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Criminal Penalties for Harassment

Everyone is harassed, annoyed, or alarmed to some degree at some time. In certain instances, though, the harassment¹ is of such kind or frequency as to cause a substantial interference with the victim's normal life. This occurs when one person engages in a course of conduct which is intended to, or which actually does, cause another person to become intimidated, frightened, or alarmed to such an extent that emotional distress results.

Harassment can be regarded as a tortious intrusion of the victim's right to privacy because the perpetrator of the harassment creates an unwarranted interference with the victim's life. Harassing conduct may also fit within the tort concept of intentional infliction of emotional distress if the perpetrator's conduct is done with the intent of causing the victim to suffer severe emotional distress. In these tort situations, the victim may bring suit against the perpetrator for invasion of privacy or for intentional infliction of emotional distress, seeking damages and/or a prohibitory injunction. These civil remedies, however, do not provide the victim with any police protection, nor are they always adequate to halt the harassment. In harassment cases, the presence of strong emotions may render the legal process totally ineffective.² The perpetrator of the harassing conduct may be so set upon a course of action that the threat of civil liability is disregarded.

In addition to tort remedies, seven states³ have enacted criminal harassment statutes to protect the victim from the perpetrator's harassing conduct. California, however, is among the majority of jurisdictions having no criminal sanctions for harassment. Various related criminal statutes do prohibit certain offenses against the person and against the public peace, but harassment does not fall within the existing criminal definitions. Thus, in the majority of states which have no criminal harassment statutes, harassing conduct cannot be treated as a crime.

1. The dictionary definition of "harass" is "to vex, trouble, or annoy continually or chronically." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1031 (3d ed. 1971).

2. See Sedler, *Injunctive Relief and Personal Integrity*, 9 ST. LOUIS L.J. 147, 166 (1964) [hereinafter cited as Sedler].

3. Arkansas, Colorado, Kentucky, Maine, New York, Oregon, and Pennsylvania. See notes 144 and 147 *infra*.

When the perpetrator's conduct harasses the victim so severely that the victim suffers substantial emotional distress, there is an unwarranted interference with the victim's right to pursue and obtain safety, happiness and privacy.⁴ Harassment is not only an injury to an individual; the harm or trauma is reflected upon society, and the public has an interest in protection from this type of conduct. The strong public interest in protecting society from the type of harm caused by harassment finds support in the guarantee of privacy expressly granted by the California Constitution⁵ and implied in the Federal Constitution.⁶ Harassment is a blow to human dignity, demeans the individual,⁷ and thus is socially intolerable conduct that should be made subject to prosecution in the interest of the people of the state.

Harassment should be punishable as a crime, and this comment will propose that California enact a criminal harassment statute.⁸ A criminal sanction is necessary due to the inadequacy of the civil remedies for harassing conduct. To understand the availability and shortcomings of the tort remedies, it is first necessary to discuss the type of conduct constituting harassment. The public interest in preventing harassment will then be explored, laying a foundation for the necessity of a criminal statute. The criteria for examining a proposed statutory formulation will be established by an analysis of the case law in the states that do have criminal harassment statutes. This will lead to the proposition that a criminal harassment statute be enacted in California.

The validity of a criminal harassment statute depends upon careful drafting to avoid unconstitutional vagueness or overbreadth. A carelessly worded statute could provide a vehicle for abuse; that is, a harassment statute could itself be used as a tool for harassment.⁹ The statute must not proscribe constitutionally protected speech, and must describe the type of conduct to be prohibited with enough specificity so that a reasonable person will know whether he or she is violating the law. In order to define the boundaries of the conduct to be prohibited, it is necessary to describe exactly what conduct constitutes harassment.

CONDUCT CONSTITUTING HARASSMENT

In essence, harassment is an invasion of privacy causing the victim to suffer emotional distress. No physical contact or assault is involved in

4. The right to pursue and obtain safety, happiness and privacy is expressly guaranteed by the California Constitution. CAL. CONST. art. I, §1. See notes 135 and 136 *infra*, and text accompanying notes 135-143 *infra*.

5. CAL. CONST. art. I, §1.

6. See text accompanying notes 125-134 *infra*.

7. See Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 973 (1964) [hereinafter cited as Bloustein].

8. A proposed statute is contained in the text accompanying notes 250-56 *infra*.

9. Such abuse might occur through an individual initiating a prosecution for a petty or minor annoyance, or a police officer making an on-the-spot arrest of a person acting in a rude or offensive manner toward the officer. See text accompanying notes 207-223 *infra*.

harassment alone; if there were, the conduct would be punishable under existing criminal statutes.¹⁰ In contrast with conduct disturbing the public peace, harassment directly affects an individual rather than the community at large.

A typical case of harassment occurs when the perpetrator continually follows the victim, constantly sends letters and packages, makes incessant telephone calls, and otherwise deluges the victim with unwanted attention.¹¹ If this behavior continues for any length of time, the victim is likely to become more than mildly irritated; he or she may become frightened, feel threatened, and find it necessary to alter his or her lifestyle in an effort to elude the perpetrator of the harassment.

A victim of a conscious process of intimidation is a victim of harassment.¹² Intimidation may be even more damaging than an actual physical assault. The results of one study showed that women who received anonymous, obscene, or threatening telephone calls exhibited more anxiety than those who had been victims of serious physical assaults and thefts.¹³ An example of this type of intimidation is the case of a woman living in a Chicago high-rise who received strange phone calls, odd gifts, and sexually suggestive literature purportedly from a nonexistent foundation. It was discovered that the source of this attention was a "peeping tom" in a nearby high-rise who monitored the woman's private moves and let her know he was doing so.¹⁴

10. See, e.g., CAL. PENAL CODE §240 (assault); CAL. PENAL CODE §242 (battery). See also notes 99 and 102 and accompanying text *infra*. Nor is California's "peace bond" statute, CAL. PENAL CODE §§701-714, an appropriate remedy for harassment. Use of this provision would only be available if harassment were already codified as a crime, because a peace bond can only be used to prevent threatened offenses. Even so, use of the peace bond statute would probably not withstand judicial scrutiny due to the serious constitutional deficiencies of the statute. See Truninger, *Marital Violence*, 23 HASTINGS L.J. 259, 266 (1971); Note, "Preventive Justice"—*Bonds to Keep the Peace and for Good Behavior*, 88 U. PA. L. REV. 331 (1940).

11. An example of this type of conduct was reported in NEWSWEEK, July 4, 1977, at 59:

He followed her day after day, she remembers. He pressed his face against the windows of her classrooms and peered at her around bookstacks in the library. He swathed her car in red and white camellia blossoms. He called her 40 times a weekend and sent her gifts such as his sterling-silver baby cup. . . . When she fled to her parents' home 150 miles away, he would park nearby for hours. . . . [He] bombarded her, she says, with clippings on parapsychology, letters he had written to President Ford and gifts, including a rock shaped like a phallus.

12. Linda Douglass, a Los Angeles television newscaster, became a victim of this type of harassment after doing a story on a state mental hospital. She received threatening telephone calls, was followed in her car, and twice came home to find offensive words scrawled on her door in red lipstick. Douglass had also been subjected to harassing conduct years earlier: first, someone broke into her apartment and ripped up the magazines. Then later, in the course of looking for her bathing suit, she came across her bikini bottoms which had been cut up into small pieces and hidden under other clothing. Murphy, *One Victim's Story*, NEW WEST, February 28, 1977, at 23-24.

13. This study was conducted by Albert Bideman, a sociologist and assistant director of the Bureau of Social Science Research in Washington, D.C. He states, "The ambiguous threat can be the most devastating of them all. You think someone is after you but you don't know who it is or what they want. Fear of the unknown can freeze people's lives into a state of terror." Garfinkel, *Psychological Rape: New Terror for Women*, NEW WEST, February 28, 1977, at 21-22.

14. In a news story reporting this case, a sociologist coined the term "psychological rape" to describe this type of harassment. Garfinkel, *Psychological Rape: New Terror for Women*, NEW WEST, February 28, 1977 at 21.

Harassment does not always involve male victimization of women. The perpetrator of the harassment may be male or female, and anyone—male or female—may find him or herself the victim of harassment. In *Webber v. Gray*¹⁵, the plaintiff was a man seeking an injunction to prevent the female defendant from further humiliating, embarrassing, worrying, disturbing, and injuring him in his social and business relations. Besides writing letters to plaintiff and to plaintiff's wife, mother, and employer, the defendant daily accosted plaintiff in the street, followed him to work, and left notes in his car. Although this conduct may not have frightened or intimidated the plaintiff, it was sufficiently disrupting to his social and business life to justify the granting of an injunction.¹⁶

The perpetrator of the harassing conduct may be acting out of any of a variety of motives; he or she may be an overzealous creditor,¹⁷ an ardent suitor, a jilted lover, or a religious fanatic. The victim often does not know why he or she is the target of such harassment, or how to defend against this type of conduct.¹⁸ If the perpetrator creates a substantial and unwarranted interference with the victim's life, the victim is entitled to protection against such an interference or compensation for the harm. One source of relief from harassing conduct may be found in the tort remedies for invasion of privacy or intentional infliction of emotional distress.

HARASSMENT AS A TORT

Because harassment is conduct by one individual causing harm to another, traditional tort concepts may be employed to bring a civil suit against the perpetrator of the harassment. A tort action against the perpetrator may be based either on invasion of privacy, or intentional infliction of emotional distress.

A. Invasion of Privacy

California has recognized the right to privacy as the basis of a tort action since 1931.¹⁹ The right was first acknowledged in the legal world, however, approximately 40 years earlier in 1890, when invasion of the right to privacy was synthesized as an independent and distinct tort in Warren's and Brandeis' classic law review article, *The Right to Privacy*.²⁰ Since that

15. 228 Ark. 289, 307 S.W.2d 80 (1957).

16. *Id.* at 296, 307 S.W.2d at 84.

17. For examples of cases involving overzealous creditors, see *Santiesteban v. Goodyear Tire & Rubber Co.*, 306 F.2d 9 (5th Cir. 1962); *Bowden v. Spiegel, Inc.*, 96 Cal. App. 2d 793, 216 P.2d 571 (1950); Note, *Mental Distress from Collection Activities*, 17 HASTINGS L.J. 369 (1965).

18. See note 11 *supra*. "She had become a victim of sadistic harassment, and didn't know why, or how to defend herself." Murphy, *One Victim's Story*, NEW WEST, February 28, 1977, at 23,24.

19. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

20. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Two years earlier, however, Judge Cooley had discussed "the right to be let alone" in relation to assault and the right to be free from threats or attempts of physical violence. T. COOLEY, TORTS 29 (2d ed. 1888).

time, nearly all American jurisdictions have recognized an invasion of privacy as the basis for a tort action.²¹

The development of the tort concept of privacy has not been orderly or well-defined. In 1960, in an attempt to clarify this area of law, Dean Prosser analyzed approximately 400 cases on privacy and delineated four categories into which they could all be placed: intrusion, public disclosure of private facts, false light in the public eye, and appropriation.²²

The basis of the action in harassment cases falls under Prosser's first category—the plaintiff's interest against intrusion upon his or her solitude or seclusion. Intrusion has been defined as conduct causing mental suffering, shame, or humiliation to a person of ordinary sensibilities.²³ For example, in the case of *Nader v. General Motors Corp.*,²⁴ a cause of action was held to exist where the plaintiff, consumer advocate Ralph Nader, alleged that the defendant corporation had caused him to be shadowed, wiretapped, and eavesdropped upon, and that the defendant indiscriminately interviewed third persons about features of Nader's intimate life, pried into his bank accounts and taxes, caused him to be accosted by young women, and caused him to receive threatening telephone calls.²⁵ An action against this type of intrusion "represents a vindication of the right of private personality and emotional security, the essence of the interest protected being aptly summarized in Judge Cooley's perceptive phrase, 'the right to be left alone.'"²⁶

California courts have not expressly recognized intrusion as a basis for a cause of action under the tort of invasion of privacy. Case law indicates, however, that an extension of the tort of privacy to instances of intrusion will be approved.²⁷ The protected interest in intrusion cases is primarily mental.²⁸ Harassing conduct causes mental or emotional distress, and thus harassment is a violation of this protected interest, giving rise to a cause of action for

21. Only Nebraska, Rhode Island, and Wisconsin still expressly reject the privacy action, with the cases suggesting that the initiative for granting the right lies with the legislature and not the courts. *Brunson v. Ranks Army Store*, 161 Neb. 519, 73 N.W.2d 803 (1955), followed in *Carson v. National Bank of Commerce Trust & Sav.*, 356 F. Supp. 811 (D. Neb. 1973); *Henry v. Cherry & Webb*, 30 R.I. 13, 73 A. 97 (1909), followed in *Gravina v. Brunswick Corp.*, 338 F. Supp. 1 (D.R.I. 1972); *Yoeckel v. Samonig*, 272 Wis. 430, 75 N.W.2d 925 (1956).

22. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960). Prosser lists the four categories as:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing private facts about the plaintiff.
3. Publicity which places the plaintiff in a false light in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

Id. at 389.

23. See, e.g., *Norris v. Moskin*, 272 Ala. 174, 177, 132 So. 2d 321, 323 (1961) (unreasonable debt collection); *LeCrone v. Ohio Bell Tel. Co.*, 120 Ohio App. 129, 131, 201 N.E.2d 533, 536 (1963) (eavesdropping). See generally Comment, *The Emerging Tort of Intrusion*, 55 IOWA L. REV. 718 (1970).

24. 31 App. Div. 2d 392, 298 N.Y.S.2d 137 (1969).

25. *Id.* at 394, 298 N.Y.S.2d at 139.

26. *Id.*, quoting from *Afro-Am. Pub. Co. v. Jaffe*, 366 F.2d 649, 653-54 (D.C. Cir. 1966).

27. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971). See also Note, *Invasion of Privacy by Intrusion: Dietemann v. Time, Inc.*, 6 LOY. L. REV. 200 (1973).

28. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392 (1960).

invasion of privacy. As will be discussed later, though, the relief granted is often inadequate to compensate the victim or stop the harassment.²⁹

B. Intentional Infliction of Emotional Distress

As an alternative to a tort action based on privacy, a victim of harassment may seek relief by bringing suit for intentional infliction of emotional distress.³⁰ Establishing a cause of action for this tort is, however, more difficult than for invasion of privacy.³¹ For the latter, plaintiff need only show that the intrusion was unreasonable and would be highly offensive to a reasonable person.³² But to establish a cause of action for intentional infliction of emotional distress, the plaintiff must show that the defendant intended³³ to cause the plaintiff to suffer mental distress and that the plaintiff did in fact suffer severe emotional distress.³⁴

Until 30 years ago, no recovery was allowed for intentional infliction of emotional distress unless there was a resulting physical injury or illness.³⁵ A growing body of case law to the contrary³⁶ prompted the amendment of the Restatement of Torts in 1947 to provide that one may be liable for intentionally causing severe emotional distress to another, and damages for such emotional distress may be recovered alone or in addition to damages for bodily harm resulting from the distress.³⁷ Following this trend, the California courts in 1952 extended the right of recovery to situations in which no physical injury resulted from the mental distress.³⁸ In response to contentions that the door would now be open to unfounded claims and a flood of litigation, the court in *State Rubbish Collectors Association v. Siliznoff*³⁹ pointed out that jurors are more capable of determining whether a plaintiff

29. See text accompanying notes 51-105 *infra*.

30. See generally Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40 (1956); Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

31. Greenawalt, *New York's Right of Privacy—The Need for Change*, 42 BROOKLYN L. REV. 159, 175 (1975).

32. See *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 229, 253 P.2d 441, 444 (1953).

33. Or recklessly disregarded the possibility of causing the plaintiff to suffer mental distress. See text accompanying note 50 *infra*.

34. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88 (1970).

35. The position of the Restatement of Torts in 1934 was as follows:

The interest in mental and emotional tranquility and, therefore, in freedom from mental and emotional disturbances is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance.

RESTATEMENT OF TORTS §46, comment c. (1934).

36. See Prosser, *Insult and Outrage*, 44 CALIF. L. REV. 40, 53 (1956), and cases cited therein at n.77.

37. The amendment to the Restatement provided that, "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it." RESTATEMENT OF TORTS §46, comment d (Supp. 1948).

38. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330, 240 P.2d 282 (1952). In this case, the plaintiff had experienced extreme fear following coercive threats from an association of rubbish collectors demanding that plaintiff pay over proceeds he had made from the association's territory. *Id.* at 335, 240 P.2d at 284.

39. *Id.*

has suffered mental distress than they are of determining whether physical injury has resulted.⁴⁰

The Restatement of Torts states that recovery for intentional infliction of emotional distress is allowed only where the conduct has been so outrageous and extreme as to go beyond all possible bounds of decency, and is regarded as atrocious and intolerable.⁴¹ The requisite emotional distress may consist of any highly unpleasant mental reaction such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, or nausea.⁴²

In California, though, the trend has been to require a lesser degree of distress than indicated by the Restatement.⁴³ In *Fletcher v. Western National Life Insurance Co.*,⁴⁴ the defendant had engaged in conduct to induce the plaintiff to surrender his insurance policy or enter into a disadvantageous settlement. The plaintiff alleged that he was *frightened* and *upset* by the defendant's misrepresentations, and was *worried* and *anxious* about losing his home.⁴⁵ The court agreed with the jury's determination that emotional distress of the requisite severity existed, even though the court defined severe emotional distress as "distress of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it."⁴⁶ Similarly, a cause of action was found to exist in *Golden v. Dungan*⁴⁷ where the plaintiffs became frightened, upset, nervous, and humiliated because defendants served process on them at midnight in a loud and boisterous manner.⁴⁸ Thus, it would seem that conduct constituting harassment would certainly be sufficient grounds to bring suit for intentional infliction of emotional distress.

In addition to the requirement of extreme and outrageous conduct causing severe emotional distress, the defendant's conduct must be carried out with the intention of causing, or reckless disregard of the probability of causing, the distress; and the defendant's outrageous conduct must be the actual and proximate cause of the plaintiff's emotional distress.⁴⁹ If the defendant was harassing the plaintiff without a specific intent to cause emotional distress,

40. *Id.* at 338, 240 P.2d at 286:

From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant's conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury.

Id.

41. RESTATEMENT (SECOND) OF TORTS §46, comment d (1965).

42. *Id.* at comment j.

43. *Newby v. Alto Riviera Apartments*, 60 Cal. App. 3d 288, 298, 131 Cal. Rptr. 547, 554 (1976).

44. 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

45. *Id.* at 397-98, 89 Cal. Rptr. at 91.

46. *Id.* at 397, 89 Cal. Rptr. at 90.

47. 20 Cal. App. 3d 295, 97 Cal. Rptr. 577 (1971).

48. *Id.* at 310, 97 Cal. Rptr. at 587.

49. *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78, 88 (1970).

the defendant may still be liable if his or her mental state falls within the category of "reckless disregard." The California courts rely on the definition of reckless disregard set forth in the Restatement of Torts: one acts with reckless disregard when he or she knows that such distress is certain, or substantially certain, to result from his or her conduct.⁵⁰ Even if all of these requirements are met and the plaintiff prevails, the available tort remedies may nevertheless not afford relief, or may come too late to protect the plaintiff.

C. Shortcomings of the Tort Remedies

When seeking relief from harassment under the tort theories of invasion of privacy⁵¹ or intentional infliction of emotional distress,⁵² harassment is categorized as a "dignitary" harm. Dignitary torts are those that are primarily concerned with harm to intangible values such as peace of mind or personal integrity, rather than pecuniary or physical harm, and involve a recognition of the value of emotional tranquility.⁵³ Unlike many other torts, the harm caused in dignitary torts cannot be repaired or made whole by money damages.⁵⁴ The legal remedy merely represents a social vindication of the human spirit rather than compensation for the loss suffered.⁵⁵ Although the difficulty of computing damages does not preclude recovery,⁵⁶ it is doubtful that monetary compensation could ever be a sufficient remedy for a dignitary harm.⁵⁷ The potential liability of incurring a judgment for money damages would not be an effective deterrent against harassment if the perpetrator is seriously determined to carry out his or her course of conduct.⁵⁸ If this is the case, the plaintiff may look to a civil remedy other than money damages.

In cases involving dignitary harm caused by harassment, it would seem proper to grant the victim equitable relief in the form of a prohibitory injunction to prevent further harassment. Aside from the common problem that most people do not have the time or money to pursue a civil remedy, even an injunction is inadequate relief from harassment because of the difficulties in obtaining and enforcing injunctions.⁵⁹ Perhaps more importantly, no police protection is available to a victim of harassment while a civil remedy of damages and/or injunctive relief is pursued.⁶⁰

50. See, e.g., *Golden v. Dungan*, 20 Cal. App. 3d 295, 302-03, 97 Cal. Rptr. 577, 581-82 (1971); *Taylor v. Vallelunga*, 171 Cal. App. 2d 107, 109, 339 P.2d 910, 911 (1959).

51. See text accompanying notes 19-29 *supra*.

52. See text accompanying notes 30-50 *supra*.

53. D. DOBBS. HANDBOOK ON THE LAW OF REMEDIES 532 (1973) [hereinafter cited as D. DOBBS].

54. Bloustein, *supra* note 7, at 1002-03.

55. *Id.* at 1003.

56. *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 88, 291 P.2d 194, 198 (1955).

