

# Pace Intellectual Property, Sports & Entertainment Law Forum

---

Volume 4  
Issue 2 *Spring 2014*

Article 9

---

April 2014

## Protecting a Celebrity's Child from Harassment: Is California's Amendment Penal Code § 11414 Too Vague to be Constitutional?

Michelle N. Robinson  
*Pace University School of Law*

Follow this and additional works at: <https://digitalcommons.pace.edu/pipself>



Part of the [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Privacy Law Commons](#)

---

### Recommended Citation

Michelle N. Robinson, *Protecting a Celebrity's Child from Harassment: Is California's Amendment Penal Code § 11414 Too Vague to be Constitutional?*, 4 Pace. Intell. Prop. Sports & Ent. L.F. 559 (2014).

DOI: <https://doi.org/10.58948/2329-9894.1040>

Available at: <https://digitalcommons.pace.edu/pipself/vol4/iss2/9>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Intellectual Property, Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

---

## Protecting a Celebrity's Child from Harassment: Is California's Amendment Penal Code § 11414 Too Vague to be Constitutional?

### Abstract

This Note will describe a brief history of the legal attempts to restrict the paparazzi and the legislative history behind A.B. 3592 and its amendment, S.B. 606. The bills are controversial and have received a significant amount of criticism, due to the fact that they restrict speech by essentially prohibiting paparazzi, known for their harassing behavior, from taking pictures of the children of celebrities. The Note will conclude with an analysis utilizing the void-for-vagueness doctrine of whether the bill is in violation of the First Amendment.

### Keywords

celebrities, california, harassment, paparazzi

PACE UNIVERSITY  
SCHOOL OF LAW

PACE INTELLECTUAL PROPERTY,  
SPORTS & ENTERTAINMENT  
LAW FORUM

---

Volume 4

Spring 2014

Issue 2

---

*Note*

**Protecting a Celebrity's Child From  
Harassment: Is California's  
Amendment Penal Code § 11414  
Too Vague to be Constitutional?**

*Michelle N. Robinson\**

---

\* Michelle N. Robinson is a 3L at Pace Law School. She graduated from University of Maryland-College Park with a degree in Sociology and Criminology/Criminal Justice.

### ***Abstract***

This Note will describe a brief history of the legal attempts to restrict the paparazzi and the legislative history behind A.B. 3592 and its amendment, S.B. 606. The bills are controversial and have received a significant amount of criticism, due to the fact that they restrict speech by essentially prohibiting paparazzi, known for their harassing behavior, from taking pictures of the children of celebrities. The Note will conclude with an analysis utilizing the void-for-vagueness doctrine of whether the bill is in violation of the First Amendment.

### ***Table of Contents***

INTRODUCTION.....	560
I. BRIEF HISTORY OF LEGAL ATTEMPTS TO PROTECT CELEBRITIES .....	567
II. DISCUSSION OF A.B. 3592, CODIFIED AS PENAL CODE § 11411 .....	575
III. DISCUSSION OF S.B. 606 .....	577
IV. CRITICISM OF S.B. 606 .....	584
V. TOO VAGUE TO BE CONSTITUTIONAL .....	587
CONCLUSION.....	596

### **INTRODUCTION**

Imagine a young child who is terrorized because of her parents' occupation by peers, neighbors, or even strangers. They are constantly asking her questions, making derogatory comments about her parents, physically attacking her, and even jumping from behind trees or cars to frighten her. She is emotionally traumatized and terrified to go outside to play with her friends, go to school, or visit the local shopping mall. It is hard to imagine how a parent can cope with this situation. One way for parents to prevent this is by changing their occupations. But

for most parents, this is not an option. Something should be done to prevent this type of harassment.

California recognized that children are harassed because of their parents' occupations. This is especially the case for parents who are entertainers, public officials, or law enforcement officers. Since the advent of America's fascination with celebrities in the press and social media, there have been numerous reports of members of the media doing almost anything in their power to capture and publish the image of a celebrity's child.<sup>1</sup> For example, many tabloid magazines are willing to pay millions of dollars to feature the first image of a celebrity's newborn baby on the cover of their magazine. In July 2013, *Newsday* reported that Brad Pitt and Angelina Jolie received \$15 million for the first images of their twins, Knox Leon & Vivienne Marcheline.<sup>2</sup>

The media chases and harasses celebrity parents who want to keep their child out of the spotlight so that they can photograph the celebrity's child. For example, Beyoncé Knowles and Jay-Z decided not to sell the image of their daughter, Blue Ivy, to the media.<sup>3</sup> As a result, the media relentlessly tried to pho-

---

<sup>1</sup> "Celebrity" is a broad term that describes a famous person. THE AMERICAN HERITAGE COLLEGE DICTIONARY 231 (4th ed. 2004).

<sup>2</sup> Lacey Rose, *In Pictures: Most Expensive Celebrity Pictures*, FORBES (July 1, 2009, 4:00 PM), [http://www.forbes.com/2009/07/01/michael-jackson-magazine-business-media-jackson\\_slide\\_2.html](http://www.forbes.com/2009/07/01/michael-jackson-magazine-business-media-jackson_slide_2.html); *Celebrity Baby Scoop, 10 Most Expensive Celebrity Photos to Date*, NEWSDAY (July 10, 2013, 7:00 AM) <http://long-island.newsday.com/kids/long-island-parent-talk-1.3679226/10-most-expensive-celebrity-baby-photos-to-date-1.5612593>.

<sup>3</sup> Sarah Fitzmaurice & Nadia Mendoza, *'She Wanted to Do It This Way': Beyoncé's Friend, Celebrity Stylist June Ambrose, Reveals Why Singer and Jay-Z Chose to Forfeit Price Tag on*

tograph the baby girl. To protect her child from the paparazzi,<sup>4</sup> Beyoncé covered little Blue's face with a blanket or pressed her daughter's face into her chest when out in public.<sup>5</sup> These images are seen in almost every candid image posted of the mega-star and her daughter.<sup>6</sup>

For the most part, there are no reports of Beyoncé or her child being physically harmed by the paparazzi in their unrelenting attempts to photograph her daughter. But the media can be overly aggressive and cause severe damage, which was unfortunately demonstrated in 1997 when Princess Diana was killed.<sup>7</sup> More recently in 2011, Tori Spelling, who was pregnant at the time, was chased by the paparazzi while driving her children to school and crashed into the wall of her children's school.<sup>8</sup> How-

---

*First Pictures of Blue*, MAIL ONLINE (Feb. 12, 2012, 12:01 AM), <http://www.dailymail.co.uk/tvshowbiz/article-2100081/Blue-Ivy-Carter-pictures-Beyonce-Jay-Z-chose-forfeit-price-tag-baby-photos.html>.

<sup>4</sup> The term "paparazzi" is the plural word for paparazzo. A paparazzo is a "freelance photographer who pursues celebrities to take candid pictures for sale to magazines and newspapers." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1006 (4th ed. 2004).

<sup>5</sup> Nadia Mendoza, *Cute Feet – But We Want to See Her Face! Jay-Z Keeps Blue Ivy Covered Up as Her Little Legs Poke Out Beneath Protective Blanket*, MAIL ONLINE (June 4, 2012, 10:32 AM), <http://www.dailymail.co.uk/tvshowbiz/article-2154460/Jay-Z-keeps-Blue-Ivy-covered-little-legs-poke-beneath-protective-blanket.html>.

