

January 1998

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Recommended Citation

Christine B. Gregson, *California's Antistalking Statute: The Pivotal Role of Intent*, 28 Golden Gate U. L. Rev. (1998).
<http://digitalcommons.law.ggu.edu/ggulrev/vol28/iss2/4>

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COMMENT

CALIFORNIA'S ANTISTALKING STATUTE: THE PIVOTAL ROLE OF INTENT

I. INTRODUCTION

In 1990, California enacted the United States' first anti-stalking law, thereby creating the crime of stalking.¹ This new law prohibited repeatedly following or harassing another person and making a credible threat that causes the person to fear bodily harm.² Following California's lead, all fifty states and the federal government enacted laws that address stalking.³

1. See AMERICAN PROSECUTORS RESEARCH INSTITUTE, STALKING: PROSECUTORS CONVICT AND RESTRICT 1 (1997) [hereinafter "A.P.R.I."].

2. See CAL. PENAL CODE § 646.9(a) (Deering Supp. 1998). Section 646.9(a) states: Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both the fine and imprisonment, or by imprisonment in the state prison.

Id.

3. See A.P.R.I., *supra* note 1, at 1. ALA. CODE §§ 13a-6-90 to 13a-6-94 (1995); ALASKA STAT. §§ 11.41 260 to 11.41 270 (Michie 1996); ARIZ. REV. STAT. ANN. § 13-2923 (West Supp. 1997); ARK. CODE ANN. § 5-71-229 (Michie 1997); CAL. PENAL CODE § 646.9 (Deering Supp. 1997); COLO. REV. STAT. ANN. § 18-9-111 (West Supp. 1997); CONN. GEN. STAT. ANN. §§ 53a-181c to 53a-181d (West Supp. 1997); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1996); D.C. CODE ANN. § 22-504(b) (Supp. 1997); FLA. STAT. ANN. § 784.048 (West Supp. 1998); GA. CODE ANN. §§ 16-5-90 to 16-5-91 (1997); HAW. REV. STAT. § 711-1106.4 (Supp. 1996); IDAHO CODE § 18-7905 (1997); 720 ILL. COMP. STAT. ANN. §§ 5/12-7.3 to 5/12-7.4 (West Supp. 1997); IND. CODE ANN. §§ 35-45-10-1 to 35-45-10-5 (West Supp. 1997); IOWA CODE ANN. § 708.11 (West Supp. 1997); KAN. STAT.

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Since 1990, prosecutors have learned that in order to effectively protect victims, antistalking laws must be broad in scope, carry substantial penalties, and pass constitutional muster.⁴ Convicted stalkers have repeatedly attacked the law as unconstitutional.⁵ All such challenges have failed. However, the California legislature has clarified and strengthened the antistalking law through a series of revisions over the past eight years.⁶ Today, the antistalking law is broad in scope and has repeatedly passed constitutional scrutiny. However, the level of intent that the antistalking statute currently requires could pose problems for prosecutors by allowing accused stalkers to

ANN. § 21-3438 (1995); KY. REV. STAT. ANN. §§ 508.130 to 508.150 (Banks-Baldwin 1995); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1998); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West Supp. 1997); MD. ANN. CODE art. 27, § 121B (1996); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1997); MICH. COMP. LAWS ANN. §§ 750.41h to 750.41i (West Supp. 1997); MINN. STAT. ANN. § 609.749 (West Supp. 1998); MISS. CODE ANN. § 97-3-107 (Supp. 1997); MO. ANN. STAT. § 565.225 (West Supp. 1998); MONT. CODE ANN. § 45-5-220 (1996); NEB. REV. STAT. §§ 28-311.02 to 28-311.05 (1995); NEV. REV. STAT. § 200.575 (1997); N.H. REV. STAT. ANN. § 633:3-a (Supp. 1997); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1997); N.M. STAT. ANN. §§ 30-3A-3 to 30-3A-4 (Michie Supp. 1997); N.Y. PENAL LAW §§ 120.13 to 120.15 (McKinney 1998) (information is for New York's menacing law); N.C. GEN. STAT. § 14-277.3 (Supp. 1994); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1997); OHIO REV. CODE ANN. §§ 2903.211 to 2903.215 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1998); OR. REV. STAT. §§ 163.730 to 163.750 (Supp. 1997); 18 PA. CONS. STAT. ANN. § 2709 (West Supp. 1997); R.I. GEN. LAWS §§ 11-59-1 to 11-59-3 (Supp. 1997); S.C. CODE ANN. §§ 16-3-1700 to 16-3-1840 (Law Co-op. 1997); S.D. CODIFIED LAWS §§ 22-19a-1 to 22-19a-7 (Michie Supp. 1997); TENN. CODE ANN. § 39-17-315 (1997); TEX. PENAL CODE ANN. § 42.072 (West 1998); TEX. CRIM. P. CODE ANN. § 17.46 (West Supp. 1998); UTAH CODE ANN. § 76-5-106.5 (Supp. 1997); VT. STAT. ANN. tit. 13, §§ 1061 to 1063 (Supp. 1997); VA. CODE ANN. § 18.2-60.3 (Michie 1996); WASH. REV. CODE ANN. 9A.46.110 (West Supp. 1998); W. VA. CODE § 61-2-9a (1997); WIS. STAT. ANN. 940.32 (West 1996); WYO. STAT. ANN. § 6-2-506 (Michie 1997). The federal government's antistalking law is known as the Interstate Punishment and Prevention Act of 1996. 18 U.S.C. § 2261. This law criminalized that act of crossing a state line to injure or harass another person. See *id.* See A.P.R.I., *supra* note 1, at 37-38.

4. See A.P.R.I., *supra* note 1, at 1.

5. See *People v. Falck*, 52 Cal. App. 4th 287 (1997) (term "safety" is not unconstitutionally vague); *People v. Halgren*, 52 Cal. App. 4th 1223 (1996) (the term "credible threat" is not unconstitutionally vague); *People v. Tran*, 47 Cal. App. 4th 253 (1996) (the term "harasses" is not unconstitutionally vague as applied to a defendant who believed his actions served a legitimate purpose); *People v. McClelland*, 42 Cal. App. 4th 144 (1996) (requirement that stalking offense be classified as a felony if it violates an existing court order is not unconstitutionally vague, language of court order does not have to mirror the language of the antistalking statute); *People v. Heilman*, 25 Cal. App. 4th 391 (1994) (the term "repeatedly" is not unconstitutionally vague in context of entire statute).

6. See CPC § 646.9. Revisions were enacted in 1992, 1993, 1994 and 1995. See *id.*

escape liability by asserting a defense of lack of specific intent.⁷ The law is therefore in need of revision.

Part II of this comment will outline the history of the anti-stalking statute and present several stalkers' profiles.⁸ It will also discuss the statutory protections that were available to victims in California prior to the enactment of antistalking legislation and outline the revisions that led to the development of the current statute, particularly the revisions to the intent requirement.⁹ Finally, Part II will discuss California's antistalking legislation as it stands today and examine the challenges that have been brought against the constitutionality of the statute.¹⁰

Part III will outline and analyze the National Institute of Justice's Model Antistalking Code.¹¹ This Model Code was developed to provide state legislators with an example of anti-stalking legislation that would be enforceable, address the legal and practical issues related to stalking, and survive constitutional challenges.¹² Part III will also compare California's anti-stalking law to the Model Code and discuss the differences and similarities between the two approaches to stalking crimes.¹³

Part IV will discuss *People v. Halgren*, a case involving a convicted stalker who unsuccessfully challenged the constitu-

7. See CAL. PENAL CODE § 646.9(g) (Deerings Supp 1998). Section 646.9(g) states:

For the purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat.

Id.

8. See discussion *infra* section II.A and II.D.

9. See discussion *infra* section II.C and II.D.

10. See discussion *infra* section II.E and II.F.

11. See discussion *infra* Part III.

12. See NATIONAL INSTITUTE OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES 8-9 (1993) [hereinafter "N.I.J."].

13. See discussion *infra* Part III.

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tionality of California's antistalking statute.¹⁴ In 1994, Earl Halgren was convicted of stalking Melissa Gonzales.¹⁵ Halgren's activities included following Gonzales to work, surveilling her office, and making numerous phone calls to her home and workplace in which he made several threatening statements.¹⁶ Although Halgren was convicted, his defense and the sentencing court's comments demonstrate that the antistalking statute's current intent requirement is a potential weakness of the law. Part IV will also outline the differences between specific and general intent and present a hypothetical stalking scenario to better illustrate the weakness in California's antistalking law.¹⁷

Finally, Part V will propose a legislative revision to California's antistalking statute that would replace the existing specific intent requirement with a general intent requirement.¹⁸ The antistalking laws of several states, including Washington, incorporate a general intent standard and have withstood constitutional scrutiny.¹⁹ Part V will discuss the proposed amendment to California's antistalking law as well as Washington's current antistalking law.²⁰ Finally, Part V will apply the proposed general intent standard to *People v. Halgren* and the hypothetical scenario and demonstrate how it would have affected the outcome of those cases.²¹ In doing so, the benefits of the general intent standard will become clear.

