anti-paparazzi legislation, including the events that prompted the enactment of AB 381. Part II discusses the split among the courts regarding whether to impose liability for newsgathering torts. Part III argues that the Fourth Circuit's opinion in *Food Lion, Inc. v. Capital Cities/ABC, Inc.* indicates that a law that imposes liability for newsgathering torts will not survive a constitutional challenge if the law singles out the press and specifically targets a limited portion of the media, unless the law serves a compelling state interest that cannot be protected in its absence.⁹ Part III also argues that AB 381 will not survive a

⁴ See *infra* Part I.

⁵ See *infra* Part I.

⁶ See *infra* Part I.

⁷ *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

⁸ *Id.*

⁹ 194 F. 3d. 505, 520–22 (4th Cir. 1999) (holding that reporters were liable in tort for employee disloyalty and trespass committed during the newsgathering process where the

constitutional challenge since (1) the law is discriminatory on its face and (2) it does not serve a compelling state interest because (a) current assault law provides an adequate remedy for outrageous paparazzi behavior, (b) the tabloids can police themselves, and (c) there is a limited market for pictures obtained through the use of dangerous tactics.

I. FROM ROYALTY TO RODEO: THE HISTORY AND POLICY BEHIND AB 381

When people think of the paparazzi, Princess Diana is one of the first names that comes to mind. In August 1997, Princess Diana and her boyfriend Dodi Fayed were killed in a car accident, inside a Paris tunnel, while trying to elude a group of aggressive paparazzi.¹⁰ Princess Diana's death prompted a worldwide backlash against the paparazzi and spawned a movement to prevent similar tragedies.¹¹ Members of Congress proposed a number of bills to address the "paparazzi problem."¹² Despite such efforts, not a single one of the proposed federal bills reached the floor of the House of Representatives or the Senate for a vote.¹³ Although efforts to pass anti-paparazzi legislation failed at the federal level, the State of California passed the nation's first anti-paparazzi statute in 1998.¹⁴

Nearly a decade after Princess Diana's tragic death, the paparazzi have failed to refrain from their chases. In May 2005, police arrested paparazzo Galo Ramirez on suspicion of assault with a deadly weapon after Ramirez rammed his car into Lindsay

reporters secured jobs at a supermarket as a means to obtain information about the supermarket's unwholesome food handling practices for use in a television broadcast).

¹⁰ See Richard J. Curry, Jr., *Diana's Law, Celebrity and the Paparazzi: The Continuing Search for a Solution*, 18 J. MARSHALL J. COMPUTER & INFO. L. 945, 946 (2000).

¹¹ See *id.* (arguing that anti-paparazzi statutes are not necessary because existing laws effectively deal with abusive paparazzi behavior).

¹² *Id.* at 948-51. The bills proposed included the Protection from Personal Intrusion Act, the Privacy Protection Act of 1998, and the Personal Privacy Protection Act. *Id.*

¹³ *Id.* at 951.

¹⁴ *Id.*

Lohan's Mercedes while attempting to capture her photograph.¹⁵ In August 2005, Scarlett Johansson sideswiped a car while trying to elude four SUVs filled with paparazzi that had followed her for over an hour from her Hollywood home to Disneyland.¹⁶ She subsequently crashed into a vehicle carrying a woman and her two young daughters.¹⁷ Similarly, in September 2005, police cited photographer Todd Wallace for two misdemeanor counts of assault and battery after he assaulted two park employees while attempting to photograph Reese Witherspoon and her two children during their visit to Disneyland.¹⁸ Some argue that these recent incidents indicate that current laws fail to protect not only celebrities' privacy, but the safety of celebrities and the general public as well.¹⁹

Spurred by the aforementioned incidents, on September 30, 2005, California Governor Arnold Schwarzenegger approved AB 381.²⁰ AB 381 is an amendment to Section 1708.8 of the

¹⁵ Pamela McClintock, *Governator Snaps Back at Paparazzi*, DAILY VARIETY, Oct. 3, 2005, at 1. In December 2005, the Los Angeles County District Attorney decided that there was insufficient evidence to charge Ramirez and thus dropped the charges. Rush, George and Joanna Rush Molloy, *It's a Lush Life: Celebs Recall How They Got Drunk With Success*, N.Y. DAILY NEWS, Dec. 30, 2005, at 28.

¹⁶ *See That's Hollywood; When Worlds Collide*, L.A. TIMES, Aug. 27, 2005, at B18.

¹⁷ *See id.*

¹⁸ Internet Movie Database, Witherspoon Explains Paparazzi Campaign (Nov. 1, 2005), <http://www.imdb.com/news/wenn/2005-11-01>. Witherspoon stated,

[t]hey do things that are illegal. They've hit my car and tried to push me off the road. And they've blocked me in with their cars, which is false imprisonment. They shout terrible obscene things at you and your children to try and get a reaction on your face. I had one follow us to the pediatrician's office shouting the f-word at us. My daughter was only four—she was shaking and crying. It's hard to live with. And I don't understand why it's legal to print pictures of my children.

Id.

In February 2006, Todd Wallace was found dead in his Brentwood home. He was never arraigned in the Witherspoon case. *See* Sarah Hall, *Reese's Theme Park Photog Believed Dead*, EONLINE, Feb. 6, 2006, <http://www.eonline.com/News/Items/0,1,18304,00.html>.

¹⁹ *See* Harrison Sheppard, *Photos Finished?; Bill Would Target Paparazzi*, DAILY NEWS OF L.A., July 24, 2005, at N1. "The bill is a follow-up to a state law passed in 1998—the year after Princess Diana was killed in a car crash following a chase by paparazzi—that targeted and spelled out similar penalties for photographers who trespass in pursuit of a photo." *Id.*

²⁰ 2005 Cal. A.L.S. 424, 2005 Cal. AB 381, Stats. 2005 ch. 424.

California Civil Code.²¹ The law creates a cause of action against those persons who commit assault with the intent to capture any sort of visual image, sound recording or physical impression.²² AB 381 provides that a person who commits such an assault is liable for up to three times the amount of general and special damages proximately caused by that violation and may also be liable for punitive damages.²³ Furthermore, AB 381 provides that if the assault is proven to have been committed for a commercial purpose, any proceeds or consideration obtained as a result of that violation are subject to disgorgement to the plaintiff.²⁴ AB 381 also imposes liability on “[a] person who directs, solicits, actually induces or actually causes another person, regardless of whether

²¹ *Id.*; see Cal. Civ. Code § 1708.8 (2006). This provision establishes two causes of action. The first cause of action is for physical invasion of privacy which occurs when the

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

Cal. Civ. Code § 1708.8(a) (2006).

The second cause of action is for constructive invasion of privacy which occurs 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.

Id. at § 1708.8(b).

²² Cal. Civ. Code § 1708.8(c) (2006). This provision prohibits “[a]n assault committed with the intent to capture any type of visual image, sound recording or other physical impression of the plaintiff is subject to subdivisions (d), (e), and (h).” *Id.*

²³ *Id.* at § 1708.8(d). This provision establishes that

[a] person who commits any act described in subdivision . . . (c) is liable for up to three times the amount of any general and special damages that are proximately caused by the violation of this section. This person may also be liable for punitive damages, subject to proof according to Section 3294.

Id.