<sup>6</sup> *Id.*

<sup>7</sup> The Learning Network, *Aug. 31, 1997 Princess Diana Is Killed Car Crash*, N.Y. TIMES (Aug. 31, 2011, 4:41 AM), <http://learning.blogs.nytimes.com/2011/08/31/aug-31-1997-princess-diana-is-killed-in-car-crash/>.

<sup>8</sup> Nancy Dillon, *Tori Spelling Gets in 'Pretty Big' Car Crash: Pregnant Star Blames Paparazzo for Causing Accident*, N.Y. DAILY NEWS (July 14, 2011, 9:23 AM),

ever, the crash did not stop the aggressive photographers. The photographers continued to snap pictures after she collided with the building.<sup>9</sup> They were eventually chased away by other parents.<sup>10</sup> Fortunately, the damage was minimal.

Children of celebrities are not the only children targeted by overzealous individuals. Families of law enforcement officials are also threatened with violence and harassed by individuals who are resentful towards law enforcement officers.<sup>11</sup> For example, in February 2013, Christopher Dorner targeted police officers and their families, stating in his manifesto that he intended to “destroy, exploit and seize designated targets.”<sup>12</sup> Dorner was a former Los Angeles Police Department (LAPD) Officer whose employment was terminated after he accused his training officer of assaulting a mentally ill man.<sup>13</sup> A year after the LAPD disciplinary panel terminated his employment, the Los Angeles County Superior Court

---

<http://www.nydailynews.com/entertainment/gossip/tori-spelling-pretty-big-car-crash-pregnant-star-blames-paparazzo-causing-accident-article-1.131844>; Tim Kenneally, *Pregnant Tori Spelling Survives Accident After Paparazzi Chase*, WRAP (June 13, 2011, 5:07 PM),

<http://www.thewrap.com/tv/article/pregnant-tori-spelling-survives-accident-after-paparazzi-chase-28199>.

<sup>9</sup> Kenneally, *supra* note 8.

<sup>10</sup> *Id.*

<sup>11</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Pub. Safety*, 2013-14 Leg., Reg. Sess. 4 (Cal. 2013).

<sup>12</sup> Joel Rubin et al., *Investigators Focus on What Makes Dorner Tick*, L.A. TIMES (Feb. 11, 2013), <http://articles.latimes.com/2013/feb/11/local/la-me-dorner-hunt-20130211>.

<sup>13</sup> Jack Leonard et al., *Dorner's LAPD Firing Case Hinged on Credibility*, L.A. TIMES (Feb. 10, 2013), <http://articles.latimes.com/2013/feb/10/local/la-me-lapd-dorner-20130211>.

reexamined his case and determined that the disciplinary committee did not have sufficient evidence to terminate Dorner's employment. However, the court did not overturn the disciplinary panel's decision to fire Dorner.<sup>14</sup> As a result, Dorner vowed to seek revenge in his online manifesto. In the manifesto he claimed that he was "unjustly fired" and that "[the disciplinary panel members] lack of ethics and conspir[acy] to wrong a just individual are over."<sup>15</sup> He further stated that the panel members' unjust behavior would result in "deadly consequences" for them and their loved ones.<sup>16</sup> Dorner killed several people, including a police officer, a sheriff's deputy and the daughter of a former LAPD Captain, who defended Dorner at the disciplinary hearing.<sup>17</sup> Other police officers, such as Phil Tingirides, a LAPD Captain who was a member of the disciplinary panel that

---

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Jens Erik Gould, *After Christopher Dorner, What Next for the LAPD?*, TIME (Feb. 14, 2013), <http://nation.time.com/2013/02/14/after-christopher-dorner-what-next-for-the-lapd/> ("Dorner is suspected of killing a total of four people,, including a Riverside, Calif., police officer, a San Bernardino sheriff's deputy and the daughter of a former police captain, all part of a one-man war against the Los Angeles Police Department over what he called the force's 'lying, racism' and 'cover-ups.'"); Jack Leonard et al., *Police Say Ex-Cop Was Bent on Exacting Revenge*, L.A. TIMES (Feb. 7, 2013), <http://articles.latimes.com/2013/feb/07/local/la-me-dorner-profile-20130207/2> ("Dorner spent the next couple of years unsuccessfully appealing his termination. Then, this week, police say, Dorner made good on his threat to seek revenge when he fatally shot the daughter of an ex-LAPD captain who represented him at his discipline hearing. He also allegedly shot her fiancé. Dorner went on to fatally shoot one officer and injure two others, police say.").



terminated Dorner's employment, had round-the-clock protection for his six foster children during the hunt for Dorner.<sup>18</sup>

Despite the outrageousness of this type of behavior, the law does not offer much protection from obsessive individuals who threaten and harass children because of their parents' identity. There are statutes that punish threats that result in a felony, such as Section 422 of California's Penal Code.<sup>19</sup> But parents do not want to wait until their child is physically harmed. They want to deter individuals from behaving in a manner that would cause their children emotional and psychological harm. Whether it is unwarranted attention from the media or threats from individuals seeking revenge, parents want legal protection that will deter others from harassing their children.

Almost twenty years ago, California passed A.B. 3592, codified as Penal Code Section 11414, to protect children from individuals who harassed them because of their parents' occupations.<sup>20</sup> However, many argued that this law was not effective in deterring individuals because of its "relatively weak penalties."<sup>21</sup> As a result, a California senator presented a bill, S.B. 606, to amend Penal Code Section 11414 in early 2013.<sup>22</sup> This amendment is very similar to the existing law as it prohibits harassment of a child

---

<sup>18</sup> *Bill Analysis of S.B. 606 Before the S. Rules Comm.*, 2013-14 Leg., Reg. Sess. 3-4 (Cal. 2013).

<sup>19</sup> CAL. PENAL CODE § 422 (West 2013).

<sup>20</sup> A.B. 3592, 1993-1994 Leg., Reg. Sess., (Cal.1994) (enacted).

<sup>21</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Pub. Safety*, 2013-14 Leg., Reg. Sess. 4 (Cal. 2013).

<sup>22</sup> S.B. 606, 2013-2014 Leg., Reg. Sess. (Cal. 2013) (enacted).

because of his parent's occupation.<sup>23</sup> However, the biggest difference between the existing law and the amendment is that the criminal penalties are enhanced.<sup>24</sup> In September 2013, the California State Legislature passed the amendment and the Governor signed it into law.<sup>25</sup>

This Note will focus on whether Penal Code Section 11414, as amended, will protect children, specifically children of celebrities, from the paparazzi, without violating the press' right to due process. According to critics of the amendment, the new law violates the void-for-vagueness doctrine, which derived from the due process clauses of the Fifth and Fourteenth Amendment.<sup>26</sup> Under the void-for-vagueness doctrine, a criminal statute will be void if it does not provide clear notice of the prohibited behavior.<sup>27</sup> Without clear notice, the law will not be

---

<sup>23</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Judiciary*, 2013-14 Leg., Reg. Sess. at 2 (Cal. 2013).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> Patrick McGreevy and Melanie Mason, *Gov. Brown Signs Bills Aimed at Paparazzi, Family Leave and Quakes*, L.A. TIMES (Sep. 24, 2013), <http://articles.latimes.com/2013/sep/24/local/la-me-brown-bills-paparazzi-20130925>.