57. Sedler, *supra* note 2, at 168.

58. See text accompanying notes 96-97 *infra*.

59. See text accompanying notes 61-97 *infra*.

60. See text accompanying notes 98-105 *infra*.

1. Inadequacy of Injunctions

The long history of equitable self-limitation has too frequently resulted in judicial reluctance to fashion specific relief; therefore, injunctions are not readily granted.⁶¹ Although injunctive relief was formerly granted only for property rights and would not lie for a purely personal right such as privacy, this limitation is now nearly obsolete.⁶² Even so, other problems remain in the granting of equitable relief from dignitary harms.

Equitable relief will be denied if the legal remedy is adequate, or if it has not been proven that the legal remedy is inadequate.⁶³ The plaintiff cannot merely allege that no other adequate remedy is available; the plaintiff must plead and prove that actual or threatened irreparable injury will result unless an injunction is issued.⁶⁴ For example, in *Chappell v. Stewart*,⁶⁵ the court refused to enjoin the defendant from causing private detectives to follow plaintiff, in part because plaintiff failed to prove that damages were inadequate to prevent further harm.⁶⁶ Even if money damages were determined to be adequate compensation for the inconvenience, annoyance, and interference caused in the plaintiff's social and business life, the "shadowing" in the *Chappell* case was a continuous course of conduct. Thus, a better argument for an injunction could have been made based on an expected multiplicity of suits.⁶⁷

Another problem in the granting of injunctive relief from dignitary harms is the difficulty of describing with sufficient certainty and exactitude the conduct from which the defendant is to be restrained. Each and every injunction against harassing conduct must be able to pass the same scrutiny that a proposed criminal statute against harassment would have to undergo.⁶⁸ If the injunction is too broad or vague, it will be unenforceable.⁶⁹ Instead of asking trial court judges to fashion equitable relief in each case, it would appear to be more efficient, economical, and equitable to enact a criminal statute that proscribes any conduct constituting harassment within narrowly defined boundaries.⁷⁰

61. D. DOBBS, *supra* note 53, at 534.

62. *See* Orloff v. Los Angeles Turf Club, Inc., 30 Cal. 2d 110, 117, 180 P.2d 321, 325 (1947).

63. D. DOBBS, *supra* note 53, at 534.

64. *Renzel Co. v. Warehousemen's Union*, 16 Cal. 2d 369, 373, 106 P.2d 1, 3 (1940).

65. 82 Md. 323, 33 A. 542 (1896).

66. *Id.* at 325, 33 A. at 543.

67. *See* Harlow v. Feder, 89 Cal. App. 435, 439-40, 264 P. 782, 783 (1928).

68. A party "cannot be held guilty of contempt for violating an injunction that is uncertain or ambiguous . . . just as he may not be held guilty of violating a criminal statute that fails to give him adequate notice of the prohibited acts." *Brunton v. Superior Court*, 20 Cal. 2d 202, 205, 124 P.2d 831, 833-34 (1942).

69. *Id.*

70. Applying a single standard established by a criminal statute would be a superior solution for harassment cases. "By laying down standards and criteria in advance, repeated applications of the law, within loosely controlled ranges, are possible, while at the same time members of the community are forewarned as to punishable criminal behavior." W. CLARK & W. MARSHALL, *CRIMES* 4 (7th ed. 1967).

Even if it is phrased with adequate specificity, an injunction will not be issued where enforcement of it cannot be practically carried out.⁷¹ If an injunction is obtained in a harassment action, enforcement may be difficult and impractical. The police are unable to be with the plaintiff continually to enforce the defendant's compliance with the injunction, so the injunction can only be enforced by contempt proceedings. If the defendant is charged with criminal contempt, the proceedings must adhere to the rigorous protections of criminal procedure.⁷² This may make a district attorney reluctant to initiate the contempt proceedings, especially if the injunction is somewhat vague⁷³ or overbroad⁷⁴ so that its constitutionality may be readily attacked.

In a harassment case, it may be difficult to obtain an injunction that will be effective, yet not be too broad so as to infringe upon the perpetrator's right to pursue legitimate conduct. In *Galella v. Onassis*,⁷⁵ the court found that injunctive relief was appropriate to protect Jackie Kennedy Onassis and her children from further harassment by "paparazzo"⁷⁶ Ronald Galella, a free-lance photographer. The court of appeals found, however, that the injunction granted by the district court was broader than required, and therefore proceeded to decrease the protection originally granted.⁷⁷

In using his "paparazzo" technique to report on Mrs. Onassis, Galella had been making himself as obnoxious to her and as visible to the public as possible in order to publicize his work. To protect Mrs. Onassis from this harassing conduct, the district court had enjoined Galella from: (1) keeping Mrs. Onassis and her children under surveillance or following any of them; (2) approaching within 100 yards of their home or the children's schools, or within 75 yards of either child or 50 yards of Mrs. Onassis; (3) using the name, portrait, or picture of Mrs. Onassis or her children for advertising; or (4) attempting to communicate with Mrs. Onassis or her children except through her attorney.⁷⁸

The court of appeals noted that the relief must be tailored to Galella's "paparazzo" attacks, which distinguish his behavior from that of other photographers, and that the injunction should not unnecessarily infringe upon Galella's reasonable efforts to report on and photograph Mrs. Onassis.⁷⁹ The court, therefore, modified the district court's injunction to prohibit only: (1) any approach within 25 feet of Mrs. Onassis, or any touching

71. D. DOBBS, *supra* note 53, at 534.

72. *People v. Saffell*, 74 Cal. App. 2d Supp. 967, 982, 168 P.2d 497, 506 (1946).

73. An injunction, like a criminal statute, cannot be so vague that persons of ordinary intelligence would not know when they are committing a violation. See text accompanying notes 228-29 *infra*.

74. Overbreadth must be eliminated so that there will be no "chilling" effect upon first amendment freedoms. See text accompanying note 232 *infra*.

75. 487 F.2d 986 (2d Cir. 1973).

76. Literally, "paparazzo" is a kind of annoying insect, similar to the English "gadfly." *Id.* at 991-92.

77. *Id.* at 998.

78. *Id.* at 993.

79. *Id.* at 998.

of her person; (2) any blocking of her movement in public places and thoroughfares; (3) any act foreseeably or reasonably calculated to place the life and safety of Mrs. Onassis in danger; and (4) any conduct that would reasonably be foreseen to harass, alarm, or frighten her.⁸⁰ The court of appeals felt this modified relief would be adequate to protect Mrs. Onassis and still allow Galella the opportunity to photograph and report on the public activities of Mrs. Onassis.⁸¹

In a separate opinion concurring in part and dissenting in part, Circuit Judge Timbers expressed his belief that the modifications to the injunction were unwarranted and unworkable.⁸² Judge Timbers pointed out that the modified injunction provides no restrictions whatsoever against Galella's hovering at the entrance to Mrs. Onassis' home or at the children's school.⁸³ The dissenter protested the majority's abandonment of the findings of the district court⁸⁴ in relation to the amount of protection needed, and noted the unexplained 84 percent reduction in the distance that Galella was required to keep from Mrs. Onassis, and the 87 percent reduction of the distance he was required to maintain from her children.⁸⁵ Moreover, Judge Timbers feared that the majority overlooked the fact that Galella had in the past jeopardized the lives and safety of Mrs. Onassis and her children *in spite of* previous restraining orders of the district court then in effect.⁸⁶ Judge Timbers also dissented from the denial of rehearing en banc, noting the majority's inconsistency in condemning Galella's outrageous and dangerous conduct toward Mrs. Onassis and her children on the one hand, yet effectively stripping them of the protection of the district court injunction on the other.⁸⁷

In cases of harassment such as *Galella*, an injunction prohibiting further harassment may be effective if an injunction such as that issued by the district court in *Galella* is allowed to stand. By narrowing the injunction in an effort to prevent infringement upon Galella's right to report and photograph a public figure, however, the court of appeals eliminated necessary protections from the district court's injunction. Galella's harassing conduct was clearly criminal, and could have been prosecuted under New York's criminal harassment statute.⁸⁸ If a criminal harassment statute were adopted in California, there would be no need for one to spend the time and money seeking an injunction that might ultimately prove ineffective.

80. *Id.*

81. *Id.* at 999.

82. *Id.* at 1001 (Timbers, J., dissenting).

83. *Id.*

84. The decision of the district court is reported at 353 F. Supp. 196 (S.D.N.Y. 1972).

85. 487 F.2d at 1001 (Timbers, J., dissenting).

86. *Id.* at 1002.

87. *Id.* at 1006.

88. *Id.* at 995. New York's criminal harassment statute, N.Y. PENAL LAW §240.25 (McKinney 1967), is discussed in note 146 and accompanying text *infra*.

An injunction was also granted in the much earlier case of *Hawks v. Yancey*.⁸⁹ In this case, plaintiff ended her six-year affair with the defendant because he would not get a divorce. The defendant continued to try to make himself a part of plaintiff's life against her will, prevented her from forming relationships with others, pursued her with letters and telephone calls and accosted her in public. At a hearing for a temporary injunction, the judge did not issue the injunction because the defendant had *agreed* with the judge that he would no longer harass the plaintiff.⁹⁰ On appeal, the injunction was finally ordered.⁹¹ It is questionable, though, whether an injunction would be effective. The strong emotions in harassment cases may result in conduct not controllable through the civil process. In situations such as *Hawks*, however, where no criminal statute is available, injunctive relief is the only possible device⁹² by which the plaintiff may be protected from the unwanted intrusion in his or her life.⁹³

In another case⁹⁴ involving a jilted lover, a temporary restraining order was granted, but the defendant persistently violated the order and a permanent injunction was not issued until numerous hearings had been held extending over a period of six years. An injunction is only as effective as its enforcement capability; because the defendant in this case appeared from her conduct to be in need of psychiatric help, it was questionable whether an injunction would be effective.⁹⁵ Without a criminal statute allowing the police to intervene, though, an injunction affords the only possibility of relief.

Even if an injunction is granted, it may be entirely ineffective in a harassment case. A party intending to engage in harassing conduct would be no more deterred by the issuance of an injunction than he or she would be by the threat of an action for damages.⁹⁶ Because harassment cases often involve litigants with strong feelings that the law is unlikely to affect, the only result of an ineffective injunction is disrespect for the legal process.⁹⁷ Although even a criminal statute may not deter a perpetrator of the harassment, at least the victim would have the benefit of immediate police protection. Without such a statute, the victim is without police protection and unable to defend against the perpetrator's harassing conduct.

2. Police Protection

If a victim of harassment contacts the police for help or to report the perpetrator of the harassment, the police will be unable to give any assist-

89. 265 S.W. 233 (Tex. Civ. App. 1924).

90. *Id.* at 236.

91. *Id.* at 239.

92. These traditional limitations on injunctive relief are still present today, notwithstanding the evolution of the tort theories of invasion of privacy and intentional infliction of emotional distress.

