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Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars

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STALKING STUFFERS: A REVOLUTIONARY LAW TO KEEP PREDATORS BEHIND BARS

I. INTRODUCTION

Due to an elevated national awareness of the crime of stalking, a wave of recent legislation has been codified in order to provide more legal protection for stalking victims.1 The crime of stalking commanded national attention when actress Rebecca Schaeffer was murdered by an obsessed stalker. Prompted by this tragedy and the murder of four Orange County women, all of whom had restraining orders against their harassers, California recognized the need for revolutionary legislation and passed the nation's first stalk-

ing law in 1990. Since then, forty-eight other states have followed California’s lead.

Stalking presents a complex legal problem which requires both improved legislation and earlier intervention to prevent situations from culminating in violence. It is an urgent matter which requires immediate attention because approximately 200,000 people in this country are currently being terrorized by stalkers. Although the current California stalking statute represents a marked improvement over prior legal devices used to combat stalking, it falls short of a complete solution. Further protective measures must be employed in order to ensure the safety of the victim.

This comment explores the “profile” of a stalker and the characteristic victim before presenting California’s stalking statute, California Penal Code section 646.9, and other related recent legislation. It traces correlations between stalking and domestic violence, and reveals the problems inherent in the current California approach. This comment compares and contrasts the California approach to the Model Anti-Stalking Code with suggestions recently released by the National Institute of Justice (NIJ). Moreover, it provides analogies between stalkers and sexual predators before proposing revolutionary legislation permitting civil commitment for people who are classified as “chronic aggravated stalk-

2. How to Deter Stalkers; Other States Follow California’s Lead, SAN DIEGO UNION-TRIB., July 3, 1993, at B-14.
4. A Bill to Assist the States in the Enactment of Legislation to Address the Criminal Act of Stalking Other Persons, 1992: Hearings on S. 2922 Before the Comm. on the Judiciary, 102nd Cong., 2nd Sess. 6 (1992) [hereinafter Hearings]
5. CAL. PENAL CODE § 646.9 (Deering 1993). See infra notes 83-91 and accompanying text.
6. CAL. CIV. PROC. CODE § 527.6 (Deering 1993) (temporary restraining orders); CAL. PENAL CODE § 653m (Deering 1993) (telephone calls with intent to annoy); CAL. PENAL CODE § 422 (Deering 1993) (terrorist threats).
7. See infra part II.A-B. Stalking is a gender neutral crime—both males and females suffer as victims. However for the purposes of convenience and expediency, this comment will use “he”, “his” and “him” to portray the stalker and “she”, “hers” and “her” to portray the victim.
8. See infra part II.E-F.
9. See infra part II.C.
10. See infra part III.C.
11. See infra part III.E.
12. See infra part III.F.
ers.” Ultimately, the comment seeks to provide an approach which maximizes legal protection for the victim.

II. BACKGROUND

A. Profile of a Stalker

In order to craft an effective solution to the problems posed by stalking, it is important to become familiar with the nature of the stalker, the person engaged in the conduct that the law aims to prevent. The drafting of effective legislation is complicated by the difficulty, if not impossibility, of profiling a prototypical stalker. An identifiable prototype of a stalker does not exist; people stalk for a multitude of reasons. The mental state of individuals who engage in stalking remains a largely unexplored and uncertain area of psychology. However, approximately seventy percent of stalkers suffer from some mental defect. Ascertaining the mental defects that plague stalkers remains integral to formulating an effective approach towards stalking. Once the defect is identified, treatment can be mandated which may prevent the stalker from engaging in his deadly game of “cat and mouse.” Without treatment, the stalker’s behavior may never cease until he kills the object of his obsession.

According to current information, four types of mental defects affect stalkers. First, some stalkers suffer from Delusional Erotomania. A person who suffers from Delusional Erotomania believes that a certain individual is in love with him or her. The delusional erotomaniac usually attempts to establish an intimate, romantic relationship with the object of his desire. He may attempt to accomplish this through phone calls, letters, gifts, and visits. Although there is not

13. See infra part IV.
14. Hearings, supra note 4, at 5.
18. Id. at 832.
19. Id.
20. Id. at 833.
21. Id.
the slightest hint of reciprocity of affection, the delusional erotomaniac continues in his efforts to establish a relationship.22

Second, some stalkers suffer from Borderline Erotomania.23 Borderline Erotomania can be distinguished from Delusional Erotomania because a borderline erotomaniac realizes that the object of his obsession does not reciprocate his affection.24 Borderline erotomaniacs usually have some history of emotional involvement with the individual.25 In addition, the borderline erotomaniac displays a tendency to experience alternate emotions of love and hate towards the individual upon whom he is fixated.26 The borderline erotomaniac's behavior towards the object of his desire may be very similar to behavior of the delusional erotomaniac; he may barrage his victim with letters, gifts and phone calls. The borderline erotomaniac, however, knows that his affections are unrequited.27

A third type of stalker is the "Former Intimate" stalker.28 Former intimate stalkers refuse to let go of a terminated relationship.29 Former Intimate stalkers share a number of common characteristics. First, they often have a history of abusive relationships.30 Second, they are often extremely emotionally dependent on their former lovers and cannot tolerate the thought of rejection from them.31 In some cases, stalkers are so dependent on their former lovers that they would rather kill them than let them go and be forced to live without them.32 Third, the stalkers have a need to control their victims.33

Typically, batterers and some Former Intimate stalkers regard their intimates as personal possessions that can be

22. Id. at 834.
23. Id. at 835. The Los Angeles Police Department characterizes this disorder as "love obsessional." Id. at 839.
24. Id. at 835.
25. Id. at 836.
26. Id. at 837.
27. Id. at 837-38.
28. Id. at 838. The Los Angeles Police Department designates these stalkers as "simple obsessional." Id. at 839.
29. Id. at 839.
30. Id.
31. Id. at 840.
32. Id.
33. Id.
treated as such. The propensity for batterers to apply force to exert control or domination over their partners is widely accepted by clinicians and the general public. Abusive partners may perceive a threat to their dominance when their partner expresses a desire for independence, and they may consequently threaten to apply force to maintain their position within the relationship—even after the relationship ends.\textsuperscript{34}

“Sociopathic” stalkers comprise a fourth category of stalkers.\textsuperscript{35} Sociopathic stalkers display two especially salient features.\textsuperscript{36} First, they do not seek to establish a romantic relationship with their victim.\textsuperscript{37} Second, they compile certain criteria for an “ideal victim” and then seek out an individual that conforms to their criteria.\textsuperscript{38}

Stalkers pose a serious problem for society, in part, because of the difficulty involved in identifying them. One commentator has suggested that “[s]talkers seem to slip between the cracks of law-enforcement and mental health agencies—neither of those institutions has the responsibility or capacity for identifying stalkers or protecting victims.”\textsuperscript{39} It is difficult to predict who will become a stalker. Stalkers, however, do share some common characteristics. Although stalkers come from various ethnic and social backgrounds, most are men.\textsuperscript{40} Stalkers tend to have an intense interest in the media, an inability to develop healthy and secure relationships, a history of misguided attempts to establish an identity, and a desire for attention.\textsuperscript{41} Many share a family history of mental

\textsuperscript{34} Id. Interestingly enough, the State will base its argument on this type of reasoning when prosecuting O.J. Simpson for the murder of his ex-wife, Nicole Simpson. Larry Reibstein et al., \textit{And Now, The Trial}, \textit{Newsweek}, Jan. 23, 1995, at 44. The prosecution will introduce various evidence suggesting that O.J. Simpson abused his wife, both physically and psychologically and in “classic batterer fashion” ended her life. \textit{Id.} Lydia Bodin, deputy district attorney reveals: “[W]hen he finally couldn’t control her, when she was finally breaking away from him, when she had finally estranged herself from him and tried to distance herself from him, it is the people’s contention that he killed her.” \textit{Id.}

\textsuperscript{35} McAnaney et al., \textit{supra} note 17, at 841.

\textsuperscript{36} Id.

\textsuperscript{37} Id.

\textsuperscript{38} Id.


\textsuperscript{40} Cheryl Laird, \textit{Stalking; Laws Confront Obsession that Turns Fear into Terror and Brings Nightmares to Life}, \textit{Hous. Chron.}, May 17, 1992, at 1.

\textsuperscript{41} Tharp, \textit{supra} note 39, at 29.
illness; all are mentally or emotionally disturbed.\footnote{42} Fantasies about romantic involvement with the target ignite their campaign of sexual harassment.\footnote{43} The stalker equates love with possession, and he enjoys the thrill of the chase in realizing his fantasy.\footnote{44} In a very real sense of the word, the stalker is a relentless hunter. The victim is his prey.