<sup>26</sup> See *Kolender v. Lawson*, 461 U.S. 352 (1983) (holding that "[t]he statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated [. . .]").

<sup>27</sup> *Connally v. General Construction*, 269 U.S. 385, 391 (1926)(stating "[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

enforced.

In this Note, I will first describe a brief history of the legal attempts to restrict the paparazzi in section I. Next, I will discuss the legislative history behind the existing law and its amendment in sections II and III. Finally, I will analyze whether the bill fails the void-for-vagueness doctrine in section IV.

## **I. BRIEF HISTORY OF LEGAL ATTEMPTS TO PROTECT CELEBRITIES**

The First Amendment to the U.S. Constitution protects the press' right to photograph celebrities, and to some extent, those associated with them. It provides that "Congress shall make no law . . . abridging the freedom of speech, or the press."<sup>28</sup> Legislators must balance the press' First Amendment rights with the celebrity's right to privacy when drafting a bill that protects celebrities from the paparazzi.<sup>29</sup> Some justifications for enumerating a

---

differ as to its application violates the first essential of due process of law.") (citing *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1926)).

<sup>28</sup> U.S. CONST. amend. I.

<sup>29</sup> Although the "right to privacy" is not expressly stated in the U.S. Constitution, the U.S. Supreme Court found that the right to privacy was a fundamental right in *Griswold v. Connecticut*, 381 U.S. 479 (1965). According to Justice Douglas, "[t]he foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substances. Various guarantees create zones of privacy [. . .]. We have had many controversies over these penumbral rights of privacy and repose. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one." *Id.* at 480. As such, Justice Douglas held in this case that a Connecticut statute banning married couples from using

separate right for the press in the First Amendment are that the press has a very unique role in informing the public and, according to the Supreme Court, without separate protection, the public would be denied access to significant information.<sup>30</sup>

Although the Constitution recognizes separate protection for the press, the federal and state courts have taken the approach that the press is not entitled to special protection from generally applicable laws.<sup>31</sup> For example, in *Branzburg v. Hayes*, the Court refused to create a shield that protected reporters from revealing their sources.<sup>32</sup> While courts are reluctant to create special privileges for the

---

contraceptives was unconstitutional because it violated their right to privacy. *Id.* at 485-86.

<sup>30</sup> *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) (stating that “[w]e do not question the significance of free speech, press, or assembly to the country’s welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.”); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICES 1214 (Vicki Been et al., eds., 4th ed. 2011) (discussion of *Hayes*).

<sup>31</sup> *Branzburg*, 408 U.S. at 682-683 (according to Justice White, “[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that the publisher of a newspaper has no special immunity from the application of general laws.”).

<sup>32</sup> *Id.* at 709 (holding that where the reporter refused to reveal his sources before a grand jury, the “petitioner must appear before the grand jury to answer the questions put to him [. . .].”); *see* CHEMERINSKY, *supra* note 30 at 1214-20 (discussing cases in which the Court refused to grant the press special privileges.).

press, they recognize that the press has the right to report on matters of public significance.<sup>33</sup> When the matter of public significance involves a public person, including a celebrity, the Court has expanded the First Amendment to protect the press' freedom to publish information.<sup>34</sup>

Unlike the average person, celebrities have a limited right to privacy. In 1974, the U.S. Supreme Court articulated in a defamation action, that "[t]hose who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures [. . .]." <sup>35</sup> The Court recognized that there are different types of public figures by stating that an all-purpose public figure was one who "achieve[s] such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."<sup>36</sup> However, a limited public figure is "an individual [who] voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of

---

<sup>33</sup> *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979) (stating that "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.").

<sup>34</sup> *See Gertz v. Robert Welch Inc.*, 418 U.S. 323, 342 (1974) (stating that "[i]n our continuing effort to define the proper accommodation between [the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury], we have been especially anxious to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise.") (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 351.

issues.”<sup>37</sup> These figures have relinquished their right to privacy and can recover damages if they satisfy the elements for one, or more, of the four separate categories of invasion of privacy. The categories are an “(1) intrusion upon a person’s seclusion or solitude; (2) public disclosure of private facts; (3) publicity that places a person in a false light; and (4) misappropriation of a person’s name and likeness.”<sup>38</sup>

However, the elements of these categories can be difficult for a public figure to satisfy. For example, in *Howard v. Antilla*, the United States Court of Appeals for the First Circuit held that to establish a false light invasion of privacy action, the plaintiff had the burden of proving the statements were false and were made with actual malice.<sup>39</sup> In this case, the defendant, a reporter for *The New York Times*, learned the plaintiff, Robert Howard, a chairman of two publicly traded companies, was in fact Howard Finkelstein.<sup>40</sup> Finkelstein was convicted of “securities fraud, violation of the White Slave Act,<sup>41</sup> conspiracy to defraud, and interstate transportation of

---

<sup>37</sup> *Id.*

<sup>38</sup> *Ignat v. Yum! Brands, Inc.*, 154 Cal. Rptr. 3d 275, 279 (Cal. Ct. App. 2013).

<sup>39</sup> *Howard v. Antilla*, 294 F.3d 244, 249 (2002) (holding that “only statements that are ‘provable as false’ are actionable. The plaintiff must also shoulder the burden of proving the falsity of each statement. Moreover, the plaintiff must prove that the offending statement was made with ‘actual malice’—that is, that the false statement was made intentionally or with reckless disregard as to whether it was false—and proof of that element must be established by the quantum of ‘convincing clarity.’”).

<sup>40</sup> *Id.* at 245.

<sup>41</sup> Also known as the Mann Act, this federal law prohibits the transportation of an individual in “interstate and foreign commerce for prostitution or other criminal sexual activity.” BLACK’S LAW DICTIONARY 822 (9th ed. 2009).

stolen property.”<sup>42</sup> The defendant investigated the rumor but was unable to confirm or refute it.<sup>43</sup> The article, entitled “Is Howard Really Finkelstein? Money Rides on It,” was published.<sup>44</sup>

However, after the story was published, Finkelstein’s attorney contacted the defendant and told her that his client and the plaintiff were not the same person.<sup>45</sup> *The Times* then published a corrected version of the article, apologizing for publishing the story and stating that there was “‘no credible evidence’ to support the rumor.”<sup>46</sup> However, three years after the story was published, the plaintiff sued the defendant for, among other things, false light invasion of privacy.<sup>47</sup>

As a limited public figure, the plaintiff needed to demonstrate that the article was written with actual malice.<sup>48</sup> The Court of Appeals held that a plaintiff could not prove actual malice by merely demonstrating that the defendant’s behavior was “an extreme departure from professional standards.”<sup>49</sup> The plaintiff must show that there was “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts to the truth of his publication or acted with a ‘high degree of awareness of . . . probable falsity.’”<sup>50</sup> Furthermore, “where the plaintiff is claiming injury from an allegedly harmful

---

<sup>42</sup> Antilla, 294 F.3d at 245-46.

<sup>43</sup> *Id.* at 246.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 247.

