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# Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9

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## Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9

Reports of stalking<sup>1</sup> have become increasingly common in the United States.<sup>2</sup> Commentators predict that approximately five percent of women in the United States will be victims of unwanted pursuit at some time in their lives.<sup>3</sup> In 1990, following the fatal shooting of actress Rebecca Schaeffer and the murders of four other southern Californian women,<sup>4</sup> the California Legislature responded by passing the nation's first anti-stalking law.<sup>5</sup> Numerous

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1. The crime of stalking has been defined as the willful, malicious, and repeated following or harassing of another person, in addition to the making of a credible threat with the intent to place that person in reasonable fear of death or great bodily injury. *See, e.g.*, CAL. PENAL CODE § 646.9(a) (West Supp. 1993); FLA. STAT. ANN. § 784.048(3) (West Supp. 1993); 720 ILL. COMP. STAT. ANN. § 5/12-7.3(a)(1) (Smith-Hurd 1993); LA. REV. STAT. ANN. § 14:40.2(2)(A) (West Supp. 1993).

2. *See* Elizabeth Ross, *Problem of Men Stalking Women Spurs New Laws*, CHRISTIAN SCI. MONITOR, June 11, 1992, at 6, available in LEXIS, Nexis Library, Newspapers File (noting that the problem of stalking has gained increased attention due to society's growing awareness of domestic abuse as a serious crime); *see also* *World News Tonight With Peter Jennings* (ABC television broadcast, Aug. 11, 1992) [hereinafter *World News Tonight*], available in LEXIS, Nexis Library, Transcripts File (noting there are an estimated 200,000 stalkers in the United States).

3. Maria Puente, *Legislators Tackling the Terror of Stalking but Some Experts say Measures are Vague*, USA TODAY, July 21, 1992, at 9A, available in LEXIS, Nexis Library, Newspapers File (quoting Park Dietz, a clinical psychiatrist, who conducted a major study on stalking).

4. *See Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) [hereinafter *Sonya Live*], available in LEXIS, Nexis Library, Transcripts File (reporting that all four murders of the southern Californian women occurred within a period of a month and a half and that each woman had obtained a temporary restraining order and communicated to her family, friends, and police that she thought she was going to be killed).

5. CAL. PENAL CODE § 646.9 (West Supp. 1993); ASSEMBLY COMM. ON PUBLIC SAFETY, REPORT ON SENATE BILL 2184 (1990) (noting that increased stalking of celebrities and the murders of five Orange County women highlighted the need for anti-stalking legislation in California); *see* Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J., Aug. 20, 1992, at 1, available in

other states have followed California's lead by enacting anti-stalking laws similar to California's provision.<sup>6</sup>

Prior to the passage of these anti-stalking laws, a victim's usual remedy against a harasser was to obtain a restraining order or injunction aimed at keeping the stalker away from the victim.<sup>7</sup> Unfortunately, these remedies were often inadequate to protect victims of harassment.<sup>8</sup> It is not surprising, therefore, that many people have welcomed anti-stalking legislation in an effort to aid victims.<sup>9</sup> However, civil libertarians, such as the American Civil Liberties Union, are concerned with how these laws will be applied and have been apprehensive in endorsing them.<sup>10</sup>

This Comment provides an overview of the traditional remedies available to victims of harassment and of the new anti-stalking laws in effect in some states, which are aimed specifically at protecting victims of stalking. Part I describes the stalking phenom-

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LEXIS, Nexis Library, Newspapers File (noting that the catalyst for stalking laws in states other than California has come primarily from women and domestic violence organizations because in those states, unlike in California, few victims of stalking are celebrities); *see also infra* notes 150-158 and accompanying text (discussing section 646.9 of the California Penal Code).

6. *See* COLO. REV. STAT. § 18-9-111(4) to (6) (1986 & Supp. 1992); 1992 Conn. Acts 92-237 (Reg. Sess.); 68 Del. Laws 250 (1992); FLA. STAT. ANN. § 784.048(2) to (3) (West Supp. 1993); HAW. REV. STAT. § 711-1106.5(1)(a) to (b) (Supp. 1992); IDAHO CODE § 18-7905(a) (Supp. 1992); 720 ILL. COMP. STAT. ANN. § 5/12-7.3(a)(1) to (2) (1992); 1992 Iowa Acts 190; 1992 Ky. Rev. Stat. & R. Serv. 443 (Baldwin); LA. REV. STAT. ANN. § 14:40.2(A) (West Supp. 1993); MASS. ANN. LAWS ch. 265, § 43(a) (Law Co-op. 1993); MISS. CODE ANN. § 97-3-107(1) (Supp. 1992); NEB. REV. STAT. § 28-311.03 (Supp. 1992); N.C. GEN. STAT. § 14-277.3(a)(1) to (3) (Supp. 1992); OKLA. STAT. tit. 21, § 1173(A) (Supp. 1993); R.I. GEN. LAWS § 11-59-2(a) (Supp. 1992); S.C. CODE ANN. § 16-3-1070(B) (Law. Co-op. Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1992); TENN. CODE ANN. § 39-17-315(a)(1) to (3) (Supp. 1992); UTAH CODE ANN. § 76-5-106.5(2) (Supp. 1992); VA. CODE ANN. § 18.2-60.3(A) (Michie Supp. 1992); W. VA. CODE § 61-2-9a(a) (1992).

7. *See infra* notes 87-119 and accompanying text (discussing restraining orders and injunctions to prevent stalking).

8. *See infra* notes 81-86, 161-171 and accompanying text (discussing the inadequacies of traditional civil remedies in protecting harassment victims); *supra* notes 4-5 and accompanying text (discussing the cases of four southern California women who were murdered by stalkers even though they had obtained injunctions and filed complaints with the police).

9. *See* Arthur Higbee, *American Topics*, INT'L HERALD TRIBUNE, June 6, 1992, News, available in LEXIS, Nexis Library, Newspapers File (noting that anti-stalking laws are supported by victim's rights advocates who see such laws as additional deterrents to the kind of behavior that often precedes more violent acts).

10. *See* Spencer, *supra* note 5, at 1 (reporting that the American Civil Liberties Union has stated that it will watch to see how anti-stalking laws are implemented to ensure they are not used to prohibit constitutionally protected activities).

enon and illustrates several case histories.<sup>11</sup> Part II explores the advantages and disadvantages of traditional remedies for victims of harassment<sup>12</sup> and explains California's anti-stalking provision, California Penal Code section 646.9.<sup>13</sup> Finally, Part III discusses the validity of the various arguments that have been asserted against California Penal Code section 646.9.<sup>14</sup>

## I. THE STALKING PHENOMENON

### A. Case Histories

Most incidents of stalking fall into one of three categories: domestic violence, work-place harassment, or stalking of a famous person.<sup>15</sup> Undoubtedly, the most widely publicized cases are those involving celebrities. In fact, it was the murder of actress Rebecca Schaeffer which prompted the enactment of California's anti-stalking law.<sup>16</sup> More recent examples include actress Justine Bateman, whose stalker threatened suicide in her presence, and actor Michael J. Fox and his wife, actress Tracy Pollan, who were threatened by a woman who sent them almost 6,000 harassing and threatening letters in one year.<sup>17</sup> Although these celebrity cases attract much public attention, stalking is far from being a behavior directed exclusively at celebrities.<sup>18</sup>

The most commonly occurring cases of stalking are associated with domestic violence and usually involve former spouses or

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11. See *infra* notes 15-61 and accompanying text.

12. See *infra* notes 62-149 and accompanying text.

13. See *infra* notes 150-158 and accompanying text.

14. See *infra* notes 159-236 and accompanying text.

15. See Ross, *supra* note 2, at 6 (discussing common situations in which stalking occurs).

16. See CAL. PENAL CODE § 646.9 (West Supp. 1993); *supra* notes 4-5 and accompanying text (explaining the catalyst of California's anti-stalking law).

17. Faye Mayo, Address to the California Assembly Committee on Public Safety (July 3, 1990) (on file with the *Pacific Law Journal*).

18. See Puente, *supra* note 3, at 9A (noting that 38% are average citizens). Only 17% of stalking victims are highly recognized celebrities, and 32% are less widely known entertainment figures. *Id.*

lovers.<sup>19</sup> Not only are these more common, but police have indicated that stalking cases involving domestic relationships have the highest potential for violence.<sup>20</sup> Statistics reveal that nine percent of all violence against women is done by husbands, thirty-five percent by ex-husbands, and thirty-two percent by boyfriends or ex-boyfriends.<sup>21</sup> In the case of stalking specifically, forty-seven percent of stalkers know their victims either as ex-spouses, ex-lovers, or former bosses.<sup>22</sup> The following three cases are illustrative of the problem and of the inadequacy of traditional remedies.

### *1. Case #1*

The first person ever charged under California Penal Code section 646.9 was Mark Bleakley.<sup>23</sup> Bleakley was found guilty of stalking his ex-girlfriend, Leslie Wein, for two months.<sup>24</sup> Bleakley's reign of harassment began shortly after Wein ended their two-year relationship.<sup>25</sup> At first, "I Love You" notes and bouquets of roses appeared mysteriously on Wein's bed.<sup>26</sup> Next, Bleakley moved items around in Wein's room to show that he had escaped her security system and that he had been in her room while she was not home.<sup>27</sup>

Bleakley's mind games quickly escalated into an obsession.<sup>28</sup> He followed her wherever she went, appearing in Wein's rearview mirror when she was driving, sometimes even in rental cars to con-

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19. See *World News Tonight*, *supra* note 2. See generally Ross, *supra* note 2, at 6 (noting that the vast majority of domestic violence occurs after a couple separates).

20. *World News Tonight*, *supra* note 2.

21. *Nighline: Anti-Stalker Laws* (ABC television broadcast, Sept. 3, 1992) [hereinafter *Nighline*], available in LEXIS, Nexis Library, Transcripts File.

22. Puente, *supra* note 3, at 9A.

23. See Michael Connelly, *Ex-Boyfriend Jailed Under 'Stalking' Law*, L.A. TIMES, June 10, 1991, at B1, available in LEXIS, Nexis Library, Newspapers File.

24. *Id.*

25. James Quinn, *Man Pleads No Contest in 'Stalking' Case*, L.A. TIMES, July 23, 1991, at B3, available in LEXIS, Nexis Library, Newspapers File.

26. Norma Meyer, *Ex-Boyfriend Nabbed in State's 1st 'Stalking' Case*, NEWS PILOT, Aug. 12, 1991, at A1, available in LEXIS, Nexis Library, Newspapers File.

27. *Id.*

28. *Id.*

fuse her.<sup>29</sup> He also made threatening telephone calls, flattened Wein's tires twice, poured acid on her car, and stole her dog from her backyard.<sup>30</sup> On one occasion, Bleakley shattered the windshields of cars belonging to Wein's friends and wrote Wein's name across the broken glass in red lipstick.<sup>31</sup>

Even though Wein had obtained a temporary restraining order, Bleakley's harassment did not cease.<sup>32</sup> Wein made twenty police reports before Bleakley was finally arrested and charged under California's new anti-stalking law, Penal Code section 646.9.<sup>33</sup>

## 2. Case #2

Erin Tavegia was only fifteen years old when a forty-nine year-old man began stalking her.<sup>34</sup> Every day while Tavegia and her friend walked to school, the man followed them in his car.<sup>35</sup> He sat outside of Tavegia's house and waited for her.<sup>36</sup> Tavegia contacted the police repeatedly over fourteen months but was told that the police could not help her because the man was not breaking the law.<sup>37</sup> Finally, however, the stalker pled guilty to breaching the peace.<sup>38</sup> Nevertheless, Tavegia claims the stalking experience has changed her entire life.<sup>39</sup> She remains afraid and will forever be looking over her shoulder, and she doubts that she will ever be able to trust anyone again.<sup>40</sup>

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29. *Id.*

30. *Id.*

31. *Id.*

32. Connelly, *supra* note 23, at B6; *see infra* notes 87-119 and accompanying text (discussing temporary restraining orders).

