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The Efficacy of the California Stalking Law: Surveying Its Evolution, Extracting Insights from Domestic Violence Cases

Tatia Jordan*

"The right to be left alone is the most comprehensive of rights and the right most valued by civilized [people]."
—Justice Louis Brandeis

I. Introduction

In 1990, California became the first state to pass anti-stalking legislation. The rush of other states to quickly pass similar legislation in the succeeding four years is evidence that stalking is becoming an increasingly common crime in our society and has come to the fore of the public conscience. Indeed, since 1990, forty-eight states have enacted anti-stalking statutes. Further, in 1993, United States Senator Barbara Boxer (D-California) co-sponsored a bill to make stalking a federal crime.

The attentive legislative response to this crime may be prompted in part by the celebrity status of some of the victims of stalking. Although celebrities account for only seventeen percent of all stalking cases, their visibility attracts heavy publicity. In addition, a growing number of

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2. Id.
3. Id. at 13.
politicians have been stalked, among them former San Francisco Board of Supervisors President Angela Alioto\(^6\), California Senator Diane Feinstein, and Texas Senator Bob Krueger.\(^7\) These high-profile cases and incidents have, on their own, spurred legislators into action with unprecedented speed.

The media has also fixated on the more sensational cases in which the stalkings have culminated in gruesome multiple murders or murder-suicides at work or in other public places.\(^8\) These cases make for a rousing and politically popular cause, especially amidst the current tough-on-crime climate.

These more publicized cases of stalking, however, account for only a small fraction of the stalkings that occur in this country.\(^9\) More commonly, stalking occurs in the context of domestic violence.\(^10\) Thus, after describing the act of stalking and delineating California's stalking law, this note will explore stalking as part of the continuum of escalating violence within intimate relationships. The enforcement and prosecution of California's stalking law will be evaluated and compared with law enforcement's handling of domestic violence, focusing on San Francisco as a micro study. Finally, possible solutions to some of the legislative and enforcement problems will be discussed.

A. THE NATURE OF THE CRIME OF STALKING

1. The Stalker

"Stalking" is a term that has come to represent a variety of behaviors.\(^11\) Although there is sparse research on the psychological profiles of stalkers, one early study has evaluated cases handled by the Los Angeles Police Department Threat Management Unit.\(^12\) The LAPD's Threat


\(^{7}\) Combating Stalking Hearing, supra note 4, at 5, 24 (opening statement of Senator Feinstein and testimony of Kathleen Krueger, wife of Senator Krueger).


\(^{9}\) Antistalking Hearing, supra note 5, at 5 (see generally statement of Chair. Joseph Biden referring to stalking as a subcategory of domestic violence).

\(^{10}\) See generally COMM’N ON THE STATUS OF WOMEN, CITY AND COUNTY OF SAN FRANCISCO, A STUDY OF FAMILY AND DOMESTIC VIOLENCE HOMICIDE CASES IN SAN FRANCISCO (1993) [hereinafter COSW HOMICIDE STUDY]; and Combating Stalking Hearing, supra note 4, at 1 (statement of Chair. Joseph Biden referring to stalking as a subcategory of domestic violence).

\(^{11}\) Antistalking Hearing, supra note 5, at 69 (testimony of Lt. John Lane, Threat Management Unit, Los Angeles Police Dep’t).

Management Unit was specifically created in 1990 to deal with stalking crimes and to enforce California's new stalking law. The study analyzed seventy-four cases of stalking that had been investigated by the Threat Management Unit. Based on the study, researchers defined three categories of obsessions that drive the stalkers' behavior. The first group is erotomania. A person with this delusional disorder believes that the subject of his obsession passionately loves him, even though they have never met. Usually the target of an erotomania obsession is a celebrity. The erotomanic group comprised approximately nine and one half percent of the studied stalking cases. In the overall study, the majority of victims were women and the majority of perpetrators were men, while within the erotomanic group, eighty-six percent of the pursuers were women who were obsessed with mostly male subjects (seventy-one percent). The erotomanic stalker pursues his subject mainly through letter writing, telephone calls, and visits to the target's home. Even though seventy-one percent of erotomanic pursuers actually discovered their victims' homes, few attempted to make physical contact with their subjects.