<sup>46</sup> *Id.* at 247.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 249.

<sup>49</sup> *Id.* at 252 (quoting *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989)).

<sup>50</sup> *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

implication arising from the defendant's article, 'he must show with clear and convincing evidence that the defendant intended or knew of the implications that the plaintiff is attempting to draw . . . .' ”<sup>51</sup>

The Court of Appeals did not agree with Howard that the article was capable of causing the public to believe that he was Finkelstein.<sup>52</sup> The Court looked at the fact that article casted doubt on both the rumor and the defendant's attempts to dispel the rumor.<sup>53</sup> Furthermore, “the article remained ‘agnostic’ with respect to the truth” of the rumor.<sup>54</sup> As such, the Court held that actual malice was not established because the “false accusation was not shown to be either intentional or treated with reckless disregard.”<sup>55</sup>

As demonstrated in *Antilla*, it is difficult for public figures to bring a successful invasion of privacy action against the paparazzi due to the “freedom of the press” clause.<sup>56</sup> However, in a well-known pa-

---

<sup>51</sup> *Id.* (citing *Saenz v. Playboy Enters., Inc.*, 841 F.2d 1309, 1314 (7th Cir. 1988)).

<sup>52</sup> *Id.* at 252.

<sup>53</sup> *Id.* (stating “it is questionable, even doubtful, that the article is actually capable of bearing the harmful implication charged by Howard – namely, that he is Finkelstein.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 256.

<sup>56</sup> See *Levesque v. Doocy*, 560 F.3d 82 (1st Cir. 2009) (holding that a news show host did not make false statements about a public official recklessly or with actual malice); *Bernstein v. National Broadcasting Company*, 129 F.Supp. 817 (D.D.C 1955) (holding that the press did not invade a public person's privacy if they reported on a matter that was public at one time); see also Lauren N. Follett, *Taming the Paparazzi in the “Wild West”: A look at California’s 2009 Amendment to the Anti-Paparazzi Act and a Call for Increased Privacy Protections for Celebrity Children*, 84 S. CAL. L. REV. 201, 211 (2010) (“While celebrities have successfully obtained restraining orders against



parazzi case, *Galella v. Onassis*, the Court of Appeals for the Second Circuit balanced a public person's right to privacy with the media's First Amendment right to gather news.<sup>57</sup> As the wife of the late President John F. Kennedy, Jacqueline Onassis was a public figure.<sup>58</sup> Despite her status as a public figure, the press did not have unlimited access into her life.<sup>59</sup> Furthermore, the press could not engage in behavior that was outside the reasonable bounds of newsgathering such as, jumping into Onassis' son's path as he rode his bike to capture his picture.<sup>60</sup> The

---

paparazzi, practical issues make injunctive relief ineffective in curbing the majority of paparazzi issues in California. Not only must celebrities be able to identify a particular paparazzo in court, but there must also already have been an identifiable incident of harassment, and the celebrities must be able to convince the court that they are likely to succeed on the merits of the case without introducing discovery. This leaves most celebrities without effective injunctive recourse against the paparazzi who place them under constant surveillance.”).

<sup>57</sup> *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

<sup>58</sup> *Id.* at 995 (holding that “legitimate countervailing social needs may warrant some intrusion despite an individual’s reasonable expectation of privacy and freedom from harassment. However the interference allowed may be no greater than that necessary to protect the overriding public interest. Mrs. Onassis was properly found to be a public figure and thus subject to news coverage.”).

<sup>59</sup> *Id.* at 992.

<sup>60</sup> *Id.* (stating that “some examples of Galella’s conduct brought out at trial are illustrative. Galella took pictures of John Kennedy riding his bicycle in Central Park across the way from his home. He jumped out into the boy’s path, causing the agents concern for John’s safety. The agents’ reaction and interrogation of Galella led to Galella’s arrest and his action against the agents; Galella on other occasions interrupted Caroline at tennis, and invaded the children’s private schools. At one time he came uncomfortably close in a power boat to Mrs. Onassis swimming. He often jumped and postured around while taking pictures of her party notably at a theater opening

Court of Appeals held that the photographer's conduct was outside of the "reasonable bounds of news-gathering."<sup>61</sup> They also found that injunctive relief was appropriate but needed to be "tailored to protect Mrs. Onassis from the 'paparazzo' attack which distinguishes Gallela's behavior from that of other photographers" and "it should not unnecessarily infringe on reasonable efforts to 'cover' defendant."<sup>62</sup> The injunctive relief prohibited "(1) any approach within twenty-five (25) feet of defendant or any touching of the person of the defendant Jacqueline Onassis; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of defendant in jeopardy; and (4) any conduct which would reasonably be foreseen to harass, alarm or frighten the defendant."<sup>63</sup>

*Gallela* demonstrates that there can be a balance between a celebrity's right to privacy and the press' right to gather and publish the news. The Court recognized that Gallela's methods was dangerous and outside of the reasonable bounds of news-gathering. As such, the Court structured the injunctive relief to balance the rights of the media and that of the celebrity. California's amended law criminalizes the same methods Gallela used to capture Mrs. Onassis and her children's images. Whether the amended statute will be enforced, depends on whether the statute gives clear notice of the prohibited be-

---

but also on numerous other occasions. He followed a practice of bribing apartment house, restaurant and nightclub doormen as well as romancing a family servant to keep him advised of the movements of the family.").

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 995.

<sup>63</sup> *Id.*

havior. If it fails to do so, that statute will be invalid under the void-for-vagueness doctrine.

## **II. DISCUSSION OF A.B. 3592, CODIFIED AS PENAL CODE § 11411**

In 1994, California passed A.B. 3592 to protect children of health care service workers from being harassed as a result of their parents' occupation. The bill was drafted as a result of a 1993 Clinic Violence Survey Report that showed increasing anti-abortion violence towards medical staff throughout the country.<sup>64</sup> The violence was not only directed towards medical staff but also their families.<sup>65</sup> One abortion clinic reported that the life of a director's child was threatened so that "she can see how it feels."<sup>66</sup> California recognized that this type of behavior could not be tolerated and the bill was signed into law and codified as California Penal Code Section 11414. It read:

(a) Any person who intentionally harasses the child or ward of any other person because of that person's employment, is guilty of a misdemeanor.

(b) For purposes of this section, the following definitions shall apply:

(1) "Child" and "ward" mean a person under the age of 16 years.

(2) "Harasses" means knowing and willful conduct directed at a specific child that seriously alarms, annoys, torments, or terrorizes the child, and

---

<sup>64</sup> *Bill Analysis of A.B. 3592 Before the Assemb. Comm. of Pub. Safety*, 1993-94 Leg., Reg. Sess. (Cal. 1994).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

that serves no legitimate purpose. The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress.

(c) A second conviction under this section shall be punished by imprisonment in a county jail for not less than five days. A third or subsequent conviction under this section shall be punished by imprisonment in a county jail for not less than 30 days.<sup>67</sup>

In summary, under this statute, anyone in violation was guilty of a misdemeanor.<sup>68</sup> In California, generally speaking, punishment for a misdemeanor could result in imprisonment, not exceeding six months, or a fine, not exceeding one thousand dollars, or both.<sup>69</sup> A second conviction resulted in mandatory imprisonment in county jail for five days or more.<sup>70</sup> For subsequent convictions, imprisonment for 30 days or more was mandatory.<sup>71</sup>

Despite the purpose of the statute, the 1994 California Legislature designed the law so that it applied to all children, not just children of health care service providers.<sup>72</sup> As a result, this statute sought to protect children who were harassed, regardless of

---

<sup>67</sup> CAL. PENAL CODE § 11414 (West, Westlaw through ch. 16 of 2014 Reg. Sess.).