93. Sedler, *supra* note 2, at 170.

94. *Webber v. Gray*, 228 Ark. 289, 307 S.W.2d 80 (1957). The facts of this case are contained in the text accompanying notes 15-16 *supra*.

95. Sedler, *supra* note 2, at 170.

96. *Id.* at 166.

97. *Id.*

ance because the harassing conduct does not fit into any of the existing criminal statutes.⁹⁸ California does have criminal statutes proscribing some offenses that may result from or be related to harassment, such as assault,⁹⁹ disturbing the peace,¹⁰⁰ and annoying or anonymous telephone calls.¹⁰¹ Unless the harassing conduct includes an act proscribed by one of these existing criminal statutes, police protection is unavailable. Harassment alone does not rise to the level of assault since this would require an attempted battery,¹⁰² nor can harassment be punished under the disturbing the peace statute because harassment is aimed at an individual rather than the public.¹⁰³ Neither is the phone call statute applicable to harassment since it requires a specific intent to annoy and the caller must either be anonymous, or use obscene or threatening language.¹⁰⁴

In most cases, harassment is a traumatic experience for the victim. Pursuit of a civil remedy only prolongs this trauma, and may even intensify the emotional distress because the victim remains accessible and vulnerable to further harassment throughout the civil proceedings. The public interest in preserving individual integrity would seem to dictate that this trauma be terminated at the earliest possible opportunity. If there is a criminal statute proscribing harassment, the victim may be able to stop the harassment with only a single telephone call to the police.¹⁰⁵ Not only would the victim have a resource for help, but society as a whole would have protection against the harm to societal interests caused by harassing conduct.

PUBLIC INTEREST IN PREVENTING HARASSMENT

When viewed as a tort, harassment can be categorized either as invasion of privacy¹⁰⁶ or intentional infliction of emotional distress.¹⁰⁷ The actual wrong inflicted, though, is broader than these two categories of tortious conduct. Harassment is not only an injury to an individual, but is an infringement upon the societal interest in preserving individual dignity and

98. An example of the inability of the police to render assistance was reported in the story about the harassment of newscaster Linda Douglass, discussed in note 12 *supra*. Douglass said she "felt like a jerk" after calling the police and hearing their argument over what criminal category in which to put the offense—peeping tom, attempted rape, or burglary. The police sympathized with and humored her, but were unable to take any action against the perpetrator of the harassing conduct because the conduct did not fall within any of the existing criminal statutes. Murphy, *One Victim's Story*, NEW WEST, February 28, 1977, at 23-24.

99. CAL. PENAL CODE §240.

100. CAL. PENAL CODE §415. (In 1974, the scope of this statute was narrowed and the title changed from "Disturbing the peace" to "Fighting, noise, offensive words.")

101. CAL. PENAL CODE §653m.

102. A battery is defined as "any willful and unlawful use of force or violence upon the person of another." CAL. PENAL CODE §242. An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." CAL. PENAL CODE §240.

103. The disturbing the peace statute punishes one who: (1) unlawfully fights, or challenges another to fight, in a public place; or (2) maliciously and willfully disturbs another by loud and unreasonable noise; or (3) uses offensive words in a public place likely to cause a violent reaction. CAL. PENAL CODE §415.

104. CAL. PENAL CODE §653m.

105. If harassment is codified as a crime, the police would be authorized to respond as they do to any other reported crime.

106. See text accompanying notes 19-29 *supra*.

107. See text accompanying notes 30-50 *supra*.

personal autonomy. The strong public interest in providing protection from the type of harm caused by harassment is indicated by the right to privacy expressly granted in the California Constitution and implied in the federal constitution.

A. Assault Upon Dignity

It has been suggested that all assaults upon privacy are really blows to a person's independence, dignity, and integrity.¹⁰⁸ "He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant."¹⁰⁹ An intrusion is demeaning to individuality because our western culture defines individuality as including the right to be free from certain types of intrusions.¹¹⁰ The intrusion is an affront to personal dignity, and even the resulting mental trauma or distress flows from the indignity perpetrated upon the individual.¹¹¹ The right to privacy preserves an individual's essential human dignity.¹¹² This interest in securing personal autonomy is an interest that society shares.¹¹³ A society cannot function effectively unless it preserves to its members the right of privacy because this right is so essential to individual existence.¹¹⁴

The right to be let alone has been regarded as the right most valued by civilized persons.¹¹⁵ Surely, then, it is well within the public interest to preserve this right. The imposition of criminal penalties for harassment is justified because criminal statutes are intended to prevent undesirable conduct and thus protect societal interests.¹¹⁶ Whereas the function of tort law is to compensate one for the harm suffered, the aim of the criminal law is to protect the public against such harm by punishing harmful results of conduct, or at least conduct likely to result in harm, thereby deterring such conduct.¹¹⁷ Criminal law defines socially intolerable conduct;¹¹⁸ if harassment is a blow to human dignity, then such conduct is outside the limits of reasonably acceptable behavior in society. Harassment seems to be criminal conduct; but unless this type of conduct is specifically prohibited by the

108. Bloustein, *supra* note 7, at 971.

109. *Id.* at 974 (footnote omitted).

110. *Id.* at 973.

111. *Id.*

112. S. HUFSTEDLER, *THE DIRECTIONS AND MISDIRECTIONS OF A CONSTITUTIONAL RIGHT OF PRIVACY* 15 (1971) (text of 28th Annual Benjamin N. Cardozo Lecture delivered by The Honorable Shirley M. Hufstедler before The Association of the Bar of the City of New York, May 11, 1971).

113. *Id.*

114. In autocratic societies, this right is ordinarily reserved principally for the ruling class; but even among the general populace, particularly after the regime has consolidated power, privacy cannot be eliminated totally. A democratic regime appears to be altogether impossible without substantial deference to personal privacy. A. WESTIN, *PRIVACY AND FREEDOM* 23-51 (1st ed. 1967).

Id.

115. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

116. W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 21 (1972).

117. *Id.* at 11.

118. R. PERKINS, *CRIMINAL LAW* 4 (2d ed. 1969).

Penal Code, the perpetrator of the harassment cannot be prosecuted.¹¹⁹ The wrong in the harassment cases is a violation of the public interest, and should be subject to prosecution in the interest of the people of the state.

This same value of individual dignity is also enforced in numerous statutes making various other intrusions on privacy a crime.¹²⁰ For example, "peeping tom" statutes make it a crime to spy upon another through open windows.¹²¹ More recently, statutes have been enacted to prohibit electronic eavesdropping and surveillance.¹²² Another group of statutes intended to preserve individual integrity prohibits disclosure of certain confidential information.¹²³ The common thread running through all these statutes, as well as the privacy tort cases, is the social value of preserving the individual's independence and freedom from unwarranted intrusions.¹²⁴ A criminal statute proscribing harassment appears to be a logical addition to this type of protection. The magnitude of society's interest in the right to privacy is indicated by the express and implied protections of that right in the state and federal constitutions.

B. Constitutional Guaranties to Privacy

1. United States Constitution

The societal interest in human dignity also underlies the right to privacy implied in the federal constitution.¹²⁵ Although the Constitution does not expressly mention any right of privacy, the United States Supreme Court has recognized the existence of a constitutional guaranty of privacy in certain areas.¹²⁶

One of the protected areas of privacy is the right of association contained in the first amendment.¹²⁷ The right of privacy in criminal prosecutions arises from the protections of the fourth and fifth amendments precluding illegal search and seizure and self-incrimination.¹²⁸ Support has also been found in the ninth amendment for unenumerated fundamental rights such as

119. No act is criminal or punishable unless proscribed or authorized by the Penal Code. CAL. PENAL CODE §6.

120. Bloustein, *supra* note 7, at 995-97.

121. California's "peeping tom" statute is part of the disorderly conduct statute. CAL. PENAL CODE §647(h).

122. California has enacted comprehensive legislation dealing with this type of intrusion. CAL. PENAL CODE §§630-637.2.

123. *See, e.g.*, CAL. PENAL CODE §618 (opening or publishing sealed letters addressed to another); CAL. PENAL CODE §641 (bribery of telegraph or telephone agent to disclose message).

124. Bloustein, *supra* note 7, at 994.

125. *Id.* at 974.

126. *See* *Roe v. Wade*, 410 U.S. 113, 152 (1973) (abortion); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (contraceptives).

127. 381 U.S. at 484. *Cf.* *Stanley v. Georgia*, 394 U.S. 557 (1969) (pornography in home); *NAACP v. Alabama*, 357 U.S. 449 (1958) (political association protected from governmental intrusions).

128. *See* *Boyd v. United States*, 116 U.S. 616, 630 (1886). *See also* *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

privacy,¹²⁹ and privacy has also been found within the concept of liberty guaranteed by the fourteenth amendment.¹³⁰

The core of the constitutional protection of privacy is found in the fourth amendment's protections against unreasonable searches and seizures.¹³¹ The Supreme Court has indicated that the purpose of the fourth amendment protection is the preservation of individual liberty.¹³² The social interest underlying protection against harassment is also liberty of the person, the same interest protected by the fourth amendment.¹³³ Because privacy is a right so fundamental that its roots can be traced to several provisions in the Bill of Rights,¹³⁴ the violation of an individual's privacy by harassing conduct is an affront to society as well as a wrong to the victim.

2. California Constitution

Further support for the concept of privacy as a public interest can be found in the 1974 amendment to the California Constitution. By a voter initiative ballot measure, "privacy" was added to the inalienable rights guaranteed by Article I, Section 1 of the California Constitution.¹³⁵ The amendment was proposed and passed in response to, but not limited to, the threat of uncontrolled governmental surveillance and data collection activity.¹³⁶ Subsequent case law has begun to expand the boundaries of this new

129. *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring).

130. *Roe v. Wade*, 410 U.S. 113, 152 (1973), (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

131. See Clark, *Constitutional Sources of the Penumbra Right to Privacy*, 19 VILL. L. REV. 833, 856 (1974).

132. See Bloustein, *supra* note 7, at 974.

133. *Id.* at 977.

134. See notes 127-130 and accompanying text *supra*.

135. CAL. CONST. art. I, §1 now reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*." (Emphasis added).

136. A statement drafted by the proponents of the amendment and included in the state's election brochure is as follows:

The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles on every American.

At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian.

The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom to communion, and our freedom to associate with the people we choose. It prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us.

Fundamental to our privacy is the ability to control circulation of personal information. This is essential to social relationships and personal freedom. The proliferation of government and business records over which we have no control limits our ability to control our personal lives. Often we do not know that these records even exist and we are certainly unable to determine who has access to them.

Even more dangerous is the loss of control over the accuracy of government and business records on individuals. Obviously, if the person is unaware of the record, he or she cannot review the file and correct inevitable mistakes. Even if the existence of this information is known, few government agencies or private businesses permit individuals to review their files and correct errors.

constitutional right beyond purely governmental intrusion about which the proponents of the amendment were concerned.