B. The Victim

Anyone can become a victim. Women, however, are almost always the target.\footnote{45} Approximately five percent of women in the general population will become victims of stalking at some point in their lives.\footnote{46} Fifty-one percent of stalking victims are non-public figures, of which thirteen percent are former employers of the stalkers.\footnote{47} Seventeen percent are highly recognizable celebrities while thirty-two percent are lesser known entertainment figures.\footnote{48} Approximately ninety percent of victims know their stalker.\footnote{49}

Once aware of being stalked, all victims share an "omnipresent fear of attack from malevolent predators."\footnote{50} Stalking victims report feeling "invaded and exploited" and wonder what they did in order to encourage this type of behavior.\footnote{51} The stalker's game invades every part of the victim's life, leaving emotional scars as well as physical ones.\footnote{52} Victims of stalking have the right to be left alone and to live their lives free from constant fear for themselves and their loved ones; the law must enforce this right.\footnote{53}

\footnotesize{\begin{itemize}
\item \footnote{42} \textit{Id.}
\item \footnote{43} Laird, \textit{supra} note 40, at 1.
\item \footnote{44} \textit{Id.}
\item \footnote{45} Scott Armstrong, \textit{States Crack Down on 'Stalking'}, CHRMSTCN SCI. MONITOR, May 19, 1993, at 7.
\item \footnote{46} \textit{Hearings}, \textit{supra} note 4, at 5.
\item \footnote{47} \textit{Id.}
\item \footnote{48} \textit{Id.}
\item \footnote{49} Laura Griffin, \textit{Stalking Law Under Attack}, ST. PETERSBURG TIMES, Jan. 25, 1993, at 1B.
\item \footnote{50} \textit{How to Deter Stalkers}, \textit{supra} note 2, at B-14.
\item \footnote{51} Laird, \textit{supra} note 40, at 1.
\item \footnote{52} \textit{Hearings}, \textit{supra} note 4, at 3.
\item \footnote{53} This comment emphasizes legal protection for the victim. However, because current laws fail to provide stalking victims with safe refuge, many stalking victims are attempting to take control of their situation. Victims are resorting to dangerous methods such as carrying their own weapons. Melinda Beck et al., \textit{Murderous Obsession}, Newsweek, July 13, 1992, at 60. “The prospect of more victims arming themselves is no comfort to law-enforcement officials. Yet
C. Stalking's Correlation with Domestic Violence: The Family As A Dangerous Place

A comparison between stalking incidences and domestic violence sheds additional light on the crime of stalking. Stalking is not a novel issue. Rather, stalking is an ancient problem bearing a new name. The type of behavior exhibited by a stalker directly correlates with the behavior associated with a spouse-abuser; they are often one and the same.54 One expert psychologist posited that "[t]he frequent dynamic in a stalker is the same as someone who is abusive, the dynamic is a need to control, to have power—a need to exert some terror."55 Moreover, one police sergeant remarked that stalking is so common at the domestic violence unit that it is an exception when stalking is not involved.56 One-half of the more than two-hundred stalking cases handled by the Los Angeles Police Department since 1990 have involved situations in which the stalker was an ex-lover or an ex-husband.57

The arrest of O.J. Simpson in connection with the murders of his ex-wife, Nicole Simpson, and Ronald Goldman, has focused the nation's attention on domestic violence. As the following statistics demonstrate, domestic violence appears on the rise and resources fall short of providing protection for battered women.

most admit there is very little they can do in the face of a persistent stalker.”
Id.

54. Telephone Interview with Detective Greg Boles, Supervisor of the Threat Management Unit Division of the Los Angeles Police Department (Dec. 20, 1993) [hereinafter Interview with Greg Boles]. The Threat Management Unit is a division of the Los Angeles Police Department designed solely for the purpose of investigating abnormal, long-term threat and harassment cases. Hearings, supra note 4, at 69. The main goal of the Threat Management Unit is to intervene in stalking situations which may eventually result in violence. Christina Perez, Stalking: When Does Obsession Become a Crime?, 20 Am. J. CRIM. L. 263, 272 (1993). The officers of the Unit perform varying levels of "interventions," tailored to specific circumstances, in order to warn the stalker that his behavior is suspicious. Id. As to date, the Los Angeles Police Department is the only police department in the nation with a Unit specially designed to handle stalking. Cawley, supra note 16, at 1.


(1) The number of people arrested for spousal abuse between 1987 and 1991 in California has increased by seventy-five percent. 58

(2) There are approximately 1,100,000 aggravated assaults, murders, and rapes committed in the home against women and by people who know them. 59

(3) Every twelve seconds a woman is beaten in the United States; every six hours a woman is killed. 60

(4) More than two million women are battered every year. 61

(5) Domestic violence is the leading cause of injury and death to women, aged 15-44. 62

(6) There are three times more animal shelters than shelters for battered women. 63 Moreover, visits and phone calls to shelters for raped and battered women have grown enormously. 64

D. Legal Devices Employed Prior to the Enactment of the California Stalking Statute: An Exercise in Futility

Prior to the enactment of the California stalking statute, California Penal Code section 646.9, law enforcement agencies often used criminal trespass, terrorist threat, and har-
assment laws to combat stalking and provide legal protection for the victim.\footnote{65}

1. \textit{Temporary Restraining Orders: Paper Shields}

Prior to the enactment of the stalking law, restraining orders were the primary legal instruments used to keep stalkers at bay.\footnote{66} A temporary restraining order is an emergency remedy of limited duration, which may be issued to keep a stalker from coming into physical proximity with his victim.\footnote{67} Special procedures provide quick relief to people who are being "harassed," if great or irreparable injury is threatened.\footnote{68} California's Civil Procedure Code defines harassment as:

\begin{quote}
\begin{center}
a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a \textit{reasonable person} to suffer \textit{substantial} emotional distress, and must actually cause substantial emotional distress to the plaintiff.\footnote{69}
\end{center}
\end{quote}

In these situations, the following conditions apply. First, a temporary restraining order may be issued with or without notice upon an affidavit which shows reasonable proof of harassment by the defendant and great or irreparable injury to the plaintiff.\footnote{70} Second, the restraining order must be personally served on the defendant.\footnote{71} Third, the permanent injunction hearing must be held within fifteen days after the filing of the petition unless the court extends the time for a hearing because of good cause, but not to surpass 22 days.\footnote{72} Finally, the injunction will be granted only upon a showing of "clear

\footnote{65. Criminal trespass, terrorist threat, and harassment laws generally were available to law enforcement agencies to deal with stalking behavior before stalking laws were enacted. Stalking laws are to be distinguished from all other laws by the elements they require, their application to a variety of threatening situations, their ties to civil protection, and their penalties structure. \textit{Project}, supra note 15, at 37.}
\footnote{66. Interview with Greg Boles, \textit{supra} note 54.}
\footnote{67. \textit{BLACK'S LAW DICTIONARY}, 1484 (6th ed. 1990).}
\footnote{68. \textit{CAL. CIV. PROC. CODE} § 486.020(d) (Deering 1993).}
\footnote{69. \textit{Id.} § 527.6(b) (emphasis added).}
\footnote{70. \textit{Id.}}
\footnote{71. \textit{Id.} § 527.6(g).}
\footnote{72. \textit{Id.} § 527.6(c), (d).}
and convincing evidence” that harassment is occurring.73 If
granted, the injunction may remain in effect up to a duration
of three years.74

2. Section 653(m) Telephone Calls with Intent to
Annoy

In addition to temporary restraining orders, California
Penal Code section 653(m) provided another legal device com-
monly employed by law enforcement agencies prior to the en-
actment of the stalking law.75 Under this section, a person

73. Id. § 527.6(d).
74. Id.
75. Interview with Greg Boles, supra note 54.
76. CAL. PENAL CODE § 653m (Deering 1993).
77. Probation is a “sentence imposed for commission of crime whereby a
convicted criminal offender is released into the community under the supervi-
sion of a probation officer in lieu of incarceration.” BLACK’S LAW DICTIONARY
1202 (6th ed. 1990). Factors which are used to determine whether the defend-
ant will be eligible for probation include the nature and seriousness of the of-
fense, the defendant’s history, and the need for the sentence imposed. Id.
78. Interview with Greg Boles, supra note 54.
79. Id.
sustained fear for his or her own safety or for his or her immediate family's safety.\textsuperscript{80}

This has proven to be a very difficult and strict standard to meet, and has therefore been narrow in its application.\textsuperscript{81} In situations where stalking had not yet escalated to the level required under section 422, the victim had no legal recourse other than to seek a restraining order.\textsuperscript{82}

E. The California Stalking Statute Section 646.9

The recently amended California stalking statute defines stalking as the willful, malicious, and repetitious following or harassing\textsuperscript{83} of an individual.\textsuperscript{84} The stalker must have the intent to place the victim in fear of death or great bodily injury to himself or his or her immediate family.\textsuperscript{85} The law’s requirement that there be a credible threat plays a pivotal role in securing a conviction under section 646.9.\textsuperscript{86}