33. *Id.*

34. Sonya Live, *supra* note 4.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

### 3. Case #3

Sam Cooper began stalking Ms. Jimmie Breeding after Breeding terminated their relationship.<sup>41</sup> Cooper followed Breeding, blocked her driveway, and put harassing letters in her mailbox.<sup>42</sup> On one occasion, Cooper confronted Breeding at her home and struck her on the head with a hammer, causing severe injuries.<sup>43</sup> Although Cooper pled guilty to attempted murder, he was still free on bail for nearly a year, during which time he continued to harass Breeding.<sup>44</sup> As is common with many stalking cases, Breeding had previously begged for, but was denied, police protection because Cooper had not yet broken the law.<sup>45</sup>

#### B. Typical Stalker Profile

In general, most stalkers are males,<sup>46</sup> coming from all ethnicities and ages, and from a variety of social and family backgrounds.<sup>47</sup> Many are intelligent with a history of inadequate heterosexual relationships.<sup>48</sup> They are often motivated by fantasies of intimate relationships with their victims.<sup>49</sup> However, to many stalkers, love means possession.<sup>50</sup> Stalkers do not see the object of their obsession as a real person, but rather, see that person as a thing to be possessed.<sup>51</sup>

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41. *World News Tonight*, *supra* note 2.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Cheryl Laird, *Stalking: Laws Confront Obsession That Turns Fear into Terror and Brings Nightmares to Life*, THE HOUSTON CHRON., May 17, 1992, Lifestyle, at 1, available in LEXIS, Nexis Library, Newspapers File.

47. *Id.*

48. See John C. Lane, *Threat Management Fills Void in Police Services*, THE POLICE CHIEF, Aug. 1992, at 28 (noting that the experiences of the Threat Management Unit of the Los Angeles Police Department indicate that some stalkers are of above-average intelligence while others are socially maladjusted).

49. Laird, *supra* note 46, at 1.

50. *Id.*

51. *Id.*

Many stalkers suffer from mental disorders.<sup>52</sup> These disorders tend to fall into three categories: erotomania, love obsessions, and simple obsessions.<sup>53</sup> *Erotomania* is a condition where persons falsely believe that the victim is in love with them.<sup>54</sup> A *love obsession* is a condition in which a person is a stranger to the victim but, because of the obsession, mounts a campaign of harassment in order to make the victim aware of the person's presence.<sup>55</sup> Finally, a *simple obsession* involves a person, known to the victim as an ex-spouse, ex-lover, or former boss, who begins to harass the victim.<sup>56</sup> Of those who suffer from these disorders, an erotomaniac is almost twice as likely to engage in stalking.<sup>57</sup>

Regardless of their mental condition, stalkers, at least initially, do not desire to hurt their victims but simply want to possess them.<sup>58</sup> However, when the victim does not respond as the stalker desires, the stalker becomes angry.<sup>59</sup> This is typically when the

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52. Puente, *supra* note 3, at 9A (suggesting that some statistics show that more than 90 percent of stalkers suffer from mental disorders).

53. See Michael A. Zona, M.D., et al., *A Comparative Study of Erotomania and Obsessional Subjects in a Forensic Sample*, in AM. ACADEMY OF FORENSIC SCI. (forthcoming July 1993) (on file with the *Pacific Law Journal*) (discussing the characteristics of erotomania, love obsessions, and simple obsessions).

54. See Zona, *supra* note 53 (defining erotomania as the delusional belief that one is passionately loved by another, usually a person of higher socio-economic status or a public figure, and that the person would return the affection if not for some external influence). Persons afflicted with erotomania often will go to great lengths to contact the person of their delusion. *Id.* They believe that the actions taken by the other person are specifically intended for them and reject any evidence to the contrary. *Id.* While the prognosis for such persons is poor, some clinical anecdotes suggest that newer objects may replace older ones. *Id.* See also Puente, *supra* note 3, at 9A (indicating that 9½% of stalkers suffer from *erotomania*).

55. See Zona, *supra* note 53 (noting that persons suffering from love obsessions begin taking steps to make their existence known to the victim sometimes due to a belief that the victim will love them if only given a chance); see also Puente, *supra* note 3, at 9A (noting that 43% of stalkers suffer from love obsessions).

56. See Zona, *supra* note 53 (distinguishing a simple obsession from erotomania and love obsessions because the victim is known to the person suffering from a simple obsession as a neighbor, acquaintance, or lover). In the case of simple obsessions, the obsessional activities begin after the relationship has gone bad or there is a perception of mistreatment by the other person. *Id.* The person usually begins to harass the victim in order to rectify the situation or to seek retribution. *Id.* See also Puente, *supra* note 3, at 9A (noting that 47% of stalkers experience simple obsessions).

57. See Zona, *supra* note 53 (noting that 43% of those with erotomania, 21% of those with love obsessions, and 28% of those with simple obsessions are likely to engage in stalking).

58. Laird, *supra* note 46, at 1.

59. *Id.*



harassment begins, which is often in the form of telephone calls and notes of "love" or "hate."<sup>60</sup> When the victim rejects the stalker, the blow to the stalker's self-esteem and the realization that the stalker cannot have what the stalker desires most, often leads to violence.<sup>61</sup>

## II. TURNING TO THE LEGAL SYSTEM FOR RELIEF FROM STALKING: TRADITIONAL REMEDIES

The psychological distress suffered by many harassment victims and the potential for physical harm necessitates effective legal sanctions.<sup>62</sup> However, harassers most often utilize methods such as telephone calls, letters, shadowing, and direct communication, none of which involve any legally prohibited human interaction.<sup>63</sup> As a result, the legal system has experienced difficulty dealing with all but the most obvious forms of harassment.<sup>64</sup> For that reason, new remedies must enable authorities to distinguish harassment from ordinary human contacts, while providing relief only in situations where harassment does in fact occur.<sup>65</sup> Before examining the need for the newly passed anti-stalking legislation, it is first necessary to consider traditional remedies that have been available to harassment victims and their inadequacies in protecting those vic-

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60. *Id.*; see Zona, *supra* note 53 (citing the results of a study in which all erotomania subjects, 81% of love obsessional subjects, and 34% of simple obsessional subjects wrote to their victims; on the other hand, 85% of erotomania subjects, 40% of love obsessional subjects, and 65% of simple obsessional subjects made telephone contact).

61. Laird, *supra* note 46, at 1 (stating that stalkers are likely to become angry when the victim does not respond to them in the manner they wish); see Zona, *supra* note 53 (noting that only 15% of persons suffering from erotomania, 12% of those with love obsessions, and 22% of those with simple obsessions engaged in face-to-face contact with their victims). In the Zona study, those suffering from simple obsessions made threats to the victims more frequently than those suffering from erotomania or love obsessions: 65%, 57% and 18%, respectively. *Id.*

62. A.J.R., Comment, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 513 (1984) (explaining that many victims reach a "breaking point" where they can find few areas in which to feel secure; they become nervous and then paranoid, and they go to great lengths to change their situation).

63. See *id.* (noting that the methods of harassment are as wide-ranging as the forms of human contact); *supra* notes 17-45 and accompanying text (illustrating the types of contact made by harassers).

64. A.J.R., *supra* note 62, at 513.

65. *Id.* at 513-514.

tims. Yet, it should be noted that in some situations, such as where the offender is mentally unstable or where the police are not dedicated to enforcing the law against the offender, police intervention may do no more than simply aggravate the offender and increase the offender's potential for violence.<sup>66</sup> Traditionally, the principal ways a harassment victim could obtain relief was to seek civil tort remedies or to file a complaint against the harasser and encourage the state to seek criminal sanctions.<sup>67</sup>

A. *Tort Remedies Available in California for Victims of Harassment*

In certain instances, the harassment may be of such a degree or frequency so as to cause a substantial interference in the victim's life.<sup>68</sup> A victim of harassment may bring a civil suit against a harasser and may seek damages, or an injunction, or both.<sup>69</sup> Specifically, the tort actions of invasion of privacy and intentional

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66. Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993) (commenting that police intervention does not, in the typical case, cause the offender's behavior to escalate into violence absent some mental instability on the part of the offender or inadequate police involvement); see *infra* notes 186-188 and accompanying text (discussing the limitation of anti-stalking legislation).

67. Linda M. Gunderson, Comment, *Criminal Penalties for Harassment*, 9 PAC. L.J. 217 (1978) (qualifying the availability of traditional remedies by explaining that because harassment cases often involve strong emotions of the harasser, the threat of civil liability is inadequate to cease the harassment, and thus, criminal remedies have been made available); see *infra* notes 68-158 and accompanying text (discussing the availability of tort and criminal remedies).

68. Gunderson, *supra* note 67, at 217; see A.J.R., *supra* note 62, at 507 (indicating that stalking by strangers or ex-lovers can generate so much anxiety and fear of imminent physical harm that victims radically alter their lifestyles to avoid further contact); see also *World News Tonight*, *supra* note 2 (reporting that one stalking victim moved to a secret location and refused to go outside in an attempt to avoid her stalker).

69. See CAL. CIV. CODE § 1708 (West 1979) (providing that every person is bound to abstain from injuring another person, or infringing upon any rights of that person). But see Steven M. Cook, Comment, *Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261, 263, 267 n.39 (1983) (explaining that a tort action against a spouse is not allowed in almost half of the states, *not* including California, due to interspousal tort immunity).

infliction of emotional distress (IIED) may provide some relief to harassment victims.<sup>70</sup>

Because a harasser creates an unwarranted interference in the victim's life and intrudes upon the victim's solitude or seclusion, harassment amounts to a tortious invasion of a victim's right to privacy.<sup>71</sup> A person's right to privacy includes the right to be left alone.<sup>72</sup> Thus, the interest protected is a person's mental tranquility.<sup>73</sup>

To establish a cause of action for invasion of privacy, the victim must show that the defendant's intrusion was unreasonable and would be highly offensive to a reasonable person.<sup>74</sup> Unwarranted intrusion has been defined as any conduct which causes mental suf-

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70. A.J.R., *supra* note 62, at 517 (noting that a cause of action for nuisance or trespass has limited application to harassment claims because it requires proof of the defendant's physical invasion or interference with the plaintiff's property which is often absent from the harassment context). In addition, a civil assault action may be brought against a harasser for which the victim can recover damages. *See infra* notes 134-142 and accompanying text (discussing the elements of an assault action).

71. *See* *Goldman v. Time, Inc.*, 336 F. Supp. 133, 136 (N.D. Cal. 1971) (listing four types of invasions of privacy: (1) public disclosure of private facts about the plaintiff, (2) portrayal of the plaintiff in a false light, (3) appropriation of the plaintiff's name or likeness for the defendant's advantage, and (4) *intrusion upon the plaintiff's seclusion or solitude*, or into his or her private affairs); *see also* *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 85, 291 P.2d 194, 196 (1955) (asserting that California courts recognize a cause of action for invasion of privacy); *Gunderson*, *supra* note 67, at 221-222 (acknowledging that California courts have not expressly recognized intrusion as a basis for an invasion of privacy cause of action, but that case law indicates such an extension will be approved).

72. *See* *Schwartz v. Thiele*, 242 Cal. App. 2d 799, 805, 51 Cal. Rptr. 767, 770 (1966) (stating that the right of privacy is a recognized justiciable right in California and has been defined as the right to be left alone).