²⁴ *Id.* This provision establishes that “[i]f the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant shall also be subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the violation of this section.”

there is an employer-employee relationship,” to commit an assault with the intent to capture any sort of visual image, sound recording or physical impression.²⁵ By enacting AB 381, the State of California sought to restrain the paparazzi by creating a disincentive for the paparazzi to go to extraordinary lengths to photograph celebrities.²⁶

Whether in the traditional tabloids such as *The National Enquirer* or in “celebrity weeklies” such as *Us Weekly*, the market for paparazzi photographs continues to flourish. With some paparazzi photographs selling for exorbitant amounts of money,²⁷ some argue that the only way to protect celebrities from the increasingly aggressive onslaught of the paparazzi is by eliminating the economic incentive for the paparazzi to take any means necessary to obtain the perfect picture.²⁸ Nonetheless,

²⁵ *Id.* at § 1708.8(e). This provision establishes that [a] person who directs, solicits, actually induces, or actually causes another person, regardless of whether there is an employer-employee relationship to [commit an assault with the intent to capture a visual image, sound recording or other physical impression] is liable for any general, special, and consequential damages resulting from each said violation. In addition, the person that directs, solicits, instigates, induces, or otherwise causes another person, regardless of whether there is an employer-employee relationship, to violate this section shall be liable for punitive damages.

Id.

²⁶ See 2005 Cal. A.L.S. 424, 2005 Cal. AB 381, Stats. 2005 ch. 424; *AB 381 Bill Analysis*, at 4, available at http://www.aroundthecapitol.com/billtrack/analysis.html?file=ab_381_cfa_20050714_095213_sen_comm.html (last visited July. 8, 2006) [hereinafter *AB 381 Bill Analysis*]. Assemblywoman Cindy Montañez, the author of AB 381, wrote, [r]ecently, 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 impede the mobility of a celebrity so that an image may be taken. . . . And, the financial rewards of the ‘right’ celebrity photo can be an incentive for the [paparazzi] to continue to push this trend.

Id.

²⁷ See *Paparazzi Moments Over the Years*, COX NEWS SERVICE, Aug. 31, 2005. In 2002, a bidding war erupted between *Us* and *People* magazines over pictures of Jennifer Lopez and Ben Affleck kissing. *People* got the photos for \$100,000. *Id.* In 2004, a man getting married in the same Las Vegas chapel as Britney Spears and her childhood friend Jason Alexander takes pictures and sells them for \$300,000. *Id.* In 2005, pictures of Brad Pitt, Angelina Jolie and her son, Maddox, vacationing on a beach in Africa sold for \$500,000. *Id.*

²⁸ See AB 381 Bill Analysis, *supra* note 26, at 4.

despite the abundance of people who support AB 381, controversy persists as to whether a change in the law is necessary at all, and if it is, whether AB 381 is a reasonable solution.²⁹

The incidents involving Lindsay Lohan, Scarlett Johansson and Reese Witherspoon reveal that the paparazzi's actions can endanger celebrities, their companions and members of the general public, particularly those in California.³⁰ Nonetheless, the incidents do not necessarily justify the creation of legislation that singles out the press and specifically targets the paparazzi. To pass constitutional muster, AB 381 must serve a compelling state interest that cannot be achieved without the regulation.³¹ This standard is not easily satisfied.

A. *Is Anything Sacred?: Celebrity Privacy Rights under California Law*

AB 381 may override the presumption of unconstitutionality only if the law serves a compelling state interest that cannot be achieved without the regulation.³² Courts must therefore determine whether protecting celebrity privacy, celebrity safety and the safety of the general public are compelling state interests that cannot be protected in the absence of AB 381. The courts continue to struggle with providing protection for personal privacy without infringing on the freedom of the press.³³ As the Supreme Court of California stated in *Shulman v. Group W Productions, Inc.*, "it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news

²⁹ See Parts I–II.

³⁰ See *supra* notes 15–18 and accompanying text.

³¹ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

³² *Id.*

³³ *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 477 (Cal. 1998) (holding that the broadcast of an accident victims' rescue from a serious accident could not be the basis for tort liability under a private facts claim because it was newsworthy as a matter of law; that triable issues of fact existed as to whether reporters invaded a woman's privacy when they accompanied her in the rescue helicopter and as to whether the reporters tortiously intruded into the woman's privacy when they listened to confidential conversations with a nurse at the rescue scene, without the woman's consent; and that members of the press did not have a First Amendment privilege to intrude on plaintiffs' seclusion and private communications).

media's right to investigate and relate, facts about the events and individuals of our time."³⁴ The conflict between personal privacy and freedom of the press fuels the controversy surrounding AB 381.

Over the years, both the federal and state courts have come to recognize the existence of a right to privacy.³⁵ There are many different types of privacy laws, including, but not limited to, the common law tort,³⁶ the constitutional right of privacy protecting rights to contraception³⁷ and abortion,³⁸ and other statutory rights of privacy that address specific privacy issues such as the use of personal data by the government.³⁹ The privacy laws generally focus only on the common law tort. However, because privacy jurisprudence developed alongside modern notions of free expression, privacy jurisprudence is heavily influenced by First Amendment theory.⁴⁰ Thus, it comes as no surprise that the paparazzi's First Amendment rights as members of the press greatly shape celebrities' right to privacy under California common law.

1. California's Common Law Right to Privacy

Celebrities argue that, like ordinary American citizens, they have a right to privacy that should be protected from invasion by the paparazzi.⁴¹ However, celebrities do not possess the same

³⁴ *Id.* at 474.

³⁵ *Griswold v. Conn.*, 381 U.S. 479 (1965) (finding a right to privacy implicit in the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's right of people to be secure in their persons, the Fifth Amendment's right against self-incrimination, and the Ninth Amendment's right to retain rights not enumerated in the Constitution); *Melvin v. Reid*, 297 P. 91 (Cal. 1931) (holding that the use of a woman's name in a movie about her life was an invasion of her right of privacy guaranteed by the California Constitution); see Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 REV. LITIG. 285, 287–88 (1999).

³⁶ See *infra* notes 42–45; MARC A. FRANKLIN ET AL., *MASS MEDIA LAW* 365–67 (7th ed. 2005).

³⁷ See *Griswold*, 112 Cal. App. 285.

³⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

³⁹ 5 U.S.C. § 552a(b) (2000).

⁴⁰ See FRANKLIN ET AL., *supra* note 36, at 365–66.

⁴¹ See Liz Crokin, *Chasing After Fame; Inside the Thrill, Mayhem of Photographing Celebs*, CHI. TRIB., Nov. 19, 2004, at 24. Kirsten Dunst acknowledged her frustration

right to privacy as the average Joe (and not the average Joe who has become more than average due to a reality television role) because celebrities by trade throw themselves into the spotlight.⁴² Some celebrities have a greater acceptance of the limits that fame places on their privacy. George Clooney stated, “[i]t’s a tradeoff. You just have to sort of steel yourself when you go out and know that the walk to the market will be a more public event.”⁴³

Whatever a particular celebrity’s perception of the paparazzi may be, celebrities undeniably do possess a right to privacy. California recognizes a common law right to privacy, which provides protection against four distinct categories of invasion as identified by Dean Prosser:⁴⁴ (1) intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs;⁴⁵ (2) public disclosure of embarrassing facts about the plaintiff;⁴⁶ (3) publicity which places the plaintiff in a false light in the public eye;⁴⁷ and (4) appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.⁴⁸ The common law right to privacy recognized by California, nevertheless, is far from absolute and remains subject to qualification, particularly in the case of celebrities and

with the paparazzi’s intrusive behavior as she stated, “I don’t see how it can be a legal thing to just take pictures of people in their everyday life.” *Id.*

⁴² See Nordhaus, *supra* note 35, at 289–92.