14. See discussion section IV.B. See *People v. Halgren*, 52 Cal. App. 4th 1223 (1996).

15. See *Halgren*, 52 Cal. App. 4th at 1226.

16. See *id.* at 1226-28.

17. See *People v. Hood*, 462 P.2d 370 (Cal. 1969). A statute contains a general intent standard when "the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence." *Id.* at 378. A statute contains a specific intent standard when "the definition refers to defendant's intent to do some further act or achieve some additional consequence." *Id.*

18. See discussion section V.A.

19. See WASH. REV. CODE ANN. § 9A.46.110(1)(c) (West Supp. 1998); *State v. Lee*, 917 P.2d 159 (1996).

20. See discussion *infra* section V.A and V.B.

21. See discussion *infra* section V.C.

II. BACKGROUND

Stalking initially captured public attention after an obsessed fan stalked and killed actress Rebecca Schaeffer in 1989, and after the news media reported that an obsessed fan was persistently harassing TV personality David Letterman in the early 1990's.²² Although celebrities receive the majority of publicity and public attention, they are actually involved in only seventeen percent of stalking cases.²³ More frightening is that as many as 200,000 people are currently being stalked in the United States today, the majority of whom are women.²⁴

The crime of stalking is defined as "willful, malicious and repeated following or harassing of another person combined with a credible threat."²⁵ While stalking requires following or harassing, not all such activity rises to the level of seriousness that is classified as stalking. Initially, a stalker's behavior may be nothing more than bothersome and annoying.²⁶ A stalker whose conduct is merely annoying may not realize that his behavior is prohibited.²⁷ In many such cases, a call or visit from the police is generally sufficient to notify the stalker that his behavior is unacceptable and to put a stop to it.²⁸ In more serious cases, however, where a call or visit from the police is not sufficient to convince the stalker to stop the behavior, the stalker may have a mental disorder which contributes to his obsession.²⁹ If not checked, the stalker's obsession with the

22. See NATIONAL INSTITUTE OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES 5 (1993).

23. See Tatia Jordan, Note, *The Efficacy of the California Stalking Law: Surveying its Evolution, Extracting Insights from Domestic Violence Cases*, 6 HASTINGS WOMEN'S L.J. 363, 363 (1995).

24. CONGRESSIONAL RESEARCH SERVICE, The Library of Congress, *Stalking: Recent Developments* 96-832 GOV 2 (October 17, 1996) [hereinafter "C.R.S."]. An estimated one in every twelve American women will become a victim of stalking at some time in her life. See A.P.R.I., *supra* note 1, at 1.

25. CAL. PENAL CODE § 646.9(a) (Deering Supp. 1998).

26. See Telephone Interview with Michael Hamilton, Inspector, San Francisco Police Department (Sept. 15, 1997) [hereinafter "Hamilton"].

27. See *id.*

28. See *id.*

29. See Michael A. Zona, *A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample*, 38 J. FORENSIC SCI. 894, 894 (1993). Dr. Zona's study identified three mental disorders that commonly afflict stalkers: erotomania, love

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victim may grow. As a result, the behavior that began as merely bothersome or annoying can escalate into violence, and may end in the victim's injury, or even death.³⁰

A. THE PROFILE OF A STALKER

Although stalking behavior has long been acknowledged as problematic, it was not recognized as a crime until California took legislative action in 1990.³¹ Relatively few studies exist that fully explore the psyche of the stalker, in part because this crime has only recently been recognized.³² However, it is clear that a multitude of factors combine to create stalking behavior.³³ For example, stalkers may be male or female.³⁴ They may be "motivated by anger, revenge, jealousy, absolute fantasy, or delusion."³⁵ In 1993, Dr. Michael Zona of the University of Southern California School of Medicine identified three mental disorders that may prompt one person to stalk another: erotomania, love obsession, and simple obsession.³⁶

1. Erotomaniac Stalkers

According to Dr. Zona's study, erotomaniac stalkers commonly believe that the object of their obsession, who is either of a higher socioeconomic class or is an unattainable figure, such as a movie star or political figure, passionately loves them.³⁷ Generally, no prior relationship exists between the stalker and the victim. Erotomaniac stalkers are usually women and their

obsession and simple obsession. The study was based on 74 stalking cases handled by the LAPD's Threat Management Unit in 1991. *See id.*

30. *See* N.I.J., *supra* note 12, at 49.

31. *See* AMERICAN PROSECUTORS RESEARCH INSTITUTE STALKING, PROSECUTORS CONVICT AND RESTRICT 1 (1997).

32. *See* Zona, *supra* note 29. While this study is not particularly recent, it has been cited as definitive in studies and articles published as recently as 1997. A.P.R.I., *supra* note 1, at 15.

33. *See* A.P.R.I., *supra* note 1, at 15.

34. *See id.* While it is true that stalkers can be men or women, the majority of stalkers are men. *See* Zona, *supra* note 29, at 897. Therefore, this article will refer to stalkers in the masculine and victims in the feminine for ease of reference.

35. A.P.R.I., *supra* note 1, at 15.

36. *See* Zona, *supra* note 29, at 894-96.

37. *See* A.P.R.I., *supra* note 1, at 15.

victims are usually men.³⁸ This is the opposite of the general population of stalkers and victims.³⁹ Erotomantic stalkers may continue to contact their victim for up to nineteen months and may maintain their obsession for up to 125 months.⁴⁰ These stalkers are most likely to initiate contact by writing letters, making telephone calls, and appearing at their victim's home, although these visits do not necessarily involve face-to-face contact.⁴¹ The erotomantic stalker is the least likely to become violent because this type of stalker rarely initiates face-to-face contact with the object of his obsession.⁴²

2. Love Obsessional Stalkers

Love obsessional stalkers, like erotomantic stalkers rarely have a prior personal relationship with their victim.⁴³ However, unlike erotomantic stalkers, love obsessional stalkers are most often men who suffer from an additional mental disorder, such as schizophrenia, bipolar affective disorder, or schizoaffective disorder.⁴⁴ Additionally, unlike erotomantic stalkers, love obsessional stalkers do not believe that they are loved by their victim.⁴⁵ Women are typically the victims of love obsessional stalkers.⁴⁶ These stalkers may contact their victim for up to nine months, although they may maintain their obsession for up to twelve years.⁴⁷ Love obsessional stalkers most often contact their victim through letters and phone calls.⁴⁸

38. See *Zona*, *supra* note 29, at 897-98 & Table 3.

39. See *id.* at 898 & Table 3.

40. See *id.* at 899 & Table 4.

41. See *id.* at 899 & Table 5.

42. See *Zona*, *supra* note 29, at 899 & Table 5.

43. See *id.* at 901.

44. See *id.*

45. See *A.P.R.I.*, *supra* note 1, at 16.

46. See *id.* at 898 & Table 2.

47. See *id.* at 901.

48. See *id.*

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3. Simple Obsessional Stalkers

The most dangerous type of stalker is the simple obsessional stalker.⁴⁹ He is usually a male who has had a prior relationship with his victim, who is most often a female.⁵⁰ The prior relationship between the stalker and the victim need not have been intimate.⁵¹ The stalker could have been anything from a casual acquaintance to a former lover.⁵² The outstanding characteristic of this group is that the stalking behavior is almost always triggered by a single event, either the termination of the relationship or the perception by the stalker that the victim is mistreating him.⁵³ As a result of the triggering event, the stalker seeks either to restore the relationship or to exact retribution upon the victim.⁵⁴ The simple obsessional stalker is the most dangerous type of stalker because he is the most likely of the three types to engage in person-to-person confrontation and to destroy the victim's property or physically harm the victim.⁵⁵

B. EFFECT OF STALKING ON THE VICTIM

Stalkers' behavior has a tremendous detrimental impact on their victims. Stalking commonly destroys the victim's sense of privacy.⁵⁶ Frequently, the result is paranoia and constant fear: fear of others, fear of sleep, or fear of the unknown.⁵⁷ This may cause the victim to withdraw from social activity and make it impossible for her to undertake activities that were previously commonplace in her life.⁵⁸ In addition, stalking often disrupts the victim's relationships with others.⁵⁹ Overall, the victim bears a great physical and emotional burden as a result of stalking.

49. See A.P.R.I., *supra* note 1, at 901-02.

50. See *id.* at 902.

51. See *id.* at 896.

52. See *id.*

53. See A.P.R.I., *supra* note 1, at 901.

54. See *id.* at 896.

55. See *id.* at 902.

56. See A.P.R.I., *supra* note 1, at 27.

57. See *id.*

58. See *id.*

59. See *id.*

C. BEFORE THE ANTISTALKING STATUTE: TEMPORARY RESTRAINING ORDERS AND STATUTES PROSCRIBING TERRORIST THREATS AND ANNOYING TELEPHONE CALLS

A stalker's behavior often begins as harassment. In many stalking situations, the initial harassment may not involve physical confrontation. However, the harassment can escalate to physical contact and even violence.⁶⁰ Prior to the enactment of antistalking legislation, California's statutory scheme did not allow police to intervene and protect victims who were being harassed, but where the harassment stopped short of physical confrontation.⁶¹ California's antistalking law was the first law that enabled the police to get involved in a harassing situation before the harassment resulted in physical confrontation.

While in most cases prior to the enactment of antistalking legislation the police lacked the authority to intervene, several statutes existed which permitted the police to offer some protection to the victim, but only if a narrowly defined set of circumstances existed.⁶² These statutes protected victims by allowing a judge to issue a temporary restraining order and allowed prosecution of people who made terrorist threats or placed annoying telephone calls to the victim.

1. Temporary Restraining Orders

Prior to the enactment of California's antistalking law, the temporary restraining order ("TRO") was the most widely used of the available tools⁶³ and is still an important part of the pro-

60. See Hamilton, *supra* note 26.

61. See *id.*

62. See CAL. PENAL CODE § 527.6 (Deering 1995) (providing for the issuance of temporary restraining orders); CAL. PENAL CODE § 653m (Deering Supp. 1998) (prohibiting annoying telephone calls), and CAL. PENAL CODE § 422 (prohibiting terrorist threats).