<sup>68</sup> *Id.*

<sup>69</sup> CAL. PENAL CODE § 19 (West, Westlaw through ch. 16 of 2014 Reg. Sess.).

<sup>70</sup> PENAL § 11414 (Westlaw).

<sup>71</sup> *Id.*

<sup>72</sup> *Bill Analysis of A.B. 3592 Before S. Comm. on Judiciary*, 1993-94 Leg., Reg. Sess. (Cal. 1994).

their parents' employment. Prior to its enactment, California's Senate Committee on Judiciary acknowledged that this bill might be challenged because it criminalized First Amendment protected conduct.<sup>73</sup> However, for the nineteen years the bill existed, it was never challenged.

### III. DISCUSSION OF S.B. 606

Nineteen years after the enactment of California Penal Code Section 11414, some California residents did not believe the statute's penalties were effective in deterring people from harassing their children. In early 2013, a very famous resident of California, Halle Berry, met with California State Senator Kevin de Leon.<sup>74</sup> At the meeting, Ms. Berry expressed the need for protection from paparazzi who "stalked and harassed" children of celebrities for their photographs.<sup>75</sup> She also emphasized the need for a bill that would deter the paparazzi from harassing children because "she and other parents had no real recourse to protect their children."<sup>76</sup>

Ms. Berry's demand for protection was a result of her personal experience. There are numerous stories in the media about Ms. Berry's violent interactions with the paparazzi because of their unrelenting attempts to photograph her and her daughter. In May 2012, Ms. Berry lashed out on the paparazzi af-

---

<sup>73</sup> *Id.*

<sup>74</sup> *Release: Paparazzi Harassment Deterrent Bill Signed by the Governor – Increases Penalties & Allows for Civil Action to Protect Children*, STATE SEN. KEVIN DE LEÓN (Sept. 24, 2103), <http://sd22.senate.ca.gov/news/2013-09-24-release-paparazzi-harassment-deterrent-bill-signed-governor-increases-penalties-allo>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

ter they camped out in front of her daughter's preschool.<sup>77</sup> In an interview with the television show *Extra*, regarding the incident, Ms. Berry said that she had been "struggling for years" to keep her daughter safe from the paparazzi.<sup>78</sup> She also stated that "[t]here are no laws [. . .] that protect our children and as a mom, coming to the school . . . not only my child, but all the children that are there. It's just wrong, wrong, wrong."<sup>79</sup>

Senator de Leon ultimately agreed that the current law was ineffective in protecting children of public figures from harassment. He introduced S.B. 606, as an amendment to California's Penal Code Section 11414, on February 22, 2013.<sup>80</sup> In a press release, he stated that children should not be "subjected to such unwarranted and harmful persecution" because of their parent's occupations.<sup>81</sup> He believed that by increasing the penalties and allowing parents to have access to a civil cause of action, the amended bill would deter "those who would consider tormenting the most vulnerable and defenseless members of our society."<sup>82</sup>

Ms. Berry aggressively advocated for the pas-

---

<sup>77</sup> *Halle Berry on Paparazzi Blowup: 'When It Comes to My Daughter, I'm Ferocious!'*, EXTRA (May 14, 2012)

<http://www.extratv.com/2012/05/14/halle-berry-on-paparazzi-blow-up-when-it-comes-to-my-daughter-im-ferocious/>.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Release: Paparazzi Harassment Deterrent Bill Passes to Protect Children - SB 606 Increases Penalties & Allows for Civil Action*, STATE SEN. KEVIN DE LEÓN, (Sept. 6, 2013), <http://sd22.senate.ca.gov/news/2013-09-06-release-paparazzi-harassment-deterrent-bill-passes-protect-children-sb-606-increases>.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

sage of the proposed amendment and sought the support of fellow thespians. In August 2013, Jennifer Garner joined Ms. Berry to testify in front of California's Assembly Judiciary Committee and the State Assembly Committee on Public Safety to support the amendment. Ms. Garner described how the paparazzi aggressively followed her and her children on a daily basis.<sup>83</sup> She also stated that although she chose a public life, her children did not and she does not "want a gang of shouting, arguing, law-breaking photographers who camp out everywhere [her family is] all day, every day, to continue traumatizing [her] kids."<sup>84</sup> Ms. Berry testified that her daughter was terrified to go to school because the paparazzi were always watching her and jumping out of bushes and from behind vehicles to get a photo of her child.<sup>85</sup> She also stated that a photographer asked her daughter how she felt that she might never see her father again, after it was reported that Ms. Berry was seeking permission from a court to move her daughter to France.<sup>86</sup> The paparazzi would also curse and call Ms. Berry names to provoke a response from her while she was with her daughter, she testified.<sup>87</sup>

Although media reports and legislative history show that the amendment was motivated by the

---

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Natalie Finn, *Halle Berry & Jennifer Garner Join Forces to Support Anti-Paparazzi Bill That Would Make Photographing Their Kids a Crime*, E! ONLINE (Aug. 13, 2013, 6:56 PM), <http://www.eonline.com/news/448665/halle-berry-jennifer-garner-join-forces-to-support-anti-paparazzi-bill-that-would-make-photographing-their-kids-a-crime>.

need to protect children of public figures, the statute was not only designed to protect children of celebrities. The statute protects all children who are harassed because of their parents' occupations, especially law enforcement officials, who are big supporters of this amendment after the violence committed by Dorner. The Chair of the Assembly Committee on Judiciary, Bob Wieckowski, wrote that the author of the existing law, former Assemblyman Tom Umberg, "sees [S.B. 606] as a logical extension of the earlier legislation, since children of many other occupations – including law enforcement officers, psychologist or psychiatrists, or others engaged in high-profile or controversial occupations – could also be vulnerable."<sup>88</sup> Some of the other supporters of this amendment include the Screen Actors Guild, California Medical Association, and the California Psychological Association. These organizations recognize that the law needs to protect children from the "dangerous actions of out of control members of the paparazzi" and, according to the Screen Actors Guild, S.B. 606 is "appropriately balanced and limited in that it exempts legitimate activities, including transmission, publishing, and broadcasting."<sup>89</sup>

In September 2013, the amendment, S.B. 606, to Penal Code Section 11414 unanimously passed through California's State Assembly and Senate. On September 24, 2013, California's Governor signed the

---

<sup>88</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Judiciary*, 2013-14 Leg., Reg. Sess. 6 (Cal. 2013).