73. *See* *Dietemann v. Time, Inc.*, 449 F.2d 245, 248-49 (9th Cir. 1971) (suggesting that California courts' willingness to allow relief from unreasonable penetrations of mental tranquility based on the tort of intentional infliction of emotional distress is indicative of a trend to protect that same interest in invasion of privacy cases); *Fairfield*, 138 Cal. App. 2d at 86, 291 P.2d at 197 (explaining that the main concern of the cause of action in a privacy case is mental and subjective injury).

74. *See* *Strickler v. National Broadcasting Co.*, 167 F. Supp. 68, 71 (S.D. Cal. 1958) (holding that the right to privacy is a question of fact to be determined by the norm of the ordinary person and only where the intrusion goes beyond the limits of decency does liability accrue); *see also* *Emerson v. J.F. Shea Co.*, 76 Cal. App. 3d 579, 592, 143 Cal. Rptr. 170, 177-78 (1978) (stating that a cause of action for invasion of privacy exists when the defendant has performed an unreasonably intrusive investigation of the plaintiff, and the test is what is objectionable or offensive to the reasonable person).

fering, shame, or humiliation to a person of ordinary sensibilities.<sup>75</sup> Therefore, as the intrusion need not be physical, a suit for invasion of privacy is a viable cause of action for victims of harassment.

Similarly, victims of harassment can seek a cause of action for IIED. To prove IIED, the plaintiff must show that the defendant's conduct was outrageous,<sup>76</sup> that the defendant intentionally or recklessly caused the plaintiff's emotional distress,<sup>77</sup> that the plaintiff in fact suffered severe or extreme emotional distress, and that the emotional distress was actually or proximately caused by the defendant's outrageous conduct.<sup>78</sup> The emotional distress suffered by the plaintiff may include any highly unpleasant mental reaction such as fright, grief, or anger, and the victim need not suffer any physical injury.<sup>79</sup>

Because physical injury to the plaintiff is not an element for a cause of action for IIED, the conduct of harassment may be sufficiently outrageous to form the basis for a successful suit for IIED.

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75. See *Nader v. General Motors Corp.*, 298 N.Y.S.2d 137 (1969) (upholding the plaintiff's claim for invasion of privacy where the defendant corporation caused him to be shadowed and to receive threatening telephone calls); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS [hereinafter KEETON] § 117, at 855 (5th ed. 1984) (noting that some courts have held that making persistent and unwarranted phone calls constitutes an invasion of privacy).

76. Extreme and outrageous conduct is that which exceeds all bounds of conduct usually tolerated in a civilized community. See *Cervantez v. J.C. Penney Co., Inc.*, 24 Cal. 3d 579, 593, 595 P.2d 975, 983, 156 Cal. Rptr. 198, 206 (1979); RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965) (noting that particular conduct exceeds all bounds of what is usually tolerated in a civilized community when recitation of the facts to an average member of the community would arouse resentment toward the actor and lead the person to exclaim "outrageous").

77. People act intentionally if they desire to cause consequences of their acts or believe the consequences are substantially certain to result. See generally *Schroeder v. Auto Driveaway Co.*, 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974). One acts in reckless disregard when one knows that such emotional distress is certain, or substantially certain, to result from one's conduct. *G.D. Searle & Co. v. Superior Court (Seaton)*, 49 Cal. App. 3d 22, 31, 122 Cal. Rptr. 218, 224 (1975) (stating that recklessness connotes action which is insensate, heedless or negligent); see also *Gunderson*, *supra* note 67, at 224 (defining reckless disregard).

78. See *Crain v. Krehbiel*, 443 F. Supp. 202, 212 (N.D. Cal. 1977) (listing the elements for a cause of action for intentional infliction of emotional distress); *Cervantez*, 24 Cal. 3d at 593, 595 P.2d at 983, 156 Cal. Rptr. at 206 (discussing the prima facie elements of a cause of action for intentional infliction of emotional distress).

79. See *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 396-97, 89 Cal. Rptr. 78, 90 (asserting that in California, a plaintiff may recover for intentional infliction of emotional distress for mere emotional distress alone without any resulting disability); see also RESTATEMENT (SECOND) OF TORTS § 46, cmt. j (1965).

In fact, some types of harassment are similar to certain activities which have been held to be outrageous and unreasonable in the more typical context of IIED cases. For example, some cases have held that investigative surveillance is outrageous conduct sufficient to sustain a suit for IIED.<sup>80</sup> Likewise, harassment can occur from a distance and need not involve any direct physical harm.

Even if the harasser's conduct is sufficient to provide the plaintiff with a cause of action for IIED or invasion of privacy, the intangible nature of these causes of action has meant that neither has provided an adequate remedy for victims.<sup>81</sup> The intangible nature of these torts stems from their categorization as "dignitary" harms.<sup>82</sup> Dignitary torts are primarily concerned with harm to intangible values such as peace of mind, rather than pecuniary or physical harm.<sup>83</sup> As a result, courts have experienced difficulty in measuring the emotional distress suffered by plaintiffs adequately.<sup>84</sup> Even if a court is able to place a dollar value on the harm suffered by the plaintiff, the injury caused by dignitary torts cannot be made whole by money damages.<sup>85</sup> In addition, the potential for monetary liability is not an effective deterrent against harassment if the perpetrator is seriously determined to carry out

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80. See, e.g., *Cain v. State Farm Mut. Auto. Ins. Co.*, 62 Cal. App. 3d 310, 313, 132 Cal. Rptr. 860, 861-62 (1976) (remanding a case in order to determine if an investigator's surveillance of a claimant was unreasonable and outrageous); *Nobel v. Sears, Roebuck & Co.*, 33 Cal. App. 3d 654, 659, 109 Cal. Rptr. 269, 272 (1973) (citing with approval cases holding an investigator's conduct as unreasonable and outrageous where the investigator trails or shadows the plaintiff or conducts an investigation in a frightening manner).

81. See *infra* notes 82-86 and accompanying text (discussing the inadequacies of civil tort actions).

82. Gunderson, *supra* note 67, at 224 (defining a dignitary tort as one recognizing the value of emotional tranquility).

83. See *Clark v. Celeb Publishing, Inc.*, 530 F. Supp. 979, 983 (S.D.N.Y. 1981) (using California law to award plaintiff damages resulting from invasion of privacy and noting that California law allows damages for embarrassment, humiliation, and other forms of mental anguish); see also Gunderson, *supra* note 67, at 219, 224 (noting that intimidation may be more damaging to the victim than actual physical harm). One study has shown that women who receive anonymous, threatening telephone calls typically exhibit more anxiety than those who have been victims of serious physical abuse. *Id.* at 219.

84. A.J.R., *supra* note 62, at 514. See Gunderson, *supra* note 67, at 224 (noting that although it is difficult to measure monetary damages for dignitary torts, recovery is not precluded).

85. Gunderson, *supra* note 67, at 224 (stating that the legal remedy for dignitary torts is not compensation for the loss suffered, but is a representation of social vindication of the human spirit).

the perpetrator's course of conduct, as is often the case.<sup>86</sup> Thus, the victim may also look to civil injunctions for additional relief.

Civil injunctions are a third option available to victims of harassment.<sup>87</sup> Although injunctions are civil in nature, their violation can result in *both* civil and criminal contempt sanctions.<sup>88</sup> Thus, they provide a civil remedy to deter what is essentially criminal behavior.<sup>89</sup> In addition, injunctions may be easier for victims to obtain than criminal remedies because injunctions are not encumbered by constitutional protections, such as due process of law or proof beyond a reasonable doubt.<sup>90</sup>

A common type of injunction is a temporary restraining order (TRO) which restricts specified acts by the defendant until a hearing, at which the plaintiff must show cause as to why a preliminary injunction should be granted.<sup>91</sup> This preliminary injunction, if granted, remains effective until the merits of the case are determined by a court.<sup>92</sup> At a hearing on the merits, a court may decide to grant a permanent injunction which remains in effect

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86. *Id.* (commenting that where monetary damages do not effectively deter harassment, the victim may look to other civil remedies).

87. See Gary Richard Brown, Comment, *Battered Women and the Temporary Restraining Order*, 10 WOMEN'S RTS. L. REP. 261 (1988) (stating that restraining orders are available in 47 states and the District of Columbia). See generally CAL. CIV. PROC. CODE § 525 (West Supp. 1993) (defining an injunction as a "writ or order requiring a person to refrain from a particular act"); Janice L. Grau, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703, 725 (1982) (describing that the two goals of restraining orders are to provide a remedy for victims and to reduce the conduct the restraining orders prohibit).

88. See Grau, *supra* note 87, at 719-23 (listing civil and indirect criminal contempt, arrest, and misdemeanor charges as possible sanctions).

89. See Cook, *supra* note 69, at 271-72 (discussing the use of temporary restraining orders as provided by domestic abuse legislation to deter criminal behavior in several different jurisdictions).

90. See Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1329, 1331 (1991) (noting that the Sixth Amendment's requirement of trial by jury and appointment of counsel, and the Fifth Amendment's due process requirements of proof beyond a reasonable doubt, need only apply in criminal cases); *infra* notes 120-122 and accompanying text (comparing civil and criminal remedies).

91. See *Neumann v. Moretti*, 146 Cal. 31, 33, 79 P. 512, 513 (1905) (noting that a temporary restraining order is an injunction that is granted for the time between application for a preliminary injunction and the day on which the plaintiff is to show cause).

92. See *Hartsif v. Wann*, 139 Cal. App. 2d 119, 121, 293 P.2d 65, 66 (1956) (defining the purpose of a preliminary injunction as preserving the status quo until there can be a hearing on the merits); *Doudell v. Shoo*, 159 Cal. 448, 455, 114 P. 579, 582 (1911) (noting that the purpose of a preliminary injunction is to cover the interval before the entry of a final decree).

indefinitely.<sup>93</sup> Once an injunction is granted it may not be disobeyed.<sup>94</sup> In order to show that the defendant has violated an injunction, the plaintiff must prove that the defendant either knew of the violation or had reason to believe the defendant was in violation.<sup>95</sup> If a plaintiff can show that the defendant violated the injunction, some statutes provide for civil and criminal contempt remedies, or misdemeanor charges, or both.<sup>96</sup>

California has a TRO statute specifically for victims of harassment.<sup>97</sup> California Civil Procedure Code section 527.6 provides that a victim of harassment may seek a TRO which prohibits harassment.<sup>98</sup> The TRO remains effective for up to fifteen days.<sup>99</sup> After a plaintiff files a petition, the defendant may file a response explaining, excusing, justifying, or denying the harassment allegation.<sup>100</sup> However, if the judge finds by clear and convincing evidence that unlawful harassment exists, the judge will issue an injunction prohibiting the harassment for up to three years.<sup>101</sup>

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93. If a permanent injunction is denied, the effect of a preliminary injunction also comes to an end. *Shahen v. Superior Court of San Bernardino County*, 46 Cal. App. 2d 187, 188, 115 P.2d 516, 517 (1941). If a permanent injunction is granted, the preliminary injunction merges with it and ceases to exist. *Webber v. Wilcox*, 45 Cal. 301, 302 (1873).

94. See *Morton v. Superior Court of Tulare County*, 65 Cal. 496, 497, 4 P. 489, 490 (1884) (stating that an injunction must be fairly and honestly obeyed and not defeated by tricks on the part of those bound to obey it).

95. See *Hutton v. Superior Court of San Francisco City and County*, 147 Cal. 156, 160, 81 P. 409, 410 (1905) (noting that some knowledge of the defendant is essential to prove a willful violation of an injunction).

96. See CAL. CIV. PROC. CODE § 527.6(j) (West Supp. 1993) (referring to section 273.6 of the California Penal Code which makes any willful disobedience of a temporary restraining order a misdemeanor); see also Elizabeth Topliffe, Comment, *Why Civil Protection Orders are Effective Remedies for Domestic Violence but Mutual Protective Orders are Not*, 67 IND. L.J. 1039, 1046 (1992) (noting that enforcement provisions are important to ensure that defendants follow injunctions ordered against them).