63. See Heather M. Stearns, Comment, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 SANTA CLARA L. REV. 1026, 1035 (1995). See CPC § 527.6. "(A) A person who has suffered harassment as defined in subsection (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section. (B) For the purposes of this section, "harassment" is a knowing

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tection and prosecution process today.⁶⁴ A TRO is a protective court order that prohibits a stalker from further harassing the victim.⁶⁵ Such protective orders can serve as the first formal notice to the stalker that his behavior is unwelcome and that further harassing behavior will be regarded as criminal.⁶⁶ In order to obtain a TRO, the victim must first demonstrate that the harassment would cause a reasonable person to suffer substantial emotional distress.⁶⁷ Second, the victim must demonstrate that she actually suffered emotional distress.⁶⁸ Until recently, a TRO was necessary to the stalking prosecution process.⁶⁹ Today, however, a first stalking offense may be prosecuted as a misdemeanor or a felony, regardless of whether a restraining order is in effect.⁷⁰ The first stalking offense is known as a "wobbler" because the prosecuting attorney has discretion to charge the offense as a misdemeanor or a felony depending on the circumstances and seriousness of the offense.⁷¹ If a restraining order is in effect when the stalking behavior occurs, the statute removes the prosecuting attorney's discretion and the crime must be charged as a felony, carrying a penalty of incarceration in state prison for up to four years.⁷²

For enforcement of restraining orders to be effective, victims must be informed of their rights both at the time they seek and

and willful course of conduct directed at a specific person which seriously alarms, annoys or harasses the person, and which serves no legitimate purpose." *Id.*

64. When a TRO is in effect, a stalking offense in violation of the order must be prosecuted as a felony. *See* CPC § 646.9(b). "Any person who violates subsection (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subsection (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years." *Id.*

65. *See* CPC § 527.6.

66. *See* N.I.J., *supra* note 12, at 75.

67. *See* CPC § 527.6(b). "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 plaintiff." *Id.*

68. *See id.*

69. *See infra* discussion section II.D. Revisions to the antistalking statute eliminated the requirement that the victim obtain a TRO before the stalker could be charged with a felony.

70. *See* A.P.R.I., *supra* note 1, at 17.

71. *See* Telephone Interview with Susan Breall, Assistant District Attorney, San Francisco District Attorney's Office (September 15, 1997) [hereinafter "Breall"].

72. *See* CPC § 646.9(b).

after they have obtained a TRO.⁷³ Also, the courts must monitor compliance by the stalker, victims must report violations, and police, prosecutors, and judges must respond sternly to reported violations.⁷⁴ As a result, the burden of effective protection falls on many shoulders, not just those of the police or prosecutors. For this reason, TRO's may be very limited in their effectiveness.

2. Conviction for Annoying Telephone Calls and Terrorist Threats

California Penal Code section 653m prohibits a person from making telephone calls intending to annoy the recipient.⁷⁵ Calls placed to a recipient's home containing obscene language or threats that the caller will inflict injury on the recipient are classified as misdemeanor offenses.⁷⁶ Similar calls placed to the recipient's place of business are also classified as misdemeanors but carry a penalty of a fine of up to \$1,000 or imprisonment in a county jail.⁷⁷

73. See N.I.J., *supra* note 12, at 78.

74. See *id.* at 77.

75. CPC § 653m(a). Section 653m(a) states:

Every person who, with intent to annoy, telephones another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor.

Id.

76. See *id.* CPC § 653m(b). The statute differentiates between calls placed to the recipient's home and calls placed to the recipient's place of business. "Every person who makes repeated telephone calls with intent to annoy another person at his or her residence, is, whether or not conversation ensues from making the telephone call, guilty of a misdemeanor" (emphasis added). *Id.*

77. See CPC § 653m(c). Section 653m(c) states:

Every person who makes repeated telephone calls with the intent to annoy another person at his or her place of work is guilty of a misdemeanor punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment in a county jail for not more than one year, or by both the fine and imprisonment... This subdivision applies only if one or both of the following circumstances exist: (1) There is a temporary restraining order, an injunction, or any other court order, or any combination of these court orders, in effect prohibiting the behavior described in this section. (2) The person who makes repeated telephone calls with the intent to annoy another person at his or her place of work, totaling more than 10 times in a 24-hour period, whether or not conversation ensues from making the telephone call, and the repeated

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The statute prohibiting terrorist threats, Cal. Penal Code section 422, offered additional protection to a stalking victim prior to the enactment of antistalking legislation in California.⁷⁸ This statute prohibits a person from making threats of death or great bodily injury.⁷⁹ The statute requires proof that the person making the threat intends for the recipient to interpret it as a threat.⁸⁰ The threat must be specific enough to make the recipient expect that it will be carried out immediately.⁸¹ The statute also requires that the recipient reasonably fear for her safety or the safety of her immediate family.⁸² The penalty for violation of this statute is imprisonment in county jail or state prison for up to one year.⁸³

Statutes proscribing annoying telephone calls or terrorist threats are problematic in the context of stalking because their application is too narrow to provide adequate protection to the stalking victim.⁸⁴ The restrictive language of the statutes requires prosecutors to prove that the stalker made an unconditional and unequivocal threat of immediate harm or engaged in specific behaviors, such as placing harassing, obscene phone

telephone calls are made to the workplace of an adult or fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the person has a child or has had a dating or engagement relationship or is having a dating or engagement relationship" (emphasis added).

Id.

If a TRO is not in effect, the law requires that a narrowly defined relationship between the caller and the recipient exist. *See id.*

78. *See* CAL. PENAL CODE § 422. Section 422 states:

Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

Id.

79. *See id.*

80. *See id.*

81. *See id.* The person need not intend to carry out the threat. *Id.*

82. *See* CPC § 422.

83. *See id.*

84. *See* Stearns, *supra* note 63, at 1048.

calls to the recipient's home or place of business. The terrorist threat and annoying telephone call statutes were designed to protect victims from specific instances of threatening or annoying activities. They do not protect against a *series* of acts that, when viewed as a whole, represent a harassing or threatening *course of conduct*. To remedy this deficiency in the statutory scheme, California's legislature enacted the antistalking statute to protect victims from a cumulative series of individual acts that, when viewed in context with each other, represent a threat or harassment.

D. HISTORY OF CALIFORNIA'S ANTISTALKING STATUTE

California's antistalking statute, enacted in 1990, was the first in the country to criminalize harassing behavior. The new law eliminated any requirement of physical confrontation. By eliminating this requirement, the California legislature essentially created a new crime.⁸⁵ Since a model statute to which California could compare its new antistalking law did not exist, the first incarnation of the law contained numerous weaknesses. These weaknesses were revealed in a series of cases in which convicted stalkers challenged the law.⁸⁶ Legislators have revised the statute four times since 1990, thereby strengthening the law.⁸⁷

In its original form, the statute was narrower in scope and provided far less protection to the victim than it does today.⁸⁸

85. See A.P.R.I., *supra* note 1, at 1.

86. See *People v. Falck*, 52 Cal. App. 4th 287 (1997) (term "safety" is not unconstitutionally vague); *People v. Halgren*, 52 Cal. App. 4th 1223 (1996) (the term "credible threat" is not unconstitutionally vague); *People v. Tran*, 47 Cal. App. 4th 253 (1996) (the term "harasses" is not unconstitutionally vague as applied to a defendant who believed his actions served a legitimate purpose); *People v. McClelland*, 42 Cal. App. 4th 144 (1996) (requirement that stalking offense be classified as a felony if it violates an existing court order is not unconstitutionally vague, language of court order does not have to mirror the language of the antistalking statute); *People v. Heilman*, 25 Cal. App. 4th 391 (1994) (the term "repeatedly" is not unconstitutionally vague in context of entire statute).

87. See CPC § 646.9. Revisions were enacted in 1992, 1993, 1994 and 1995. See *id.*

88. See *id.* Section A of the original statute read as follows:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent

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Stalking was defined as the willful, malicious, and repeated following or harassing of another person, combined with a credible threat that causes the person to fear great bodily injury or death.⁸⁹ The definition of "credible threat" required that the stalker threaten the life or safety of the victim, with the intent and apparent ability to carry out the threat, causing the victim to reasonably fear for her safety.⁹⁰ The first offense was a misdemeanor carrying a maximum penalty of not more than one year in county jail and/or a fine of up to \$1,000.⁹¹ A second offense occurring within seven years of the first offense, or a first offense in violation of a court order, was punishable as a misdemeanor or a felony, depending upon the seriousness of the crime.⁹²

In 1992, the legislature expanded the definition of "credible threat" to include threats to family members.⁹³ This was a sig-

to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment.

Id.

89. *See id.*

90. *See id.* Section E of the original statute read as follows:

For the purposes of this section, a "credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

Id.

91. *See* CPC § 646.9. Section B of the original statute read as follows:

Any person who violates subdivision (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subdivision (a) against the same party, is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

Id.

92. *See id.* Section C of the original statute read as follows:

A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or "a credible threat" of violence, as defined in subdivision (e), is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars (\$1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

Id.

93. *See id.* Section F of the statute was amended in 1992 to read as follows:

For the purposes of this section, a "credible threat" means a threat made with the intent and the apparent ability to carry out the threat so

nificant revision because stalkers sometimes exploit a victim's family and friends in order to reach the victim.⁹⁴ The 1992 revisions also increased the classification of second offenses to a felony, providing for incarceration for up to one year and a fine of up to \$1,000.⁹⁵

In 1993, the California legislature revised the statute significantly. Among the revisions, the legislature expanded the definition of "credible threat" to include threats implied by a "course of conduct." The legislature also expanded the intent requirement from threats of death or great bodily harm to threats intended to place the victim in reasonable fear for her safety or the safety of her family.⁹⁶ Finally, they increased penalties for the second offense to incarceration for up to four years in state prison.⁹⁷

as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

Id.

94. See A.P.R.I., *supra* note 1, at 17.

95. See CPC §646.9. Section C of the statute was amended in 1992 to read as follows:

A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or "a credible threat" of violence, as defined in subdivision (f), is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both that fine and imprisonment, or by imprisonment in the state prison.