\textsuperscript{80} CAL. PENAL CODE § 422 (Deering 1993).
\textsuperscript{81} Interview with Greg Boles, supra note 54.
\textsuperscript{82} See supra text accompanying notes 66-74.
\textsuperscript{83} The statute defines “harasses” as a “knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or terrorizes the person, and which serves no legitimate purpose.” CAL. PENAL CODE § 646.9(e) (Deering 1993).
\textsuperscript{84} Id. § 646.9(a). Along with the conventional conduits used by stalkers to deliver their threats such as the postal system, telephone or face-to-face confrontation, electronic communications present yet another vehicle in which stalkers can carry-out their harassment. Cristina Carmody, Deadly Mistakes, ABA JOURNAL, Sept. 1994, at 70. An estimated five million Americans currently subscribe to computer based commercial services such as America Online, Compuserve and Prodigy, which allow the exchange of commercial mail, popularly known as “E-Mail.” Peter H. Lewis, Persistent E-Mail: Electronic Stalking or Innocent Courtship?, NY TIMES, Sept. 16, 1994, at 18. One domestic violence expert has stated that “[i]t’s just another tool a sophisticated, intellectual, creative stalker will use. They come up with whatever they can.” Cristina Carmody, Deadly Mistakes, ABA JOURNAL, Sept. 1994, at 70.
\textsuperscript{85} CAL. PENAL CODE § 646.9(a) (Deering 1993). The statute defines “immediate family” as “any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.” Id. § 646.9(i).
\textsuperscript{86} A credible threat is defined as:

- 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. § 646.9(f).
Upon a first offense, stalking can be charged as a misdemeanor or felony, punishable by imprisonment.\(^8\) Any person who commits an offense in violation of a restraining order is guilty of a felony and shall be punished for two, three, or four years.\(^8\) A conviction is punishable by imprisonment for two, three, or four years.\(^9\) Further, upon release, probation shall be conditioned upon participation in counseling by the offender, although a judge can dismiss this requirement upon a showing of good cause.\(^9\)

In addition to its punitive and rehabilitative measures, the statute contains a preventative provision which states that the court shall consider issuing a restraining order mandating no contact with the victim for up to ten years based on the following factors: seriousness of the situation, the probability of future violations, and the safety of the victim and his or her immediate family.\(^9\)

F. Related Legislative Developments

1. Recent California Legislative Bills

The California legislature, recognizing a need for further legislation, has recently passed a number of measures aimed at stalkers. One such measure amends the California Civil Code to allow stalkers to be subject to civil suits as well as criminal prosecution.\(^9\) According to this law, stalking victims who are able to establish a prima facie case can receive damages including, but not limited to, general damages, special damages, and punitive damages as well as equitable relief.\(^9\)

87. *Id.* § 646.9.
88. *Id.* § 646.9(b).
89. *Id.* § 646.9(c).
90. *Id.* § 646.9(g).
91. *Id.* § 646.9(h).
92. *CAL. CIV. CODE* § 1708.7 (Deering 1995).
93. *Id.* The elements of the tort of stalking are identical to what must be proved in securing a criminal conviction. *See supra* text accompanying notes 83-86. General damages are damages that the law presumes to have accumulated from the injury complained of as they are a direct, immediate result from the wrong complained of. *Black's LAW DICTIONARY* 391 (6th ed. 1990). Special damages are awarded for damages which do not directly arise from the wrong itself, but instead depend on circumstances peculiar to the wrongdoing. *Id.* at 392. Punitive damages are damages given to the plaintiff over and above compensation for the injury in order to punish the defendant for his actions and to serve as an example to other potential wrongdoers. *Id.* at 390. Equitable relief
A second alteration in California law provides for convictions for possessing a firearm within ten years of committing one of the following crimes: spousal abuse, stalking, or a violation of a restraining order.\(^94\)

A third measure amends the California Penal Code by increasing the penalties for people who stalk others at battered women's shelters by allowing prosecutors to charge the stalker with trespassing in addition to stalking.\(^95\) This bill also eliminates the $182 fee that women must pay in order to get a restraining order against their stalkers.\(^96\)

Finally, a fourth amendment changes the California Penal Code by liberalizing the language used to define stalking and toughening the penalties for it.\(^97\) This bill makes punishment for a first conviction of stalking either a felony or misdemeanor whereas prior law designated it as only a misdemeanor.\(^98\) In addition, stalking in violation of a restraining order will now be classified as a felony punishable by up to four years in prison, rather than either a felony or a misdemeanor.\(^99\)

2. **Proposals To Make Stalking A Federal Crime**

Several bills have been currently before Congress that suggest a federal role in stalking crimes. Senator Barbara Boxer of California and Senator Bob Krueger of Texas cosponsored a bill which proposed that stalking be designated as a federal crime—punishable by up to ten years in prison—anytime a stalker crosses state lines or uses the mail or telephone in order to convey a threat.\(^100\) Unfortunately, the bill lapsed.

Moreover, Senator Boxer has proposed another bill considered and passed by Congress.\(^101\) This bill is a "secrecy bill" is sought when the injured party is seeking an injunction or specific performance instead of money damages. \(\text{Id. at 539.}\)

\(^94\) Cal. Penal Code § 12021 (Deering 1995).

\(^95\) Id. § 602.

\(^96\) Cal. Family Code § 6222(a) (West 1995).

\(^97\) Cal. Penal Code § 646.9 (West Supp. 1995).


\(^99\) Id.

\(^100\) Armstrong, supra note 45, at 7.

\(^101\) Telephone Interview with John Hess, Aide to Barbara Boxer (Dec. 20, 1993).
which serves to amend the crime bill. This amendment removes personal information from all of the Department of Motor Vehicle records, nationally. She hopes that the bill will ensure all Americans' privacy and safety. This bill has been passed and successfully attached as an amendment to the crime bill by both the Senate and the House. The crime bill has been passed by both houses.

G. National Institute of Justice's Multi-Disciplinary Approach

When making recommendations and formulating a model code, the NIJ considered the appropriate role of federal government in addressing stalking. Despite the temptation of uniformity, the NIJ concluded that a model code which provided guidance on general legal and practical issues, while leaving latitude for the states to make adjustments according to their unique circumstances, would be more effective than enacting a federal anti-stalking statute. The NIJ announced its Model Anti-Stalking Code on October 1, 1993. Congress had charged the NIJ with a task encompassing two primary duties: studying the crime of stalking; and introducing model legislation that would be both enforceable and able to withstand constitutional challenge. Congress reasoned that the federal government could muster both the resources and the capacity to initiate such a study of the complicated issue of stalking, and accordingly develop fair laws.

102. Id.
103. Id.
104. Id. The law improves public safety because it would make it more difficult to locate stalking victims. Cristina Carmody, Deadly Mistakes, A.B.A. J., Sept. 1994, at 68, 71. Robert Bardo, the man who murdered actress Rebecca Schaeffer hired a private detective who located Ms. Schaeffer's address through DMV public records. The Rush to Secrecy, ST. PETERSBURG TIMES, Nov. 14, 1993, at 2D.
106. Id.
108. Id.
111. Hearings, supra note 4, at 2.
In fulfilling this charge the NIJ sought to accomplish many goals. First, it attempted to discover and study the many variations of stalkers so that it could provide legislation which would effectively combat the offensive conduct. Second, it wanted to provide the necessary latitude to enable law enforcement to intervene earlier in a potentially volatile situation, thereby resulting in maximum legal protection for the victim. Finally, the NIJ sought to develop a code that did not sweep constitutionally protected activity within its prohibitions.

1. The NIJ's Model Anti-Stalking Code

In section one, the Model Anti-Stalking Code (hereinafter Model Code) defines language used in the empirical application of the statute. “Course of conduct” is defined as “repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.” “Repeatedly” is defined as on two or more occasions. The statute defines “immediate family” as a “spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.”

In section two, the Model Code states that a person is guilty of stalking if he (1) purposefully or has knowledge or should have knowledge that engagement in a course of conduct directed against a specific person would cause a reasonable person to fear bodily injury or death to himself or his immediate family; and (2) those acts actually induce fear of bodily injury or death to himself or his immediate family.

Significantly, in providing guidance to the states, and in applying the Model Code, the NIJ stressed that a multi-disciplinary approach was needed.

The model anti-stalking code and its related analysis, commentary, and recommendations are intended to pro-

112. Id.
113. Id.
114. Id.
115. Project, supra note 4, at 43.
116. Id.
117. Id.
118. Id. at 43-44.
119. Id. at 9.
vide guidance to state legislators, policymakers, and law enforcement officials in dealing with the problem of stalking. In developing the model code, the resource group and project contractors and staff did not expect that any jurisdiction would adopt the code without making appropriate adjustments to accommodate political interests, fiscal constraints, and other conditions and tolerances of that particular jurisdiction.  

H. Sexual Predator Law

1. Revised Code of Washington Section 71.09

When developing a multidisciplinary approach, examination of Washington's Sexual Predator Law, although aimed at curtailing a different crime, may provide insight into possible alternatives which could be used to eradicate repeat stalking offenses. This law, and other states' laws similar to it, answer the question of what to do with people whose "sexual predatory" urges have not been deterred by prison terms or cured by psychiatric treatment. For a proper understanding of the law, some of its terms require definition. The Washington law defines a "sexual predator" as someone "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."  

Under the law, a crime of sexual violence includes any degree of rape, a felony offense that is comparable to some degree of rape, and any other crime, including murder, assault, kidnapping, burglary, or unlawful imprisonment, which has been determined beyond a reasonable doubt to have been sexually motivated.