97. See CAL. CIV. PROC. CODE § 527.6(a) (West Supp. 1993) (allowing a person who has suffered harassment to seek a temporary restraining order and an injunction prohibiting harassment).

98. *Id.* The plaintiff must provide the court with an affidavit which shows to the court's satisfaction: (1) reasonable proof of harassment of the plaintiff by the defendant; and (2) the plaintiff would suffer great or irreparable harm if the injunction is denied. *Id.* at § 527.6(c).

99. *Id.* at § 527.6(c)-(d) (providing that a hearing will be held within 15 days of the filing of a petition).

100. *Id.* at § 527.6(d).

101. *Id.* Such injunctions may not last for more than three years. Thereafter the plaintiff may apply for a renewal of the injunction. *Id.*

These injunctions, even though specifically designed to protect victims of harassment, are still inadequate for many reasons. First, injunctions may be difficult for a victim to obtain because judges grant them only in limited circumstances.<sup>102</sup> For example, a judge may grant an injunction where pecuniary compensation is inadequate,<sup>103</sup> or where such compensation would be difficult to ascertain.<sup>104</sup> In addition, a judge may grant an injunction if the plaintiff can prove that irreparable harm would be caused if it were not granted.<sup>105</sup> Second, the plaintiff must be able to sufficiently describe the conduct which the injunction will restrain.<sup>106</sup> If an injunction is too broad or too vague it will be unenforceable.<sup>107</sup> The terms of injunctions must be certain, so that defendants will be able to determine what conduct is restricted.<sup>108</sup> Third, even if the

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102. See Grau, *supra* note 87, at 706 (noting that many statutes which contain prerequisites to obtaining a TRO against domestic violence actually serve as barriers to court access). In the case of domestic violence TROs, most statutes allow relief for physical abuse and threatened physical abuse, but completely omit any mention of recovery for psychological abuse. *Id.* at 706-707.

103. CAL. CIV. PROC. CODE § 526(4) (West Supp. 1993). The plaintiff cannot merely allege that no other remedy exists, but must plead and prove that actual irreparable injury will result unless an injunction is issued. *E.H. Renzel Co. v. Warehouseman's Union*, 16 Cal. 2d 369, 373, 106 P.2d 1, 3 (1940).

104. See CAL. CIV. PROC. CODE § 526(5) (West Supp. 1993) (allowing for an injunction where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief).

105. *Id.* at § 526(2) (West Supp. 1993); see *Lorenz v. Waldron*, 96 Cal. 243, 250, 31 P. 54, 56 (1892) (stating that in order to obtain injunctive relief, the plaintiff must show a reasonable probability of suffering harm); *Roman Catholic Archbishop of San Francisco v. Shipman*, 69 Cal. 586, 593, 11 P. 343, 346 (1886) (noting that injunctions may not be granted merely to allay a plaintiff's fears and apprehensions, but are only appropriate when a plaintiff can show a reasonable probability of real injury). But see *Nicholson v. Getchell*, 96 Cal. 394, 396, 31 P. 265, 266 (1892) (conceding that a plaintiff need not show that injury is inevitable in order to be granted injunctive relief).

106. See *Brunton v. Superior Court*, 20 Cal. 2d 202, 205, 124 P.2d 831, 833-34 (1942) (holding that a party cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous, just as a party may not be held guilty of violating a criminal statute that fails to give the party adequate notice of the prohibited acts); *Gunderson*, *supra* note 67, at 225 (noting that injunctions against harassment must withstand the same level of constitutional scrutiny as a proposed criminal statute against harassment).

107. See *Pitchess v. Superior Court*, 2 Cal. App. 3d 644, 651, 83 Cal. Rptr. 35, 40 (1970) (noting that it exceeds the power of a court to forbid an act in terms so vague that people of common intelligence must necessarily guess as to its meaning and differ as to its application).

108. See *Griffin v. Lima*, 124 Cal. App. 2d 697, 700, 269 P.2d 191, 193 (1954); *Wheeler v. Superior Court*, 82 Cal. App. 202, 209, 255 P. 275, 278 (1927) (commenting that a defendant must be able to from the injunctive order what behavior is being proscribed). A court may clarify



plaintiff obtains an injunction, it may be too short in duration, thus allowing the defendant to resume the unlawful conduct.<sup>109</sup>

In addition to these three major problems, there are many other difficulties with injunctions. Compliance is not guaranteed because injunctions, like other remedies, are only effective against people who understand what injunctions are and decide to comply with them.<sup>110</sup> Many stalkers are not sufficiently deterred because they have mental disorders and cannot understand injunctions and thus, cannot follow them.<sup>111</sup> Even if stalkers do not suffer from mental disorders, harassers often possess extremely strong desires, and an injunction will often not deter them.<sup>112</sup>

Even if the assailant does understand the significance of the injunction, it does not always provide the victim with adequate protection because there are ways to avoid violating its terms while still continuing the harassing conduct.<sup>113</sup> Enforcing injunctions is difficult because the police are unable to accompany the victim continuously in order to ensure the defendant's compliance.<sup>114</sup> Moreover, many stalkers actually measure the distance at which they are to remain from the victim and then move slightly beyond that point to continue the harassing behavior.<sup>115</sup> As a result, the harasser is able to continue harassing the victim but cannot be arrested for contempt because the distance requirement set by the injunction is being observed.<sup>116</sup> Finally, injunctions are most effective against people who are not extremely violent.<sup>117</sup> Yet, many stalking cases

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uncertainty and ambiguity by looking to findings of fact, conclusions of law, and the purpose of the litigation. *City of Vernon v. Superior Court*, 38 Cal. 2d 509, 514, 241 P.2d 243, 246 (1952).

109. See, e.g., CAL. CIV. PROC. CODE § 527.6 (West Supp. 1993) (providing that a temporary restraining order against harassment shall not be effective for more than 15 days, unless otherwise modified by the court).

110. *Crier & Company: Terrorized by Stalkers* (CNN television broadcast, March 11, 1992) [hereinafter *Crier & Company*], available in LEXIS, Nexis Library, Transcripts File.

111. *Id.*

112. Gunderson, *supra* note 67, at 228.

113. Ross, *supra* note 2 (noting that some domestic abusers begin stalking their victims in response to, the issuance of a restraining order).

114. See generally Gunderson, *supra* note 67, at 226.

115. *Morning Edition: Anti-Stalking Laws Considered by Virginia* (National Public Radio radio broadcast, March 10, 1992), available in LEXIS, Nexis Library, Transcripts File.

116. *Id.*

117. Topliffe, *supra* note 96, at 1045 (discussing the inadequacies of injunctions).

fall into the domestic violence category involving ex-spouses or ex-lovers.<sup>118</sup> It is these cases that police say have the highest potential for violence.<sup>119</sup> Therefore, injunctions will not be very effective in protecting those victims who need the most protection. Where civil remedies fail, another alternative for harassment victims may be criminal remedies.

## B. Criminal Statutory Remedies

Criminal statutes provide harassment victims with two major advantages over civil remedies.<sup>120</sup> First, criminal statutes provide victims with the benefit of police protection.<sup>121</sup> Second, criminal statutes serve the function of incapacitating particular offenders for a longer time than civil injunctions.<sup>122</sup> There are three basic criminal statutes available to a victim of harassment in California: a telephone and general harassment statute, an assault statute, and a statute prohibiting the making of threats.

### 1. Harassment Statutes

Many states provide specific protection against telephone harassment.<sup>123</sup> A number of these statutes prohibit the making of

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118. *World News Tonight*, *supra* note 2.

119. *Id.*

120. Gunderson, *supra* note 67, at 224-29 (discussing the inadequacies of injunctions and civil tort actions).

121. CAL. PENAL CODE § 697 (West 1985) (stating that police officers may prevent public offenses); *see* Gunderson, *supra* note 67, at 228-29 (noting that where criminal statutes are applicable, they allow the police to intervene immediately). *But see* A.J.R., *supra* note 62, at 507 (maintaining that victims of harassment often find criminal remedies nonexistent).

122. *See* A.J.R., *supra* note 62, at 515 (comparing criminal and civil remedies). *Compare* CAL. PENAL CODE § 646.9(d) (West Supp. 1993) (providing for a felony charge in cases where the defendant commits the crime of stalking while a temporary restraining order is in existence or where the defendant is convicted of stalking twice within seven years) *with* CAL. CIV. PROC. CODE § 527.6(j) (West Supp. 1993) (providing for a misdemeanor charge if the defendant violates a temporary restraining order).

123. *See infra* notes 124-128 and accompanying text (describing various forms of telephone harassment statutes).

threats or the use of obscene language.<sup>124</sup> Others prohibit anonymous or repeated telephone calls.<sup>125</sup> Some prohibit the deliberate refusal to terminate the telephone connection.<sup>126</sup> Many prohibit false statements concerning injury or death to the recipient or members of the recipient's family.<sup>127</sup> Finally, several statutes contain "catch-all" provisions for other types of telephone harassment.<sup>128</sup>

In addition to telephone harassment statutes, many states have enacted criminal statutes directed at various other forms of harassment.<sup>129</sup> Some statutes prohibit communicating by telegraph or

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124. See, e.g., ALASKA STAT. § 11.61.120(a)(4) (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-2921(A)(1) (Supp. 1992); CAL. PENAL CODE § 653m(a) (West Supp. 1993); COLO. REV. STAT. § 18-9-111(1)(e) (Supp. 1992); CONN. GEN. STAT. § 53a-183(a)(1) (Supp. 1992); DEL. CODE ANN. tit. 11, § 1312(1) (1991); GA. CODE ANN. § 16-11-39(2) (Michie 1992); KAN. STAT. ANN. § 21-4113(1)(a) to (b) (Supp. 1992); LA. REV. STAT. § 14:285(A)(1),(4) (West Supp. 1993); ME. REV. STAT. ANN. tit. 17-A, § 506(1)(A) (West 1983); MO. REV. STAT. § 565.090(1)(1)-(2) (Supp. 1992); N.D. CENT. CODE § 12.1-17-07(1)(a) (Supp. 1991); OHIO REV. CODE ANN. § 2917.21(A)(2),(4) (Baldwin Supp. 1991); OR. REV. STAT. § 166.065(1)(c) (Supp. 1992); 18 PA. CONS. STAT. § 5504(a)(1) (Supp. 1992); TEX. PENAL CODE ANN. § 42.07(a)(1)-(2) (West Supp. 1993); WASH. REV. CODE § 9.61.230(1),(3) (Supp. 1993); see also A.J.R., *supra* note 62, at 523-24 (commenting that various statutes reflect differing degrees of sensitivity to the many forms of harassment).

125. See, e.g., ALA. CODE § 13A-11-8(b)(1)(a) (Supp. 1992); ALASKA STAT. § 11.61.120(a)(3)-(4) (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-2921(A)(1) (Supp. 1992); COLO. REV. STAT. § 18-9-111(1)(e) to (g) (Supp. 1992); GA. CODE ANN. § 16-11-39(4) (Michie 1992); HAW. REV. STAT. § 711-1106(1)(d) (Supp. 1992); KAN. STAT. ANN. § 21-4113(d) (Supp. 1992); LA. REV. STAT. § 14:285(A)(2) (West Supp. 1993); ME. REV. STAT. ANN. tit. 17-A, § 506(1)(D) (West 1983); MO. REV. STAT. § 565.090(3)-(4) (Supp. 1992); N.H. REV. STAT. ANN. § 644:4(II) (Supp. 1992); N.D. CENT. CODE § 12.1-17-07(1)(b) to (c) (Supp. 1991); OHIO REV. CODE ANN. § 2917.21(A)(1) (Baldwin Supp. 1991); 18 PA. CONS. STAT. § 5504(a)(2) (Supp. 1992); TENN. CODE ANN. § 39-17-308(a)(2) (1991); TEX. PENAL CODE ANN. § 42.07(a)(4) (West Supp. 1993); UTAH CODE ANN. § 76-9-201(1)(b) (Supp. 1992); WASH. REV. CODE § 9.61.230(2) (Supp. 1993).