⁴³ Liz Crokin, *Chasing After Fame; Inside the Thrill, Mayhem of Photographing Celebs*, CHI. TRIB., Nov. 19, 2004, at 24.

⁴⁴ FRANKLIN ET AL., *supra* note 36, at 365.

⁴⁵ *Sanchez-Scott v. Alza Pharms.*, 86 Cal. App. 4th 365 (2001) (holding that a breast cancer patient had a sustainable cause of action for intrusion when the doctor allowed a drug salesman to stay in the room during the woman’s examination without informing the woman of the drug salesman occupation).

⁴⁶ *Porten v. Univ. of S.F.*, 64 Cal. App. 3d 825 (1976) (holding that a student’s complaint against a university for disclosure of prior college transcripts to a loan commission was a prima facie violation of the State’s constitutional right to privacy).

⁴⁷ *Eastwood v. Super. Ct. of L.A. County*, 149 Cal. App. 3d 409 (1983) (holding that a newspaper’s use of petitioner’s likeness to promote a false article could have infringed petitioner’s right of publicity because a California statute provided no exemption for publication of news known to be false).

⁴⁸ *Fairfield v. Am. Photocopy Equip.*, 291 P.2d 194 (Cal. 1955) (holding that an invasion of a consumer’s right to privacy occurred when the seller of a product used the consumer’s name in a print advertisement without the consumer’s permission).

other public figures.⁴⁹ Despite what *Us Weekly* may imply, celebrities are not just like us.⁵⁰

2. The Newsworthiness Limitation

A celebrity's right to privacy is especially limited when that celebrity enters a public place,⁵¹ and it is upon entering a public place that the celebrity's problems with the paparazzi arise. However, even things that occur behind closed doors may not qualify as private when they concern the lives of celebrities because when the subject matter is of legitimate public interest, courts limit an individual's ability to bring a cause of action for invasion of privacy.⁵²

In *Kapellas v. Kofman*, the Supreme Court of California outlined the factors to consider when determining whether a subject is newsworthy: (1) "the social value of the facts published," (2) "the depth of the article's intrusion into ostensibly private affairs," and (3) "the extent to which the party voluntarily acceded to a position of public notoriety."⁵³ The court further explained that as the legitimate public interest in the published information became more "substantial," greater intrusions into a person's private life would be allowed.⁵⁴ Nonetheless, while the *Kapellas* court acknowledged the factors that the court should

⁴⁹ See *Carlisle v. Fawcett Publ'ns, Inc.*, 201 Cal. App. 2d 733 (1962) (holding that because the marriage of the defendant actress with the plaintiff and the later annulment were matters of public record there were no revelations of any intimate details which would tend to outrage public decency and therefore there was no cause of action for an invasion of his right of privacy).

⁵⁰ *Us Weekly* contains a regular feature entitled "Stars—They're Just Like Us." The feature typically contains pictures of celebrities engaged in everyday activities and looking far from glamorous. See *US Weekly Online*, <http://www.usmagazine.com/blog/> (click on "Quick Link" "Stars—They're Just Like Us").

⁵¹ See *Nordhaus*, *supra* note 35, at 302–03.

⁵² *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (holding that the cause of action for invasion of privacy through public disclosure of the name of a rape victim imposed sanctions on pure expression, the content of a publication).

⁵³ *Kapellas v. Kofman*, 459 P.2d 912, 922–24 (Cal. 1969) (holding that a qualified First Amendment newsworthiness privilege did not apply to a libel claim brought against the publisher of an editorial that stated that a politician was not putting her children's needs first and that her performance as a mother was less than adequate).

⁵⁴ *Id.* at 922.

balance when determining a subject's newsworthiness,⁵⁵ the *Shulman* court made clear that the tastes or interests of an individual judge or juror do not determine newsworthiness.⁵⁶ According to the *Shulman* court, a subject is newsworthy so long as some reasonable members of the community could maintain a legitimate interest in it.⁵⁷

Unfortunately for celebrities, “[o]ften, it is the intensely private aspects of a celebrity’s life—involving drugs, sex or sexual orientation, marital discord, issues with children or other family members, or similar topics—that the public and the media deem newsworthy. (Illegality only ratchets up the stakes, and increases interest in the story.)”⁵⁸ While some may believe that a celebrity’s sexual relationships or battles with addiction do not qualify as newsworthy, the courts have taken a different view.⁵⁹ In *Carlisle v. Fawcett Publications, Inc.*, the Court of Appeal of California acknowledged the existence of a public interest in the activities of celebrities.⁶⁰ The court stated,

⁵⁵ *Id.*

⁵⁶ *See* *Shulman v. Group W Prods.*, 955 P.2d 469, 485 (Cal. 1998).

⁵⁷ *Id.* at 485–86.

⁵⁸ Julie Hilden, *Does Celebrity Destroy Privacy? Naomi Campbell and Narcotics Anonymous*, FINDLAW, Apr. 2, 2002, <http://writ.news.findlaw.com/hilden/20020402.html>.

⁵⁹ *See* *Eastwood v. Super. Ct. of L.A. County*, 149 Cal. App. 3d 409, 423 (1983). The court stated “[w]e have no doubt that the subject of the Enquirer article—the purported romantic involvements of Eastwood with other celebrities—is a matter of public concern, which would generally preclude the imposition of liability.” *Id.* In *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135, 1149 (1996), the court reversed a preliminary injunction restraining Melissa Gilbert’s ex-husband from disclosing allegedly defamatory statements regarding Gilbert’s sexual relationships and substance abuse. The court stated,

[a]s we previously indicated, information concerning Gilbert’s personal life is newsworthy due to her celebrity status While Gilbert has not lost all of her privacy rights by virtue of attaining celebrity status, the media attention regarding her personal relationships has to some degree diminished the zone of privacy surrounding those relationships.

Id.

⁶⁰ *See* *Carlisle v. Fawcett Publ’ns, Inc.*, 201 Cal. App. 2d 733, 746 (1962). The court stated, “there is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities.” *Id.*

[c]ertainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses, professional athletes, public officers, noted inventors, explorers, war heroes, may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons.⁶¹

The *Carlisle* court suggested that a Faustian bargain exists—in exchange for life as a celebrity, one must surrender one’s right to privacy.⁶²

B. Reality Bites: Existing California Law and the Motivation behind AB 381

The paparazzi, and the members of the press in general, have much greater leeway when it comes to publishing and gathering information about celebrities’ lives as a result of jurisprudence that limits the ability to bring a cause of action for invasion of privacy when the issue concerns a matter of public interest.⁶³ In addition to using judicial limits placed on privacy as a means to obtain information about the so-called private aspects of celebrities’ lives, the paparazzi have also hidden behind such limits when accused of overzealously pursuing celebrities and posing a danger to celebrities and the general public. Privacy law, however, is not the only source of law that can protect celebrities from the paparazzi.

⁶¹ *Id.* at 746–47.

⁶² *Id.*; see Camrin L. Crisci, *All the World Is Not a Stage: Finding a Right to Privacy in Existing and Proposed Legislation*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 207, 210 (2002). During the congressional hearings for the Personal Intrusion Act and the Privacy Protection Act of 1998 Michael J. Fox stated,

I work very hard to entertain an audience, and when they enjoy my work, I am deeply gratified. . . . I strongly disagree with those who would argue that some sort of Faustian bargain has been struck whereby ‘public’ figures are fair game, any time, any place, including within the confines of their own homes.