The statute fails to define the term "personality disorder." "Mental abnormality," however, is described as a "congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the

120. Project, supra note 4, at 43.
125. Id. § 71.09.020(4)
commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."¹²⁶

"Predatory" acts are defined as those acts directed at strangers or individuals with whom a relationship has been established for the primary purpose of victimization.¹²⁷

Under this statute, when a person's sentence for a sexually violent crime has or soon will expire, the State may file a petition alleging that the individual is a sexually violent predator.¹²⁸ A judge must then determine ex parte if "probable cause exists to believe that the person named in the petition is a sexually violent predator."¹²⁹ If the judge decides that the requisite probable cause has been found, the individual is transferred to a facility for evaluation until a trial is conducted within forty-five days.¹³⁰ If the State can prove beyond a reasonable doubt that the individual is a sexually violent predator, he can be committed to a facility "for control, care, and treatment" until he is ready to be released into public.¹³¹

2. Testing the Constitutionality of a Sexual Predator Law: In Re the Personal Restraint of Andre Brigham Young

Just recently, the Washington Sexual Predator Law was challenged as unconstitutional in a case entitled In re Young.¹³² In a 6-to-3 decision, the Supreme Court of Washington upheld the statute. The court held that (1) Washington's Sexual Predator Law was civil in nature; (2) it did not constitute an ex post facto law; (3) it did not violate the prohibition against double jeopardy; and (4) it did not infringe upon the defendants substantive due process rights.¹³³ Most important was the court's designation of the law as civil in nature.¹³⁴ The court emphasized that by imposing criminal liability for criminal conduct, a state does not consti-

¹²⁶. Id. § 71.09.020(2).
¹²⁷. Id. § 71.09.020(3).
¹²⁸. Id. § 71.09.030.
¹²⁹. Id. § 71.09.040.
¹³⁰. Id. § 71.09.050.
¹³¹. Id. § 71.09.060(1).
¹³³. Id. at XXX.
¹³⁴. The United States Supreme Court has listed the following factors in order to provide guidance when determining whether a statute is criminal in nature:
titionally foreclose itself from later civilly committing the person based on his or her underlying mental disorder and dangerousness to society.138 In determining that this law was civil in nature, the court reiterated the fact that the law was a legislative endeavor designed to protect its citizens by incapacitating dangerous offenders and attempting to treat those whose mental disorders pose a serious risk to public safety.136 The court acknowledged that while the ultimate goal of the law was to treat sexual offenders, the law's immediate function served to incapacitate these dangerous individuals in order to protect society.137

The designation of the law as civil in nature played an important role in determining that the Washington law did not violate the constitutional prohibition of "double jeopardy"138 and "ex post facto"139 laws. Generally, these clauses only apply to criminal matters. In deciding whether the law violated the prohibition against double jeopardy, the court focused on whether the nature of the sanction was punitive or remedial in nature.140 The court recognized that the purposes of the law included incapacitation and treatment, both of which are legitimate goals under an ordinary civil commitment law.141 Therefore, it found no violation of the constitutional prohibition against double jeopardy.142

The court applied similar reasoning to the issue raised by the ex post facto clause and likewise concluded that, due to

whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

135. Young, 857 P.2d 989.
136. Id.
138. The double jeopardy clause of the Fifth Amendment states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.
140. Young, 857 P.2d 989.
141. Id.
the civil nature of the law, the *ex post facto* clause could not serve as the foundation for a constitutional challenge.\footnote{143}

III. ANALYSIS

In examining the problem of stalking in its entirety, this comment will analyze both the legal devices used prior to the enactment of the California stalking statute and the statute itself. By comparing this stalking statute with the NIJ's Model Code, and tracing its correlation with domestic violence and sexual predators, the problems inherent in California's current approach become clear and the need for a change becomes self-evident. A hypothetical will be used throughout the analysis section in order to elucidate the discussion.

A. *Presentation of Hypothetical*\footnote{144}

A hypothetical victim/stalker situation provides a useful framework in which to analyze the efficacy of California's current approach. The victim is Mrs. V, a young, married woman who has two children.\footnote{145} Mr. S, the stalker, is a single male with a history of mental illness.

Mrs. V has been relentlessly stalked by Mr. S for seven years. After meeting Mrs. V at a party, Mr. S began telephoning her and sending her countless letters conveying his affection for her. Despite Mrs. V's emphatic pronouncements that she has a family and her refusal to return his affections, he continues to contact her. He begins dropping by her family home and following her on different occasions when she leaves the house. Mr. S' behavior continues to escalate and grows increasingly frightening. His notes have become more threatening and he now constantly tells her that

\footnote{143. *Id.*}

\footnote{144. This hypothetical situation is partially based in fact. Some of the details of a stalker's behavior towards his victim have been extracted from the real life stories of two stalking victims—Kimberly Poland, whose mother testified before the Senate, and Kathleen Krueger, wife of Senator Bob Krueger. For more information on these real life victims, see *Hearings, supra* note 4, at 34-38 (statement of Kimberly Poland's mother explaining Kimberly's ordeal); Gavin de Becker & Doris Bacon, *When Fans Turn Into Fanatics, Nervous Celebs Call For Help From Security Expert Gavin de Becker*, PEOPLE, Feb. 12, 1990, at 103.}

\footnote{145. For the purposes of this hypothetical, the victim will be female and the stalker male although it is recognized that there are situations where the roles are reversed.}
it is their "destiny to be together" and that "only death can separate them." He tells her "that their time is coming" and that if he can't have her, nobody else can. He sends her various objects, which he calls "gifts," including valentines pierced by arrows with blood dripping from them and locks of his hair. Although Mrs. V has made it quite clear that Mr. S' purported affection for her is unrequited and that his obsession with her is unacceptable, undesired, and unwarranted, Mr. S' actions continue to escalate and Mrs. V now fears for her life and her family's safety. Mrs. V has obtained a temporary restraining order against Mr. S. Mr. S is undaunted by the restraining order and continues to indulge in his threatening behavior.

B. Analysis of the Legal Devices Used Prior to the Enactment of the California Stalking Statute

1. Temporary Restraining Orders

Unfortunately, one conclusion that is becoming virtually impossible to dispute is that temporary restraining orders fail to adequately protect stalking victims.\textsuperscript{146} One law enforcement official has designated them as merely "paper shields."\textsuperscript{147} Temporary restraining orders present a number of problems. First, police simply do not have the resources to monitor every temporary restraining order.\textsuperscript{148} Second, a woman may risk the chance that she will aggravate her stalker and endanger her own safety if she obtains a restraining order.\textsuperscript{149}

Third, temporary restraining orders lack reliable enforcement. One commentator has suggested that "men don't obey these orders, prosecutors don't prosecute violations of the orders, and if they do, judges don't sentence the violators."\textsuperscript{150} In order for protective orders to achieve maximum effectiveness, all concerned parties—the victim, the defend-

\begin{footnotesize}
\begin{enumerate}
\item[146.] For example, Yon Soon Choe obtained two temporary restraining orders warning Jae Choe, her ex-husband to stay away from her and their children. However, Jae Choe broke into her house and gunned down Yon Soon and their son, along with two policemen who tried to help. Keven Fagan, \textit{New Focus on Deadly Stalkers}, S.F. CHRON., Jan. 11, 1993, at A1.
\item[147.] \textit{Id.}
\item[148.] \textit{Id.}
\item[149.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
ant, the court system, and the probation and parole officers—must be aware of their existence and their specific provisions.\(^{151}\) According to the U.S. Department of Justice,

> Enforcement is the Achilles' heel of the civil protection order process, because an order without enforcement at best offers scant protection and at worst increases the victim's danger by creating a false sense of security . . . . For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported.\(^{152}\)

According to one study conducted by The Urban Institute, women were extremely dissatisfied with police response to reported violations of their restraining orders.\(^{153}\) Although women rate police performance highly on their response to the incident which led to the restraining order, they rate police performance as poor when police are responding to a violation of that order.\(^{154}\)

Despite these shortcomings, procurement of a restraining order remains imperative if the victim wishes to secure maximum protection under the legal system.\(^{155}\) Although restraining orders are by themselves inadequate, under the California stalking law, if a suspect violates a restraining order, he can be charged with a felony instead of a mere misdemeanor, and will receive an enhanced penalty.\(^{156}\) Therefore, it is important that a victim obtain a restraining order in order to ensure that her stalker will be charged with a felony, assuming a prima facie case for stalking can be made out and that a restraining order has been violated.\(^{157}\)

### 2. Annoying Phone Calls and Terroristic Threats

The other two legal devices used to combat stalking—statutes proscribing annoying phone calls and terroristic

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151. Project, supra note 15, at 76.
154. Id. at 79.
155. Id.
156. See supra note 88 and accompanying text.
157. Interview with Greg Boles, supra note 54.
threats\textsuperscript{158}—are too narrow in their application to provide adequate legal protection for the victim. As previously discussed, the penalty for making annoying phone calls is minute and amounts to little more than an annoyance to the stalker. Moreover, the requirements for violating the terrorist threat statute are often too difficult to satisfy, leaving it applicable in only a few cases.