<sup>89</sup> *Id.*; *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Appropriations*, 2013-14 Leg., Reg. Sess. 2 (Cal. 2013).



bill into law.<sup>90</sup> Beginning January 1, 2014, Penal Code Section 11414 now reads:

**11414. SEC. 1.**

- (a) Any person who intentionally harasses the child or ward of any other person because of that person's employment shall be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both that fine and imprisonment.
- (b) For purposes of this section, the following definitions shall apply:
  - (1) "Child" and "ward" mean a person under 16 years of age.
  - (2) "Harasses" means knowing and willful conduct directed at a specific child or ward that seriously alarms, annoys, torments, or terrorizes the child or ward, and that serves no legitimate purpose, including, but not limited to, that conduct occurring during the course of any actual or attempted recording of the child's or ward's image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child's or ward's activities or by lying in wait. The conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer substantial emotional distress.

---

<sup>90</sup> *Release: Paparazzi Harassment Deterrent Bill Passes to Protect Children - SB 606 Increases Penalties & Allows for Civil Action*, *supra* note 80; McGreevy & Mason, *supra* note 80.

*Protecting a Celebrity's Child From Harassment*

---

- (3) "Employment" means the job, vocation, occupation, or profession of the parent or legal guardian of the child or ward.
- (c) A second conviction under this section shall be punished by a fine not exceeding twenty thousand dollars (\$20,000) and by imprisonment in a county jail for not less than five days but not exceeding one year. A third or subsequent conviction under this section shall be punished by a fine not exceeding thirty thousand dollars (\$30,000) and by imprisonment in a county jail for not less than 30 days but not exceeding one year.
- (d) Upon a violation of this section, the parent or legal guardian of an aggrieved child or ward may bring a civil action against the violator on behalf of the child or ward. The remedies in that civil action shall be limited to one or more of the following: actual damages, punitive damages, reasonable attorney's fees, costs, disgorgement of any compensation from the sale, license, or dissemination of a child's image or voice received by the individual who, in violation of this section, recorded the child's image or voice, and injunctive relief against further violations of this section by the individual.
- (e) The act of transmitting, publishing, or broadcasting a recording of the image or voice of a child does not constitute a violation of this section.
- (f) This section does not preclude prosecution under any section of law that provides for greater punishment.

**SEC. 2.** No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.<sup>91</sup>

In summary, there are three major changes to the existing law. First, the criminal penalties are harsher than a misdemeanor. Anyone who violates this law could face up to a year in jail as well as a fine of up to \$10,000 for a first conviction. The penalties increase for repeat violations. The second change to the statute is that it allows a parent or guardian to bring a civil action against any violators.<sup>92</sup> The third change, and a source of potential litigation, is that the amendment expands the definition of “harassment” to include “conduct occurring during the course of any actual or attempted recording of the child’s or ward’s image or voice, or both, without the express consent of the parent or legal guardian of the child or ward, by following the child’s or ward’s activities or by lying in wait.”<sup>93</sup> Furthermore, “[t]he conduct must be such as would cause a reasonable child to suffer substantial emotional distress, and actually cause the victim to suffer sub-

---

<sup>91</sup> CAL. PENAL CODE § 11414 (West, Westlaw through ch. 16 of 2014 Reg. Sess.).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

stantial emotional distress.”<sup>94</sup>

The amended law does not prevent the paparazzi from taking pictures of a celebrity's child.<sup>95</sup> Rather, it prohibits the dangerous methods the paparazzi use to photograph a child of a celebrity.<sup>96</sup> As discussed in Part I of this paper, it is difficult to draft a bill that would prevent the paparazzi from taking a picture of a celebrity in a public place, even if that picture is of the celebrity's child. Lawmakers are very limited in how they can restrict the paparazzi when it comes to photographing public figures. There is a very thin line between protecting celebrities' privacy and the paparazzi's right to gather news. The California's Legislature believes the amended law balances both the celebrity's limited right to privacy and the press' right to gather news.

#### IV. CRITICISM OF S.B. 606

However, the California Newspapers Publishers Association (CNPA), the National Press Photographers Association (NPPA) and the California Broadcasters Association (CBA) argued that the amended law infringes on constitutional rights of the press.<sup>97</sup> The CNPA raised First Amendment concerns with amended law. They argued that “the in-

---

<sup>94</sup> *Id.*

<sup>95</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Judiciary*, 2013-14 Leg., Reg. Sess. 4 (Cal. 2013) (stating that “[a]lthough the bill creates enhanced criminal penalties and a new civil cause of action, it arguably makes no change as to what constitutes an underlying offense. To begin with, the bill does not – as some of the opposition letters suggest – make it misdemeanor harassment to simply take a photograph of a child without the consent of the parent or guardian, either by following the child or by lying in wait.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 7.

creased penalties and liabilities . . . improperly abridge First Amendment protected newsgathering activity that occurs in public places where a person normally has no reasonable expectation of privacy.”<sup>98</sup> The CNPA further argued that the amendment “pertain[ing] to photography and recording is overly broad [and] vague.”<sup>99</sup>

The NPPA agreed with the CNPA but also raised two separate constitutional arguments. The first is that the amended law “raises First Amendment concerns by singling out attempts to take a photograph – an activity commonly done for valid newsgathering or expressive activities, especially if the attempt to take the photograph is in a public place where there is no reasonable expectation of privacy.”<sup>100</sup> The second argument is that the amendment’s definition of “harass” is vague and subjective because the terms, “harassment,” “annoys and alarms,” and “no legitimate purpose,” which are used to define it, are vague.<sup>101</sup> Furthermore, NPPA does not see a need for this amendment since California has laws on the books that address harassment concerns.<sup>102</sup> Along with the CNPA, the NPPA argued that the additional enhanced criminal penalties, along with a new civil cause of action, will “further chill free speech and create uncertainty.”<sup>103</sup>

In the legislative hearing reports, constitutional law Professor Erwin Chemerinsky disagreed with the opponent’s vagueness and First Amendment

---

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Pub. Safety*, 2013-14 Leg., Reg. Sess. 5 (Cal. 2013).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

arguments. In response to the First Amendment concerns, Professor Chemerinsky, a renowned constitutional law professor at University of California-Irvine, argued that there is no substantial First Amendment issue “because the bill targets only harassing *conduct*, not constitutionally protected expression.”<sup>104</sup> Professor Chemerinsky supported his claim by stating that there is no constitutional right to harass.<sup>105</sup> However, he failed to explain his conclusion that the amended statute was not vague.

California’s Assembly Committee on Public Safety disagrees that the definitions of ‘harass’ singles out journalistic activity.<sup>106</sup> The Committee believes that the statute merely lists a form of journalistic activity as an example of the kinds of conduct that *could* rise to the level of harassment.<sup>107</sup> Essentially, the phrase “any actual or attempted recording of the child’s or ward’s image or voice” is simply an example of the kind of activity that could be considered harassment.<sup>108</sup> The Committee recognizes that if the statute singles out journalistic activity, the statute may be unconstitutional because the Supreme Court has previously held that statutes that single out journalistic activities and subject it to heightened punishment are unconstitutional.<sup>109</sup> Ac-

---

<sup>104</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Judiciary*, 2013-14 Leg., Reg. Sess. 5 (Cal. 2013).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 6.

<sup>108</sup> CAL. PENAL CODE § 11414 (West, Westlaw through ch. 16 of 2014 Reg. Sess.).

<sup>109</sup> *Minneapolis Star & Tribune v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 586 (1983) (holding that “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

cordingly, the statute was designed to punish anyone who violates it. Not just members of the press.