Id.

⁶³ See *supra* Part I.B.1.

Therefore, to determine whether AB 381 overcomes the presumption of unconstitutionality it is necessary to examine existing California law, including, but not limited to, privacy law, as well as the motivation for AB 381's enactment.

1. California Law—Assault, Trespass, Stalking and Harassment

Supporters of AB 381 argue that recent incidents involving the paparazzi indicate that existing statutes and the common law provide celebrities with insufficient protection from the paparazzi while in public places.⁶⁴ According to Assemblywoman Cindy Montañez, “rare instances may produce criminal charges due to the egregious nature of the assault, [but] many others go unpunished due to the difficulty of proving criminal assault.”⁶⁵ In contrast, opponents argue that AB 381 is unnecessary because current assault law sufficiently protects celebrities from paparazzi who break the law while in pursuit of a photograph.⁶⁶ As Peter Scheer, the executive director of the California First Amendment Coalition, stated, “[t]he behavior that’s described is an assault. And you can sue somebody right now for an assault, and somebody who assaults you can also be prosecuted.”⁶⁷

California’s trespass, stalking, and harassment laws, while providing celebrities with protection against some predators, fail to protect celebrities from the paparazzi.⁶⁸ Trespass laws do nothing to shield celebrities from the prying eyes of the paparazzi while on public property.⁶⁹ California Civil Code Section 1708.7 creates a civil cause of action against stalking. However, since California’s stalking law requires the plaintiff to prove that the defendant had “the *intent* to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member,” the law does

⁶⁴ See Nordhaus, *supra* note 35, at 301–03.

⁶⁵ See AB 381 Bill Analysis, *supra* note 26, at 4.

⁶⁶ Harrison Sheppard, *In the Sights of the Paparazzi: Assembly Bill Would Allow Stars to Sue Aggressive Photographers*, CAL. FIRST AMENDMENT COALITION, available at http://www.cfac.org/Attachments/sue_paparazzi.htm (last visited Mar. 23, 2006).

⁶⁷ *Id.*

⁶⁸ See Nordhaus, *supra* note 35, at 301–03.

⁶⁹ *Id.* at 301.

not offer celebrities protection from the paparazzi because the paparazzi's intent is to capture an image.⁷⁰ California's harassment statute eliminates the element of intent from stalking statutes.⁷¹ Nonetheless, the harassment statute contains its own loophole as the law covers only harassment that "serves no legitimate purpose."⁷² Since newsgathering is a legitimate purpose, the harassment statute is unlikely to apply to the paparazzi.⁷³

In the absence of provable criminal assault, celebrities have limited recourse against the paparazzi when in public places because, traditionally, courts have not considered the taking of an individual's photograph in a public place to constitute an invasion of privacy.⁷⁴ Courts take the position that a celebrity, or any person for that matter, effectively consents to the glare of the public eye upon entering a public place. The photograph merely makes a record of that which is already public.⁷⁵ Although California's common law right to privacy, as well as the State's trespass, stalking, and harassment laws, fail to protect celebrities

⁷⁰ See Cal. Civ. Code § 1708.7(a)(3)(A) (2006) (emphasis added); Nordhaus, *supra* note 35, at 302–03.

⁷¹ See Cal. Civ. Proc. § 527.6 (2005).

⁷² See *id.* at § 527.6(b); Nordhaus, *supra* note 35, at 303.

⁷³ Nordhaus, *supra* note 35, at 303.

⁷⁴ See generally *Gill v. Hearst Publ'g Co.*, 253 P.2d 441, 443 (Cal. 1953) (reversing defendant's demurrer to an amended complaint that maintained that plaintiff's cause of action must rest solely on the publication of photographs without reference to the accompanying text because the plaintiffs failed to make the allegation that defendant consented to the publication of the article); see also Phillip E. Hassman, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374, 378–81 (2005).

⁷⁵ *Gill*, 253 P.2d at 443–45. The court stated,

the mere publication of the photograph standing alone does not constitute an actionable invasion of plaintiffs' right of privacy. . . . The photograph of plaintiffs merely permitted other members of the public, who were not at plaintiffs' place of business at the time it was taken, to see them as they had voluntarily exhibited themselves. Consistent with their own voluntary assumption of this particular pose in a public place, plaintiffs' right to privacy as to this photographed incident ceased and it in effect became a part of the public domain, as to which they could not later rescind their waiver in an attempt to assert a right of privacy. In short, the photograph did not disclose anything which until then had been private, but rather only extended knowledge of the particular incident to a somewhat larger public than had actually witnessed it at the time of the occurrence.

Id.

from the paparazzi while in public places, the paparazzi do not have carte blanche to assault celebrities while in pursuit of a photograph.

2. Meritless Defense?: The Misguided Motive behind AB 381

Proponents of AB 381 argue that the law will protect public safety and celebrity privacy by eliminating the economic incentive to go to dangerous lengths to obtain photographs of celebrities.⁷⁶ However, opponents believe that the State's justification lacks merit because there is a limited market for photographs obtained through the use of dangerous tactics.⁷⁷ Frank Griffin, a longtime celebrity photographer with Los Angeles-based Bauer-Griffin, implied that Assemblywoman Montañez's view of the situation was somewhat misguided when he stated, "[y]ou've got this image of photographers driving around like Mad Max with big battering rams on their cars smashing into celebrities to take pictures of them. . . . It doesn't make any sense. It doesn't happen in the real world. It may happen in her (Montañez's) imagination."⁷⁸ According to Griffin, a paparazzo who crashes into a celebrity, or otherwise assaults a celebrity, while trying to capture the celebrity's photograph will have difficulty selling the picture to a major magazine, and thus has a limited incentive to engage in dangerous and potentially harmful behavior.⁷⁹

⁷⁶ Assemblywoman Montañez stated, "[t]his bill hits the paparazzi where it hurts—the wallet. Money is their motivation, so taking away their money will be the solution." *Legislation That Puts a "Freeze-Frame" on Aggressive Paparazzi Signed by Governor*, CAL. ST. ASSEMBLY DEMOCRATIC CAUCUS, Oct. 3, 2005, <http://democrats.assembly.ca.gov/templates/ademmain.asp?articleid=293&zoneid=2>.

⁷⁷ Harrison Sheppard, *In the Sights of the Paparazzi: Assembly Bill Would Allow Stars to Sue Aggressive Photographers*, CAL. FIRST AMENDMENT COALITION, available at http://www.cfac.org/Attachments/sue_paparazzi.htm (last visited Mar. 23, 2006). Griffin stated, "[w]ho is going to buy the pictures of a celebrity having been crashed into by rampant photographers?" *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

Photographers who crash into a celebrity or otherwise assault them often have difficulty selling that picture to major magazines . . . so they have little financial incentive to engage in such behavior. The incidents are also relatively rare.

Id.

3. Self-Policing

Opponents of the AB 381 also believe the law is unnecessary because the paparazzi and the tabloids can police themselves. One tabloid in particular, *Us Weekly*, demonstrated its willingness to change the situation in Los Angeles by banning pictures from publication that were taken by photographers who “violated traffic laws, trespassed on private property or invaded the privacy of children at school.”⁸⁰ If given the opportunity, other tabloids, as well as the paparazzi, may take a similar route. This would make AB 381 a completely irrelevant statute.