3. \textit{Hypothetical Application to Legal Devices Prior to the Enactment of the California Stalking Statute}

In the hypothetical situation of Mrs. V and Mr. S,\textsuperscript{159} these laws fail to provide sufficient protection. Mrs. V could obtain a conviction under the annoying phone call law.\textsuperscript{160} Mr. S, however, would probably be sentenced to probation, leaving him free to continue his campaign of obsessive stalking. Next, Mrs. V would try and obtain a conviction under the terrorist threat statute.\textsuperscript{161} However, given the circumstances, she will probably not be able to prove that Mr. S' statements that “only death will keep them apart” or that “they are destined to be together,” is a threat so unequivocal as to convey an “immediate prospect of execution.”\textsuperscript{162} Most likely, her only viable recourse would be the acquisition of a restraining order,\textsuperscript{163} which would forbid Mr. S from contacting her. Unfortunately, the first violation of the restraining order could prove fatal to Mrs. V.

C. \textit{Analysis of the California Stalking Statute—Section 646.9}

Penal Code section 646.9 has provided encouragement for people seeking reform in California’s stalking law: “The enactment of anti-stalking laws throughout the country is a triumph for the victims’ rights movement—when the message gets through to criminal predators that they no longer may follow and harass their victims with virtual im-

\begin{footnotes}
\item 158. See supra part II.D.2-3.
\item 159. See supra part III.A.
\item 160. See supra part II.D.2.
\item 161. See supra part II.D.3.
\item 162. CAL. PENAL CODE § 422 (Deering 1995).
\item 163. See supra part II.D.1.
\end{footnotes}
punishment, there may be fewer stalking victims."

Although falling short of perfection, the California anti-stalking statute is a marked improvement over the previous laws used to deal with stalking.

1. California Penal Code Section 646.9

Legislators developed the stalking law because of a realization of the lack of protection afforded by the other legal devices previously discussed. By the time law enforcement could intervene in a stalking situation, it was often too late for the victim. Moreover, if stalkers were convicted under one of these laws, they were not detained for very long and were released into the public perhaps undeterred and even aggravated by the punishment.

Even now, California legislators recognize the stalking statute's imperfections and are aware of the need for constant revision to insure its efficacy. For example, the definition of credible threat has been expanded to include threats implied by conduct as well as verbal and written threats. This expansive language allows law enforcement to intervene at an earlier stage, providing more legal protection for the victim. The law no longer requires that the offender make an overt physical or verbal threat before he can be charged with stalking, provided the other elements of the offense are satisfied. In addition, law enforcement is pleased with alterations in the statute which have allowed a first offense, which used to be charged as a misdemeanor, to be a "wobbler"—capable of being charged as a felony or misdemeanor. If the committed offense violates a restraining order, law enforcement will almost always, if possible, charge the offender with a felony. Moreover, the statute can be looked upon favorably because it contains a reasonable fear standard. This al-

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165. *See supra* part II.D.1-3.
167. *See supra* note 86 and accompanying text.
169. *Id.*
170. *Id.*
171. *Id.*
allows law enforcement to focus on the victim’s fear resulting from the stalking instead of the offender’s behavior.\textsuperscript{172}

These improvements have been embraced as the “best preventative tool in law enforcement,” especially in domestic violence cases.\textsuperscript{173} The stalking statute provides the police with “one more weapon to employ against stalkers,” and the statute can be considered successful “if they deter even a small percentage of crimes.”\textsuperscript{174} Furthermore, since offenders can be charged with stalking once they have violated a restraining order, the law provides assurance to women who have obtained restraining orders against their husbands:\textsuperscript{175} “It is one more tool a battered woman has in her pocket.”\textsuperscript{176}

Nonetheless, the laws will be rendered moot unless law enforcement agencies treat women’s complaints very seriously.\textsuperscript{177} Women who seek protection from this type of domestic abuse must confront a judicial system that has traditionally viewed violence against women as domestic disputes to be settled in the home.\textsuperscript{178} Studies reveal that approximately ninety percent of those who are murdered by their intimate partners called the police at least once, and that more than half called at least five times.\textsuperscript{179} Domestic violence against women is a common form of stalking, but state laws often address it only after the crime has escalated into a serious assault or homicide.\textsuperscript{180} Too frequently, “[t]he focus is constantly on the woman—what did she do to provoke it, why did she stay—rather than on why men batter and why society allows it.”\textsuperscript{181}

\textsuperscript{172} Id.
\textsuperscript{174} Melinda Beck et al., \textit{Murderous Obsession}, \textit{Newsweek}, July 13, 1992, at 60.
\textsuperscript{175} Id.
\textsuperscript{176} Id. (quoting Linda Osmundson, director of the CASA center for domestic violence laws).
\textsuperscript{177} Schuyler, supra note 57, at 19. \textit{See also Stalked to Death?}, \textit{Newsweek}, Nov. 1, 1993, at 27.
\textsuperscript{178} Hearings, supra note 4, at 8 (statement of Hon. William S. Cohen, a U.S. Senator from Maine).
\textsuperscript{179} Id.
Regrettably, women who do seek protection from this abuse fail to receive it as such, which exacerbates the problem. Women are also very afraid that if they do call the police it might anger and aggravate their stalker, resulting in violence. As many cases illustrate, their fear exists not merely hypothetically, but is grounded in reality. For example, when an employee obtained a restraining order against Richard Farley, a former co-worker who had been harassing her for four years, he burst into their company one day and killed seven people. The correlation of stalking with domestic violence illustrates the sensitivity of the issue and the need for taking into consideration all of the individual circumstances.

Despite these advancements, general problems with stalking statutes persist. First, the statutes have not been widely tested. The statutes are relatively new and there have not been enough challenges to the statutes to proceed through the appellate process. Litigation under the statutes remains in its nascent stages. Therefore, the question of whether these statutes will be upheld in court is speculative. Second, there have been charges that stalking statutes may not pass constitutional muster. Third, the concept that a credible threat must be made at all remains problematic. Actual threats by a stalker do not necessarily precipitate his approaching of the victim. In reality, there doesn't seem to be

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182. Hearings, supra note 4, at 8.
183. Id. at 76. The chairman calls attention to statistics which show that women who have called the police are literally bleeding from the beatings that they have received but will not press charges because they are afraid that things will only get worse for them if they do. Id.
184. Schuyler, supra note 57, at 19. "Kim" presents another example. Kim's ex-boyfriend, Little, was the first to be sentenced under the California stalking law. According to Kim, who had a restraining order, Little "just laughed it off and said that he would never let her leave him." Fagan, supra note 146, at A1. She fears that now that she has sent him to prison, he will be even angrier. Id.
much of a correlation between a stalker approaching a victim and actual threats at all.\textsuperscript{187}

The problem of credible threats is exacerbated by the fact that behavior which may appear ambiguous or even innocent to a police officer or judge may trigger tremendous fear in the victim.\textsuperscript{188} If there were no credible threat requirement, however, critics could argue that the law would be based upon a totally subjective standard, providing no predictability for the defendant since he would not know whether he was committing a crime.\textsuperscript{189} One court has stated that “the fallacy in this theory is that the victim’s subjective ideas on what is or is not harassing are not in issue... [T]he point is that the defendant... intend[s] to harass and the defendant certainly knows if he is doing that.”\textsuperscript{190}

2. \textit{Hypothetical Application to California Stalking Statute}

Mrs. V would most likely be able to secure a conviction against Mr. S for stalking under section 646.9. First, as to the requisite element of harassment, Mr. S’s repetitive be-


This finding contradicts a vast body of assumptions that is relied on each day in judging whether harassing communications warrant concern, notification of the police, security precautions or investigation. With respect to inappropriate communications to entertainment celebrities, the presence or absence of a threat in the communications is no indication whatsoever of whether a subject is going to pursue an encounter. Those who rely on the presence or absence of threats in making judgments about what to do are making a serious mistake. Unfortunately, this error is codified in the criminal law, which recognizes various types of verbal threats as unlawful but does not accord equal recognition to harassment without threats, even though the latter often poses an equal or greater danger of harm to persons or property. \textit{Id.} at 131-32. (quoting Dietz, et al., \textit{Threatening and Otherwise Inappropriate Letters to Hollywood Celebrities}, 36 JFSCA, No. 1, Jan. 1991).

\textsuperscript{188} Schuyler, supra note 57, at 18. For example, Terry, a 34-year-old woman who has been stalked by her ex-husband for the past four years, felt threatened when she found her husband’s empty soda cans and cigarette butts on her front porch. \textit{Id.} at 19. Another woman felt threatened when her ex-boyfriend telephoned her and accurately described what she was wearing. \textit{Id.} “He knew at all times where I was and what I was doing.” \textit{Id.} The ex-boyfriend ended up shooting and wounding her. \textit{Id.}

\textsuperscript{189} Montesino, supra note 186, at 564.

\textsuperscript{190} \textit{Id.} at 565 (quoting Constantino v. State, 255 S.E.2d 710, 713 (Ga. 1979)).
behavior—including the letter, the phone calls, and the bloody valentines—surely constitutes "harassment" under the meaning of the statute. With the newly amended statute, law enforcement agencies would focus on Mrs. V's fear and whether her fear was reasonable, rather than concentrate on Mr. S's intent to harm her.