In *Valley Bank of Nevada v. Superior Court*,¹³⁷ the California Supreme Court extended the constitutional right of privacy to include financial information a depositor discloses to a bank.¹³⁸ The court noted that the 1974 constitutional amendment "elevated the right of privacy to an 'inalienable right' expressly protected by force of constitutional mandate."¹³⁹ In *Porten v. University of San Francisco*,¹⁴⁰ an invasion of privacy action was allowed to be brought against a private university based on the new constitutional guaranty to privacy.¹⁴¹ In *Porten*, the court stated that privacy is not only protected against state action, but is an inalienable right that no one may violate.¹⁴² This decision also noted that the elevation of the right to be free from invasions of privacy to constitutional status was apparently intended as an extension of the privacy right.¹⁴³

In light of the importance placed on the right to privacy in both the state and federal constitutions, society should be protected from invasions of this right by harassing conduct. Criminal sanctions against harassment would be an appropriate means of accomplishing this protection.

HARASSMENT AS A CRIME

Seven states have enacted statutes making harassment a crime.¹⁴⁴ These statutes are patterned after a code section formulated by the American Law Institute for the Model Penal Code. The relevant portion of this section provides that "[a] person commits a petty misdemeanor if, with purpose to

The average citizen also does not have control over what information is collected about him. Much is secretly collected. We are required to report some information, regardless of our wishes for privacy or our belief that there is no public need for the information. Each time we apply for a credit card or a life insurance policy, file a tax return, interview for a job, or get a drivers' license, a dossier is opened and an informational profile is sketched. Modern technology is capable of monitoring, centralizing and computerizing this information which eliminates any possibility of individual privacy.

The right of privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments to the U.S. Constitution. This right should be abridged only when there is compelling public need. Some information may remain as designated public records but only when the availability of such information is clearly in the public interest.

CAL. SEC. OF STATE, 1972 CALIFORNIA GENERAL ELECTION BROCHURE 26-27 (emphasis in original) (argument in favor of Proposition 11, a legislative constitutional amendment adding right of privacy to inalienable rights of people).

137. 15 Cal. 3d 652, 542 P.2d 977, 125 Cal. Rptr. 553 (1975).

138. *Id.* at 656, 542 P.2d at 979, 125 Cal. Rptr. at 555.

139. *Id.*

140. 64 Cal. App. 3d 825, 134 Cal. Rptr. 839 (1976).

141. *Id.* at 832, 134 Cal. Rptr. at 843.

142. *Id.* at 829, 134 Cal. Rptr. at 842.

143. *Id.*

144. ARK. STAT. ANN. §41-2909 (1975); COLO. REV. STAT. §18-9-111 (1973); KY. REV. STAT. ANN. §525.070 (Baldwin 1975); ME. REV. STAT. tit. 17-A, §506-A (1976); N.Y. PENAL LAW §240.25 (McKinney 1967); OR. REV. STAT. §166.065 (1975); 18 PA. CONS. STAT. ANN. §2709 (Purdon 1973).

harass another, he: . . . (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor."¹⁴⁵

New York was the first state to enact a criminal harassment statute based on the Model Penal Code section. New York's statute amplified the language of that section to provide:

A person is guilty of harassment when, with intent to harass, annoy or alarm another person: . . . 5. He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.¹⁴⁶

This statute was adopted by the New York Legislature in 1965, and became effective on September 1, 1967. Since then, six other states have enacted criminal harassment statutes containing language similar to the New York provision.¹⁴⁷ These statutes were enacted to reach disorderly conduct creat-

145. MODEL PENAL CODE §250.4 (Proposed Official Draft, 1962). The other subsections of this section are:

- (1) makes a telephone call without purpose of legitimate communication; or
- (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or
- (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or
- (4) subjects another to an offensive touching

Id. Subsection (5) is that which should be looked to for a prohibition against harassment, because the other subsections are already covered under other sections of the California Penal Code or may be unconstitutionally overbroad and thus invalid. Subsection (1) is covered by CAL. PENAL CODE §653m, and most other states have similar provisions, *see Note, Unwanted Telephone Calls—A Legal Remedy?*, 1967 UTAH L. REV. 379 (1967). Subsection (2) proscribes "fighting words" (*see note 194 infra*) and is covered by CAL. PENAL CODE §415 (3). Subsection (3) would most likely be found unconstitutional due to overbreadth because it attempts to prohibit "offensively coarse" language. In *Bolles v. People*, 541 P.2d 80 (Colo. 1975), a similar statute subsection was held to be facially overbroad because it potentially included constitutionally protected speech within its proscriptions. Subsection (4) is related to assault. CAL. PENAL CODE §240.

This section (MODEL PENAL CODE §250.4) was needed to fill what would otherwise be a gap in the Model Penal Code. One of its purposes is to extend the penal law to new areas of misbehavior involving aggravated assault on the feelings of individuals. MODEL PENAL CODE art. 250, comment at 4, and §250.9, comment at 52 (Tent. Draft No. 13, 1961).

146. N.Y. PENAL LAW §240.25 (McKinney 1967), enacted by New York Legislature in 1965, effective September 1, 1967. This statute was intended to proscribe conduct that would constitute disorderly conduct if public alarm or disorder were intended or created, but does not amount to such because the conduct alarms or harasses an individual rather than the public. *Id.*, Practice Commentary at 159.

147. ARK. STAT. ANN. §41-2909(1)(e)(1975), effective January 1, 1976: "A person commits the offense of harassment if, with purpose to harass, annoy, or alarm another person, he: . . . (e) engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose."

COLO. REV. STAT. §18-9-111(1)(d)(1973), effective July 1, 1972: "A person commits harassment if, with intent to harass, annoy, or alarm another person, he: . . . (d) Engages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose"

KY. REV. STAT. ANN. §525.070(1)(d)(Baldwin 1975), effective January 1, 1975: "A person is guilty of harassment when with intent to harass, annoy or alarm another person he: . . . (d) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

ME. REV. STAT. tit. 17-A, §506-A (1976), effective May 1, 1976: "A person is guilty of harassment if, without reasonable cause, he engages in any course of conduct with the intent to harass, torment or threaten another person, after having been forbidden to do so by any sheriff, deputy sheriff, constable, police officer or justice of the peace."

OR. REV. STAT. §166.065(1)(d)(1975), effective January 1, 1972: "A person commits the crime of harassment [sic] if, with intent to harass, annoy or alarm another person, he: . . . (d) Engages in a course of conduct that alarms or seriously annoys another person and which serves no legitimate purpose."

ing alarm or annoyance to an individual rather than the general public,¹⁴⁸ and to prevent repeated assaults on individual privacy interests.¹⁴⁹

An analysis of the existing criminal harassment statutes is helpful to the formulation of a similar statute for California. Such an analysis is aided by a discussion of the type of intent required, the meaning of "course of conduct," the constitutional problems of overbreadth and vagueness, and the penalties imposed for violation of the harassment statutes.

A. Intent

1. Specific Intent

Of the seven existing criminal harassment statutes, all include the requirement of a specific intent to harass, annoy or alarm.¹⁵⁰ If a harassment statute includes such a specific intent requirement, then proof of an intent to harass, annoy, or alarm is required to establish a violation of the statute.¹⁵¹ Specific intent must be established by proof and cannot be presumed from the act and its probable consequences.¹⁵² When specific intent is an element of the offense, it is a question of fact which must be proved like any other fact in the case,¹⁵³ and no presumption¹⁵⁴ may ever arise that a person intended the natural consequences of his or her acts.¹⁵⁵ Thus, if specific intent to harass is an element of a criminal harassment statute, it cannot be presumed that the perpetrator *intended* to cause the resulting emotional distress just because this would be the natural result of the defendant's conduct.¹⁵⁶

Where specific intent is an element of the offense, the defendant must be allowed to prove any fact tending to show that no such specific intent existed,¹⁵⁷ and must be allowed to testify regarding his or her intent, state of mind, or belief.¹⁵⁸ A person charged with harassment could argue that his or her intent was not to harass, but rather to renew an old love affair, or win the

18 PA. CONS. STAT. ANN. §2709(3)(Purdon 1973), effective June 6, 1973: "A person commits a summary offense when, with intent to harass, annoy or alarm another person: . . . (3) he engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."

148. N.Y. PENAL LAW §240.25, Practice Commentary at 159 (McKinney 1967); OR. REV. STAT. §166.065, Criminal Law Revision Commentary, Proposed Criminal Code, at 218 (1975).

149. Commonwealth v. Duncan, 239 Pa. Super. Ct. 539, 547, 363 A.2d 803, 807 (1976).

150. Although the Model Penal Code section and the Arkansas statute use the word "purpose" rather than "intent," these words express the same thought and idea. People v. Armentrout, 118 Cal. App. Supp. 761, 773, 1 P.2d 556, 562 (1931); Estate of Olmstead, 122 Cal. 224, 232-33, 54 P. 745, 747 (1898).

151. E.g., People v. Moyer, 27 N.Y.2d 252, 253, 265 N.E.2d 535, 536, 317 N.Y.S.2d 9, 10 (1970); Di Donna v. Di Donna, 72 Misc. 2d 231, 339 N.Y.S.2d 592 (1972).

152. People v. Snyder, 15 Cal. 2d 706, 708, 104 P.2d 639, 640 (1940); People v. Mize, 80 Cal. 41, 45, 22 P. 80, 81 (1889).

153. People v. Maciel, 71 Cal. App. 213, 218, 234 P. 877, 880 (1925).

154. A presumption is an assumption of fact that the law *requires* to be made from other facts established in the action. CAL. EVID. CODE §600(a). A presumption is to be distinguished from an inference, which is a deduction of fact that *may* logically and reasonably be drawn from other facts established in the action. CAL. EVID. CODE §600(b).

155. People v. Maciel, 71 Cal. App. 213, 218, 234 P. 877, 880 (1925).

156. The presumption that a person intended the ordinary consequences of his or her voluntary act is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged. CAL. EVID. CODE §665.

157. People v. Martel, 21 Cal. App. 573, 576, 132 P. 600, 601 (1913).

158. People v. Sheasby, 82 Cal. App. 459, 464, 255 P. 836, 838 (1927).

victim's affections, or save the victim's soul, or some other "non-evil" motive. The requirement of specific intent, however, cannot be overcome by proof of a "good" motive.¹⁵⁹ Such proof is permissible and sometimes valuable, but it is never essential and is merely a circumstance to be considered by the jury.¹⁶⁰ It is the intent to cause the ultimate emotional distress, regardless of motive, that establishes the requisite element of specific intent to harass. If the defendant did not have the specific intent to cause the ultimate act, a conviction for a specific intent crime cannot stand.¹⁶¹ Thus, to establish specific intent in a harassment case under these statutes, it must be proven that the defendant intended that his or her conduct would have the ultimate effect of harassing the victim.