In addition to the First Amendment challenges that can be made to the amendment, the opponents argue that this amendment is unconstitutionally vague. However, I contend that, despite the opponents' arguments, this statute is not unconstitutionally vague as applied to the press. The purpose of determining whether the statute is vague is not to rid the California law books of this crime. Rather, because there is a need to protect children from the dangerous conduct of the paparazzi, it is very important that the statute is clear in what behavior it is prohibiting. The amendment clearly articulates the type of conduct it prohibits. In the remainder of this Note, I will demonstrate that this statute does not violate the void-for-vagueness doctrine.

## V. TOO VAGUE TO BE CONSTITUTIONAL

The amended California Penal Code Section 11414 terms "annoys," "alarms," "torments," and "terrorizes," despite the opponents' claims, are not void under the vagueness doctrine because the terms provide adequate notice of the prohibited conduct. Under the void-for-vagueness doctrine, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law," especially if it is a criminal stat-

---

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.").

ute.<sup>110</sup> In *Kolender v. Lawson*, the Court used a two-pronged test to determine whether a statute failed the void-for-vagueness doctrine.<sup>111</sup> Under the first prong, a criminal statute must define the offense with “sufficient definiteness” so that a layperson knows what conduct is prohibited.<sup>112</sup> Under the second prong, the statute must comply with the first prong “in a manner that does not encourage arbitrary and discriminatory enforcement.”<sup>113</sup> The Court, interpreted the second prong to “[require] that a legislature establish minimal guidelines to govern law enforcement” and considered this to be the most important part of the test.<sup>114</sup>

This test must be met so that a criminal statute provides for fair enforcement and notice of the prohibited conduct.<sup>115</sup> In *City of Chicago v. Morales*, an ordinance was unconstitutionally vague because it failed to establish minimal guidelines for enforcement. In an effort to rid the city of gang activity, Chicago enacted the Gang Congregation Ordinance<sup>116</sup> to prevent gang members from loitering in

---

<sup>110</sup> *Connally v. General Construction*, 269 U.S. 385, 391 (1926).

<sup>111</sup> *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (citing *Smith v. Goguen*, 415 U.S. 566, 574(1974)).

<sup>115</sup> ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICES 970 (Vicki Been et al., eds., 4th ed. 2011) (“In, part, the vagueness doctrine is about fairness; it is to unjust to punish a person without providing clear notice as to what conduct was prohibited. Vague laws also risk selective prosecution; under vague statutes and ordinances the government can choose who to prosecute based on their views of the policies.”).

<sup>116</sup> The ordinance provides that “[w]henever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or



the public.<sup>117</sup> The Supreme Court found that the statute covered additional activities besides the congregation of gang members for the purpose of engaging in illegal activity.<sup>118</sup> It was this “uncertainty about the scope of [the] additional coverage [that] provide[d] the basis” of the vagueness claim.<sup>119</sup> The Court applied the two-prong test articulated in *Kolender* to determine whether the statute was vague.<sup>120</sup>

As to whether the ordinance provided “sufficient definiteness” or fair notice to a layperson, the Court looked to the meaning of the term “loiter,” which meant, “to remain in any one place with no apparent purpose.”<sup>121</sup> According to the Court, the term “apparent purpose” was unclear, stating that “[i]t [was] difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an “apparent purpose.”<sup>122</sup> To illustrate its point, the Court asked two hypothetical questions: “[i]f she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose?” The Court doubted the city meant to criminalize every instance in which a person stands with a gang member.<sup>123</sup> For that reason,

---

more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.” *City of Chicago v. Morales*, 527 U.S. 41, 65 (1999).

<sup>117</sup> *Id.* at 45-46.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 56.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 57.

<sup>123</sup> *Id.*

the statute failed the first prong because the term “loiter” did not distinguish between loitering with a criminal purpose and loitering with an innocent purpose.<sup>124</sup>

Under the second prong, the Court held that the ordinance failed to provide minimum guidelines to govern law enforcement, which would prevent arbitrary and discriminatory enforcement.<sup>125</sup> As a result, a police officer could instruct a gang member standing in a public place to disperse without determining the person’s reason for standing in that public place.<sup>126</sup> According to the Court, the language of the ordinance directing a police officer to issue an order without inquiry was too broad. Furthermore, a statute that allowed too much discretion was prohibited because the “Constitution does not permit a legislature to ‘set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.’”<sup>127</sup> For example, the statute did not take into consideration that a gang member could be standing in front of a place with a relative for rea-

---

<sup>124</sup> *Id.* (The Court also stated that “[t]he Illinois Supreme Court emphasized the law’s failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term ‘loitering’ with a second specific element of the crime.”)

<sup>125</sup> *Id.* at 60 (“The broad sweep of the ordinance also violates ‘the requirement that a legislature establish minimal guidelines to govern law enforcement.’ There are no such guidelines in the ordinance.”(quoting *Kolender v. Lawson*, 461 U.S. at 358)).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* (quoting *United States v. Reese*, 92 U.S. 214, 221 (1876)).

sons that were not criminal.<sup>128</sup> Under the ordinance, if a police officer ordered the gang member in the preceding example to leave the area and he refused to do so, he would be arrested, even though he was not loitering for criminal purposes. Since there were no guidelines in the ordinance, the statute violated the void-for-vagueness doctrine.<sup>129</sup>

As explained by the Supreme Court in *Morales*, a statute will be upheld under the void-for-vagueness doctrine as long as the terms are not too subjective. For example, in *People v. Ewing*, the California's Court of Appeals for the Fourth District upheld a harassment statute because the terms were clear, understandable and not subjective and it provided an objective standard to guide the public.<sup>130</sup> In this case, the defendant argued that a stalking statute was unconstitutionally vague because the terms "alarms," "annoys," "torments," and "terrorizes" in the "harass" section of the statute "[were] subjective terms that [did] not provide adequate notice for an individual to avoid liability under the statute."<sup>131</sup> To determine whether that terms were vague, the court stated that it "must view a statute from the 'standpoint of the reasonable person who might be subject to its terms' and uphold the statute if its meaning is

---

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *People v. Ewing*, 90 Cal Rptr. 2d 177, 182 (Cal. Ct. App. 1999).

<sup>131</sup> *Id.* at 181. (Section 649.9 provided that "[f]or the purposes of this section, 'harasses' means a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. This course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.").

reasonably ascertainable.”<sup>132</sup> This is required because the courts recognize that there will be some ambiguity in a statute because of the difficulty in “defining the subject matter with precision” and as long as the meaning is reasonably ascertainable, the statute will be upheld.<sup>133</sup>

In *Ewing*, the Court look to Webster’s dictionary to define each of the terms and concluded, that along with the term “seriously” and the reasonable person standard, the definition of “harass,” provided a clear standard of conduct that a man of ordinary intelligence will understand the behavior the law prohibits.<sup>134</sup> According to the court, the terms

---

<sup>132</sup> *Id.* at 182 (quoting *People v. Deskin*, 13 Cal. Rptr. 2d 391, 392 (Cal. Ct. App. 1992)).

<sup>133</sup> *Deskin*, 13 Cal. Rptr. 2d at 392.