Second, proving the existence of a "credible threat" would be the crucial step in convicting Mr. S under the California law. As previously discussed, new language in the statute allows a credible threat to include a threat implied by conduct. Despite the lack of an overt threat, such as, "I am going to kill you on Thursday," a threat could be implied from his statements that "Only death will keep them apart" and "The time is coming where they must be together and that if he can't have her nobody else will." In addition, a threat could be implied from Mr. S's conduct such as the graphic violent letters and "souvenirs" received by Mrs. V. It is probable that this would constitute a "credible threat."

Even though Mr. S is a first-time offender, he has violated a restraining order and, therefore, can be charged with a felony and sentenced to prison for a maximum of four years. After he has served his time, he will be released into the community. The judge may condition his probation on participation in a counseling program and may issue a restraining order ordering Mr. S to stay away from Mrs. V for up to ten years.

As was previously discussed, however, restraining orders do not guarantee that Mr. S will abandon his sexual harassment campaign against Mrs. V. Despite the possibility that he will be incarcerated once again if he violates the restraining order, the first violation could prove fatal for Mrs. V. It is most unlikely that prison has "treated" Mr. S's mental disorder or "cured" him of his deadly obsession with Mrs. V. Thus, it becomes evident that although the law may succeed at sequestering stalkers in prison for a limited duration, it fails to provide an answer as to what to do with them once they are released into the community.

191. See supra note 69 and accompanying text.
192. See supra note 86 and accompanying text.
193. See supra note 88 and accompanying text.
194. See supra notes 91 and accompanying text.
E. Comparison of California Statute, Pre-Trial Release Conditions, and Sentencing Procedure with the Model Anti-Stalking Code and Recommendations

The NIJ has attempted to examine the phenomenon of stalking in all its complexity and has proposed a multi-disciplinary approach. The NIJ conducted an extensive study, utilizing its vast resources, and consulted with many people considered to be experts in formulating its Model Code and recommendations. Considering the thoroughness of this report, it would be wise to compare California's approach to the NIJ approach. Perhaps the California approach could be improved both by focused study of the NIJ approach and by the adoption of some of the NIJ's recommendations.

1. Prohibited Acts

First, California loosely defines the type of prohibited acts which constitute stalking. It lists "following" and "harassing" as specific types of conduct. The Model Code refrains from listing specific prohibited acts that could be construed as stalking and instead uses the words "course of conduct" that would result in fear for a reasonable person. The Model Code uses this terminology because some courts have ruled that if a statute includes a specific list, the list is exclusive of other activities. The efficacy of the Model Code definition lies in its flexibility and its ability to avoid a loophole that would provide an ingenious stalker an opportunity to circumvent the law by ensuring that his conduct did not fall within the specific language of the law.

195. The project was managed by the National Criminal Justice Association and was assisted by a project resource group composed of individuals from the National Conference of State Legislatures, the American Bar Association, the Police Executive Research Forum, the National Governors' Association, the National Association of Attorneys General, the National District Attorneys' Association, the National Center for State courts, the National Organization for Victim Assistance, the Los Angeles Police Department, the National Victim Center, the American Civil Liberties Union, Mobil Corporation, the U.S. Department of Justice's Office for Victims of Crime, and the U.S. Department of Treasury's U.S. Secret Service. Project, supra note 4, at 5-6.
196. See supra note 83 and accompanying text.
197. See supra note 83 and accompanying text.
198. See supra note 115 and accompanying text.
199. Project, supra note 4, at 44.
200. Id.
2. Actionable Threat

As for the type of threats which are actionable, the Model Code is virtually identical, in effect if not in language, with the California statute. Both seek to include threats implied by a pattern of conduct as well as overt verbal or written threats. As previously discussed, this expanded definition is significant because it allows law enforcement to intervene in situations other than those where an overt threat is made. By allowing earlier police intervention, the victim is afforded more protection.

3. Immediate Family

The Model Code language defining the phrase "immediate family," is identical to that used in the California statute. This definition recognizes that a victim's fear may extend to others beyond a "nuclear family." This broadened definition allows more law enforcement intervention. Realistically, this definition recognizes that many people may be emotionally involved and cohabitating but not bound together by ties of blood or marriage. The Model Code, however, cautions that if states expand the definition of nuclear family further, they may render it constitutionally defective by formulating it too broadly. Nonetheless, the definition is favorable in that it affords more protection to a victim's extended family even if not related through consanguinity.

4. Classification as a Felony

California's statutory approach towards stalking classifications aligns closely with Model Code recommendations. The Model Code advises states to establish a continuum of charges in order to deal with different stages of stalking. It recommends that a felony stalking provision be developed to handle the most egregious behavior. Less offensive behavior could be managed under harassment statutes. California accomplishes this by designating a first offense as a

201. See supra notes 83, 115 and accompanying text.
202. See supra notes 85, 117 and accompanying text.
203. Project, supra note 4, at 45.
204. Id. at 46.
205. Id.
206. Id.
"wobbler." The Model Code begins by noting the virtues of its recommended felony stalking statute. First, it would "assist in the development of the public's understanding of stalking as a unique crime, as well as permit the imposition of penalties that would punish appropriately the defendant and provide protection for the victim." Second, and more importantly, it would send out a signal to law enforcement agencies, judges, and potential offenders that stalking is a crime that will be taken seriously. As previously discussed, this realization is critical to combating stalking and classification of a first offense as a felony serves a positive step in that direction.

5. Intent Element

Under the Model Code, the intent element is satisfied if a defendant "consciously engages in conduct that he knows or should know would cause fear in the person at whom the conduct is directed." As a result of improvements to section 646.9, the California law also provides a reasonable fear standard, allowing law enforcement agencies to focus on how the victim feels, rather than on what the stalker intended. The Model Code further explains the need for a reasonable fear standard by pointing out that often a stalker is under a delusion that the victim returns his affections. Therefore, a stalker may actually believe that he is only trying to establish a relationship with the victim, not intending to threaten or harm her in any way. Nonetheless, the victim may reasonably fear bodily injury or death and may pursue a conviction under the stalking statute regardless of the stalker's intent. "I didn't mean to scare her" will no longer serve as an acceptable excuse under either the Model Code or California law.

6. The Element of Fear

The victim's fear represents a very important component of the crime of stalking since "stalking statutes criminalize
what otherwise would be legitimate behavior based upon the fact that the behavior induces fear. 214 Therefore, only the greatest fear—fear of bodily injury or death—will qualify to satisfy the requisite fear element. 215 Other statutes, such as those which concern themselves with harassment or trespassing, can be employed to punish activity which induces lower amounts of fear. 216 The standard under the Model Code is objective, for it requires a finding that the victim's fear was reasonable, thus preventing an over-sensitive victim from securing a conviction under this law. California's law is identical in that it mandates a finding that the victim reasonably feared bodily injury or death. 217 The Code and California's description of the fear element seems to successfully incorporate both the type of fear mandated, and the standard by which it is measured, thus narrowing the scope of the statute's applicability.

7. Fear of Sexual Assault

The Model Code introduces an interesting proposal: including fear of sexual assault along with fear of bodily injury and death. 218 As of present, California fails to include fear of sexual assault in its statute. Conceivably, it is very likely that a person who fears sexual assault may also fear bodily injury if she attempts to resist her attacker. Moreover, because AIDS (acquired immunodeficiency syndrome), which eventually results in death, could be contracted through sexual assault, a victim is more likely to fear bodily injury or death if she is sexually assaulted. 219 Therefore, the project recommends that states may want to consider including conduct which causes a reasonable person to fear sexual assault. 220 Furthermore, although this standard would lower the threshold as to the requisite fear needed, it recognizes that women may equate sexual assault with great bodily injury. Thus, not only would it result in more stalking convictions, it would affirmatively recognize that rape is serious enough to be contemplated by this statute.

214. Id.
215. Id.
216. Project, supra note 4, at 48.
217. See supra note 86 and accompanying text.
218. Project, supra note 4, at 47.
219. Id.
220. Id.
8. Pre-trial Release

The arrest of a stalking suspect may offer immediate relief to the stalking victim. However, such relief is almost always short-lived. The accused is generally released prior to trial and, upon release, may present as much of a threat as before the arrest. In fact, in some instances, the arrest actually may escalate the danger to the victim by increasing the urgency of the stalking activity from the stalker's perspective.221

There are two competing interests to be weighed when determining a defendant's release prior to trial: the defendant's right to a presumption of innocence until proven guilty, and the possible danger to the victim. In California, however, the only factor used in determining release conditions is the defendant's probability of appearance in court.222 California should consider imposing reasonable conditions of release, such as those recommended by the NIJ, in order to safeguard the public. The Model Code does not include pretrial release conditions but does make recommendations as to conditions which should be included and tailored to the specific circumstances of each case. These include restrictions on movements of the accused, including house arrest; prohibition on the possession of weapons; prohibition on contact or other communication with the victim or members of the victim's family; mental health testing and treatment; and prohibition on intentionally following the victim or going near any

221. Id. at 55. For example, one woman in Florida had filed a stalking complaint against her husband, but while he was awaiting prosecution, he killed her. Laura Griffin, Stalking Law Under Attack, St. Petersburg Times, Jan. 25, 1993, at 1B.