Id.

96. See *id.* Section E of the statute was amended in 1993 to read as follows:

For the purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

Id.

97. See *id.* Section B of the statute was amended in 1993 to read as follows: "Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years." Additional revisions included giving the court discretion to classify the first offense as a misdemeanor or felony, depending upon the circumstances of the crime; increasing the penalty for violation of a restraining order to a felony offense; expanding the definition of immediate family to the language found in

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During the hearings in which the legislature discussed the 1993 amendments, California Assemblyman Bob Epple explained that by expanding the scope of the fear requirement and allowing the courts to consider threats implied by conduct, the changes would “prevent stalkers from being able to hide behind California’s lenient antistalking laws.”⁹⁸ He believed that the changes would send a clear message that California takes stalking crimes very seriously.⁹⁹ Assemblywoman Jackie Speier noted that increased penalties would decrease the disparity between the suffering and damage incurred by a stalking victim and the current penalties to the stalker.¹⁰⁰ The legislature approved Assemblyman Epple’s proposed amendments by an overwhelming majority.¹⁰¹

The legislature amended the statute again in 1994 and 1995.¹⁰² The 1994 amendments included increasing the penalty for second offenses to mandatory incarceration; approving a provision requiring law enforcement officials to notify victims prior to their stalkers’ release from prison; and giving law enforcement officials the power to prosecute stalkers who continued to threaten their victims while in jail. In 1995, the legislature expanded the definition of “credible threat” to the current language.¹⁰³

the current statute; and giving the court discretion to recommend that the stalker undergo rehabilitative treatment as a condition of parole.

See id.

98. *Hearing on Assembly Bill No. 1178 Before the Assembly Committee on Public Safety* (statement by Bob Epple, Chair), Apr. 13, 1993 [hereinafter “Epple”].

99. *See id.*

100. *See Hearing on Assembly Bill No. 284 Before the Assembly Committee on Public Safety* (statement by Assemblywoman Jackie Speier), Apr. 20, 1993 [hereinafter “Speier”].

101. *See Committee Report for 1993 Cal. Assembly Bill No. 1178, 1993-1994 Reg. Sess. Before the Senate Committee on the Judiciary* (June 22, 1993). The vote totaled 70 ayes and 0 noes. *See id.*

102. *See* CPC § 646.9.

103. *See* CPC § 646.9(g). Section 646.9(g) states:

For the purposes of this section, “credible threat” means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is

E. CALIFORNIA'S EXISTING ANTISTALKING LAW

Today, California Penal Code section 646.9 defines stalking as willfully, maliciously, and repeatedly following or harassing another person and making a credible threat with the intent to place the victim in reasonable fear for her safety, or the safety of her immediate family.¹⁰⁴ The statute is triggered only when the stalker makes a credible threat with the specific intent to cause the victim to reasonably fear for her safety and commits one of two prohibited acts — either willful, malicious, and repeated following; or harassment.¹⁰⁵ The stalker's first offense can be prosecuted as a misdemeanor or a felony, with penalties varying depending upon the classification and seriousness of the crime.¹⁰⁶ Additionally, the court may require the stalker to register as a sex offender or to participate in counseling as a condition of probation.¹⁰⁷ The court also has discretion to issue

the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat.

Id.

Other amendments included giving the court discretion to require that a stalker register as a sex offender pursuant to Cal. Penal Code section 290(2)(e) (the decision to do this must be based on the court's determination that the stalking took place as a result of a sexual compulsion or for sexual gratification) and giving the court the discretion to impose a restraining order prohibiting contact between the victim and the stalker for up to ten years. *See id.*

104. *See* CPC § 646.9(a). Section 649 (a) states:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars, or by both that fine and imprisonment, or by imprisonment in the state prison.

Id.

105. *See* Respondent's Brief at 18, *People v. Halgren*, 52 Cal. App. 4th 1223 (1996) (No. SCD107843) [hereinafter "Respondent's Brief"].

106. *See* CPC § 646.9. If it is classified as a misdemeanor it carries a penalty of up to \$1,000 and/or incarceration in county jail for up to one year. However, if it is classified as a felony it carries a penalty of incarceration in state prison for up to one year. If a court order is in effect, or if the violation is a second offense, the violation is a felony carrying a penalty of incarceration in state prison for two to four years. *See id.*

107. *See* CPC § 646.9(d) and 646.9(i). Section (d) states: "In addition to the penalties provided in this section, the sentencing court may order a person convicted of a felony under this section to register as a sex offender pursuant to subparagraph (E) or paragraph (2) of subdivision (a) of Section 290."

Section (i) states:

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a restraining order barring any contact between the stalker and the victim for a period of up to ten years.¹⁰⁸ Finally, the statute allows law enforcement officials to prosecute stalkers who continue to threaten their victims through letters and telephone calls from prison.¹⁰⁹

1. Credible Threat

California's antistalking statute defines "credible threat" as encompassing both verbal and written threats, as well as threats implied by a pattern of conduct.¹¹⁰ This definition of "credible threat" allows prosecutors to consider a broad range of stalking activities and to prosecute offenders without proving that they intended to execute the threat.¹¹¹ A prosecutor must prove only that the stalker intended to cause the victim to be afraid and that he had the concurrent ability to carry out his threat.¹¹²

If probation is granted, or the execution of imposition of a sentence is suspended, for any person convicted under this section, it shall be a condition of probation that the person participate in counseling, as designated by the court. However, the court, upon a showing of good cause, may find that the counseling requirement shall not be imposed.
Id.

108. See CPC § 646.9(j). Section 646.9(j) states:

The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to ten years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. *Id.*

109. See CPC § 646.9(g). Section 646.9(g) states:

For the purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section.

Id.

110. See *id.*

111. See A.P.R.I., *supra* note 1, at 17.

112. See CPC § 646.9(g).

This definition of "credible threat" is problematic because it requires the accused stalker to actually intend to cause his victim to be afraid.¹¹³ This is a specific intent requirement, because it requires the accused stalker to undertake an act with the intent to bring about a particular result.¹¹⁴ Under this specific intent requirement, an accused stalker could potentially avoid conviction by presenting one of several defenses, including the assertion that he suffers from a mental disorder or that he did not form the requisite specific intent.

As mentioned in Part II.A, a stalker's obsession can be driven by a mental disorder which may prevent the stalker from understanding the nature of his actions.¹¹⁵ Because California's antistalking law contains a specific intent requirement, an accused stalker could present evidence that he did not actually form the specific intent necessary for the commission of the crime due to a mental disease or disorder.¹¹⁶ If successful, this assertion provides the accused stalker with a complete defense to the charged crime.¹¹⁷

Alternatively, the accused stalker in California could assert that he did not intend to cause his victim to be afraid but was instead expressing his feelings and opinions. Several convicted stalkers have unsuccessfully attempted to overturn their convictions by asserting this defense.¹¹⁸ Although this defense has been unsuccessful, the court has clearly given considerable attention to the assertion.

113. *See id.*

114. *See* *People v. Hood*, 462 P.2d 370, 378 (1969).

115. *See* discussion *supra* Part II.A.

116. *See* CAL. PENAL CODE § 28(a) (Deering 1985). Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged (emphasis added). *Id.*

117. *See* PAUL H. ROBINSON, CRIM. L. DEF. § 64, 273 (West 1984).

118. *See* *People v. Tran*, 47 Cal. App. 4th 253 (1996); *People v. Halgren*, 52 Cal. App. 4th 1223 (1996).

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2. Course of Conduct

California's antistalking statute specifically defines "course of conduct" as a series of acts evincing a continuity of purpose.¹¹⁹ This is a broad definition which allows the police to bring charges against a person who harasses his victim as few as two times.¹²⁰ Acts of stalking occurring up to two years from each other may be considered as evidence that the stalker has engaged in a "course of conduct."¹²¹ This broad definition of "course of conduct" provides law enforcement with a tremendous tool with which to prosecute stalkers because it allows them to consider a broad range of activities before pressing charges.¹²²

3. Harass

California's antistalking statute defines "harass" as a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person.¹²³ To constitute harassment, the course of conduct must be enough cause a reasonable person to suffer substantial emotional distress.¹²⁴ Further, the conduct must actually cause the victim to suffer substantial emotional distress.¹²⁵

119. See CPC § 646.9(f). "For purposes of this section, "course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." *Id.*

120. See Hamilton, *supra* note 26.

121. See *id.*

122. See Breall, *supra* note 71.

123. See CPC § 646.9(e). Section 646.9(e) states:

For 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.

Id.

124. See *id.*

125. See *id.*

F. CONSTITUTIONAL CHALLENGES TO CALIFORNIA PENAL CODE SECTION 646.9

Drafting effective antistalking legislation that will withstand constitutional challenge is a complex task. Lawmakers must weigh the fear of the victim against the constitutionally protected activities of the accused.¹²⁶ Since the enactment of antistalking legislation in 1990, several stalkers have appealed their stalking convictions and have attacked the constitutionality of the antistalking statute. Constitutional challenges are generally based on the argument that the statute is either void for vagueness or is overbroad.¹²⁷ Although several cases have directly challenged the constitutionality of California's antistalking statute, the courts have demonstrated their unwillingness to strike down the statute as unconstitutional.¹²⁸

A statute is unconstitutionally vague if it does not comport with due process requirements.¹²⁹ First, due process requires that "a statute provide a standard of conduct for those whose activities are proscribed."¹³⁰ To do this, the statute must be definite enough that a person of common intelligence can understand its meaning and application.¹³¹ However, this requirement "does not preclude the use of ordinary terms" in the statute, as long as the terms have a common usage and understanding.¹³² Second, the statute must provide "a standard for police enforcement and for ascertainment of guilt."¹³³ If a statute meets these two requirements, it will not be found void for vagueness.