2. General Criminal Intent

There is no requirement that specific intent be an element of every crime. If no specific intent or state of mind is required by definition, the law requires only that there be a unity of act and intent,¹⁶² that is, a general criminal intent. To find a general criminal intent, it is never necessary to prove that the defendant intended to violate the law or cause the ultimate harm; it is sufficient that he or she intentionally committed the forbidden act.¹⁶³ General criminal intent, then, is the intention to *do* an act that violates the law, and does not necessarily involve an *intent* to violate the law; hence, ignorance of the illegal nature of an act is not a bar to conviction.¹⁶⁴

In regard to general criminal intent, one is presumed to have intended all the natural, probable, and usual consequences of an unlawful act done voluntarily, and the intent to cause the ultimate harm need not be alleged or proved.¹⁶⁵ Thus, if harassment is made a general intent crime, it need not be proven that the defendant intended to cause the victim to suffer harassment, but only that harassment would be a natural, probable or usual consequence of the perpetrator's conduct.

The elements of the crime of harassment can be further delineated by requiring that the perpetrator's conduct be carried out in a knowing and willful manner. This would resolve any claim that the statute is too vague¹⁶⁶ without a specific intent requirement. "Knowingly" means that the defend-

159. *People v. Durrant*, 116 Cal. 179, 208, 48 P. 75, 82 (1897).

160. *Id.*

161. *People v. Armentrout*, 118 Cal. App. Supp. 761, 774, 1 P.2d 556, 562 (1931).

162. CAL. PENAL CODE §20.

163. *People v. Bateman*, 175 Cal. App. 2d 69, 74, 345 P.2d 334, 337 (1959). "An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charged." See CAL. EVID. CODE §668.

164. *People v. Kuykendall*, 134 Cal. App. 2d 642, 645-46, 285 P.2d 996, 999 (1955).

165. *People v. Wade*, 71 Cal. App. 2d 646, 652, 163 P.2d 59, 63 (1945); CAL. EVID. CODE §665 (see note 156 *supra*).

166. A criminal statute cannot be so vague that persons of ordinary intelligence would not know when they are committing a crime. See notes 228-29 and accompanying text *infra*.

ant knew what he or she was doing.¹⁶⁷ “Willfully” implies a purpose or willingness to commit the act.¹⁶⁸ Therefore, in order to find the requisite general criminal intent for harassment, it would have to be proven that the perpetrator of the harassment acted consciously and purposely in carrying out the course of conduct that ultimately results in harassment.

A requirement that the defendant’s conduct be carried out “knowingly and willfully” would act as a safeguard against abuse where specific intent to harass is not required.¹⁶⁹ A person could not be found guilty of harassment unless he or she was conscious of the conduct engaged in, and was aware that this conduct would harass the victim and/or a reasonable person, even though there may be no intent to harass. Moreover, if punishment is imposed only for conduct that is knowingly and willfully done, the statute cannot be held unconstitutionally vague for punishing without warning.¹⁷⁰ To comply further with the due process requirement of not punishing without warning, a criminal harassment statute should define the type of conduct constituting the crime of harassment.

B. Course of Conduct

The deletion of the specific intent requirement would necessitate an expansion of the statutory description of the type of conduct constituting the crime of harassment.¹⁷¹ In order to proscribe a certain type of behavior, a statute must define the proscribed conduct with enough specificity so that persons of ordinary intelligence will know when they are committing a crime.¹⁷² The statute must provide a standard by which a reasonable person can determine if he or she is carrying out a course of conduct that will result in harassment. Case law in those states having harassment statutes provides some guidelines for defining the type of conduct that harasses, alarms, or seriously annoys another person.

167. CAL. PENAL CODE §7(5).

The word “knowingly” imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

Id.

168. CAL. PENAL CODE §7(1).

The word “willfully,” when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

Id.

169. For example, the “knowingly and willfully” requirement would prevent a criminal harassment statute from being used to impose criminal penalties upon a mentally ill person for exhibition of bizarre behavior.

170. *Screws v. United States*, 325 U.S. 91, 101-02 (1945).

171. In the cases that have upheld harassment statutes, specific intent to harass was an essential element of the crime and thus “course of conduct” was not unconstitutionally vague. This is illustrated in *Commonwealth v. Duncan*, 239 Pa. Super. Ct. 539, 549, 363 A.2d 803, 808 (1976).

172. *United States v. Reese*, 92 U.S. 214, 220 (1875).

In *People v. Hotchkiss*,¹⁷³ a New York court said that a course of conduct is more than an isolated verbal or physical act.¹⁷⁴ In this case, the defendant had been arrested during a racetrack disturbance and then said to a deputy sheriff, "If I could have drawn my gun fast enough, I would have shot you."¹⁷⁵ The appellate court reversed the lower court's harassment conviction, determining that this one statement did not constitute a course of conduct.¹⁷⁶ According to this court, a course of conduct for purposes of the crime of harassment is "a pattern of conduct composed of same or similar acts repeated over a period of time, however short, which establishes a continuity of purpose in the mind of the actor."¹⁷⁷

The New York courts seem, however, to be unsettled as to whether more than one act is required to constitute harassment. The court in *Hotchkiss* decided that more than an isolated act was required to constitute a course of conduct. Later, in *People v. Caine*,¹⁷⁸ a different New York court interpreted the statute as requiring both a "course of conduct" and "repeatedly committed acts," and thus one act could not constitute a course of conduct.¹⁷⁹ Four years later in *People v. Tralli*,¹⁸⁰ another New York court reverted to a literal reading of the statute ("course of conduct or repeatedly committed acts") so that one act could constitute a course of conduct for purposes of the statute.¹⁸¹

These seemingly inconsistent results may be reconciled by noting that the one act in *Tralli* was planned and deliberate,¹⁸² whereas *Caine* and *Hotchkiss* involved spontaneous, emotional, verbal outbursts.¹⁸³ It would seem then that if the act is planned and deliberate, a specific intent to harass is inherent in the perpetrator's conduct. Perhaps the distinction lies in the court's ability to perceive the presence or absence of specific intent, rather than one or more acts. If the conduct consists of only one act, but that act is done with the specific intent to harass the victim, this would constitute a course of conduct within the meaning of the New York statute.

In formulating a harassment statute for California, it would be impracticable to list every conceivable act resulting in harassment. But if only a general criminal intent is required,¹⁸⁴ then the conduct to be prohibited must

173. 59 Misc. 2d 823, 300 N.Y.S.2d 405 (1969).

174. *Id.* at 824, 300 N.Y.S.2d at 407.

175. *Id.* at 824, 300 N.Y.S.2d at 406.

176. *Id.* at 824, 300 N.Y.S.2d at 407.

177. *Id.*

178. 70 Misc. 2d 178, 333 N.Y.S.2d 208 (1972).

179. *Id.* at 179, 333 N.Y.S.2d at 210.

180. 88 Misc. 2d 117, 387 N.Y.S.2d 37 (1976).

181. *Id.* at 118, 387 N.Y.S.2d at 38.

182. The defendant had maneuvered the victim into a position whereby she would readily observe his exposed genitals. *Id.* at 117, 387 N.Y.S.2d at 37.

183. In *Caine*, the defendant had addressed obscene language toward a police officer who had stopped him for a traffic violation. 70 Misc. 2d at 179, 333 N.Y.S.2d at 209. In *Hotchkiss*, the defendant had said to a deputy sheriff after his arrest: "If I could have drawn my gun fast enough, I would have shot you." 59 Misc. 2d at 824, 300 N.Y.S.2d at 406.

184. See text accompanying notes 171-72 *supra*.

be described in more detail than merely “course of conduct which alarms or annoys another.”¹⁸⁵ The California statute can define 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. This definition, similar to that set forth in *Hotchkiss*,¹⁸⁶ would be sufficient to demonstrate that the conduct proscribed is that which results in harassment. The “continuity of purpose” need not be an intent to harass; it need only be conduct which results in harassment.

1. Substantial Emotional Distress

The type of conduct to be proscribed can be further defined to avoid unconstitutional vagueness by relating the conduct to the harm caused the victim.¹⁸⁷ A two-pronged standard by which to measure the harm should be included so that only conduct which would cause a *reasonable person* to suffer substantial emotional distress, and actually does cause this *victim* to suffer such distress, would be unlawful.

The proscribed conduct can be described in terms of the harm caused the victim. Rather than relying on definitions of “annoy,” “alarm,” or “harass” to determine if the defendant has harassed the victim, a statute could provide that harassment has been committed if the victim has been annoyed, alarmed, or harassed by the defendant to the point where the victim suffers substantial emotional distress.¹⁸⁸ The requirement of “substantial” emotional distress would eliminate prosecutions for petty annoyances or neighborhood squabbles. For example, a Pennsylvania court reversed a conviction for harassment where the defendant’s only act was severing a plastic hose which supplied water to his tenant’s cottage.¹⁸⁹ In agreeing with *Hotchkiss* that this behavior did not constitute a course of conduct within the meaning of the statute because this was only one isolated act, the court also noted that the legislature did not intend this type of minor disagreement to entail criminal sanctions.¹⁹⁰

In addition to a subjective standard requiring actual harm, the inclusion of an objective “reasonable person” standard¹⁹¹ in a harassment statute would further narrow its scope and prevent false or exaggerated charges. Before a

185. See language in the harassment statutes quoted in text accompanying note 146 *supra* and in note 147 *supra*.

186. See text accompanying note 177 *supra*.

187. Other criminal statutes relate the proscribed conduct to the harm caused the victim, e.g., CAL. PENAL CODE §245 (assault with a deadly weapon or force likely to produce *great bodily injury*); CAL. PENAL CODE §273d (infliction of corporeal injury upon wife or child *resulting in a traumatic condition*).

188. In *People v. Di Feo* 69 Misc. 2d 1036, 331 N.Y.S.2d 554 (1972), the court interpreted New York’s harassment statute to require that the victim must *actually* have been annoyed or harassed by the defendant. *Id.* at 1038, 331 N.Y.S.2d at 556.

189. *Commonwealth v. Schnabel*, 236 Pa. Super. Ct. 280, 344 A.2d 896 (1975).

190. *Id.* at 284, 344 A.2d at 898.