222. Project, supra note 4, at 58 (emphasis added). The project compiles a chart which lists a number of possible considerations used by states in determining release conditions. Id. These considerations include seriousness of charge, weight of evidence/probability of conviction, nature/circumstance of charge, defendant's background, previous criminal record, probability of appearance, policy against unnecessary detention, family ties, employment/financial resources, character/mental condition, record of appearance at court, threats to victims/witnesses, ties to/length of residence in community, persons who will vouch for individual, likelihood of posing danger, likelihood of victim/witness intimidation, use/possession of firearms, use of controlled substances, current status re other offenses, source of bail funds, persons assisting him in attending court/making conditions, likelihood of violations on release. Id. There are only three other states who use probability of appearance as the sole factor in determining pretrial release: Michigan, New York and Oklahoma. Probability of appearance is also the sole factor considered in the District of Columbia. Id. at 58-61.
place frequently visited by the victim (residence, place of employment, etc.).

In addition, the California legislature would be prudent to formulate a victim notification provision which alerts victims as to the release of their alleged perpetrators. As one study notes:

Stalking victims have an obvious concern about the release of their alleged stalkers as well as in any release conditions relevant to their own safety. Such awareness enables victims to plan their own lives accordingly. It also enhances their ability to report violations and, as a consequence, improves the likelihood of compliance.

By integrating these conditions, California can attain the delicate balance between affording the defendant his rights under the law and providing the victim with the protection to which she is unequivocally entitled.

9. Sentencing Procedure

California provides to judges general sentencing guidelines, with sentences not to exceed four years in prison. In addition, section 646.9 gives a very broad definition of "ha-rasses" which allows the judge discretion in sentencing so as to address different levels of stalking. For example, when an offender violates a protective order, he can be charged with a felony. Moreover, California's law mandates that the defendant participate in counseling as a condition of probation. The law retreats from this mandate, however, by

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223. These conditions are extracted from a task force list which made recommendations on pre-release conditions that states may want to consider. Id. at 57, 62. Each stalking situation is different and the conditions can be used to ensure protection for the victim depending on the seriousness of the offense.

224. Victim notification provisions may be especially salient in stalking convictions because the stalker usually fixates and obsesses on one person. This can be distinguished from other crimes, such as rape, where a greater chance exists that the victim was randomly selected. If a stalker fixates on one person, there is a high risk that the victim remains a target and would benefit from and appreciate being notified in order to protect herself accordingly. Id. at 57, 62.

225. Project, supra note 4, at 67.

226. See supra notes 87-91 and accompanying text.

227. See supra note 83 and accompanying text. The spectrum covers any behavior which "annoys" the victim to behavior which "terrorizes" the victim. Id.

228. See supra note 90 and accompanying text.
stating that this condition can be dispensed with upon a showing of "good cause." 229

The NIJ has not codified sentencing procedure but does put forth a number of suggestions. For example, it recommends that states adopt enhanced penalties for aggravated circumstances. 230 When releasing a defendant on probation or parole, the NIJ cautions judges to take into consideration the fact “that some stalkers may be more dangerous once they are released from prison, and that stalking behavior often escalates into violence as time passes and the stalker’s obsession with the victim grows.” 231 Therefore, courts must keep protection of the victim as a primary consideration when conditioning release of the stalker. Following this logic, the NIJ also recommends that states consider requiring evaluation and counseling as a part of the sentence because stalkers who are psychologically ill will not be deterred solely through punishment. 232

Always considering the safety of the victim, the NIJ has recognized the merit in certain technological innovations. 233 A few states are currently testing new ideas. For example, some states are requiring released stalkers to wear an electronic arm band. 234 If the defendant violates a no-contact order and comes near the victim’s residence, the device contacts the vendor, who requests assistance from the police. 235 The device may also activate an alarm which alerts the victim as to the defendant’s close proximity. 236

E. Stalkers and their Mental Disorders

As previously mentioned, stalkers will be released once they have served their sentence. Success of the stalking statute should not be measured solely by the number of convictions it generates. It must also effectively prevent harm. If a

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229. *See supra* note 90 and accompanying text.
230. Other states mandate enhanced penalties when the victim is a minor or when a weapon is used during the commission of the crime *See, e.g.,* ALASKA STAT. § 11.41.260-.270 (1993); Conn. Gen. Stat. § 53a-181(c) to (d) (1993); IND. CODE § 35-33-1-1 to 35-46-1 (1993).
232. *Id.* at 51.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
stalker suffers from a mental defect, which approximately seventy percent do, it is unlikely that imprisonment alone will cure him of his ailment. It may succeed in isolating him from society for a short period of time, but it may fail to deter him from fixating once again on his victim upon release.

Many believe that "[s]talkers are by nature the most relentless of criminals." One forensic psychologist stated that obsessional stalkers, if left without treatment, will return to their earlier conduct regardless of the length of the prison term. In her opinion, jail is an effective method of preventing crime but aggressive psychological intervention is needed before the stalker's behavior can improve. When somebody's entire focus of life is directed at one individual, the possibility of going to jail is not much of a deterrent. In summary, "[i]f a stalker . . . is determined to kill, there is little short of death, permanent jail time or round-the-clock bodyguards that will keep him from his mission. Not court orders, not threats—not even moving away."

The problem crystallizes as the gap between criminal laws and mental health treatment becomes more clear. Unfortunately there is a giant valley between the criminal and mental health systems. Stalkers often fall into this gap

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237. Drexler, supra note 55, at 4B.
238. Id. (quoting forensic psychologist Sandra McPherson).
239. Id.
240. Don Knapp, California Looking at Anti-Stalking Law's Failures, CNN TRANSCRIPTS, Sept. 2, 1993. (Mary Ashley discussing shortcomings of the law). "Just to make it a crime doesn't solve the illness that is quite often associated with the stalking problem." Keeton, supra note 56, at 1. See also, McAnaney et al., supra note 17, at 905.

Though a very hopeful development towards protecting stalking victims, most anti-stalking laws have one major shortcoming—they do not adequately recognize that many stalkers, perhaps most, are emotionally disturbed or mentally ill. The proper penal goal of anti-stalking laws, therefore, should be incapacitation of the stalker. Deterrence is not an appropriate goal because stalkers, will not cease their harmful behavior because of criminal penalties. Persons intent on stalking will break protection orders, and other laws, to contact their victim. Protection of the victim will be best served by basing sentencing provisions on the primary goal of incapacitation.

Id.

242. For example, Arthur Jackson, the man who stabbed actress, Theresa Saldana eleven times, is scheduled for release soon. From jail he has written Theresa several letters making it clear that he remains firm in his resolve to kill her. Becker & Bacon, supra note 144, at 103.
with neither system held fully accountable.\textsuperscript{243} Regardless of the craftsmanship of the stalking statute, and notwithstanding the stiffness of the penalties, the stalker's sentence will eventually come to an end and he will be released, perhaps angrier than ever before.

Legislation is needed in order to prevent a situation in which a mentally ill stalker is released into society, free to resume his deadly conduct.\textsuperscript{244} Release conditions may hinder a stalker; however, the first violation may also be the last—the legal system may not receive a second chance to intervene. The current version of the stalking law provides a foundation upon which to build, yet something more is needed to ensure the public's safety.

G. \textit{Comparison of Stalkers to Sexual Predators}

The state of Washington has codified legislation in order to combat a similar problem: the recidivism of sexual predators.\textsuperscript{245} The sexual predator law proposes civil commitment of certain persons to a mental health institution until they no longer pose a danger to the community. Sexual psychopath statutes seem to be based upon two assumptions.\textsuperscript{246} First, it appears that they are necessary to protect society because criminal laws fail to be entirely successful at accomplishing the goal of safeguarding the public.\textsuperscript{247} Second, it is assumed that certain criminals with mental defects are capable of eventually being medically treated.\textsuperscript{248} The Washington law itself is premised upon two ultimate goals: its immediate purpose is to ensure commitment of dangerous persons who pose a threat to the community; its secondary purpose seeks to treat and eventually cure the mental disease which underlies their behavior.\textsuperscript{249} These goals appear to align with the scholarly view that "[t]he broad aim of the criminal law is, of course, to prevent harm to society—more specifically, to pre-

\begin{itemize}
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} This legislation will be discussed in the Proposal section of this comment. \textit{See infra} part IV.
\item \textsuperscript{245} \textsc{Wash.} Rev. Code \textsection{} 71.09 (1992). \textit{See supra} part II.H.1.
\item \textsuperscript{246} \textsc{Wayne LaFave} & \textsc{Austin W. Scott, Jr.}, Criminal Law, \textsection{} 1.7, at 39 (2nd ed. 1986).
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{In re Young}, 857 P.2d 989, XXX (Wash. 1993).
\end{itemize}
vent injury to the health, safety, morals and welfare of the public.250

Regrettably, the law has been criticized as serving as a carefully crafted statute promoting preventative detention.251 Critics argue that confinement is based on predicting the possibility of the offender committing future crimes, not the crimes they have committed.252 The Washington Supreme Court, however, has affirmatively stated that this law does not constitute preventative detention.253 The court stated that this law fell comfortably within the realm of “civil commitment” and provided three reasons to substantiate its conclusions.254 First, the State must prove both mental illness and dangerousness.255 Second, the temporal element of the commitment is not subject to any rigid limit but instead is indeterminate and tailored to the duration of the mental illness.256 Finally, unlike pretrial detainees, those committed under the sexual predator statute have been through an entire trial with all of the procedural protections that are afforded with it.257

One could begin to draw many parallels between sexual predators and repeat stalking offenders. First, both the Washington legislature and the California legislature have the same compelling interests: to incapacitate dangerous per-

250. LaFave & Scott, supra note 246, § 1.3, at 10. This punishment theory is called deterrence, which aims through punishment, to prevent similar crimes from happening in the future. Id. § 1.5, at 23. Deterrence is to be distinguished from retribution, which condones punishment in order to exact revenge on the defendant for his harming of others. Id. at 25-26. Deterrence is also to be distinguished from incapacitation, which seeks to protect society by isolating the defendant, and rehabilitation, which imposes punishment in the form of treatment in order to reform the criminal into a law-abiding member of society. Id. at 23-24.