<sup>134</sup> *Ewing*, 90 Cal Rptr. 2d at 182-83 (stating that, “[t]he definition of ‘alarm’ is ‘to strike with fear: fill with anxiety. ‘Annoy’ is defined as ‘to irritate with a nettling or exasperating effect.’ The definition of ‘torment’ is ‘to cause (someone) severe suffering of body or mind: inflict pain or anguish on.’ The definition of ‘terrorize’ is ‘to fill with terror or anxiety’; ‘terror’ is defined as ‘a state of intense fright or apprehension.’ Moreover, these terms as they appear in the statute cannot be read in a vacuum. First, we note they are preceded and qualified with the adverb ‘seriously.’ Thus, the statutory definition of ‘harasses’ [ . . . ] refers to ‘a knowing and willful course of conduct directed at a specific person that *seriously alarms, seriously annoys, seriously torments, or seriously terrorizes* the person’ against whom it is directed. Second, when the reasonable person standard is factored in, the statutory definition of ‘harasses’ becomes ‘a knowing and willful course of conduct directed at a specific person that *a reasonable person would consider as seriously alarming, seriously annoying, seriously tormenting, or seriously terrorizing* the person.’ added.) Third, [the statute] explicitly provides the ‘course of conduct must be such as would cause *a reasonable person to suffer substantial emotional distress*, and must actually cause substantial emotional distress to the person.’ Thus, a reasonable person

“alarms,” “annoys,” “torments,” and “terrorizes” and could not be read separately.<sup>135</sup> First, the terms were “preceded and qualified with the adverb ‘seriously.’”<sup>136</sup> The word “seriously” limited the application of the statute. As such, the statute would be enforced against a person who seriously, rather than trivially, annoyed, alarmed, tormented, or terrorized another. In addition, whether a person seriously annoyed, alarmed, tormented, or terrorized another to the extent of causing substantial emotional distress depended on whether a reasonable person would find the defendant’s conduct offensive.<sup>137</sup> According to the court, the objective standard served the purpose of eliminating “the spectrum of possible subjective reactions by a targeted person.”<sup>138</sup> Construed in this light, the harassment statute is clear and certain.<sup>139</sup>

Without ascertainable standards to limit the application of a statute, a statute will be invalid under the void-for-vagueness doctrine. For example, in *Coates v. City of Cincinnati*, the Court held that terms such as “annoys” are vague if they are not paired with an objective standard to determining whether the act is “annoying.” In this case, the Cin-

---

standard also applies to the victim, which eliminates the spectrum of possible subjective reactions by a targeted person to defendant’s course of conduct. The result is the stalking statute prohibits a course of conduct directed at a specific person that *a reasonable person would consider as seriously alarming, seriously annoying, or seriously tormenting a reasonable person*. Given this context, the statutory definition of ‘harasses’—based on the four challenged words—is not uncertain.”) (alterations in original) (citations omitted).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

cinnati ordinance prohibited “three or more persons [from] assemb[ling] . . . on any of the sidewalks, . . . and there conduct themselves in a manner annoying to persons passing by.”<sup>140</sup> The Court held that the ordinance failed the void-for-vagueness doctrine “because it subjects the exercise of the right of assembly to an [unascertainable] standard.”<sup>141</sup> The statute failed to consider that there were behaviors that annoy some people but do not annoy others.<sup>142</sup> Therefore, the ordinance violated the first prong of the *Kolender* test because “men of common intelligence must necessarily guess at its meaning.”<sup>143</sup>

To determine whether Penal Code Section 11414 provides “sufficient definiteness,” the terms must be clear enough for a man of ordinary intelligence to understand what is prohibited. The analysis for determining whether Penal Code Section 11414 is vague is similar to the analysis in *Ewing*. “Annoy” is defined as “to cause irritation to by irritating acts.”<sup>144</sup> “Alarm” is defined as “to fill with alarm; frighten.”<sup>145</sup> “Torment” is defined as “to cause to undergo physical or mental torture.”<sup>146</sup> Finally, “terrorize” is defined as “to fill or overpower with terror.”<sup>147</sup> As stated in *Ewing*, these terms cannot be looked at in a vacuum. The terms are preceded with the word “seriously.” This term works to limit the

---

<sup>140</sup> *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (fourth alteration in original).

<sup>141</sup> *Id.* at 614.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

<sup>144</sup> THE AMERICAN HERITAGE COLLEGE DICTIONARY 57 (4th ed. 2004).

<sup>145</sup> *Id.* at 31.

<sup>146</sup> *Id.* at 1451.

<sup>147</sup> *Id.* at 1423.

application of the statute to only the offenses that seriously annoys, alarms, terrorizes, or torments a child. Furthermore, as required by the Supreme Court in *Coates*, the statute provides an objective standard in determining whether a person violated this statute. As such, the statute prohibits a person from seriously annoying, alarming, terrorizing, or tormenting a child to the extent that a reasonable child would suffer substantial emotional distress. Read in this context, the statute is clear and provides sufficient definiteness.

The second prong of the *Kolender* test requires that the statute provide minimum guidelines to govern law enforcement to prevent arbitrary and discriminatory enforcement. In *Morales*, the Court held that the statute failed the second prong of the void-for-vagueness test because the statute provided law enforcement officers with too much discretion. Penal Code Section 11414 instructs law enforcement officers to arrest anyone who knowingly and intentionally harasses a child because of his or her parents' occupations. Unlike the statute in *Morales*, the amendment specifically explains what conduct is criminalized: harassing a child because of her parents' occupations. In *Morales*, the statute prohibited standing in a public place for no apparent purpose, but the statute did not instruct law enforcement officers to determine whether they had an innocent reason for standing around. Unlike harassment, there is a constitutional right to assemble.<sup>148</sup> A statute cannot in-

---

<sup>148</sup> U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.") (emphasis added).

fringe on that right. As stated by Professor Chemerinsky, there is no constitutional right to harass.<sup>149</sup> Therefore, states can criminalize the conduct. In this case, a police officer is instructed to arrest someone who is engaging in criminal conduct: harassment. The amended statute does not provide unlimited discretion like the statute provided in *Morales*. As a result, it is very likely that a court will determine that Penal Code Section 11414, as amended, complies with the second prong of the *Kolender* test.

There are additional constitutional challenges that may impact the enforcement of the amendment. However, it is very unlikely that a court will void this statute because the terms used to define “harass” are vague. The amended statute is very similar to the statute in *Ewing*. The opponents of the amendment argue that the terms used to define “harass” are vague. However, as demonstrated, the terms “annoys,” “alarms,” “torments,” and “terrorizes,” read in context of the entire statute, clearly identifies the prohibited conduct so that a layperson understands what conduct is prohibited and it provides minimum guidelines to govern law enforcement.

### CONCLUSION

California has a legitimate concern to protect the emotional, psychological, and physical well-being of a child. In recent years, there have been violent interactions with the press that result in injury and even death. California has made numerous attempts to curb the behavior of the press, however, many of these attempts infringed on the press’ constitutional rights. This statute criminalizes conduct that is not

---

<sup>149</sup> *Bill Analysis of S.B. 606 Before the 2013 Assemb. Comm. on Judiciary*, 2013-14 Leg., Reg. Sess. 5 (Cal. 2013).



protected by the Constitution: harassment. The Statute is currently in effect. Time will tell whether this statute is effective in deterring the paparazzi and other overzealous individuals.