4. Crying Foul: AB 381 Provides Celebrities with Special Treatment

Another argument against AB 381 is that the law provides celebrities with special treatment. Frank Griffin questioned the motives for the law when he stated that “[t]his town lives off its celebrities. . . . I do think [Assemblywoman Montañez] is someone who is trying to climb on the bandwagon without doing proper research thinking this bill is going to attract campaign contributions from Paris Hilton and Angelina Jolie.”⁸¹ AB 381 arguably provides celebrities with special treatment because the law establishes disparate damage remedies for celebrities, whom the paparazzi target, and the members of the general public who are simply the residual victims in accidents caused by paparazzi chases.

Under AB 381, Scarlett Johansson could recover general and special damages from the paparazzo who caused her to side swipe another car, plus disgorgement of any profits received from the sale of photographs taken during the encounter.⁸² Ms. Johansson would also have a cause of action against the tabloid or agency that directed the paparazzo to take the photographs.⁸³ However, the woman and her two young daughters, in the car Ms. Johansson hit,

⁸⁰ *Us Weekly to Ban Reckless Paparazzi Shots*, GUARDIAN UNLIMITED, June 14, 2005.

⁸¹ Jennifer Myers, *Shuttering Paparazzi*, 29 (3) NEWS MEDIA & THE L. 18, 2005 WLNR 14952105, July 1, 2005.

⁸² See *supra* notes 23–24 and accompanying text.

⁸³ See *supra* note 25 and accompanying text.

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would only be able to recover for damages caused by the car accident.⁸⁴

The supporters of AB 381 tout public safety as a justification for the enactment of AB 381.⁸⁵ Nonetheless, some believe that the unequal damage remedies available to the general public and to celebrities imply that the law is motivated more by the desire to garner celebrity favoritism through the further lining of celebrity pockets, and possible lining of supporting politicians' coffers, than a desire to protect public safety.⁸⁶ Assemblywoman Montañez acknowledged the fortuitousness of the circumstances when she stated,

[t]here is no better situation than to have a Governor who can look at a bill and be an eyewitness—and personal witness—to exactly the crime that we're going after. . . . [W]e're happy that the Governor signed a law that would prevent future celebrities . . . from becoming victims the way he and his family were a couple years back.⁸⁷

C. *Chilling the First Amendment and Frivolous Lawsuits*

AB 381 creates further controversy because some believe that it will be used to chill the First Amendment and create frivolous lawsuits. According to the California Newspapers Publishers Association, “[u]nder AB 381, newsworthy persons with a bone to pick with the press will file frivolous lawsuits against journalists and the newspapers that employ them in an attempt to chill the

⁸⁴ See *supra* notes 22–24 and accompanying text.

⁸⁵ Bill Hodgeman of the Los Angeles District Attorney's office, which supports AB 381, stated, “[i]n certain instances the paparazzi photographers are violating California criminal laws and my overarching concern about that is given this sort of behavior it strikes me as inevitable that someone is going to get seriously hurt or killed.” Jennifer Myers, *Shuttering Paparazzi*, 29 (3) *NEWS MEDIA & THE L.* 18, 2005 WLNR 14952105, July 1, 2005.

⁸⁶ *Id.*

⁸⁷ *Legislation That Puts a “Freeze-Frame” on Aggressive Paparazzi Signed by Governor*, CAL. ST. ASSEMBLY DEMOCRATIC CAUCUS, Oct. 3, 2005, <http://democrats.assembly.ca.gov/templates/ademmain.asp?articleid=293&zoneid=2>.

public's right to know."⁸⁸ Opponents argue that AB 381 will be wrongfully employed by celebrities against the paparazzi and the tabloids in an attempt to keep their names and faces off the racks at supermarkets.⁸⁹ In addition, opponents argue that AB 381 threatens the First Amendment rights of mainstream journalists because the law does not simply provide protections for celebrities against the paparazzi.⁹⁰ Any individual involved in scandalous behavior will have every incentive to misuse the statute.⁹¹

II. TWO APPROACHES TO THE PRESS'S RIGHT TO GATHER NEWS

The jurisprudence regarding newsgathering torts greatly affects the struggle to find a middle ground between celebrity privacy rights and the rights of the paparazzi. Some courts take the approach that "the tort taints the speech," and thus place limits on the press's First Amendment right to gather news.⁹² Other courts take the approach that "the speech protects the tort," and allow members of the press to hide behind the First Amendment in the event that tortious conduct occurs during the course of newsgathering.⁹³ The approach taken by the California courts with regard to newsgathering torts may ultimately determine the fate of AB 381.

⁸⁸ Letter from Thomas W. Newton, General Counsel, California Newspaper Publishers Association, to Cindy Montañez, California State Assembly, Aug. 3, 2005, *available at* <http://www.cnpa.com/Leg/GA/Letters/05-06/AB381.htm>.

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *Id.*

News subjects involved in scandal, crime and government corruption have every incentive to interfere with the newsgathering process and the public's right to know. AB 381 would provide criminals and others in the spotlight with a powerful new tool to tie journalists and newspapers up in court in an attempt to stop public exposure of their behavior. Essentially, AB 381 would create liability whenever a reporter gets too close to a news subject and appears to have the present ability to get even closer.

Id.

⁹² *See infra* Part II.B.

⁹³ *See infra* Part II.C.

A. The First Amendment Right to a Free Press

The First Amendment declares the right to a free press.⁹⁴ Nonetheless, advocates of AB 381 argue that there should be limits on the means by which information may be gathered and that the paparazzi should not be permitted to use the First Amendment as a shield to protect dangerous and harmful behavior.⁹⁵ The constitutional guarantee of freedom of the press, however, does not disappear simply because the reporting involves the publication of a person's name or likeness, potentially invading that person's privacy.⁹⁶ Instead, the law expands the press's freedom to publish information when the person whose name or likeness the press seeks to publish is a celebrity.⁹⁷ Privacy jurisprudence indicates that the paparazzi have every right to photograph celebrities driving down Robertson Boulevard and drunkenly stumbling outside the Roosevelt Hotel.⁹⁸ Still, the paparazzi do not have a completely unrestricted right to gather information about celebrities simply by virtue of being members of the press.⁹⁹

The First Amendment gives the press the right to inform the public about matters of legitimate public interest absent a compelling state interest to the contrary.¹⁰⁰ Following this reasoning, if information about a celebrity's life is a matter of

⁹⁴ U.S. CONST. amend. I, "Congress shall make no law . . . abridging the freedom of speech, or of the press."

⁹⁵ See AB 381 Bill Analysis, *supra* note 26.

⁹⁶ See *Eastwood v. Super. Ct. of L.A. County*, 149 Cal. App. 3d 409, 421–22 (1983). The court stated,

[f]reedom of the press is constitutionally guaranteed, and the publication of daily news is an acceptable and necessary function in the life of the community.

The scope of the privilege extends to almost all reporting of recent events even though it involves the publication of a purely private person's name or likeness.

Id. at 422.

⁹⁷ *Id.*

⁹⁸ See *supra* notes 68–73.

⁹⁹ See *infra* Part III.A–B.