251. Christy Hoppe & Diane Jennings, Ex-inmates Pose Quandary for Many States Convicts Seen as Threat Even After Their Release, The Dallas Morning News, Aug. 29, 1993, at 1A. “It doesn't take a rocket scientist to see this is a poorly veiled disguise for preventative detention.” Id. (quoting John La Fond, a law professor at the University of Puget Sound in Tacoma, Washington).


253. Young, 857 P.2d at 1007.

254. Id.

255. Id.

256. Id.

257. Id. For the list of procedural protection afforded to defendants see supra part II.H.1. Accord Foucha v. Louisiana, 112 S. Ct. 1780 (1992) (holding that continued confinement of individuals found not guilty by reason of insanity even after they are no longer considered insane violates due process).
sons who pose a serious threat to society and to rehabilitate people with treatable mental disorders which cause them to engage in harmful conduct. Second, a great majority of sexual predators and stalkers are mentally disordered. Imprisonment alone will merely isolate the offender for a determinate period, but will not cure the defect which induces him to act in this manner. Sexual predators have been singled out by the Washington legislature for the exceptional risks they pose to society and the seemingly intractable nature of their illness. Stalkers, too, appear to possess these same characteristics. Both appear to show a great propensity for violence and a likelihood that their behavior will not alter without aggressive psychological intervention. As a result of these correlations, it is conceivable that a statute aimed at stalking, modeled after Washington’s Sexual Predator statute, may provide an answer to the question of what to do with persistent stalkers upon their release.

IV. PROPOSAL

A. Proposed Statute For California Pertaining to the Civil Commitment of Aggravated Stalkers

As previously demonstrated, there lies a gap between the criminal justice system and the mental health system. Although much progress has been made in regard to anti-stalking legislation, more statutory intervention is necessary. It has been illustrated that most stalkers suffer from a mental disorder and that many simply cannot, without help, relinquish their obsessive stalking campaign until someone is dead. Terrible crimes require drastic measures.

The following proposed statute will be narrow in its application to only the most egregious offenders. It seeks

258. State ex rel. Seezer v. Green, 232 S.W.2d 897 (Mont. 1952). “[T]he state has a sovereign right and duty of guardianship as to persons found to be criminal sexual psychopaths and dangerous to the health, morals, and safety of its citizens, and to themselves.” Id.
259. See supra part II.F.
261. See supra part II.F.
262. The structure and a portion of the language has been taken from Washington Sexual Predator statute.
263. For example, the statute would only apply to those who repeatedly attacked the object of their obsession and who show no indication even after serving their sentence that they will cease their behavior.
foremost to protect society and, second, to rehabilitate stalkers by helping them to emerge from their obsession with the victim. It provides a great deal of substantive and procedural protection for the defendant and aims to strike a delicate balance between protection of society and fairness to the defendant.

**Aggravated Stalking**

(A) Definitions

(1) “Aggravated Stalker” means any person who has been convicted of the crime of aggravated stalking and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory, violent acts of stalking.

(2) “Mental Abnormality” means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.

(4) “Aggravated stalking” means an act defined in § 646.9 in conjunction with one of the following aggravating factors:

(a) a severe physical attack on an individual for which the person has been convicted.

(b) repeated stalking of a minor

(c) any other factors which indicate that this offender suffers from a mental abnormality and poses a great danger to society.

(B) Aggravated Stalker Petition

When it appears that the sentence of a person who has been convicted of an aggravated stalking offense is about to expire, or has expired, and it appears that the person may be an aggravated stalker, the prosecuting attorney of the county where the person was convicted or charged or the attorney general if requested by the prosecuting attorney may file a petition alleging that the person is an “aggravated stalker” by stating sufficient facts to support such an allegation.

(C) Aggravated Stalker petition—Judicial determination—Transfer for evaluation

264. A crime of sexual violence includes any degree of rape, molestation, and other crimes such as murder, assault, kidnapping, burglary, or unlawful imprisonment, which has been proven to be sexually motivated.
Upon the filing of a petition, the judge shall determine whether probable cause exists to believe that the person named in the petition is an aggravated stalker. If such determination is made the judge shall direct that the person be taken into custody and the person shall be transferred to an appropriate facility for an evaluation as to whether the person is an aggravated stalker. The evaluation shall be conducted by a person deemed to be professionally qualified to conduct such an examination pursuant to rules developed by the department of social and health services.

(D) Trial—Rights of parties

Within forty-five days after the filing of a petition pursuant to (B), the court shall conduct a trial to determine whether the person is an aggravated stalker. At all stages of the proceedings, the person shall be entitled to the assistance of counsel. Whenever any person is subjected to an examination under this chapter, he or she may retain experts or professionals of his or her own choice as well as have reasonable access to all relevant medical and psychological records and reports. The person, the prosecuting attorney or attorney general, or the judge shall have the right to demand that the trial be before a jury. If no demand is made, the trial shall be before the court.

(E) Trial—Determination—Commitment Procedures

The court or jury shall determine whether, beyond a reasonable doubt, the person is an aggravated stalker. If the court or jury determines that the person is an aggravated stalker, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person’s mental abnormality or personality disorder has so changed that the person is safe to be at large.

(F) Annual Examinations

Each person committed under this chapter shall have a current examination of his or her mental condition made at least once every year. The person may retain an expert or professional person to examine him or her who shall have access to all records concerning the person. The periodic report shall be provided to the court that committed the person under this chapter.

(G) Petition for release—Procedures
(1) If the secretary of the department of social and health services determines that the person's mental abnormality or personality disorder has so changed that the person is not likely to commit acts of stalking if released, the secretary shall authorize the person to petition the court for release. Upon receipt of the petition, the court shall order a hearing to take place within forty-five days. The hearing shall be before a jury and the prosecuting attorney or attorney general shall bear the burden of proof to show beyond a reasonable doubt that the petitioner's mental abnormality or personality disorder remains such that the petitioner is not safe to be at large.

(2) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for discharge without the secretary's approval. The court shall set a show cause hearing to determine whether facts exist that warrant a hearing on whether the person's condition has so changed that he or she is safe to be at large.

(H) Release of information authorized

In addition to any other information required to be released under this chapter, the department is authorized to release relevant information that is necessary to protect the public, concerning a specific aggravate stalker committed under this chapter.

B. Hypothetical Application of Proposed Statute

In order to understand the improvements that the proposed statute would make in California's approach towards stalking, it may be helpful to apply the proposed statute to the hypothetical presented earlier. Although the California stalking statute would have resulted in Mr. S' imprisonment for a couple of years, it would be unable to provide an effective solution to protect Mrs. V upon his release.

Assume for the purposes of this discussion that Mr. S's behavior has continued to escalate until it has resulted in a severe physical attack upon Mrs. V. Mr. S has been sent to jail and has continued to harass and frighten Mrs. V. He swears that they must be re-united in order to meet their Maker and that he will not rest until they are together. Under California law, he has served his time and must be
released. Under the proposed statute, he can be segregated from society and treated until he no longer poses a threat to Mrs V. When Mr. S is about to be released, the prosecuting attorney may file a petition alleging that Mr. S is an “aggravated stalker.” The court or jury shall decide whether, beyond a reasonable doubt, Mr. S is an “aggravated stalker.” If he is found to be so, he will be transferred to a mental health facility, where he will receive treatment until he is no longer a danger to society. The proposed statute would succeed in balancing the defendant’s need for treatment for his mental abnormality with the safety of the public.

V. CONCLUSION

This comment proposes a statutory addition to the current legal devices employed by California in its attempt to eradicate stalking and its pernicious effects upon society. Although the California stalking statute serves as a marked improvement over prior existing law, it fails to ensure maximum legal protection for victims. Limiting the California approach towards stalking solely to punishment is to dally in ignorance; stalking requires drastic measures aimed at the source of the problem—curing the stalker of his mental defect. The proposed statute attempts to supplement existing law by recommending that the most egregious stalkers be subject to civil commitment in a mental institution.

Through this statute, two significant goals would be accomplished: the treatment of underlying mental disorders which compel stalkers to stalk their victims, and the protection of society from dangerous individuals. This comment concedes that the new legislation introduces new questions and controversial issues. However, it maintains that the problems posed by the civil commitment law are not insurmountable, and that when countered with the strong interest in public safety, worth the struggle.

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