126. See, e.g., ALASKA STAT. § 11.61.120(a)(2) (Supp. 1992); GA. CODE ANN. § 16-11-39(4) (Michie 1992); LA. REV. STAT. § 14:285(A)(3) (West Supp. 1993); TEX. PENAL CODE ANN. § 42.07(a)(5) (West Supp. 1993).

127. See, e.g., OR. REV. STAT. § 166.065(1)(b) (Supp. 1992); TENN. CODE ANN. § 39-17-308(a)(3) (1991); TEX. PENAL CODE ANN. § 42.07(a)(3) (West Supp. 1993).

128. See, e.g., ALA. CODE § 13A-11-8(b)(1)(b) (Supp. 1992); COLO. REV. STAT. § 18-9-111(1)(f) (Supp. 1992); CONN. GEN. STAT. § 53a-183(a)(3) (Supp. 1992); HAW. REV. STAT. § 711-1106(1)(c) (Supp. 1992); IND. CODE ANN. § 35-45-2-2(a)(1) (West Supp. 1992); IOWA CODE § 708.7(1)(a) (Supp. 1992); KY. REV. STAT. ANN. § 525.080(1)(a) (Baldwin Supp. 1991); N.H. REV. STAT. ANN. § 644:4(I) (Supp. 1992); N.Y. PENAL LAW § 240.30(2) (Consol. 1992); N.D. CENT. CODE § 12.1-17-07(1)(c) (Supp. 1991); 18 PA. CONS. STAT. § 5504(a)(1) (Supp. 1992); TENN. CODE ANN. § 39-17-308(a)(2) (1991); UTAH CODE ANN. § 76-9-201(1)(a) (Supp. 1992).

129. See *infra* notes 130-133 and accompanying text (citing and describing various criminal harassment statutes in different states).

mail in a manner likely to harass, annoy, or alarm.<sup>130</sup> Others prohibit abusive or obscene language or gestures.<sup>131</sup> A number of statutes expressly forbid persons from following others in public places.<sup>132</sup> Finally, some states have enacted "catch-all" provisions, similar to those in telephone harassment statutes, that prohibit a person from engaging in any course of conduct that intentionally alarms or annoys another person.<sup>133</sup> However, harassment statutes are not the only criminal remedies available to harassment victims.

## 2. Assault Statutes

Assault statutes provide an alternative criminal remedy to harassment victims who have not been inflicted with physical harm. To commit an assault, a defendant must attempt to use force against the victim and must have a present ability and opportunity

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130. See, e.g., ALA. CODE § 13A-11-8(b)(1)(a) (Supp. 1992); ARIZ. REV. STAT. ANN. § 13-2921(A)(1) (Supp. 1992); CONN. GEN. STAT. § 53a-183(a)(2) (Supp. 1992); DEL. CODE ANN. tit. 11, § 1311(2) (1991); IND. CODE § 35-45-2-2(a)(2) (Supp. 1992); KY. REV. STAT. ANN. § 525.080(1)(a) (Baldwin Supp. 1991); MINN. STAT. § 609.795(1)(3) (Supp. 1993); MO. REV. STAT. § 565.090(1)(1) (Supp. 1992); N.D. CENT. CODE § 12.1-17-07(1)(a) (Supp. 1991); OR. REV. STAT. § 166.065(1)(c) (Supp. 1992); TENN. CODE ANN. § 39-17-308(a)(1) (1991); UTAH CODE ANN. § 76-5-106(1) (1990).

131. See, e.g., ALA. CODE § 13A-11-8(a)(1)(b) (Supp. 1992); ALASKA STAT. § 11.61.120(a)(1),(5) (Supp. 1992); ARK. CODE ANN. § 5-71-208(a)(2),(4) (Michie Supp. 1991); COLO. REV. STAT. § 18-9-111(1)(b),(g) to (h) (Supp. 1992); DEL. CODE ANN. tit. 11, § 1311(1) (1991); HAW. REV. STAT. § 711-1106(1)(b),(d) (Supp. 1992); KY. REV. STAT. ANN. § 525.070(1)(b) (Baldwin Supp. 1991); N.H. REV. STAT. ANN. § 644:4(II)-(III) (Supp. 1992); OR. REV. STAT. § 166.065(1)(a)(B) (Supp. 1992); TEX. PENAL CODE ANN. § 42.07(a)(1) (West Supp. 1993).

132. See, e.g., ARIZ. REV. STAT. ANN. § 13-2921(A)(2) (Supp. 1992); ARK. CODE ANN. § 5-71-208(a)(3) (Michie Supp. 1991); COLO. REV. STAT. § 18-9-111(1)(c) (Supp. 1992); KY. REV. STAT. ANN. § 525.070(1)(c) (Baldwin Supp. 1992); MD. ANN. CODE art. 27, § 121A(c)(1)-(3) (1992); 18 PA. CONS. STAT. § 2709(2) (1990).

133. See, e.g., ARIZ. REV. STAT. ANN. § 13-2921(A)(3) (Supp. 1992); ARK. CODE ANN. § 5-71-208(a)(1),(5) (Michie Supp. 1991); IOWA CODE § 708.7(3) (Supp. 1992); KY. REV. STAT. ANN. § 525.070(1)(a),(d) (Baldwin Supp. 1991); ME. REV. STAT. ANN. tit. 17-A, § 506-A(1) (West Supp. 1992); NEV. REV. STAT. § 200.571(a)-(b) (1991); OR. REV. STAT. § 166.065(1)(a)(A) (Supp. 1992); 18 PA. CONS. STAT. § 2709(1) (1990); WASH. REV. CODE § 9A.46.020(a)-(b) (Supp. 1993); WIS. STAT. § 813.125(1)(a)-(b) (Supp. 1992); see also A.J.R., *supra* note 62, at 523, 525 (discussing nontelegraphic harassment statutes and noting that all states have statutes criminalizing telephone harassment, and several states have statutes prohibiting abuse through the use of the mails).

to carry out that threat immediately.<sup>134</sup> No actual physical contact is necessary.<sup>135</sup> Physical contact is not a required element for an assault cause of action because assault statutes recognize the victim's interest in freedom from *apprehension* of harmful or offensive contact with the victim's own person.<sup>136</sup> However, courts have required the plaintiff's apprehension to be that which would normally be aroused in the mind of a *reasonable* person.<sup>137</sup> The reasonableness of a victim's belief depends on whether the defendant had a present ability to cause harm to the victim.<sup>138</sup> Therefore, because the standard is an objective one, a person who was not actually put in fear of harmful contact may bring suit for assault if a reasonable person would have been afraid.<sup>139</sup>

This present ability requirement relates back to the original justification behind assault statutes which was the likelihood that certain incidents might result in breaches of the peace.<sup>140</sup> However, a defendant cannot commit an assault when the defendant is too far from the plaintiff to make contact because the possibility

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134. See CAL. PENAL CODE § 240 (West Supp. 1993) (defining assault as an unlawful attempt, in addition to a present ability to commit a violent injury on another person); see also *State v. Ingram*, 74 S.E.2d 532, 535 (N.C. 1953) (defining an assault as some overt act or attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to another).

135. See CAL. PENAL CODE § 240 (West Supp. 1993) (requiring that the defendant only make an unlawful attempt to commit a violent injury on the plaintiff); see also *Lowry v. Standard Oil Co.*, 63 Cal. App. 2d 1, 7, 146 P.2d 57, 60 (1944) (holding that pointing an unloaded gun at another in a threatening manner is sufficient to cause fear of personal injury unless the other person knows the gun is unloaded).

136. See *Lowry*, 63 Cal. App. 2d at 7, 146 P.2d at 60 (stating that a civil action for assault is based upon an invasion of the right to live without being put in fear of personal harm); see also KEETON, *supra* note 75, at 43.

137. See *Ingram*, 74 S.E.2d at 536 (stating that a plaintiff's fright is insufficient by itself to constitute an assault in the absence of circumstances which would put a person of ordinary firmness in fear of immediate injury); see also KEETON, *supra* note 75, at 44.

138. See CAL. PENAL CODE § 240 (West Supp. 1993) (requiring an assailant to have a present ability to commit a violent injury on the person of another). It is not the subjective belief of the victim that determines if an assault has been committed, but whether the assailant had the present ability to commit a violent injury. *People v. Mosqueda*, 5 Cal. App. 3d 540, 544, 85 Cal. Rptr. 346, 347 (1970).

139. See *People v. Wilson*, 119 Cal. 384, 51 P. 639 (1897) (holding that the victim need not be placed in fear to constitute the offense of assault with intent to commit sodomy).

140. KEETON, *supra* note 136, at 43.

for a breach of peace is minimal.<sup>141</sup> Thus, it seems that assault statutes will not adequately protect victims of harassment because unlawful harassment may be committed from a distance through the use of telephones or the mail.<sup>142</sup> In such situations, the present ability element of assault statutes is absent.

### 3. Statutes Prohibiting Threats

A third type of statute is one which specifically prohibits the making of threats.<sup>143</sup> Section 422 of the California Penal Code prohibits a person from willfully making threats to commit a crime which would result in great bodily injury to another person.<sup>144</sup> While the defendant must have the specific intent that the statement be taken as a threat, the defendant need not intend to actually carry out that threat.<sup>145</sup> The threat must be immediate and specific so as to convey to the victim an immediate possibility of execution of the threat.<sup>146</sup> Finally, the victim must reasonably sustain fear for personal safety, or the safety of the victim's immediate family.<sup>147</sup> Unfortunately, like other traditional remedies, section 422 may also be inadequate to protect victims of harassment because prosecutors and judges have failed to take it seriously and to provide adequate enforcement.<sup>148</sup> Thus, many states have enacted anti-stalking laws.<sup>149</sup>

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141. *But see* *People v. Yslas*, 27 Cal. 631, 634-35 (1865) (noting that it is not indispensable to the commission of an assault that the defendant be within striking distance of the victim at any time).

142. *See supra* notes 23-45 and accompanying text (providing three case histories which illustrate the various techniques used by stalkers to harass their victims).

143. CAL. PENAL CODE § 422 (West Supp. 1993).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (defining immediate family as any spouse, parent, child, any person related by kinship, or any other person who regularly resides in the household, or who, within six months prior, regularly resided in the household).

148. Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993); *see infra* notes 172-190 and accompanying text (comparing sections 420, 422, and 646.9 of the California Penal Code).

149. *See supra* note 6 and *infra* notes 150-158 and accompanying text (discussing section 646.9 of the California Penal Code).

*C. California's New Anti-Stalking Law: Section 646.9 of the California Penal Code*

The California legislature enacted section 646.9 of the California Penal Code in 1990 as a new remedy for harassment victims.<sup>150</sup> Ten convictions were obtained under section 646.9 within the first year after its enactment.<sup>151</sup> Section 646.9 provides that the crime of stalking occurs when a person willfully, maliciously, and repeatedly follows or harasses another person *and* makes a credible threat<sup>152</sup> with the intent to place that person in reasonable fear of death or great bodily injury.<sup>153</sup> If a person violates section 646.9 when the victim has already obtained a temporary restraining order against the defendant, the law allows for either a misdemeanor or felony charge.<sup>154</sup> Similarly, a second or subsequent conviction occurring within seven years of a prior conviction of stalking against the *same* victim is punishable either as a misdemeanor or as a felony.<sup>155</sup>

The primary advantage of this statute is that a victim no longer has to suffer physical harm before the police may arrest the assailant.<sup>156</sup> A stalker need only communicate a threat of bodily injury and then follow or harass the victim twice before police can make

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150. CAL. PENAL CODE § 646.9 (West Supp. 1993). Before 1990, the crime of stalking did not exist in California, or in any other state. See *supra* notes 4-5 and accompanying text (discussing the catalyst for California's law).