¹⁰⁰ See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (holding that the state interest in protecting the identity of a juvenile offender could not justify the statute's imposition of criminal sanctions on the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper). The Court stated, "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Id.*

legitimate public interest and no compelling state interest justifies the suppression of the information, then the First Amendment should protect the paparazzi's right to inform the public about such a matter. However, because the courts distinguish between the press's right to publish news and the press's right to gather news, and afford the right to publish news greater First Amendment protection, the right to inform the public does not equate to an unrestrained right to obtain information.¹⁰¹

B. The Tort Taints the Speech: Limiting the Press's Right to Gather News

Courts have recognized limits on the press's right to gather news.¹⁰² The *Dietemann* court found that "[t]he First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."¹⁰³ The rulings that recognize limits on the press's right to gather news support imposing liability for newsgathering torts and imply that the "tort taints the . . . speech."¹⁰⁴

1. Federal Cases

Courts have determined that newsmen may not violate generally applicable contract¹⁰⁵ or tort laws¹⁰⁶ in the name of the

¹⁰¹ See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 496 (Cal. 1998). The court stated, "the constitutional protection accorded newsgathering, if any, is far narrower than the protection surrounding the publication of truthful material; consequently, the fact that a reporter may be seeking 'newsworthy' material does not in itself privilege the investigatory activity." *Id.*

¹⁰² *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

¹⁰³ *Dietemann*, 449 F.2d at 249.

¹⁰⁴ See Andrew B. Sims, *Food for the Lions: Excessive Damages For Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 521-22 (1998) (arguing that the focus of the debate should not be on limiting media liability for newsgathering torts but instead should be on preventing the award of excessive damages for newsgathering torts). "If the argument . . . is, in effect, that the speech should protect the tort, a contrary argument might be made that the tort 'taints' the ensuing speech, stripping it of First Amendment protection." *Id.*

¹⁰⁵ See *Cowles Media*, 501 U.S. at 670.

First Amendment. In *Cohen v. Cowles Media*, the United States Supreme Court held that an informer was entitled to receive compensatory damages from a publisher that breached its confidentiality agreement with the source under a theory of promissory estoppel.¹⁰⁷ In *Dietemann v. Time*, the Ninth Circuit held that the First Amendment did not permit an individual to invade another's home with a hidden camera and concealed electronic equipment simply because that individual was gathering news.¹⁰⁸

The most famous case involving the paparazzi is *Galella v. Onassis*, in which Jacqueline Kennedy Onassis obtained an injunction against paparazzo Donald Galella after suing him for harassment.¹⁰⁹ The Second Circuit upheld the injunction reasoning that while Jackie Onassis was a public figure, and therefore subject to news coverage, Galella's "constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable."¹¹⁰ The Second Circuit acknowledged the limits on the press's right to gather news as well as the unique character of the paparazzi when it stated, "[r]elief must be tailored to protect Mrs. Onassis from the 'paparazzo' attack which distinguishes Galella's behavior from that of other photographers."¹¹¹ On the other hand, the court also recognized that the injunction must not be broader than required and should not "unnecessarily infringe on reasonable efforts to 'cover' Jackie Onassis."¹¹² Not even American "royalty" could gain absolute protection from the prying eyes of the paparazzi.

¹⁰⁶ See *Dietemann*, 449 F.2d at 249.

¹⁰⁷ See *Cowles Media*, 501 U.S. at 672. The Court stated, "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." *Id.* at 669.

¹⁰⁸ See *Dietemann*, 449 F.2d at 249, 252.

¹⁰⁹ *Galella v. Onassis*, 487 F.2d 986, 991-92 (2d Cir. 1973).

¹¹⁰ *Id.* at 995.

¹¹¹ *Id.* at 998.

¹¹² *Id.*

2. California Cases

California courts have also recognized limits on the press's right to gather news.¹¹³ In *KOVR-TV v. Superior Court*, an action against a television station for intentional infliction of emotional distress, the Court of Appeal of California held that the First Amendment did not protect a television news reporter's on-camera interview with three young children when, during the interview, the reporter informed the children that two of their playmates had been murdered by the playmates' mother, who then committed suicide.¹¹⁴ The court explained,

[i]f indeed defendant sought to elicit an emotional reaction from the minors for the voyeuristic titillation of KOVR-TV's viewing audience, this is shameless exploitation of defenseless children, pure and simple, not the gathering of news which the public has a right to know. A free press is not threatened by requiring its agents to operate within the bounds of basic decency.¹¹⁵

In *Miller v. National Broadcasting Company*, the Court of Appeal of California held that First Amendment protection for newsgathering did not immunize a television camera crew against a wife's action for invasion of privacy by intrusion when the crew entered into her husband's bedroom without consent during an extremely sensitive time, due to her husband's heart seizure.¹¹⁶ The court reasoned that, in this instance, the obligation not to enter private premises without permission did not place an impermissible burden on newsgatherers, nor was it likely to have a chilling effect on the First Amendment.¹¹⁷

¹¹³ See *KOVR-TV v. Super. Ct. of Sacramento County*, 31 Cal. App. 4th 1023 (1995); *Miller v. Nat'l Broad. Co.*, 187 Cal. App. 3d 1463 (1986).

¹¹⁴ See *KOVR-TV*, 31 Cal. App. 4th at 1027, 1032.

¹¹⁵ *Id.* at 1032.

¹¹⁶ See *Miller*, 187 Cal. App. 3d at 1469, 1484.

¹¹⁷ *Id.* at 1492-93. The court stated,

the obligation not to make unauthorized entry into the private premises of individuals like the Millers does not place an impermissible burden on newsgatherers, nor is it likely to have a chilling effect on the exercise of First Amendment rights. To hold otherwise might have extraordinarily chilling

C. *The Speech Protects the Tort: Cases Protecting the Press's Right to Gather News*

While both the federal courts and the California courts have held that the First Amendment does not shield newsmen from punishment for torts committed in the newsgathering process, one United States Supreme Court justice cautioned against distinguishing between the right to publish news and the right to gather news. In his dissent in *Branzburg v. Hayes*, Justice Stewart warned that “[n]o less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.”¹¹⁸ Echoing Justice Stewart’s advice, some courts suggest that the First Amendment provides the press with some level of protection from liability for newsgathering torts, and support the argument that the First Amendment should protect against liability for the tort on an “anti-circumvention” theory.¹¹⁹ Anti-circumvention theory reasons that if speech is constitutionally protected, then the courts should also protect the means of obtaining that speech if the absence of protection would allow the plaintiff to circumvent the First Amendment.¹²⁰

1. Federal Cases

In *Desnick v. American Broadcasting Company*, the producer of ABC’s television show *PrimeTime Live* sent individuals manned with concealed cameras to the offices of Desnick Eye Center.¹²¹ These individuals posed as patients, requested eye exams, and secretly videotaped two ophthalmic surgeons.¹²² The ABC

implications for all of us; instead of a zone of privacy protecting our secluded moments, a climate of fear might surround us instead.

Id.

¹¹⁸ *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) (holding that the public interest in law enforcement and in ensuring effective grand jury proceedings was not insufficient to override the consequential, but uncertain, burden on news gathering).

¹¹⁹ See Sims, *supra* note 105, at 520–21.

¹²⁰ *Id.* at 520–21.

¹²¹ 44 F.3d 1345, 1347–48 (7th Cir. 1995).

¹²² *Id.*

producer had originally told Dr. Desnick that *PrimeTime Live* wanted to air a segment on large cataract practices. Based on this information, Dr. Desnick permitted an ABC crew to film the Center's main office in Chicago, to film a cataract operation "live," and to interview doctors, technicians and patients.¹²³ However, ABC actually produced and broadcasted a program on Medicare fraud involving elderly patients undergoing unnecessary cataract surgeries.¹²⁴ The Desnick Eye Center and the two surgeons caught on film sued for defamation and trespass, among other torts.¹²⁵ The Seventh Circuit affirmed the lower court's dismissal of the plaintiffs' trespass claim even though the "test patients" gained access to the plaintiff's premises by misrepresentation.¹²⁶ Judge Posner implied that the First Amendment provides the press with some level of protection from liability for newsgathering torts when he stated that "[i]f the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it . . . then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly."¹²⁷

2. California Cases

California courts have also suggested that the First Amendment provides the press with some protection from liability for newsgathering torts. In *Nicholson v. McClatchy Newspapers*, the Court of Appeal of California held that the press's right to seek information is protected so long as the journalists employ ordinary newsgathering techniques.¹²⁸ The court stated, "the constitutional

¹²³ *Id.*

¹²⁴ *Id.* at 1348–49.