191. This objective standard is used to determine whether the victim reacted as would a reasonable person.

defendant may be guilty of harassment, proof should be required that not only did the defendant's conduct cause the *victim* to suffer emotional distress, but that the conduct was such as would cause a *reasonable person* to suffer substantial emotional distress.¹⁹² This requirement would ensure that a defendant is not convicted for unknowingly causing a hypersensitive person to become seriously annoyed or alarmed. If the perpetrator of the harassment is aware of a victim's particular weakness and exploits it, however, the perpetrator is not absolved of guilt simply because the victim did not react as a "reasonable person." In such cases, a "reasonable person" is interpreted as meaning a reasonable person in the position of that particular victim.¹⁹³

2. Constitutionally Protected Speech and Other Legitimate Purposes

There are some types of conduct that may constitute harassment but should not be criminalized because they consist of constitutionally protected speech¹⁹⁴ or other legitimate purposes. A valid harassment statute cannot be susceptible of application to speech protected by the first amendment. The New York case of *People v. Carvelas*¹⁹⁵ involved a labor dispute in which the defendant had threatened to "get" the complainant. Defendant was convicted of harassment on the grounds that this threat was abusive language,¹⁹⁶ or that it was a course of conduct that alarmed or seriously annoyed the complainant.¹⁹⁷ Defendant appealed the conviction, alleging that the statute was unconstitutional because it proscribed constitutionally protected speech. The statute was upheld, however, because judicial construction had limited the application of the statute to words and/or gestures which substantially annoy a person so that he or she would be likely to react by an act of violence or a breach of the public peace.¹⁹⁸ This construction of

192. In *People v. Benders*, 63 Misc. 2d 572, 312 N.Y.S.2d 603 (1970), the court suggested that due regard should be given to the type or class of victim involved. *Id.* at 576, 312 N.Y.S.2d at 609.

193. See *People v. Benders*, 63 Misc. 2d 572, 574-76, 312 N.Y.S.2d 603, 607-09 (1970). See text accompanying notes 209-11 *infra*.

194. The type of speech protected by the Constitution was discussed in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942):

[T]he right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72 (footnotes omitted).

195. 75 Misc. 2d 616, 348 N.Y.S.2d 77 (1973), *rev'd on other grounds*, 35 N.Y.2d 803, 321 N.E.2d 550, 362 N.Y.S.2d 460 (1974).

196. Abusive language with the intent to harass is prohibited by N.Y. PENAL LAW §240.25(2) (McKinney 1967).

197. This alternative basis for the conviction is based on N.Y. PENAL LAW §240.25(5), contained in text accompanying note 146 *supra*.

198. 75 Misc. 2d at 618, 348 N.Y.S.2d at 80. Note, however, that this decision was reversed because the conduct involved did not come within the scope of the statute as written, nor did the evidence establish a violation of the statute beyond a reasonable doubt. 35 N.Y.2d 803, 804, 321 N.E.2d 550, 550, 362 N.Y.S.2d 460, 460 (1974).

the statute is in keeping with *Chaplinsky v. New Hampshire*,¹⁹⁹ in which it was stated that a statute prohibiting offensive words is valid only if the proscription is limited to the use of words in a public place likely to cause a breach of the peace.²⁰⁰ Rather than depending upon a judicial interpretation to limit the prohibitions on speech, a criminal harassment statute can be drafted to provide that constitutionally protected speech is excluded from conduct constituting a “course of conduct.”

Conduct serving a legitimate purpose may also be conduct in furtherance of public policy. The New York case of *Di Donna v. Di Donna*²⁰¹ held that the defendant’s conduct did not constitute harassment because he had been acting in an effort to save his marriage.²⁰² The defendant’s wife had petitioned the court for an order of protection to prevent her estranged husband’s “continued and incessant harassment, menacing and reckless conduct” toward her that had alarmed their daughters.²⁰³ The wife alleged that the husband discussed the breakup of the marriage with the daughters so often that the children were made to feel guilty and responsible for the breakup, and that he was trying to use the daughters as a means of bringing pressure upon their mother to reconcile with him.²⁰⁴ The husband contended that he had not done anything beyond the scope of his inherent right to raise his children. The husband further pointed out that his religious conviction regarded marriage as indissoluble, and that the public policy of New York had not gone so far as to regard divorce as a desirable social policy.²⁰⁵ The court found that there could be several legitimate purposes for the husband’s conduct, such as maintenance of normal parent-child relationships, reconciliation with his family, preservation of the marriage, and the insurance of his own mental and emotional health.²⁰⁶

Just as a criminal harassment statute cannot prohibit constitutionally protected speech, it should not limit conduct which is not unlawful and is in furtherance of public policy. This exception for conduct serving a legitimate purpose would also ensure that licensees such as private investigators and collection agencies would not be hampered in their activities if their conduct does not go beyond the scope of their licensed activity.

3. Abuse of Statute

A carelessly worded harassment statute may be susceptible of abuse by private citizens or by police officers acting in their official capacity. An

199. 315 U.S. 568 (1942).

200. 315 U.S. at 573. *Chaplinsky* refers to this type of speech as “fighting words.” *Id.* See note 194 *supra*.

201. 72 Misc. 2d 231, 339 N.Y.S.2d 592 (1972).

202. *Id.* at 233, 339 N.Y.S.2d at 595.

203. *Id.* at 231, 339 N.Y.S.2d at 593.

204. *Id.* at 231-32, 339 N.Y.S.2d at 594.

205. *Id.* at 232, 339 N.Y.S.2d at 594.

206. *Id.* at 233, 339 N.Y.S.2d at 595.

example of the use of a harassment statute for other than its intended purpose is the case of *People v. Smolen*.²⁰⁷ The defendant had been arrested for harassment by a police officer after a sidewalk confrontation during which the defendant had accused the officer of accepting bribes. The court acquitted the defendant, noting that a "police officer must make himself insensitive to the abusive and obscene epithets which this court will take notice are hurled at him almost routinely. . . ." ²⁰⁸

In *People v. Benders*,²⁰⁹ a police officer arrested a marcher in a student demonstration who swore and made gestures at the officer. In acquitting the defendant of the crime of harassment, the court noted that in proving intent, one must question whether it is reasonable for the addressee, under all the circumstances, to be actually annoyed.²¹⁰ The court also pointed out that due regard must be given to the type or class of addressee involved.²¹¹ Due to the nature of a police officer's job, it would seem that the harassing conduct must be prolonged and severe to make it punishable under the statute.

Police officers should not be able to use a criminal harassment statute to make arrests without probable cause. In *People v. Schmidt*,²¹² a police officer came to the defendant's home in order to take custody of her minor child. The defendant used her body to bar the officer's entrance through the doorway, and the officer arrested her for harassment. The defendant was acquitted on the basis that this one incident did not constitute conduct proscribed by the statute.²¹³

A way to avoid this type of misuse of the statute by police officers would be a requirement that if the "victim" of the harassing conduct is a police officer, he or she cannot also be the arresting officer. This would eliminate on-the-spot arrests by an officer who is merely irritated or annoyed by the other party's conduct.

A criminal harassment statute should not be capable of abuse by an individual through prosecutions for petty or minor annoyances. In a 1976 case in Pennsylvania, *Commonwealth v. Duncan*,²¹⁴ the defendant was convicted of harassment²¹⁵ based on three or four requests to the prosecutrix that she engage in an illegal sexual act with him. The prosecutrix was a college student who had fallen asleep on a dormitory couch and was awakened at 3:30 a.m. by the defendant who leaned close to her face and made his requests. The defendant left after the prosecutrix refused his requests and asked that he leave.

207. 69 Misc. 2d 920, 331 N.Y.S.2d 98 (1972).

208. *Id.* at 923, 331 N.Y.S.2d at 101.

209. 63 Misc. 2d 572, 312 N.Y.S.2d 603 (1970).

210. *Id.* at 575, 312 N.Y.S.2d at 607.

211. *Id.* at 576, 312 N.Y.S.2d at 609.

212. 76 Misc. 2d 976, 352 N.Y.S.2d 399 (1974).

213. *Id.* at 979, 352 N.Y.S.2d at 403.

214. 239 Pa. Super. Ct. 539, 363 A.2d 803 (1976).

215. 18 PA. CONS. STAT. ANN. §2709 (Purdon 1973). See note 147 *supra*.

Although the majority in *Duncan* upheld the conviction in a four to three decision, the dissenters felt that the defendant's conduct did not amount to a criminal offense,²¹⁶ and that more than an indecent request was necessary to support a conviction under the statute.²¹⁷ In his dissent, Judge Hoffman noted that this section attempts to proscribe behavior that is frightening or unpleasant but does not constitute an assault or disorderly conduct.²¹⁸ He warned that the legislature must avoid criminalizing constitutionally protected verbal conduct or petty nastiness that does not rise to criminal conduct. He lists three reasons for this: (1) the state runs the risk of criminalizing generally accepted behavior without giving the actor reasonable notice that his conduct is criminal; (2) such incidents are too frequent for a judicial system to handle them efficiently; and (3) courts cannot be expected to arbitrate personal disputes through the criminal process.²¹⁹ Judge Hoffman goes on to say that "[c]riminal sanction is too severe, too great a stigma, too costly to all parties, to allow the law to become a 'Big Brother.'"²²⁰

The majority decision in *Duncan* also noted that the intent of the legislature in enacting this statute was not to proscribe isolated acts which would be of only minor annoyance to the average person, or acts which are constitutionally protected.²²¹ Evidently, the majority decided that this defendant's speech was not of the type protected by the first amendment,²²² and that the prosecutrix's replies made it clear, or should have made it clear to a reasonable person, that continued entreaties would be offensive to her.²²³ Results such as that in *Duncan* can be eliminated by careful drafting of a harassment statute to ensure that it is used for its intended purpose and only punishes conduct which causes substantial emotional distress.

C. Vagueness and Overbreadth

If California is to enact a harassment statute, it can be based on the language in New York's statute²²⁴ and the Model Penal Code,²²⁵ but should be more specific and precise to avoid any attacks on its constitutionality for overbreadth or vagueness, particularly if the specific intent requirement is deleted.²²⁶ An inclusion in the statute of the definition of "course of

216. 239 Pa. Super. Ct. at 553, 363 A.2d at 811 (Price, J., dissenting).

217. *Id.* at 549, 363 A.2d at 810 (Hoffman, J., dissenting); *id.* at 553, 363 A.2d at 811 (Spaeth, J., dissenting).

218. *Id.* at 550-52, 363 A.2d at 809 (Hoffman, J., dissenting).

219. *Id.* at 551 n.4, 363 A.2d at 809 n.4 (Hoffman, J., dissenting).

220. *Id.* (Hoffman, J., dissenting).

221. *Id.* at 549, 363 A.2d at 808.

222. *Id.* at 545, 363 A.2d at 806.

223. *Id.* at 543, 363 A.2d at 805.