151. *Nightline*, *supra* note 21.

152. See CAL. PENAL CODE § 646.9(f) (West Supp. 1993) (defining credible threat as a threat made with the intent and the apparent ability to carry out the threat so as to cause the threatened person to reasonably fear for that person's safety or the safety of that person's immediate family). There must be a threat of death or great bodily injury to the person. *Id.*

153. *Id.* § 646.9(a) (West Supp. 1993). A violation of California Penal Code § 646.9(a) may be punishable as a misdemeanor subjecting the stalker to imprisonment in a county jail for not more than one year or by a fine of not more than \$1,000, or both. *Id.* Such a violation may also be punishable as a felony requiring imprisonment for 16 months, two or three years, or a fine up to \$10,000. *Id.* § 646.9(d) (West Supp. 1993).

154. *Id.* § 646.9(b),(d) (West Supp. 1993).

155. *Id.* § 646.9(c)-(d) (West Supp. 1993); Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993) (noting that most cases are prosecuted as felony cases).

156. CAL. PENAL CODE § 646.9 (West Supp. 1993); *Nightline*, *supra* note 21.

an arrest.<sup>157</sup> Because the reach of California Penal Code section 646.9 is far beyond that of traditional assault statutes, it has been challenged by some commentators on various grounds, including claims that it is unconstitutional due to the void-for-vagueness and overbreadth doctrines under the United States Constitution.<sup>158</sup>

### III. THE RAMIFICATIONS OF CALIFORNIA PENAL CODE SECTION 646.9 FOR VICTIMS OF HARASSMENT

As of the date this article was written, no court had published a decision regarding California Penal Code section 646.9, although a few convictions had been obtained.<sup>159</sup> When asked what might be the reason for the lack of judicial interpretation of California Penal Code section 646.9, Los Angeles Deputy District Attorney Andrew Diamond suggested that it is probably because such challenges to the constitutionality of the statute would fail.<sup>160</sup> In an attempt to determine what decision a California court might reach in response to future challenges of California Penal Code section 646.9, this section will examine various arguments that have been raised by some commentators against that statute.

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157. *Id.* An amendment to section 646.9 of the California Penal Code has been proposed which would add to the definition of stalking, the willful and malicious following of another person to a battered womens' shelter, or the harassment of another person by approaching a battered womens' shelter, and making a credible threat with the intent to place that person in reasonable fear of death or great bodily injury to that person or that person's immediate family. 1993 C.A. A.B. 284. The bill would create a presumption that a victim who has sought the refuge of a battered womens' shelter is under a credible threat. *Id.* Another proposed amendment would increase the penalty for a person who commits a second or subsequent violation of California Penal Code section 646.9 against the same victim and involving an act of violence or a credible threat of violence to two, three, or four years and a fine up to \$10,000. 1993 C.A. A.B. 303; *see also Nighline, supra* note 21.

158. *See World News Tonight, supra* note 2 (providing the criticism of Jeffrey Weiner from the Defense Lawyer Association that anti-stalking laws are unconstitutionally vague and overbroad). *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.8-16.9, at 944-950 (1991) (discussing the void-for-vagueness and overbreadth doctrines); *see also infra* notes 192-236 and accompanying text (discussing the vagueness and overbreadth doctrines as applied to California Penal Code section 646.9).

159. Telephone Interview with Andrew Diamond, Deputy District Attorney, Los Angeles, CA (Sept. 29, 1992) (notes on file with the *Pacific Law Journal*).

160. *Id.*



A. *Adequacy of Restraining Orders*

Some commentators have argued that California Penal Code section 646.9 is unnecessary because a violation of an injunction may result in arrest and criminal prosecution.<sup>161</sup> In addition, injunctions provide some protection against false accusations because a court will only issue them when sufficient evidence is presented.<sup>162</sup> Critics claim that California Penal Code section 646.9 circumvents these protections by removing the requirement that a judge evaluate the threat and issue an order.<sup>163</sup> Critics argue that this very minimal judicial evaluation should be made before allowing an arrest for a criminal violation, especially when that violation is punishable as a felony.<sup>164</sup>

Although injunctions provide for judicial evaluation prior to an arrest, they have proven to be an inadequate remedy for victims of domestic violence, a crime similar to stalking in that the majority of stalking victims are stalked by former spouses or lovers.<sup>165</sup> For similar reasons, injunctions are inadequate to protect victims of stalking. One reason that injunctions have been inadequate to protect victims of domestic violence is that courts have for a long time followed a public policy of respecting family privacy.<sup>166</sup> In fact, society has only recently begun to recognize the problem of domes-

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161. Letter from Melissa K. Nappan, Legislative Advocate, California Attorneys for Criminal Justice, to Edward Royce, California State Senator (Apr. 11, 1990) (on file with the *Pacific Law Journal*) (opposing the enactment of California Penal Code § 646.9).

162. *Id.*; see *supra* note 101 and accompanying text (noting the clear and convincing burden of proof required under California's harassment injunction statute).

163. Letter from Melissa K. Nappan, Legislative Advocate, California Attorneys for Criminal Justice, to Edward Royce, California State Senator (Apr. 11, 1990) (on file with the *Pacific Law Journal*).

164. *Id.*

165. *World News Tonight*, *supra* note 2.

166. See Terry L. Fromson, Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. L. REV. & SOC. CHANGE 135 & n.3, 151 & n.106 (1977). In 1868, a North Carolina court held that it would not interfere with family government except in extreme circumstances, because the evil which would result from doing so would be greater than the "lesser evil of trifling violence." *Id.* at 135 & n.3. In fact, until the early twentieth century, laws permitted men to beat their wives. *Id.* at n.2.

tic violence.<sup>167</sup> Moreover, injunctions may be difficult to obtain and are often short in duration.<sup>168</sup> Nevertheless, police recommend that stalking victims obtain injunctions because they obligate the criminal justice system to hold offenders accountable once their actions are restricted.<sup>169</sup> However, this recommendation is qualified in that injunctions are mere pieces of paper, useless to "stop a bullet," and dependent on adequate enforcement.<sup>170</sup> Therefore, injunctions by themselves are inadequate to protect victims of stalking and are merely one tool available for victims to use.<sup>171</sup>

*B. Comparison of California Penal Code 646.9 to Traditional Criminal Provisions*

Like injunctions, criminal statutes have provided inadequate measures of relief to harassment victims primarily because some states have yet to enact criminal harassment statutes.<sup>172</sup> As a result, victims of harassment go unprotected in some states.<sup>173</sup> Even when states have enacted criminal statutes, they share characteristics which make them inherently inadequate. First, criminal conduct must be proven beyond a reasonable doubt rather than by

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167. Nadine Taub, *Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny*, 9 HOFSTRA L. REV. 95 (1980) (noting that America has only recently discovered the problem of violence between cohabitating adults). In the 1978 Senate Hearings, it was estimated that between 1.8 and 3.3 million women per year were beaten by their husbands. *Id.* at n.5 (quoting from *Domestic Violence and Legislation with Respect to Domestic Violence: Hearings on S. 1728 before the Subcomm. on Child and Human Development of the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. (1978)); Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993) (stating that law enforcement has progressed dramatically in the last five years in recognizing domestic problems and identified a lack of sensitivity and appreciation of women's rights issues).

168. See *supra* notes 102-119 and accompanying text (discussing the shortcomings of injunctive relief).

169. Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993).

170. *Id.*

171. *Id.*

172. See Gunderson, *supra* note 67, at 228-29 (asserting that the police will be unable to give a victim assistance if the harassing conduct does not fit within a criminal statute). Where no applicable criminal statute exists, the traumatic experience caused by the harassment, as well as the harassment itself, is prolonged while the victim seeks civil remedies. *Id.*; see also *supra* notes 123-133 and accompanying text (discussing harassment statutes in various states).

173. See Gunderson, *supra* note 67, at 217.

lower standards such as those in civil proceedings.<sup>174</sup> Second, until the assailant has been convicted, the assailant might be released on bond, allowing for the possibility of continued harassment.<sup>175</sup> Third, the effectiveness of criminal remedies depends on adequate police enforcement.<sup>176</sup> In the past, when the crime committed was against women, as stalking often is,<sup>177</sup> police and prosecutors were criticized for their failure to enforce applicable criminal laws.<sup>178</sup> Finally, criminal harassment statutes are susceptible to constitutional challenges on void-for-vagueness and overbreadth grounds.<sup>179</sup>

In addition to these problems, some statutes are so narrowly drafted that they afford protection in only certain circumstances.

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174. See *supra* note 90 and accompanying text (discussing constitutional protections afforded a defendant in criminal cases but not civil cases).

175. See Topliffe, *supra* note 96, at 1047 (discussing domestic violence cases and noting that when victims only seek criminal sanctions, the defendants often are released on bond, thereby having the opportunity to intimidate the victims into not testifying or impressing upon the victims that the abuse will continue if they persist in pressing charges).

176. See A.J.R., *supra* note 62, at 515; Cook, *supra* note 69, at 267 (noting that one reason for the ineffectiveness of assault statutes is delayed police response); cf. *supra* notes 161-172 and accompanying text (discussing practical and societal problems regarding enforcing injunctions).

177. See *supra* notes 47-61 and accompanying text (discussing the general characteristics of the behavior of stalking).

178. See Taub, *supra* note 167, at 96 (stating that police and prosecutors minimize the seriousness of crimes against women). It has been shown that often the police might not respond until it is too late, and violence has already occurred. See Topliffe, *supra* note 96, at 1046 & n.62 (noting that the police often refuse to arrest a defendant, even if found in the victim's home, if no violence has occurred). Frequently, woman abuse calls have been assigned a low priority status. Fromson, *supra* note 166, at 144 (noting that the legal system gives the police discretion to make decisions which reflect and perpetuate misconceptions of sexual roles and family privacy). Some calls are "screened out" and never responded to officially. *Id.* (stating that police officers seem to view family violence as non-criminal, and that this attitude along with the physical danger posed by intervention has discouraged police involvement in cases of woman abuse). Even when the police do respond, they rarely make an arrest or take any action to protect the woman from future harm. *Id.* at 145. Police training manuals often advise against making an arrest. *Id.* (citing the Michigan Police Training Academy procedure as recommending that the police officer avoid arrest if possible and appeal to the vanity of the parties by explaining to them, among other things, the time and cost involved in obtaining an arrest warrant). The end result is that when law enforcement is inadequate, defendants feel that they can continue to harass their victims without risk. Topliffe, *supra* note 96, at 1046 (suggesting that monitoring of enforcement of injunctions is necessary to better protect victims).

179. See A.J.R., *supra* note 62, at 516 (noting that harassment statutes are often challenged on vagueness and overbreadth grounds); see also *infra* notes 192-236 and accompanying text (discussing the constitutional doctrines of void-for-vagueness and overbreadth as applied to section 646.9 of the California Penal Code).