¹²⁵ *Id.* at 1349.

¹²⁶ *Id.* at 1351–55.

¹²⁷ *Id.* at 1355.

¹²⁸ *Nicholson v. McClatchy Newspapers*, 177 Cal. App. 3d 509, 519 (1986). The court stated that ordinary newsgathering techniques included

asking persons questions, including those with confidential or restricted information. While the government may desire to keep some proceedings confidential and may impose the duty upon participants to maintain confidentiality, it may not impose criminal or civil liability upon the press for obtaining and publishing newsworthy information through routine reporting techniques.

protection accorded normal news-gathering activities does not depend upon the characterization of the cause of action seeking to impose sanctions upon its exercise,” implying that the State cannot restrict the press’s right to gather news by creating laws that render ordinary newsgathering techniques tortious.¹²⁹ In *Anti-Defamation League of B’Nai B’Rith v. Superior Court of the City and County of San Francisco*, the Court of Appeal of California held that the First Amendment immunized journalists from liability for violating a California statute imposing liability on individuals who intentionally disclose information, that is otherwise not public, which they know was obtained from personal information maintained by the state or federal government.¹³⁰ The court stated, “[we] do not believe the alleged unlawfulness of petitioners’ information-gathering activities is dispositive of their right to the protection of the First Amendment,” implying that a journalist does not automatically lose First Amendment protection when the journalist commits a tort in the course of newsgathering.¹³¹

The courts have yet to come to a consensus as to how much protection, if any at all, should be provided to the press against liability for newsgathering torts.¹³² While some rulings indicate that the First Amendment provides no protection for newsgathering torts,¹³³ others suggest that in certain instances the First Amendment will shield the press from liability.¹³⁴

Id. at 519–20.

The court also stated, “[s]ince those activities are protected by the First Amendment, state law may not impinge upon them by characterizing the activities as tortious.” *Id.* at 520.

¹²⁹ *Id.* at 520.

¹³⁰ *Anti-Defamation League of B’Nai B’Rith v. Super. Ct. of the City and County of S.F.*, 67 Cal. App. 4th 1072 (1998).

¹³¹ *Id.* at 1091. The court indicated, however, that a journalist’s First Amendment protection against tort liability, when in fact applicable, only applied if the journalist was acting as a journalist when committing the tort. The court stated, “[p]etitioners would be entitled to that protection even if they did violate the statute, *but only if they obtained, used and disseminated the information at issue as journalists.*” *Id.* (emphasis in the original).

¹³² *See supra* Part II.

¹³³ *See supra* Part II.B.

¹³⁴ *See supra* Part II.C.

III. SINGLED OUT: A THIRD APPROACH TO NEWSGATHERING TORTS

In determining whether to hold members of the press liable for newsgathering torts, some courts refuse to impose liability on the theory that the speech protects the tort, while others impose liability on the grounds that the tort taints the speech. However, courts should take an entirely different approach in determining whether to impose liability for newsgathering torts. The Fourth Circuit's decision in *Food Lion, Inc. v. Capital Cities/ABC* indicates that a law imposing liability for newsgathering torts will not survive a constitutional challenge if the law singles out the press and specifically targets a limited portion of the media, unless that law serves a compelling state interest that may not be achieved in the absence of the legislation.¹³⁵ Under this approach, AB 381 would not survive a constitutional challenge.

A. *The Standard*

Judicial antipathy towards legislation that singles out the press and specifically targets a limited portion of the media predates *Food Lion*. In *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, the United States Supreme Court overturned a Minnesota use tax on ink and paper used in publications.¹³⁶ While the State argued that the tax was part of the generally applicable scheme of taxation, the Court determined that the tax violated the First Amendment because the tax singled out the press for differential treatment¹³⁷ and targeted a small group of newspapers.¹³⁸ The Court stated, "differential treatment, unless

¹³⁵ *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 194 F.3d 505, 521–22 (4th Cir. 1999).

¹³⁶ *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575, 593 (1983).

¹³⁷ *Id.* at 581. The Court stated, "Minnesota . . . has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision . . . is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota law."

Id.

¹³⁸ *Id.* at 591–92. The Court stated,

justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.”¹³⁹

In *Pitt News v. Pappert*, the Third Circuit struck down a Pennsylvania law that banned advertisers from paying for alcoholic beverage advertisements in media affiliated with universities.¹⁴⁰ The court stated that although combating underage or abusive drinking was a compelling purpose, the State could employ means that would be far more direct and effective and would not infringe on First Amendment rights.¹⁴¹ The Third Circuit warned, “courts must be wary that taxes, regulatory laws, and other laws that impose financial burdens are not used to undermine freedom of the press and freedom of speech.”¹⁴² However, the Third Circuit, citing *Minneapolis Star & Tribune*, affirmed the understanding that the states and the federal government may subject the media to generally applicable laws without offending the Constitution.¹⁴³

While not all laws that single out the press or a small group of speakers will ultimately be held unconstitutional, such laws are presumptively invalid.¹⁴⁴ Significantly, the law need not represent a purposeful attempt to restrict First Amendment activities in order to be presumptively unconstitutional.¹⁴⁵ Instead, the presumption

Minnesota’s ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the \$100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax. . . . Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.

Id.

¹³⁹ *Id.* at 585.

¹⁴⁰ 379 F.3d 96 (3rd Cir. 2004).

¹⁴¹ *Id.* at 106, 108.

¹⁴² *Id.* at 110.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 111.

¹⁴⁵ *Id.* (citing *Leathers v. Medlock*, 499 U.S. 437, 448 (1991), which held that a state law that imposed a sales tax on cable television services while excluding and exempting other segments of the media was constitutional because the tax was not directed at, nor presented any danger of suppressing particular ideas).

applies if the law is “structured so as to raise suspicion” of the intent to impede expression protected by the First Amendment.¹⁴⁶

In *Minneapolis Star & Tribune*, the United States Supreme Court applied the force of the First Amendment to overturn a facially discriminatory tax.¹⁴⁷ The Court, however, did not limit its holding to tax laws, and thus created the opportunity to strike down other types of legislation that appeared to be facially discriminatory.¹⁴⁸ While the Fourth Circuit in *Food Lion* did not use *Minneapolis Star & Tribune* to strike down facially discriminatory legislation, the Fourth Circuit did suggest that the First Amendment protects journalists from liability for torts committed during the newsgathering process if the tort in question singles out the press and specifically targets a portion of the media.¹⁴⁹ In *Food Lion*, the Fourth Circuit distinguished laws of general applicability from laws that single out and target the press.¹⁵⁰ If the decision in *Food Lion* were followed in California, the First Amendment would not shield the paparazzi from liability under California’s general assault law, but the First Amendment would provide protection against discriminatory laws such as AB 381.

¹⁴⁶ *Pitt News*, 379 F.3d at 111; *Leathers*, 499 U.S. at 448.