126. See CONGRESSIONAL RESEARCH SERVICE, The Library of Congress, *Stalking: Recent Developments* 96-832 GOV 4 (October 17, 1996).

127. See N.I.J., *supra* note 12, at 9.

128. See *People v. Tran*, 47 Cal. App. 4th 253 (1996) (stalking behavior is not justified by the stalker's unreasonable belief that his activities serve a legitimate purpose); *People v. McClelland*, 42 Cal. App. 4th 144 (1996) (the antistalking law does not require a court order to mirror the language of the statute in order to be effective); *People v. Heilman*, 25 Cal. App. 4th 391 (1994) (the term "repeatedly" is not unconstitutionally vague).

129. See *People v. Heilman*, 25 Cal. App. 4th 391, 400 (1994).

130. *Id.*

131. See *id.*

132. *Id.*

133. *Id.*

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A successful challenge on the basis of overbreadth “must demonstrate that [the statute] inhibits a substantial amount of protected speech.”¹³⁴ A statute is not overbroad merely because it is possible to conceive of a single impermissible application.¹³⁵ Rather, the overbreadth of a statute must be both real and substantial in relation to its legitimate sweep.¹³⁶ “A statute may not be invalidated as overbroad unless it reaches a substantial number of protected activities.”¹³⁷

III. COMPARISON OF THE NATIONAL INSTITUTE OF JUSTICE’S MODEL ANTISTALKING CODE WITH CALIFORNIA’S ANTISTALKING STATUTE

Since California enacted the country’s first antistalking law, the federal government has also recognized the serious nature of stalking crimes and has addressed stalking on a national level.¹³⁸ In 1993, Congress delegated the task of creating a model antistalking statute to the Attorney General.¹³⁹ In turn, the Attorney General delegated this task to the National Institute of Justice (“N.I.J.”) which, in October, 1993, published a report titled *The Project to Develop a Model Antistalking Code for States* (“Model Code”).¹⁴⁰

Prior to the publication of the Model Code, state laws addressing stalking varied widely, resulting in a “hodgepodge of flawed statutes.”¹⁴¹ The N.I.J. developed the model antistalking code as an example of antistalking legislation that would effectively combat stalking crimes and also withstand constitu-

134. See *Halgren*, 52 Cal. App. 4th at 1231.

135. See *Broaderick v. Oklahoma*, 413 U.S. 601, 615 (1973).

136. See *Halgren*, 52 Cal. App. 4th at 1231.

137. See *New York v. Ferber*, 458 U.S. 747, 771 (1982).

138. See CONGRESSIONAL RESEARCH SERVICE, *The Library of Congress, Stalking: Recent Developments* 96-832 GOV 3 (October 17, 1996). In addition to the model code, the federal government enacted the Interstate Stalking Punishment and Prevention Act of 1996, making it a federal crime to cross state lines to injure or harass another person. See 18 U.S.C. § 2261 (West Supp. 1997).

139. See C.R.S., *supra* note 24, at 3-4.

140. See *id.* at 4.

141. NATIONAL INSTITUTE OF JUSTICE, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION, 4 (Apr. 1996).

tional scrutiny.¹⁴² As a result of the Model Code, many states with antistalking laws amended their existing statutes and penal codes to conform to at least some of the Model Code's recommendations, and eighteen states enacted new laws.¹⁴³

The Model Code recommends several policies for states to follow.¹⁴⁴ It encourages legislators to make stalking a felony offense and to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime.¹⁴⁵ Further, it provides criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers.¹⁴⁶ To assist lawmakers in accomplishing these goals, the Model Code discusses several critical concepts, including credible threat, intent, and fear.

142. See NATIONAL INSTITUTE OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES (1993).

143. See BUREAU OF JUSTICE ASSISTANCE, *Regional Seminar Series on Developing and Implementing Antistalking Codes* 11 June 1996 [hereinafter "B.J.A."]. "Iowa, Virginia and Utah amended their statutes to incorporate the language recommended by the model code. Wisconsin amended its code to include provisions that are similar to those in the model code..." *Id.*

The following states enacted antistalking laws in 1992: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Kansas, Idaho, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. The following states enacted antistalking laws in 1993: Alaska, Arkansas, Georgia, Indiana, Maryland, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oregon, Pennsylvania, Texas, Vermont, and Wyoming.

Id. at nn.2-3.

144. See N.I.J., *supra* note 12, at 43-44. The following is the text of the model code:

Any person who (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

Id.

145. See *id.*

146. See *id.*

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A. THE CREDIBLE THREAT REQUIREMENT

Unlike many state antistalking statutes, the Model Code does not use the term “credible threat.”¹⁴⁷ Instead of focusing on a threat, which might be construed as requiring an actual verbal or written threat, the Model Code focuses on the series of acts undertaken by the stalker.¹⁴⁸ In the Model Code, the emphasis is on threats implied by a “course of conduct” which, when taken in context, would cause a reasonable person to fear for her safety.¹⁴⁹

California’s antistalking statute, unlike the Model Code, uses the term “credible threat.”¹⁵⁰ However, the 1993 amendment addressed the problem that the Model Code sought to avoid by expanding the definition of “credible threat” to include threats implied by a “course of conduct.”¹⁵¹ By doing so, California’s statute allows prosecutors to consider the broadest possible range of activities when bringing charges against a stalker. Therefore, it is consistent with the recommendations of the Model Code.

B. THE INTENT REQUIREMENT

The Model Code incorporates a general intent provision, which simply requires that the stalker purposefully engage in activities that would cause a reasonable person to fear bodily injury or death.¹⁵² It does not require that the stalker intend to cause his victim to be afraid.¹⁵³ Stalkers may suffer from a mental disorder that causes them to believe that their victim will begin to return their feelings of love or affection if properly pursued.¹⁵⁴ If this is the case, the stalker’s intent may not be to

147. See N.I.J., *supra* note 12, at 45.

148. See *id.*

149. See *id.*

150. See CAL. PENAL CODE § 646.9(a) (Deering Supp. 1998).

151. See CPC § 646.9(e).

152. See N.I.J., *supra* note 12, at 43.

153. See *id.* at 47. The code does not require the stalker to actually intend to cause the victim to be afraid, only that the stalker consciously engage in conduct that he knows or should know would cause his victim to be afraid. *Id.*

154. See N.I.J., *supra* note 12, at 48.

cause the victim to be afraid, but to establish a relationship with or express his feelings to the victim.¹⁵⁵ The drafters of the Model Code believed that the stalker's behavior, rather than his motivation, should be the most significant factor in determining whether to press charges.¹⁵⁶ The Model Code's general intent requirement holds the accused stalker responsible for his intentional behavior if, at the very least, he *should have known* that his actions would cause the victim to be afraid.¹⁵⁷ A stalker should know that his actions are unappreciated if he was served with a court order or if he was told by the victim that she no longer wishes to be contacted. By placing the focus on the stalker's behavior, the Model Code effectively eliminates the possibility that a stalker could assert a successful defense by claiming that he did not intend to cause the victim to be afraid, but was instead expressing his feelings and opinions.¹⁵⁸

As mentioned earlier, California's antistalking law contains a specific intent requirement.¹⁵⁹ California's law requires that the stalker actually intend to cause the victim to be afraid, although it does not require that he intend to carry out his threats.¹⁶⁰ In comparison, the Model Code only requires that the stalker intend to undertake specific acts, but does not require that he intend to cause his victim to be afraid.¹⁶¹ Therefore, California's specific intent provision places a greater emphasis on the stalker's motives than does the Model Code. As a result, California might encounter difficulties in prosecuting a stalker who establishes that he did not intend to cause the victim to be afraid, even if he knew or should have known that his actions would have that result.¹⁶²

155. *See id.* See also discussion *supra* Part II.A.

156. *See* B.J.A., *supra* note 143, at 4.

157. *See id.* at 43-44.

158. *See* N.I.J., *supra* note 12, at 48.

159. *See* discussion *supra* section II.E.1.

160. *See* CPC § 646.9(g).

161. *See* N.I.J., *supra* note 12, at 43.

162. Examples of such a situation include *People v. Halgren*, 52 Cal. App. 4th 1223, 1232 (1996), in which the defendant appealed his stalking conviction on the ground that he was merely exercising his constitutional right to free speech, and *People v. Tran*, 47 Cal. App. 4th 253, 260 (1996), in which the defendant appealed his stalking

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C. THE FEAR REQUIREMENT

The Model Code requires the victim to actually experience a high level of fear: fear of serious bodily injury or death.¹⁶³ The reason for this strict standard is that stalking statutes criminalize a series of acts that, individually, might otherwise be legitimate conduct, such as making a phone call or writing a letter.¹⁶⁴ This strict fear requirement acts as a check on police power and ensures that the constitutional rights of the accused are protected.

California's antistalking statute requires that the prosecuting attorney prove a lower threshold of fear than the Model Code.¹⁶⁵ In California, a stalker need only place his victim in reasonable *fear for her safety* or the safety of her immediate family, whereas, under the Model Code, a stalker must place the victim in *fear of serious bodily injury or death*.¹⁶⁶ However, while the California statute requires a lower threshold of fear, it incorporates the Model Code's requirement of *actual fear*.¹⁶⁷ The stalker's actions must actually cause the victim to be afraid. This actual fear requirement also protects the rights of the stalker by requiring that the victim prove she was actually placed in fear, and therefore suffered as a result of the stalker's actions.

IV. THE DEFICIENCIES IN CALIFORNIA'S SPECIFIC INTENT PROVISION

In most respects, California's antistalking statute follows or exceeds the policies and protections suggested by the Model Code. However, the California legislature did not incorporate the Model Code's general intent standard. Instead, as men-

conviction on the ground that he irrationally but honestly believed his actions served a legitimate purpose. Both appeals were rejected, but the Court gave significant weight and thought to the appellant's arguments. *See id.*

163. *See N.I.J., supra* note 12, at 48.