For example, the principal difference between California Penal Code section 646.9, California's anti-stalking statute, and California Penal Code section 240, California's assault statute, is that the former does not require a *present* ability to cause great bodily injury or death, but only an *apparent* ability to do so.<sup>180</sup> As a result, a person who, from a distance, makes a credible threat to a victim might be in violation of the stalking law, provided that the other statutory elements are met,<sup>181</sup> and yet might not be in violation of the assault statute.<sup>182</sup> This distinction has caused some critics of California's anti-stalking statute to claim that requiring only an apparent ability, rather than an immediate present ability, to cause bodily harm or death allows liability to turn on the victim's subjective belief regarding the nature of the threat.<sup>183</sup> The plain meaning of California Penal Code section 646.9, however, limits the scope of liability because the victim's fear must be reasonable.<sup>184</sup> Yet, Los Angeles police claim that section 646.9 is *too* limited because the requirement of some type of threat leaves victims unprotected against other types of menacing behavior.<sup>185</sup>

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180. Compare CAL. PENAL CODE § 646.9(a),(f) (West Supp. 1993) (prohibiting the willful, malicious and repeated following or harassing of another person and the making of a credible threat with intent to place that person in reasonable fear of death or great bodily injury; a credible threat is defined as one made against the life of the victim, or to cause great bodily injury to the victim, and is made with the intent and *apparent* ability to carry out the threat so as to cause the victim to reasonably fear for their own safety) with CAL. PENAL CODE § 240 (West 1988) (defining assault as an unlawful attempt, coupled with a *present* ability, to commit a violent injury on the person of another).

181. CAL. PENAL CODE § 646.9(a) (West Supp. 1993) (defining a stalker as any person who willfully, maliciously and repeatedly follows or harasses another person in addition to making a credible threat with the intent to place that person in reasonable fear of death or great bodily injury).

182. See *supra* notes 134-139 and accompanying text (discussing the present ability requirement of section 240 of the California Penal Code).

183. Letter from Margaret Pena, Legislative Director, and Francisco Lobaco, Legislative Advocate, American Civil Liberties Union, to Edward Royce, California State Senator (Apr. 11, 1990) (on file with the *Pacific Law Journal*) (opposing the enactment of California Penal Code § 646.9).

184. CAL. PENAL CODE § 646.9(a) (West Supp. 1993) (requiring the victim to be placed in reasonable fear of death or great bodily injury to either the victim or a member of the victim's immediate family); see *supra* notes 150-158 and accompanying text (discussing the elements of California Penal Code section 646.9).

185. Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993) (noting that the Los Angeles Police Department's Threat Management Unit has dealt with 208 cases since it was created, but only 10 of them have led to

In situations where an offender has not committed any physical act, both California Penal Code section 240 and section 646.9 are inadequate. In those situations, victims may look to section 422 of the California Penal Code which prohibits threatening another person with death or great bodily injury.<sup>186</sup> Unlike California Penal Code section 646.9, section 422 does not require any physical act, such as repeated following or harassing.<sup>187</sup> Nor does section 422 require a present ability to carry out the threat, as does the assault statute.<sup>188</sup> Hence, section 422 seems to be the broadest of all three statutes and the most likely statute to reach the greatest number of offenders.

With the existence of alternative penal statutes having fewer requirements than those mandated in California Penal Code section 646.9, one might question the need for California's stalking statute. Lieutenant John Lane of the Los Angeles Police Department's Threat Management Unit has suggested that statutes such as California Penal Code section 420 (assault) and section 422 (threats) prohibit certain behaviors, which together, comprise the crime of stalking.<sup>189</sup> Unfortunately these "lesser" offenses have not been taken seriously in the past by prosecutors and judges.<sup>190</sup> Thus, Lieutenant Lane believes that California Penal Code section 646.9 is necessary because it puts law enforcement officials on notice that stalking is an important societal problem and is to be taken seriously.<sup>191</sup>

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stalking arrests primarily due to the restrictiveness of the credible threat requirement of section 646.9 of the California Penal Code); *World News Tonight*, *supra* note 2 (noting that only threats of physical harm are considered to be a crime, and that defendants often do not expressly make these threats to their victims); *see supra* notes 52-61 and accompanying text (explaining that, of the different types of mental disorders suffered by stalkers, those with erotomania are more likely to engage in stalking, but less likely to threaten or physically harm the victim).

186. CAL. PENAL CODE § 422 (West Supp. 1993); *see supra* notes 143-148 and accompanying text (discussing section 422 of the California Penal Code).

187. *Id.*

188. *See supra* notes 134-142 and accompanying text (discussing section 240 of the California Penal Code).

189. Telephone Interview with Lieutenant John Lane, Threat Management Unit, Los Angeles Police Department (May 20, 1993) (notes on file with the *Pacific Law Journal*).

190. *Id.*

191. *Id.* (stating that section 646.9 of the California Penal Code "forces the issue" and makes prosecutors and judges take the crime of stalking seriously).

C. Constitutional Challenges to California Penal Code Section 646.9 on Vagueness and Overbreadth Grounds

Many critics have claimed that California Penal Code section 646.9 is unconstitutionally vague because it does not provide possible offenders with adequate notice of what it prohibits.<sup>192</sup> Critics are concerned that certain legal behavior will be indistinguishable from illegal behavior, and that people conducting legitimate surveillance within the scope of their employment might be subject to the felony penalties of section 646.9.<sup>193</sup> Among these people are insurance adjusters, law enforcement officers, repossessioners, private investigators, and newspaper reporters.<sup>194</sup>

Although no court has reached a decision as to whether California Penal Code section 646.9 is sufficiently specific to provide fair warning to potential defendants of what conduct is prohibited, California courts have upheld the validity of other criminal statutes which have been similarly attacked as being too vague to provide fair warning.<sup>195</sup> For instance, loitering statutes, which prohibit persons from wandering about in public places, have been challenged because of the possibility that they may be used to punish mere presence.<sup>196</sup> In response to these attacks, California has imposed additional requirements such as a specific intent to solicit or engage in criminal conduct.<sup>197</sup> In *People v. Superior*

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192. See, e.g., *World News Tonight*, *supra* note 2 (providing the criticism of Jeffrey Weiner from the Defense Lawyers Association that anti-stalking laws are unconstitutionally vague).

193. Letter from W. Craig Biddle, Partner, *Biddle & Hamilton*, to Edward Royce, California State Senator (March 26, 1990) (criticizing California Penal Code § 646.9) (on file with the *Pacific Law Journal*).

194. *Id.*

195. CAL. PENAL CODE § 647(d)-(e) (West Supp. 1993) (defining the crime of loitering); see *infra* notes 196-208 and accompanying text (discussing the constitutionality of loitering statutes).

196. Pamela Sirkin, Comment, *The Evanescent Actus Reus Requirement: California Penal Code § 647(d) - Criminal Liability for "Loitering with Intent . . ." Is Punishment for Merely Thinking Certain Thoughts While Loitering Constitutional?*, 19 SW. U. L. REV. 165, 167 (1990) (noting that many loitering statutes have failed because they elevate mere status to a criminal offense and are among those statutes that are most likely to be found unconstitutional).

197. See CAL. PENAL CODE § 647(d) (West Supp. 1993) (making it a misdemeanor for a person to loiter in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act); see also Sirkin, *supra* note 196, at 165-66 (discussing the constitutionality of loitering statutes).

*Court (Caswell)*,<sup>198</sup> the California Supreme Court noted that the United States Supreme Court has on many occasions emphasized the value of a specific intent requirement in overcoming a vagueness challenge.<sup>199</sup>

California Penal Code section 646.9 is similar to the California loitering statute upheld in *Caswell* because it requires a specific intent to place the victim in reasonable fear of death or great bodily injury.<sup>200</sup> In addition, section 646.9 is very specific about the type of conduct it prohibits.<sup>201</sup> A stalker must *repeatedly* follow or harass the victim *and* must make a *credible threat* with the intent and apparent ability to carry out that threat.<sup>202</sup> Thus, not only must the defendant possess a specific intent but the defendant must also perform some affirmative act.<sup>203</sup> Therefore, only those persons who repeatedly harass *and* threaten others will be subject to liability. The credible threat requirement essentially negates the risk that someone who was merely conducting surveillance would be subject to liability under section 646.9.<sup>204</sup> However, it is unlikely that a victim would be placed in reasonable fear from legitimate

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198. 46 Cal. 3d 381, 758 P.2d 1046, 250 Cal. Rptr. 515 (1988). The California Supreme Court upheld California's loitering statute against a void-for-vagueness attack. *Id.* at 402, 758 P.2d at 1058, 250 Cal. Rptr. at 527. The court noted that the statute was not impermissibly vague due to the use of the word "loiter," because the word itself connotes a sinister purpose of lingering in a particular place for the purpose of committing a crime. *Id.* at 390, 758 P.2d at 1049, 250 Cal. Rptr. at 518. In addition, the court recognized that California Penal Code section 647(d) has a specific intent requirement so that the statute is only violated when a person loiters about for the purpose of engaging in or soliciting lewd, lascivious, or unlawful acts; thus, persons of ordinary intelligence need not guess at the applicability of the statute. *Id.* at 390-91, 758 P.2d at 1049-50, 250 Cal. Rptr. at 518-19.

199. *See id.* at 391, 758 P.2d at 1050, 250 Cal. Rptr. at 519 (citing *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982) as one case where the United States Supreme Court held that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice given to the defendant in regard to which conduct is proscribed).

200. Compare CAL. PENAL CODE § 646.9(a) (West Supp. 1993) (defining a stalker as any person who willfully, maliciously, or repeatedly follows or harasses another person in addition to making a credible threat with intent to place that person in reasonable fear of death or great bodily injury) with CAL. PENAL CODE § 647(d) (West Supp. 1993) (requiring the purpose of engaging in any lewd, lascivious, or unlawful act).

201. CAL. PENAL CODE § 646.9(a) (West Supp. 1993).

202. *Id.*

203. *Id.*

204. Press Release No. 37, Ed Royce, California State Senator, Apr. 24, 1990 (supporting section 646.9 of the California Penal Code).

types of surveillance activities. It seems probable, therefore, that California Penal Code section 646.9 will be found to provide fair notice.

Besides providing fair notice, statutes must also specify objective ways for the police and the judiciary to judge the defendant's conduct.<sup>205</sup> One section of California's loitering statute was held to be unconstitutionally vague because it gave police officers too much discretion in deciding whether someone had violated the vagrancy law.<sup>206</sup> A few years later, however, the California Supreme Court upheld a different section of California's loitering statute which proscribed loitering but had the requirement that the defendant possess a certain specific intent.<sup>207</sup> The court found that the statute limited the discretion of enforcing officials by narrowing the statute's reach to those persons who loiter with a specific illegal purpose.<sup>208</sup>

California Penal Code section 646.9 is similar to the loitering statute in that it limits the reach of the statute to those persons who have a specific illegal purpose which is objectively manifested to the victim.<sup>209</sup> These requirements, that a credible threat be manifested toward the victim and that the threat be such as to reasonably cause the victim to fear for the victim's safety, leave little subjective discretion to the police. Because of these similarities to

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205. Sirkin, *supra* note 196, at 177-178 (discussing the void-for-vagueness doctrine).

206. See *Kolander v. Lawson*, 461 U.S. 352, 358 (1983) (finding section 647(e) of the California Penal Code, which prohibits persons from wandering about the streets without apparent reason and from refusing to identify themselves and to account for their presence when requested by a police officer, to be impermissibly vague because it gave police officers virtually complete discretion to determine whether defendants had satisfied the statute's requirement that they present credible and reliable identification when stopped by the police); see also *Nightline*, *supra* note 21 (noting that many vagrancy laws were struck down because police were given too much discretion to determine when a person was in violation of the law).

207. *Superior Court (Caswell)*, 46 Cal. 3d at 402, 758 P.2d at 1058, 250 Cal. Rptr. at 527 (holding that section 647(d) of the California Penal Code was not impermissibly vague); see *supra* notes 198-199 and accompanying text (discussing the *Caswell* case).