224. See text accompanying note 146 *supra*.

225. See text accompanying note 145 *supra*.

226. One other state did have a harassment statute similar to the New York and Model Penal Code sections, but it has repealed in 1973 because the state legislature felt that it was overly vague. 1973 Haw. Sess. Laws, Act 136, §711-1106; HOUSE STANDING COMMITTEE REPORT No. 726 (1973). The statute had prohibited conduct in which a person "engages in any other course of harmful or seriously distressing conduct serving no legitimate purpose of the defendant." HAW. REV. STAT. §711-1106(1)(e)(repealed 1973).

conduct'' would provide such specificity.²²⁷

A new penal statute must be sufficiently explicit to give notice to a reasonable person as to what conduct is prohibited in order to comply with due process requirements.²²⁸ If a statute is intended to proscribe a certain type of behavior, that conduct must be defined with enough specificity so that any person can know with certainty when he or she is committing a crime.²²⁹ In order to determine the amount of specificity that must be contained in a proposed new harassment statute so that it will not be vague or overbroad, it is helpful to analyze the validity of existing harassment statutes as reported in cases in those states with harassment statutes already in effect.

In *People v. Carvelas*,²³⁰ the constitutionality of New York's harassment statute was upheld. The statute had been attacked as being overbroad and thus chilling of the first amendment right to freedom of speech. The court, however, found that judicial construction of the statute had narrowed its application so that only speech and conduct not constitutionally protected was proscribed; thus, the statute was allowed to stand as written.²³¹ Therefore, to avoid overbreadth and chilling effects upon speech, a valid harassment statute should expressly exclude constitutionally protected speech.²³²

In another New York case, *People v. Lamb*,²³³ the complainant had pressed charges against a tavern owner alleging that he was repeatedly annoyed and harassed by the defendant making excessive noise, littering complainant's yard, and using abusive and obscene language. In denying a motion to dismiss the information, the court held that these allegations fell within the scope of the harassment statute, and that the statute was not overbroad nor too vague to be capable of enforcement.²³⁴ Rather, the court decided that it was a question of fact to be decided at trial whether or not the conduct complained of met the standards necessary to obtain a conviction under the harassment statute.²³⁵

The Pennsylvania case of *Commonwealth v. Duncan*²³⁶ also upheld the validity of that state's harassment statute against an attack based on vagueness and overbreadth. Although there was a vigorous dissent to the court's ultimate holding,²³⁷ the finding of constitutionality was not questioned. The court held the statute not unconstitutionally vague or overbroad because it

227. See text accompanying notes 177-185 *supra*.

228. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

229. *United States v. Reese*, 92 U.S. 214, 220 (1875).

230. 75 Misc. 2d 616, 348 N.Y.S.2d 77 (1973), *rev'd on other grounds*, 35 N.Y.2d 803, 321 N.E.2d 550, 362 N.Y.S.2d 460 (1974).

231. 75 Misc. 2d at 618, 348 N.Y.S.2d at 80.

232. See text accompanying notes 194-200 *supra*.

233. 86 Misc. 2d 1023, 384 N.Y.S.2d 929 (1976).

234. *Id.* at 1024-25, 384 N.Y.S.2d at 930.

235. *Id.* at 1025, 384 N.Y.S.2d at 930.

236. 239 Pa. Super. Ct. 539, 363 A.2d 803 (1976).

237. See text accompanying notes 214-223 *supra*.

contained the following requirements:²³⁸ (1) course of conduct or repeated acts which would seriously offend the average person; (2) proof of specific intent on the part of the accused; and (3) conduct of a nonlegitimate nature, that is, not constitutionally protected. Specific intent may be an essential element to the validity of this Pennsylvania statute²³⁹ due to its otherwise vague wording as to the proscribed conduct. As discussed above,²⁴⁰ if the proscribed conduct is more carefully defined, specific intent is not an essential element of the offense of harassment.

In light of these considerations, a harassment statute can be drafted for California that is not unconstitutionally vague or overbroad. An inclusion within the statute of a definition of "course of conduct" would ensure that the statute is not held void for vagueness,²⁴¹ and an express exclusion of constitutionally protected speech would eliminate the danger of overbreadth.²⁴²

D. Punishment

The harassment statutes already enacted in seven states all classify the crime of harassment as a misdemeanor or less serious crime,²⁴³ and two states impose only a fine and no imprisonment.²⁴⁴ The most severe punishment is imprisonment for a term not exceeding one year.²⁴⁵

In California, crimes are classified as infractions, misdemeanors, or felonies.²⁴⁶ An infraction is not punishable by imprisonment,²⁴⁷ and punishment for a misdemeanor is imprisonment in the county jail for not more than six months, or by a fine not over \$500, or by both.²⁴⁸ By punishing the first harassment conviction as an infraction, the nonserious, nonrepeating offender would not be burdened with a serious criminal record but would be sufficiently deterred from continuing the harassment. Moreover, this first conviction as an infraction would serve as additional notice to the offender that his or her conduct is indeed harassing the victim, and that he or she is breaking the law.

For the crime of harassment, it would thus seem appropriate to have a punishment scheme classifying the first conviction as an infraction, rising to

238. 239 Pa. Super. Ct. at 549, 363 A.2d at 808.

239. See note 215 *supra*.

240. See note 171 and accompanying text *supra*.

241. This is necessary because of the deletion of a specific intent requirement. See text accompanying note 171 *supra*.

242. See note 74 and text accompanying note 232 *supra*.

243. ARK. STAT. ANN. §41-2909 (1975); COLO. REV. STAT. §18-9-111 (1973); KY. REV. STAT. ANN. §525.070 (Baldwin 1975); ME. REV. STAT. tit. 17-A, §506-A (1976); N.Y. PENAL LAW §240.25 (McKinney 1967); OR. REV. STAT. §166.065 (1975); 18 PA. CONS. STAT. ANN. §2709 (Purdon 1973).

244. Arkansas and Kentucky.

245. Maine.

246. CAL. PENAL CODE §16.

247. CAL. PENAL CODE §19c.

248. CAL. PENAL CODE §19.

a misdemeanor upon a second or subsequent conviction involving the same victim. Upon the commission of just one more act of harassment within the same pattern and directed at the same victim, the offender could be charged with a second or subsequent offense classified as a misdemeanor.

E. Proposed Harassment Statute

A criminal harassment statute embodying all of the elements necessary for the statute's validity and effectiveness should be enacted in California. The following statutory language is proposed:²⁴⁹

Harassment.

(1) A person commits the crime of harassment if he or she knowingly and willfully²⁵⁰ engages in a course of conduct directed at a specific individual which seriously alarms, annoys, or harasses such individual and which serves no legitimate purpose.

(a) For purposes of this section, "course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.²⁵¹

(b) The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause the victim to suffer substantial emotional distress.²⁵²

(c) For purposes of this section, constitutionally protected speech and other activities serving a legitimate purpose are not included within the meaning of "course of conduct."²⁵³

(2) If a peace officer acting in his or her official capacity is a victim of harassment under this section, the officer who is the victim shall not be the same officer making the arrest.²⁵⁴

249. Early in the 1977 California legislative session, a criminal harassment statute was proposed as AB 1655. As introduced by Assemblywomen Egeland and Ryan, this bill simply added a subsection to the disturbing the peace statute (CAL. PENAL CODE §415), which subsection consisted of language copied from New York's harassment statute (N.Y. PENAL LAW §240.25(5) (McKinney 1967)). This author was consulted by Assemblywoman Egeland's office to improve the language of the proposed statute. After meeting with representatives from the Sacramento County District Attorney's office, the A.C.L.U., the Governor's office, and the Senate Democratic Caucus, this author submitted a proposed criminal harassment statute to Assemblywoman Egeland, similar in substance to the statute proposed in the text of this comment. AB 1655 was amended on August 8, 1977, to incorporate this language, and the proposed statute was removed from the disturbing the peace statute and instead was proposed as an independently standing statute in the category of "Miscellaneous Crimes."

The bill was referred to the Assembly Committee on Criminal Justice for consideration. A hearing before the committee was set for August 22, 1977, but was cancelled by Assemblywoman Egeland due to the crowded calendar of the committee on that date, which was the last committee meeting of the 1977 Regular Session. Because AB 1655 had already been made into a two-year bill because it had not passed out of one house before the deadline, this postponement of the hearing date had no adverse effect upon the passage of the bill. Moreover, the postponement will allow the proponents of the bill an opportunity to respond to the analysis prepared by the committee (See ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE, BILL ANALYSIS, A.B. 1655, as amended August 8, 1977, hearing date August 22, 1977). The committee hearing has been reset for January, 1978.

250. See text accompanying notes 167-170 *supra*.

251. See text accompanying notes 171-186 *supra*.

252. See text accompanying notes 187-193 *supra*.

253. See text accompanying notes 194-206 *supra*.

254. See text accompanying notes 207-213 *supra*.

(3) For purposes of a second or subsequent offense involving the same victim, a "course of conduct" need only consist of one act which follows the same continuity of purpose established in the offense which is the basis of the first conviction.²⁵⁵

(4) A first conviction for harassment shall be punishable as an infraction, and a second or subsequent conviction involving the same victim shall be punishable as a misdemeanor.²⁵⁶

CONCLUSION

The type of conduct constituting harassment is sufficiently harmful to warrant protection against it. Although a victim of harassment may bring suit against the perpetrator for invasion of privacy or intentional infliction of emotional distress, the tort remedies do not provide adequate protection for the victim. Nor do the tort remedies prevent harassing conduct from threatening the personal autonomy so essential within a society. The tort remedy of damages is neither adequate to compensate the victim for the harm suffered, nor will it affect the behavior of one determined to accomplish the purpose for which the harassing conduct is carried out. In addition, an injunction will not be effective if the personal emotions involved are so strong as to be unaffected by a legal action. Even if the civil remedies were effective, time and money would still be required to obtain such relief. During this period, the trauma suffered by the victim due to the harassing conduct goes unrelieved, and the victim is unable to obtain police protection.

Not only the victim, but society as a whole has an interest in the curtailment of harassment. Harassment is an assault upon one's dignity and a blow to individual freedom and independence. As such, harassment is socially intolerable conduct in violation of the public interest, and should be subject to prosecution in the interest of the people of the state. The most practical and effective solution to the problem of harassment is a criminal statute prohibiting such conduct. Through careful drafting, a statute can be formulated that would effectively curtail conduct which seriously alarms, annoys, or harasses another person. At the same time, safeguards can be built into the statute to prevent abuse and to ensure that it is used for its intended purpose. A precise definition of the proscribed conduct would protect the statute against attack for vagueness or overbreadth.

A criminal statute would provide immediate relief to a victim of harassment and would punish only those persons whose conduct is of a seemingly criminal nature but is not now punishable in California because it does not fit squarely into any of the existing criminal statutes. By narrowly defining

255. This provision is included to enable arrest and prosecution after just one more act, rather than requiring another "course of conduct."

256. See text accompanying notes 243-248 *supra*.

the type of conduct to be proscribed, no undue restrictions would be placed on interpersonal behavior. A criminal harassment statute should be enacted to protect the victim of harassment as well as to ameliorate the injury reflected upon society. Only then will the problem of harassment have an effective solution.

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