164. *See id.*

165. *See* CPC § 646.9(g).

166. *See id.*

167. *See id.*

tioned earlier, California incorporates a specific intent standard.¹⁶⁸ This is a weakness because it allows accused stalkers to escape liability if they did not specifically intend to cause the victim to be afraid, even if they knew or should have known that their actions were causing their victim to be afraid.

A. COMPARISON OF GENERAL INTENT TO SPECIFIC INTENT

Specific intent is the intent to achieve a result by undertaking some specific act.¹⁶⁹ An antistalking statute containing a specific intent provision requires the prosecuting attorney to prove two things: that the stalker intended to undertake a specific act *and* that the stalker intended to achieve a particular result. Since the prosecuting attorney must prove both intents, a specific intent standard is a strict standard to meet. This is the level of intent currently required by California's antistalking statute.

In contrast, general intent requires proof of only one intent: the intent to undertake a specific act. General intent does not require proof that the defendant intended to bring about a specific result.¹⁷⁰ Because general intent does not require proof of the defendant's intent to bring about a particular result, the prosecution will have an easier time proving general intent. General intent is the level of intent required by the Model Code.

B. A CALIFORNIA STALKING CASE UNDER THE CURRENT SPECIFIC INTENT STATUTE: *PEOPLE V. HALGREN*

In *People v. Halgren* the California Court of Appeal affirmed the stalking conviction of defendant-appellant Earl Halgren ("Halgren").¹⁷¹ In 1995, Halgren was convicted of stalking Melissa Gonzales ("Gonzales") in the San Diego area during late 1994.¹⁷² On appeal, Halgren challenged the constitution-

168. *See id.*

169. *See People v. Hood*, 462 P.2d 370, 378 (1969).

170. *See id.*

171. *See People v. Halgren*, 52 Cal. App. 4th 1223, 1226 (1996).

172. *See id.* at 1226-28.

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ality of California's antistalking statute and reasserted his defense that he did not make a "credible threat."¹⁷³ In California, a "credible threat" requires specific intent to cause the victim to be afraid.¹⁷⁴ Halgren argued that he did not specifically intend to cause Gonzales to be afraid.¹⁷⁵ Rather, he was exercising his right of free speech by expressing his feelings of anger and frustration at Gonzales's rejection of his advances.¹⁷⁶ In support of his assertion, Halgren pointed out that his threats were "too vague and equivocal to be considered a 'credible threat.'"¹⁷⁷ The Court of Appeal rejected Halgren's assertions and affirmed the trial court's judgment. However, Halgren's assertion that he did not specifically intend to cause Gonzales to be afraid is indicative of the type of defense that could be successful under California's specific intent requirement.

1. Factual and Procedural History

In September 1994, Melissa Gonzales met Earl Halgren in a grocery store where they had a brief conversation.¹⁷⁸ During their conversation, Halgren learned where Gonzales worked, that she had a young son, and that she was divorced.¹⁷⁹ Beginning the following day, Halgren called Gonzales at her office once a day for the next two days.¹⁸⁰ Each day Halgren asked Gonzales to meet him for lunch.¹⁸¹ On the first day, Gonzales refused.¹⁸² However, on the second day, Gonzales agreed to go grocery shopping with him, but insisted that they go in separate cars.¹⁸³ Although she did not expect him to actually show up there, he did.¹⁸⁴ At the store, Halgren seemed "jittery" and

173. *See id.* at 1226.

174. *See* CAL. PENAL CODE § 646.9(g) (Deering Supp. 1998).

175. *See Halgren*, 52 Cal. App. 4th at 1232.

176. *See id.* at 1231-32.

177. *Id.*

178. *See* Respondent's Brief at 1-2, *People v. Halgren*, 52 Cal. App. 4th 1223, 61 Cal. Rptr. 2d 176 (1996) (No. SCD107843).

179. *See Halgren*, 52 Cal. App. 4th at 1226.

180. *See id.*

181. *See id.*

182. *See id.*

183. *See Halgren*, 52 Cal. App. 4th at 1226-27.

184. *See* Respondent's Brief, *supra* note 105, at 2.

“hyper,” and Gonzales told him that he was acting strangely.¹⁸⁵ In response, Halgren ran up and down the aisles slapping his calves.¹⁸⁶ Halgren showed her a badge and told her to remember that he was “really important.”¹⁸⁷ After this incident, Gonzales did not hear from Halgren for several weeks.¹⁸⁸

On October 26, 1994, Halgren called Gonzales at her office.¹⁸⁹ Halgren did not immediately identify himself when Gonzales picked up the line.¹⁹⁰ During the call, Halgren told Gonzales, “You’re going to have to talk to me sometime.”¹⁹¹ When she recognized Halgren’s voice, Gonzales hung up the phone.¹⁹² After this call, Gonzales and a co-worker began keeping a log of his calls.¹⁹³ He called several more times that day.¹⁹⁴ During one call, Gonzales told Halgren that she did not want to speak to him and that she had called the police, who were setting a telephone trap.¹⁹⁵

That night, although she had never given Halgren her home phone number, she received a message from him on her home answering machine.¹⁹⁶ He began to call her at home repeatedly, and made several threatening statements.¹⁹⁷ The calls and threats terrified her and caused her to fear for the safety of herself and her son.¹⁹⁸ In an attempt to protect them, Gonzales changed her home telephone to an unlisted number and notified her son’s preschool about the harassment.¹⁹⁹

185. *See id.* at 3.

186. *See Halgren*, 52 Cal. App. 4th at 1227.

187. *Id.*

188. *See id.*

189. *See Respondent’s Brief, supra* note 105, at 3.

190. *See id.*

191. *See id.*

192. *See Halgren*, 52 Cal. App. 4th at 1227.

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See Halgren*, 52 Cal. App. 4th at 1227.

198. *See id.* at 1227-28.

199. *See id.* at 1228.

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Beginning on October 28, 1994, Halgren placed between twenty-five and thirty calls to Gonzales's office each day and regularly watched her office building.²⁰⁰ On one occasion, when Gonzales wore black clothes to work, Halgren called and told her that she looked great in black.²⁰¹ Finally, on November 8, 1994, Gonzales's co-workers noticed Halgren outside their office and notified the police.²⁰² When he called her office, Gonzales kept him on the line.²⁰³ He stated, "I'm going to fix you" or "I'm going to fix this."²⁰⁴ The police traced the call to a telephone booth and arrested Halgren while he was on the telephone.²⁰⁵ When they arrested him, Halgren told the police, "I'm not a stalker or anything."²⁰⁶ The police found two knives, a small holster, and a rotating light beacon inside Halgren's car.²⁰⁷ They also found a Swiss army knife and a badge in his pocket.²⁰⁸

Halgren was arrested and charged with felony stalking.²⁰⁹ He pleaded not guilty and was convicted by a jury of felony stalking in San Diego Superior Court.²¹⁰ On Apr. 7, 1995 Halgren was granted five years probation with credit for time served.²¹¹ Halgren filed a notice of appeal on May 5, 1997.²¹²

2. The Court's Analysis

At the time of Halgren's conviction, California's antistalking law defined "credible threat" several different ways. First, a "credible threat" could be a verbal or written threat.²¹³ Second,

200. *See id.*

201. *See id.*

202. *See Halgren*, 52 Cal. App. 4th at 1228.

203. *See id.*

204. *Id.*

205. *See id.*

206. *Id.*

207. *See Halgren*, 52 Cal. App. 4th at 1228.

208. *See id.*

209. *See Respondent's Brief*, *supra* note 105, at 1.

210. *See Halgren*, 52 Cal. App. 4th at 1226.

211. *See Respondent's Brief*, *supra* note 105, at 1.

212. *See id.*

213. *See Halgren*, 52 Cal. App. 4th at 1229.

it could be a threat implied by a pattern of conduct.²¹⁴ Finally, a "credible threat" could be a combination of verbal or written statements and conduct.²¹⁵ Regardless of how the threat was conveyed, it must have been made with the intent and the apparent ability to carry out the threat, thereby causing the victim to reasonably fear for her safety or the safety of her immediate family.²¹⁶

On appeal, Halgren challenged California's antistalking statute on several grounds. He asserted that the statute was unconstitutionally vague because it failed to indicate what type of speech was prohibited and because it punished mere expressions of anger or disagreement.²¹⁷ In addition, he challenged the statute as unconstitutionally overbroad, claiming that it allowed punishment of ambiguous or unequivocal speech and expressions of anger or disagreement.²¹⁸

The Court of Appeal first addressed and rejected Halgren's vagueness challenge, noting that he took the language of the statute out of context.²¹⁹ The Court addressed the challenge by questioning whether a reasonable person of average intelligence could be reasonably certain about what behavior the statute prohibited.²²⁰ The Court indicated that the statute clearly outlined what activities it prohibited. The statute plainly states that a stalker must make a "credible threat," and the threat (1) must be made with the intent to cause the victim to be afraid and (2) must be accompanied by willful, malicious,

214. *See id.*

215. *See id.*

216. *See id.*

217. *See* Respondent's Brief, *supra* note 105, at 11.

218. *See id.*

219. *See Halgren*, 52 Cal. App. 4th at 1229-31.

220. *See Halgren*, 52 Cal. App. 4th at 1229 citing *People v. Heilman*, 25 Cal. App. 4th 391, 400 (1994). In applying this test, the court noted that the requirement of reasonable certainty does not preclude the use of commonly used terms. *See Heilman*, 25 Cal. App. 4th at 400.