208. *Id.* at 394, 758 P.2d at 1052, 250 Cal. Rptr. at 521 (noting that a person may be arrested only if the person's conduct leads to a finding of probable cause that the person is loitering about a public restroom with the proscribed illicit intent).

209. CAL. PENAL CODE § 646.9(a) (West Supp. 1993) (requiring the offender to make a credible threat to the victim with the intent that it place the person in reasonable fear of death or great bodily injury).



the recently upheld loitering statute, it is likely that section 646.9 will also be deemed to provide objective ways for the police and the judiciary to determine if the defendant's conduct violates section 646.9. Thus, it seems likely that section 646.9 has sufficient specificity and limited official discretion necessary to withstand a void-for-vagueness attack.

Even if a court were to find California Penal Code section 646.9 impermissibly vague, it would be possible to find an adequate saving construction.<sup>210</sup> In *People v. Blake*,<sup>211</sup> a California Court of Appeal held that a statute is sufficiently certain if it employs words of long usage or with a common-law meaning, or which can be made reasonably certain by reference to a dictionary.<sup>212</sup> If a statute contains a reasonably adequate disclosure of legislative intent regarding the evil it combats, a court will not readily find the statute too indefinite for the police and judiciary to enforce.<sup>213</sup> In ascertaining legislative intent, a court will consider not only the statutory language, but also the object of the legislation, the evils to be remedied, the legislative history, public policy, and any other helpful matters.<sup>214</sup>

The Legislative history of California Penal Code section 646.9 provides a clear understanding of the statutes purpose. The law was enacted following numerous murders which were committed by stalkers.<sup>215</sup> In addition, these murders and others stemming from similar circumstances, as well as the general behavioral traits associated with stalking, have been extremely well-publicized by the news media. These reports provide more notice of what the statute prohibits than the words of the statute themselves. In

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210. See *supra* note 158 and accompanying text.

211. 179 Cal. App. 2d 246, 3 Cal. Rptr. 749 (1960).

212. *Id.* at 252, 3 Cal. Rptr. at 753-54.

213. *Id.*

214. *Clinton v. County of Santa Cruz*, 119 Cal. App. 3d 927, 933-34, 174 Cal. Rptr. 296, 298-99 (1981) (setting forth the factors a court should consider in ascertaining legislative intent). A court should keep in mind the nature and purpose of a statute in order to interpret it in a manner consistent with its purpose. *Id.*

215. See *supra* notes 4-5 and accompanying text (discussing the motivation behind the statute).

addition, the terms of the statute have common meanings.<sup>216</sup> Moreover, California Penal Code section 646.9 itself defines some of its terms.<sup>217</sup> Thus, even if California Penal Code section 646.9 is found to be vague, it is very likely that a court could save the statute by applying a saving construction.

In addition to being challenged on void-for-vagueness grounds, California Penal Code section 646.9 has also been criticized on overbreadth grounds.<sup>218</sup> An analogy will be made to telephone harassment statutes because these statutes contain language similar to California Penal Code section 646.9.<sup>219</sup> In *Oregon v. Moyle*,<sup>220</sup> the Oregon Supreme Court upheld a section of Oregon's telephone harassment statute which prohibits anyone from intentionally harassing or annoying another person by conveying a threat to inflict serious physical injury that will cause the person to become alarmed.<sup>221</sup> The court reasoned that the statute is not overbroad because it does not prohibit the mere communication of a threat to another person by telephone, but makes it illegal to

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216. See, e.g., *People v. Randall*, 711 P.2d 689, 692 (Colo. 1985) (holding that the words "likely" and "alarm" in a criminal statute were not impermissibly vague and provided an identifiable standard of conduct to a person of reasonable intelligence through reference to a dictionary).

217. See, e.g., CAL. PENAL CODE § 646.9(e) (West Supp. 1993) (defining "course of conduct" as a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose). The term "harasses" is defined as 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. *Id.* "Credible threat" is defined as a threat made with the intent and apparent ability to carry out the threat so as to cause the target to reasonably fear for the victim's own safety or that of the victim's immediate family. *Id.* at § 646.9(f) (West Supp. 1993).

218. Letter from Margaret Pena, Legislative Director, and Francisco Lobaco, Legislative Advocate, American Civil Liberties Union, to Senator Edward Royce, California State Senator (Apr. 11, 1990) (on file with the *Pacific Law Journal*) (criticizing California's anti-stalking law as overbroad); see *supra* note 158 and accompanying text (discussing the overbreadth doctrine); but see *Maine v. Cropley*, 544 A.2d 302, 304-305 (Me. 1988) (holding that speech prohibited by a harassment statute forbidding persons from engaging in any course of conduct with the intent to harass, torment, or threaten another person after having been forbidden to do so by a law enforcement officer and without reasonable cause, was unprotected "fighting words").

219. See *supra* notes 123-128 and accompanying text (discussing telephone harassment statutes).

220. 705 P.2d 740 (Or. 1985).

221. OR. REV. STAT. § 166.065(1)(c) (1991); see *Oregon v. Moyle*, 705 P.2d at 745 (noting that the statute focuses on the potential effect of the threat and harm to another person, rather than speech itself).

subject another person to alarm by conveying a telephonic threat.<sup>222</sup> Thus, the statute does not punish a person who conveyed a telephonic threat, even if the person did so with a specific intent, unless the threat also had the effect of reasonably alarming the victim.<sup>223</sup> It is the effect on the victim that the statute prohibits, and speech is merely the means of achieving that forbidden effect.<sup>224</sup>

Similarly, in *People v. Hernandez*,<sup>225</sup> a California Court of Appeal upheld California's telephone harassment statute.<sup>226</sup> The court found that statute was not overbroad because it forbids particular conduct rather than speech itself.<sup>227</sup> The court held that where a statute is narrowly drawn to protect a legitimate state interests, and proscribes conduct and not merely speech, the overbreadth must be *substantial* in order for the statute to be stricken.<sup>228</sup> There must be a realistic danger that the statute will significantly compromise recognized First Amendment protections.<sup>229</sup>

California Penal Code section 646.9 proscribes conduct which, similar to telephone harassment, may be accomplished through the use of speech. Section 646.9 makes it unlawful for a person to repeatedly harass another person, which may include telephone har-

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222. OR. REV. STAT. § 166.065(1)(c) (1991) (prohibiting a person from intentionally subjecting another person to alarm by conveying a telephonic threat to inflict serious physical injury on that person or to commit a felony involving the person or property of that person or any member of that person's family, which threat reasonably would be expected to cause alarm).

223. *Moyle*, 705 P.2d at 745 (stating that harm to another person is the focus of the statute).

224. *See id.* (noting that the forbidden effect of the subsection is actual and reasonable alarm).

225. 231 Cal. App. 3d 1376, 283 Cal. Rptr. 81 (1991).

226. CAL. PENAL CODE § 653m (West Supp. 1993) (making it unlawful to intentionally annoy by telephoning another person and addressing to or about that person, any obscene language or threat to inflict injury upon the person or the person's property or any member of the person's family or by making repeated telephone calls to that person).

227. *People v. Hernandez*, 231 Cal. App. 3d 1376, 1381, 283 Cal. Rptr. 81, 83 (1991) (noting that the statute is not directed at prohibiting certain caller viewpoints).

228. *Id.* at 1381, 283 Cal. Rptr. at 83 (stating that the overbreadth must be judged in relation to its plainly legitimate sweep). A statute will not be deemed overly broad merely because some impermissible applications can be conceived. *Id.* at 1381-82, 283 Cal. Rptr. at 84 (giving examples of constitutionally protected telephone calls, as telephoning to threaten to tow away someone's car, or threatening to return items to a department store and demand reimbursement).

229. *Hernandez*, 231 Cal. App. 3d at 1381, 283 Cal. Rptr. at 83.

assment.<sup>230</sup> In addition, the stalker must make a credible threat to the victim, which may also be done verbally.<sup>231</sup> Thus, before section 646.9 will be stricken, a defendant must show that the statute is substantially overbroad.

Using the same reasoning followed in *Hernandez* and *Moyle*, California Penal Code section 646.9 would not be overly broad merely because it makes certain speech illegal. Speech is only one type of conduct prohibited by section 646.9. The harassment of another person made illegal by section 646.9 is not limited solely to speech activity but may also include physical conduct, such as leaving gifts for the victim or repeatedly following the victim.<sup>232</sup> *Hernandez* held that for a statute to be substantially overbroad there must be a realistic danger that it will significantly compromise First Amendment protections.<sup>233</sup> A court will probably not find California Penal Code section 646.9 substantially overbroad because section 646.9 does not compromise First Amendment rights any more significantly than does California Penal Code section 653(m), California's telephone harassment statute which was upheld in *Hernandez*. A telephone harassment statute will necessarily encroach more significantly upon speech because the only practical way to harass another person using a telephone, aside from repeatedly letting the telephone ring or refusing to respond, is to communicate through speech. On the other hand, a stalker has an almost infinite variety of nonverbal ways to harass another person, such as following the victim, sending the victim gifts, or coming into physical contact with the victim.

In addition, California Penal Code section 646.9, by its terms, does not make speech itself illegal but focuses on the harm caused to victims.<sup>234</sup> In this respect, section 646.9 is remarkably similar

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230. CAL. PENAL CODE § 646.9(a) (West Supp. 1993).

231. *Id.*

232. *Id.*; see *supra* notes 23-45 and accompanying text (illustrating several case histories of stalking).

233. *Hernandez*, 231 Cal. App. 3d at 1381, 283 Cal. Rptr. at 84.

234. CAL. PENAL CODE § 646.9(a) (West Supp. 1993) (prohibiting the willful, malicious, and repeated following or harassing of another person, in addition to the making of a credible threat with the intent to place that person in *reasonable fear of death or bodily injury*).

to the statutes in *Hernandez* and *Moyle*.<sup>235</sup> All three of the statutes prohibit intentional conduct on the part of the defendant, including the making of a threat to another person.<sup>236</sup> Thus, because California Penal Code section 646.9 prohibits more than mere speech, and aside from the fact that a threat in violation of a telephone harassment statute must obviously be conveyed only through a telephone, the threat requirements of the statutes are sufficiently similar to successfully argue that California Penal Code section 646.9 is likewise not overly broad.

#### IV. CONCLUSION

It must be remembered that stalking is a crime based on obsessions. Because an obsession often transcends respect for the law, there is little that any law can do to adequately deter a person from stalking another person. The threat of a civil tort action, such as invasion of privacy or intentional infliction of emotional distress, will no more deter a stalker than will waving an injunction in front of the stalker. Moreover, criminal remedies have proven to be similarly inadequate for deterring harassment, especially in states which do not have a statute aimed specifically at harassment. Thus, many hope that the recent anti-stalking legislation passed in various states across the country will do more to protect victims of stalking than other more traditional remedies. Even if the stalking laws serve no other purpose, they make the crime of stalking a felony and punishable by longer imprisonment. This allows victims time to put their lives back together and to take precautions to protect their personal safety.

*Kelli L. Attinello*

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235. Compare *id.* (prohibiting the willful, malicious, and repeated following or harassing of another person, in addition to the making of a credible threat with the intent to place that person in reasonable fear of death or bodily injury) with OR. REV. STAT. § 166.065(1)(c) (1991) (prohibiting a person from intentionally harassing or annoying another person by subjecting that person to alarm by conveying a telephonic threat to inflict serious physical injury on that person) and CAL. PENAL CODE § 653(a) (West Supp. 1993) (prohibiting a person from intentionally annoying another person by telephoning that person and addressing to that person any obscene language or threat to inflict injury upon that person, that person's property, or any member of that person's family).

236. See *supra* note 235.