¹⁴⁷ *Minneapolis Star & Tribune v. Minn. Comm’r of Revenue*, 460 U.S. 575, 593 (1983).

¹⁴⁸ The Court did this by using general language which struck down as unconstitutional laws which singled out the press without a compelling state interest which justified the burden imposed on the press. *Id.* at 585.

¹⁴⁹ *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 194 F.3d 505, 521–22 (4th Cir. 1999). The Fourth Circuit also stated,

[t]he key inquiry in *Cowles* was whether the law of promissory estoppel was a generally applicable law. The Court began its analysis with some examples of generally applicable laws that must be obeyed by the press, such as those relating to copyright, labor, antitrust, and tax. . . . The torts Dale and Barnett committed, breach of the duty of loyalty and trespass, fit neatly into the *Cowles* framework. Neither tort targets or singles out the press. . . . Here, as in *Cowles*, heightened scrutiny does not apply because the tort laws (breach of duty of loyalty and trespass) do not single out the press or have more than an incidental effect upon its work.

Id.

¹⁵⁰ *Id.*

B. *The Standard Applied to AB 381*

Supporters of AB 381 may argue that it is a generally applicable law that does not apply solely to members of the press but would also apply to the crazed fan who chases down a celebrity in a car as a means to obtain that celebrity's photograph. However, the law's disgorgement provisions provide strong support for the notion that AB 381 singles out the press and specifically targets the paparazzi.¹⁵¹ Certainly, in theory, a fan may sell a picture to the tabloids and be subject to AB 381's disgorgement provisions as a consequence. Nonetheless, California did not enact AB 381 to protect celebrities from such fans.¹⁵² The State enacted AB 381 to deter and punish those individuals who capture celebrities' images purely as a means to turn a profit.¹⁵³ Furthermore, the State tailored AB 381 to apply specifically to the actions of the paparazzi and not to the actions of mainstream journalists.¹⁵⁴

According to the California Newspaper Publishers Association, AB 381 "makes those engaged in First Amendment protected activities susceptible to special penalties for which the rest of society is exempt."¹⁵⁵ Like Minnesota's use tax on paper and ink, AB 381 should be considered discriminatory on its face.¹⁵⁶ Under the Court's decision in *Minneapolis Star & Tribune*, in order for a statute that singles out the press for differential treatment to survive a constitutional challenge, the State's interest must be "of compelling importance that it cannot achieve" without the regulation.¹⁵⁷ In other words, the regulation must satisfy the "strict scrutiny" standard of review.¹⁵⁸

¹⁵¹ Cal. Civ. Code § 1708.8(d) (2006); *see supra* note 24.

¹⁵² *See* AB 381 Bill Analysis, *supra* note 26; *supra* note 26 and accompanying text.

¹⁵³ AB 381 Bill Analysis, *supra* note 26.

¹⁵⁴ *Id.*

¹⁵⁵ *See* Letter from Thomas W. Newton, General Counsel, California Newspaper Publishers Association, to Cindy Montañez, California State Assembly, Aug. 3, 2005, available at <http://www.cnpa.com/Leg/GA/Letters/05-06/AB381.htm>.

¹⁵⁶ *Minneapolis Star & Tribune v. Minn. Comm'r of Revenue*, 460 U.S. 575, 581 (1983).

¹⁵⁷ *Id.* at 585.

¹⁵⁸ *See* *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 198, 231 (1987) (holding that Arkansas' regulation that selectively applied sales tax to certain forms of publications was unconstitutional). The Court stated that in order to justify differential

AB 381 raises a presumption of unconstitutionality because it singles out the press and specifically targets the paparazzi. As the Third Circuit found in *Pitt News*, “[o]nce the presumption of unconstitutionality arises, it can be overcome only by showing that the challenged law is needed to serve a compelling interest.”¹⁵⁹ AB 381 threatens to chill the First Amendment.¹⁶⁰ The threat to free expression outweighs any interests asserted by the State and other advocates to justify the law’s enactment. AB 381 will not pass a strict scrutiny test because the statute does not serve a compelling interest that cannot be protected without the regulation.¹⁶¹ AB 381 is an unnecessary and unreasonable law because there is a limited market for pictures obtained through dangerous tactics.¹⁶² In addition, the paparazzi may be restrained through means that do not implicate the First Amendment because celebrities can rely on current assault law, which already provides adequate protection,¹⁶³ and the tabloids can police themselves.¹⁶⁴ The State’s interests in protecting celebrity privacy, celebrity safety and public safety therefore cannot on their own justify the differential treatment of the paparazzi.¹⁶⁵

treatment, “the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Id.*

¹⁵⁹ *Pitt News v. Pappert*, 379 F.3d 96, 111 (3d Cir. 2004).

¹⁶⁰ *See supra* Part I.C.

¹⁶¹ *See supra* Part I.C; *Minneapolis Star & Tribune v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

¹⁶² *See supra* Part I.B.2.

¹⁶³ *See supra* notes 66–67 and accompanying text.

¹⁶⁴ *See supra* Part I.B.3.

¹⁶⁵ *Minneapolis Star & Tribune*, 460 U.S. at 586. The Court stated, “The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.”

Id.

CONCLUSION

In 1960, Federico Fellini released his much celebrated film *La Dolce Vita*. The word “paparazzi” derives from a character in Fellini’s film, a photographer named “Paparazzo.”¹⁶⁶ In Italian, the word “paparazzo” means “sparrow.”¹⁶⁷ Fellini reportedly gave the character this moniker because he believed that the press photographers who hounded celebrities looked like “little hungry birds.”¹⁶⁸ Almost half a century later, a much lesser known director released a much less celebrated film entitled *Paparazzi*.¹⁶⁹ In *Paparazzi*, the main paparazzi character, Rex Harper, indicates that while so much has changed in the almost half century since the release of Fellini’s film (and over a full century since Warren and Brandeis’ prophetic statements), so much remains the same.¹⁷⁰ Harper states, “[t]he public wants raw and real and that’s what we give ’em. Let me tell you something, my friends, we’re the last of the real hunters.”¹⁷¹

Courts have searched for a middle ground between celebrities’ right to privacy and the press’s right to gather information about celebrities for almost as long as celebrities have existed. While no members of the press, including the paparazzi, are completely immune from liability for torts committed in the process of gathering news, *Food Lion* indicates that tort laws that single out the press for differential treatment and specifically target a limited portion of the media will not survive a First Amendment challenge.¹⁷² In passing AB 381, California attempted to restrain the overly aggressive paparazzi. Nonetheless, if the Ninth Circuit were to follow the Fourth Circuit’s opinion in *Food Lion*, AB 381

¹⁶⁶ See Internet Movie Database, Trivia for *La Dolce Vita*, <http://www.imdb.com/title/tt0053779/trivia> (last visited Apr. 22, 2006).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ See Internet Movie Data Base, *Paparazzi*, <http://www.imdb.com/title/tt0338325/> (last visited Apr. 22, 2006).

¹⁷⁰ See Internet Movie Data Base, Plot Summary for *Paparazzi*, <http://www.imdb.com/title/tt0338325/plotsummary>.

¹⁷¹ See Internet Movie Data Base, Memorable Quotes From *Paparazzi*, <http://www.imdb.com/title/tt0338325/quotes> (last visited Apr. 22, 2006).

¹⁷² See *Food Lion, Inc. v. Capital Cities/ABC, Inc.* 194 F.3d 505, 521–22 (4th Cir. 1999).

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would not survive a constitutional challenge, and therefore the State of California would have to find another way to hunt the hunters.