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and repeated following or harassing of the victim.²²¹ A “credible threat” alone will not satisfy the elements of the crime.²²²

Next, the Court of Appeal addressed the overbreadth challenge. The Court rejected this challenge as well, concluding that California Penal Code section 646.9 does not punish mere emotional or angry speech.²²³ The First Amendment does not protect threats that are intended to cause fear.²²⁴ However, it does protect political and social discourse.²²⁵ Threats are not related to political or social discourse.²²⁶ When a reasonable person would foresee that the content and import of the threat will cause the listener to believe that she will be subjected to physical violence, the threat is not afforded First Amendment protection because it was intended to instill fear.²²⁷

After rejecting Halgren’s constitutional challenges, the Court of Appeal noted that the trial court’s decision was supported by substantial evidence, focusing on several threats made by Halgren during his telephone conversations with Gonzales.²²⁸ The Court noted that, on one occasion, Halgren told Gonzales that she would be sorry she had been rude to him, and that she would have to talk to him sometime.²²⁹ On another occasion, he told her that he would not continue to let her be rude to him, that she would pay for being rude to him, and that he was going to “fix her” or “fix this.”²³⁰ Finally, on yet another occasion, Halgren told Gonzales that he could do whatever he wanted to her.²³¹ The Court concluded that these threats, when considered in context with the series of phone calls and appearances at Gonzales’ place of business, were made with the intent to place Gonzales in reasonable fear for

221. See *Halgren*, 52 Cal. App. 4th at 1231.

222. See *id.*

223. See *id.*

224. See *id.*

225. See Respondent’s Brief, *supra* note 105, at 20.

226. See *id.* at 21.

227. See *id.*

228. See *Halgren*, 52 Cal. App. 4th at 1232-33.

229. See *id.* at 1233.

230. *Id.*

231. See *id.* at 1227.

her safety. The Court of Appeal affirmed Halgren's stalking conviction.²³²

Halgren's defense of lack of specific intent could have succeeded. Under California's specific intent statute, the jury had to weigh the evidence of Halgren's following activity and harassing phone calls and infer that Halgren intended to cause Gonzales to be afraid. The sentencing judge, in support of his decision to grant probation, stated that Halgren's behavior lacked the "severe terror-inspiring quality" of other stalking cases.²³³ Had the jurors shared this view, they could have inferred that Halgren did not intend to cause Gonzales to be afraid, and would have been required to return a verdict of not guilty.

C. A HYPOTHETICAL STALKING CASE UNDER CALIFORNIA'S CURRENT ANTISTALKING STATUTE: *PEOPLE V. STAN*

The following hypothetical presents a fictitious stalking scenario. It is designed to illustrate a stalking situation that could easily arise in California in the future. The purpose of this hypothetical is to demonstrate how a specific intent statute could fail to protect the victim when the threats and actions of the stalker are not "terror-inspiring," but the victim is nonetheless reasonably and honestly afraid for her safety as a result of the stalker's intentional acts.

1. Factual History

Victoria and Stan were involved in a casual dating relationship for several months before Victoria broke up with Stan.

232. *See id.* at 1233.

233. *See Halgren*, 52 Cal. App. 4th at 1232 n.3. The judge indicated the jury's determination of Halgren's guilt under the statute was valid, but compared to the conduct of the defendant in *People v. Heilman* (in which the defendant, after threatening and following the victim for an extended period of time, ambushed her in an elevator, shot her at point blank range, and pulled the phone off the wall so that she could not call for help). Halgren's behavior "was in fact exceedingly vague, explicitly vague in words, and certainly lacked from an outside observer's point of view the severe terror-inspiring quality that might be demonstrated in other instances of the same crime. I'm not meaning in any way to - to make less of what [Gonzales] herself experienced or the reasonableness of her own reaction..." *Id.*

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Stan, upset by Victoria's termination of the relationship, attempted to renew the relationship. He left several messages on Victoria's home telephone answering machine in which he explained his feelings and asked her to call him so that they could talk. However, Victoria did not return his calls. Victoria's unresponsiveness caused Stan to become frustrated, and he began to leave angry messages on her telephone answering machine. In one call, he stated, "You know better than to snub me." In another, he said, "I'm not joking around." Victoria still refused to return his calls. Instead of letting the matter drop, Stan's obsession grew and his telephone messages became more frequent and aggressive.

As the frequency of the calls increased, Victoria realized that Stan was not going to leave her alone, and she began to feel genuinely threatened by Stan's behavior. Not knowing what else to do, she contacted the police to report the situation and seek advice. The police advised Victoria to seek a temporary restraining order prohibiting Stan from contacting her, which she did. The police served Stan with the TRO several days later. Stan was infuriated by the order and left a message on Victoria's home answering machine stating, "You did a very stupid thing. You'll have to be taught a lesson." After this call, Victoria was terrified that Stan would actually attempt to hurt her. The next day, as Victoria drove to work, she spotted Stan driving behind her on the highway. When she arrived at her office, she immediately called the police to report Stan's actions. The police arrested Stan that afternoon at his apartment and charged him with felony stalking in violation of a restraining order under California's current antistalking statute.

2. The Court's Analysis

At trial, the prosecuting attorney will have to prove that Stan willfully, maliciously, and repeatedly followed or harassed Victoria, and that he did so with the specific intent to cause her to be afraid for her safety.²³⁴ To do this, the prosecuting attorney can point to several acts undertaken by Stan as evidence of

234. See CPC § 646.9(a).

harassing behavior. For example, Stan placed repeated phone calls to Victoria's home which included comments such as, "You know better than to snub me" and "I'm not joking around." These statements, taken out of context, clearly do not possess the "terror inspiring quality" that the trial judge in *People v. Halgren* sought as evidence of stalking.²³⁵ However, when viewed in conjunction with Stan's other actions, including his violation of the TRO and his statement, "You'll have to be taught a lesson," Stan's behavior, like that of Earl Halgren, most likely satisfies the behavioral requirements of the statute. However, under California's existing law, proving that the stalker engaged in stalking behavior is only half of the battle.

The prosecuting attorney must additionally prove that Stan had the requisite specific intent before a jury can convict him of stalking. Stan could assert that there is insufficient evidence of specific intent to support a conviction. Stan would claim that he did not intend to scare Victoria by leaving messages on her answering machine. Instead, he was expressing his frustration that she had broken off their relationship. He was only trying to convince her to renew their relationship by showing how much he loved her. Stan would point out that he never specifically threatened to hurt Victoria. He might admit that the message in which he stated, "You'll have to be taught a lesson" was irrational and ill-conceived, but was not intended to scare Victoria, and was not intended as a threat. Under California's existing specific intent antistalking statute, if the jury believes that Stan was frustrated and angry, but that he didn't really intend to scare Victoria, this defense could succeed.

V. CRITIQUE OF CALIFORNIA'S ANTISTALKING STATUTE

Both the hypothetical scenario and *People v. Halgren* are examples of situations in which California's reliance on specific intent could prove inadequate in protecting victims of stalking. If the court focuses on the accused stalker's intent, rather than

235. See *Halgren*, 52 Cal. App. 4th at 1232 n.3.

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on his behavior, the stalker's lack of specific intent could provide the stalker with an absolute defense.

A. CALIFORNIA SHOULD REPLACE THE SPECIFIC INTENT STANDARD CURRENTLY FOUND IN ITS ANTISTALKING STATUTE WITH A GENERAL INTENT STANDARD.

If the legislature revises the antistalking statute to incorporate a general intent standard rather than a specific intent standard, the statute will ensure that lack of specific intent does not provide a successful defense to one who has intentionally engaged in behavior that would otherwise be recognized as stalking. The Model Code incorporates such a general intent standard. A general intent statute would require the defendant to purposefully engage in activity that would cause a reasonable person to become afraid for her safety, and which actually causes the victim to be afraid for her safety. Additionally, the defendant would have to know, or have reason to know, that the person towards whom the activity is directed will be placed in reasonable fear for her safety. By making this revision, the California antistalking statute would more closely incorporate the recommendations of the Model Code.²³⁶

Because California's existing statute requires that prosecutors prove specific intent, California prosecutors are forced to place significant emphasis on the stalker's motivation, in addition to focusing on the stalker's activities. This specific intent standard is particularly problematic when applied to a stalker who does not intend to cause the victim to be afraid. One reason a stalker may not possess the requisite specific intent is because his judgment is clouded by a mental disorder. In such cases, the stalker's intent may be to initiate or rekindle a relationship, or express emotions of anger or frustration.²³⁷ By definition, if the accused stalker's intent is not to cause the victim to be afraid, California requires a jury to return a verdict of

236. See NATIONAL INSTITUTE OF JUSTICE, PROJECT TO DEVELOP A MODEL ANTISTALKING CODE FOR STATES 47-48 (1993).

237. See BUREAU OF JUSTICE ASSISTANCE, *Regional Seminar Series on Developing and Implementing Antistalking Codes* 98 June 1996.

not guilty.²³⁸ Therefore, if a stalker's intent is other than the inducement of fear in his victim, he is not legally guilty of stalking, even if he has undertaken acts that would otherwise satisfy the antistalking law.

Unfortunately, by focusing on the stalker's intent, the California statute provides a potential escape from liability for people whose behavior is clearly harassing or threatening. In cases where the stalker's intentional actions have caused an innocent person to be honestly afraid for her safety, but the actions do not legally qualify as stalking, the stalker's actions fall outside the scope of the antistalking statute and the victim is unable to take advantage of the protections afforded by the statute. Without these statutory protections, the victim's only remaining avenues of protection are TRO's and the terrorist threat and annoying telephone call statutes. As mentioned earlier, these statutes have proven inadequate in stalking situations because their application is too narrow to adequately address stalking crimes and because they were not designed to protect against a series of harassing acts.²³⁹ The inadequacy of pre-antistalking legislation in combating stalking crimes was one of the reasons that California enacted an antistalking statute in the first place.

In addition, if found not guilty, a stalker whose actions are driven by obsession or mental disorder will not receive the medical treatment that is available through California's statutory scheme.²⁴⁰ As mentioned earlier, one of the provisions in California's antistalking statute is that the court can order psychiatric treatment as a condition of parole.²⁴¹ If a stalker's obsession is driven by a mental disorder, in the absence of psychiatric treatment or counseling, he is likely continue to act on that obsession. In fact, the stalker may be more dangerous after trial because he may be embittered and seek retribution for being kept from the victim.²⁴² Therefore, the rehabilitative

238. See CAL. PENAL CODE § 646.9(g) (Deering Supp. 1998).

239. See discussion *supra* section II.C.

240. See discussion *supra* section II.E.

241. See CPC § 646.9(i).

242. See N.I.J., *supra* note 12, at 51.

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treatment that is available to the stalker through the anti-stalking statute may be necessary to prevent further harassing behavior in the future.

B. ANTISTALKING STATUTES CONTAINING A GENERAL INTENT STANDARD, SUCH AS THAT OF WASHINGTON STATE, HAVE PASSED CONSTITUTIONAL SCRUTINY

The State of Washington has an antistalking statute containing a general intent provision similar to the one proposed in the Model Code.²⁴³ In Washington, the victim must reasonably fear that the stalker intends to injure her or another person.²⁴⁴ The stalker must either intend to frighten, intimidate, or harass the victim or actually know or reasonably should know that the person is afraid, intimidated or harassed.²⁴⁵

In June, 1996, the Court of Appeals of Washington affirmed the constitutionality of the statute and specifically addressed the intent requirement.²⁴⁶ At the trial level, two defendants, Brian Yates and Orson Lee, were convicted of stalking in unrelated cases.²⁴⁷ Each defendant contended separately that the antistalking statute was unconstitutionally vague and over-

243. See WASH. REV. CODE ANN. 9A.46.110 (West Supp. 1998). This Washington statute states:

A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and (c) The stalker either: (i) Intends to frighten, intimidate or harass the person; or (ii) Knows or reasonably should know that the person is afraid, intimidated or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

Id.

244. See *id.*

245. See *id.* The statute does not require the stalker to intend to place the victim in fear or intimidate or harass the victim. See *id.*

246. See *State v. Lee*, 917 P. 2d 159; 162, 167 (1996).

247. See *id.* at 162.

broad. The Court combined the appeals and addressed the constitutional questions.²⁴⁸

At the time of Yates' and Lee's convictions, the Washington antistalking statute described the crime of stalking as intentional and repeated following of another person to their home, school, place of employment, business, or any other location, or following the person while she is in transit between locations.²⁴⁹ The person being followed must have been intimidated, harassed, or placed in reasonable fear that the stalker intended to injure her.²⁵⁰ The stalker must have either intended to frighten, intimidate, or harass the victim or the stalker must have known or should reasonably have known that the victim was afraid, intimidated, or harassed, *even if the stalker did not intend to place the person in fear or intimidate or harass her.*²⁵¹ Therefore, a person accused of stalking under this statute could be convicted if the prosecution proves one of two intents, assuming that the behavior satisfies the harassment requirement. First, the prosecution could win a conviction if it proves that the defendant demonstrated specific intent to frighten, intimidate or harass the victim. Alternatively, the prosecution could win a conviction if it proves that the defendant intentionally undertook acts that he knew or should have

248. *See id.*

249. *See id.* Although the legislature amended the statute since the time of Lee and Yates's convictions, the intent requirement has not been changed. At the time of Lee and Yates's convictions, the court quoted the statute as follows:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly follows another person to that person's home, school, place of employment, business, or any other location, or follows the person while the person is in transit between locations; and (b) The person being followed is intimidated, harassed, or placed in fear that the stalker intends to injure the person or property of the person being followed or of another person. The feeling of fear, intimidation, or harassment must be one that a reasonable person in the same situation would experience under all the circumstances; and (c) The stalker either: (i) intends to frighten, intimidate, or harass the person being followed; or (ii) Knows or reasonably should know that the person being followed is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

Id.

250. *See Lee*, 917 P. 2d at 162. This feeling of fear must be one that a reasonable person in the same situation would experience under the same circumstances. *See id.*

251. *See id.* (emphasis added).

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known would cause the victim to feel afraid or harassed. By incorporating a general intent alternative, the statute allows the prosecution to focus on the stalker's behavior rather than on his intent. In doing so, the Washington antistalking statute follows the intent recommendation of the Model Code and provides broader protection to the stalking victim than the current California antistalking statute.

The Washington Court of Appeals' decision provided an in-depth discussion of the constitutionality of the Washington statute's general intent requirement. The appellants challenged "the statute as vague because it allow[ed] the finder of fact to base culpability on the perceptions of others, without requiring that the defendant act with a specific intent to cause harm."²⁵² The Court rejected this assertion.²⁵³ A statute is void for vagueness if it fails to give a person of *normal intelligence* fair notice of what conduct the statute prohibits.²⁵⁴ The Court determined that the conduct proscribed by the statute was clear.²⁵⁵ In order to win a conviction, the State must show that the stalker knew or reasonably should have known that his conduct was frightening to his victim.²⁵⁶ The Court reasoned that "a person of normal intelligence would be able to consider "all the circumstances" and know whether his intentional following causes a sense of fear."²⁵⁷ The Court concluded that "[t]he statute's reliance on an objective test precludes the conclusion that it is unconstitutionally vague."²⁵⁸

C. EFFECT OF INCORPORATING A GENERAL INTENT STANDARD INTO CALIFORNIA'S ANTISTALKING LAW

If the California legislature were to remove the antistalking statute's specific intent requirement and replace it with a gen-

252. *Id.* at 167.

253. *See id.*

254. *See id.*

255. *See Lee*, 917 P. 2d at 167.

256. *See id.* One way to prove this would be to show that the victim notified the stalker that his actions/attentions were unwanted, either through a TRO or direct communication.

257. *Id.*

258. *Id.*

eral intent requirement, the effect would be to eliminate the possibility that lack of specific intent could provide a defense to harassing and threatening behavior that otherwise satisfies the statutory requirements. If California adopts a general intent standard like that found in the Model Code and Washington's antistalking statute, an accused stalker would satisfy the intent requirement as long as he intentionally undertook acts that he knew or should have known would cause his victim to become afraid.²⁵⁹ The requirement of knowledge would be satisfied if the accused stalker had been informed, either directly by the victim or through a TRO or police visit, that his actions were causing the victim to be afraid. By incorporating the phrase "should have known" into the intent requirement, the statute holds stalkers to a reasonable person standard. This is intended to prevent an accused stalker from asserting that he misunderstood the victim's request to be left alone, or that he did not understand the requirements of a TRO. As long as a reasonable person under the circumstances would have understood, the defendant will be held to have understood. As is the situation today, the behavior would still have to actually cause the victim to be afraid, and would also have to cause a reasonable person to be afraid.

If Halgren had been charged with stalking in violation of this proposed general intent statute, he would still have been convicted. The same can be said for Stan. Neither would have been able to successfully assert lack of specific intent because the desired result of the particular activities is irrelevant under a general intent standard. Both Halgren and Stan intended their actions; neither was forced to make a phone call or follow his victim. Both Halgren and Stan knew or should have known that their continued contact was unappreciated by his victim: Gonzales specifically told Halgren not to call her anymore, and Victoria served Stan with a TRO barring any further contact between them. Both Halgren and Stan repeatedly telephoned their victim and left messages that, in the context of their other activities, were reasonably interpreted as threatening. Additionally, Halgren and Stan both induced actual fear in their

259. See B.J.A., *supra* note 143 at 95.

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victim. Therefore, under a general intent statute, both defendants satisfied the elements of the crime of stalking.

The purpose of this proposal is to ensure that stalkers whose activities satisfy the behavioral requirements of stalking, including *repeated* following or harassment, combined with a credible threat, do not escape prosecution simply because they don't possess specific intent. The proposal is not intended to allow the criminal justice system to punish individuals who are simply angry or expressing frustration, and thereby expressing their right of free speech. The revised statute would still require several instances of harassing behavior. A single occurrence would not satisfy the revised statute. Also, the credible threat requirement would still exist. The stalker would have to make a threat that, when viewed in context with several occurrences of harassing behavior, would cause a reasonable person to fear for her safety. The revised statute would not be satisfied by individual threats, veiled or direct. Also, the requirement of a reasonable person would preclude a jury from convicting a defendant of stalking if the victim is overly sensitive or taking the defendant's behavior out of context. By preserving these existing safeguards, the revised antistalking statute would continue to protect the rights of defendants. However, by changing to a general intent standard, the revised statute would better protect stalking victims.

V. CONCLUSION

Stalking is a potentially dangerous crime that threatens the lives of many women each day. Today, California's antistalking statute is a comprehensive tool in combating stalking. The statute, however, is not without weaknesses.

The N.I.J. published the Model Code as an example of anti-stalking legislation that would protect the rights of both stalkers and victims, as well as withstand constitutional scrutiny. The drafters of the Model Code believed that a general intent standard was preferable to a specific intent standard because it

forces the criminal justice system to focus on the behavior of the accused stalker, rather than on his motivation.²⁶⁰ This ensures that people who purposefully engage in stalking behavior do not escape liability because they did not specifically intend to cause the victim to be afraid, even if the victim's fear was the probable and knowable consequence of the accused stalker's actions.

California should revise its antistalking statute by replacing the existing specific intent standard with a general intent standard. In doing so, California will close the loophole that is currently available to those defendants who intentionally stalk, but whose mental state allows them to escape liability under existing law.

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260. See discussion *supra*, section III.B.

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