The second type of stalker suffers from a love obsessional delusion in which the stalker does not know the victim but begins writing letters and phoning the victim to get her attention. There are similarities between this category of stalker and that of the erotomanic, as both types do not personally know the subject of their obsession, usually become aware of their subjects through the media, and share the goal of getting their subjects to respond to their expressions of love. The love obsessional stalker often, however, suffers from other delusional disorders, such as

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13. Id. at 896.
14. Id.
15. Id. at 897.
16. Id.
17. Throughout this note, references to a stalker or stalking behavior are presented in masculine terms and discussion about victims is couched in feminine terms. This use of grammar was chosen for clarity, as often the stalker and victim are referred to in the abstract. This stylistic choice in no way reflects a belief that all stalkers are males nor is it intended to promote any negative generalizations about men as perpetrators of violence against women.
19. Id.
20. Id. at 897.
21. Id. at 897-98.
22. Id. at 899, Table 5.
23. Id. at 900-01.
24. Id. at 901.
25. Id.
schizophrenia\(^{26}\) (as opposed to the erotomanic, who has no other mental conditions apart from the delusion\(^{27}\)). Others suffer from no delusions; they simply love their subjects in a fanatical, obsessive way.\(^{28}\) The love obsessional stalkers accounted for forty-three percent of the stalking cases examined in this study.\(^{29}\) Both the erotomaniac and love obsessional stalkers' obsessions can last up to thirteen years.\(^{30}\) The erotomaniacs in this study, however, pursued their victims for twice as long—an average of nineteen months—as the love obsessional pursuers, who maintained contact for an average of ten months.\(^{31}\)

The most common and dangerous type of stalking behavior falls into the simple obsessional grouping, in which the stalker has had a prior relationship with the victim.\(^{32}\) The intimacy of that relationship varies from acquaintance to former lover.\(^{33}\) The harassing behavior is precipitated by a single event: either the relationship has deteriorated or terminated, or the delusional person perceives that he has been mistreated by the victim.\(^{34}\) The stalker's response to this event is to either restore the relationship or seek retribution.\(^{35}\) Of all stalking, this type is the most likely to end with harm to the victim or destruction of the victim's property.\(^{36}\) Many simple obsessional cases of stalking fall into the domestic violence realm where ex-spouses or ex-partners are stalking victims who are attempting to escape abusive relationships.\(^{37}\)

2. Stalking Behavior

Just as there are many different types of stalkers, the acts of harassment which manifest these obsessions vary widely as well. Some stalkings begin with non-threatening letters and phone calls that express the stalker's love for the victim.\(^{38}\) The more the victim seeks to end the correspondence, the more desperate, bizarre and dangerous the stalker's behavior becomes.\(^{39}\) As the stalker is increasingly rebuffed, the obsession escalates, and the stalker will vacillate between deep hate for his subject.

\(^{26}\) Id.
\(^{27}\) Id. at 895.
\(^{28}\) Id. at 901.
\(^{29}\) Id. at 897.
\(^{30}\) Id. at 899.
\(^{31}\) Id.
\(^{32}\) Id. at 896, 901.
\(^{33}\) Id. at 896.
\(^{34}\) Id.
\(^{35}\) Id.
\(^{36}\) Id. at 902.
\(^{37}\) Antistalking Hearing, supra note 5, at 70-71 (testimony of Lt. John Lane).
\(^{38}\) See generally Zona Study, supra note 12 and Antistalking Hearing, supra note 5 (statement of victims and victims' families).
\(^{39}\) Id.
and profound love and attachment. The hatred toward the subject stems from the stalker's perception that the subject is to blame for his inability to hold a job or maintain a relationship with another person, or for any police action that the victim has initiated, simply because the victim will not respond to his romantic advances. Many times the stalker will not make an overt threat to the victim but will escalate the harassing behavior. Stalkers will leave bizarre objects at the victim's home or work, such as semen, dead animals, poetry, nude photographs of himself, gifts or flowers. Some follow the victims. A few examples of the behaviors in which stalkers engage follow.

The impetus for the enactment of California's stalking law was the 1989 case in which Richard Bardo stalked and killed Rebecca Schaeffer, a young actress starring in the television show, "My Sister Sam." While in high school, Bardo had been institutionalized for suicidal behavior. Prior to his obsession with Schaeffer, Bardo had tried to approach another young girl who had briefly been in the news. When Schaeffer became the focus of his obsession, Bardo sent her numerous incoherent letters that did not contain any threats of violence. Bardo ironically learned of how to get close to Schaeffer when the story of actress Theresa Saldana's attempted murder by another stalker came to light. The Saldana incident inspired Bardo to hire a private investigator to locate Schaeffer. An Arizona investigator obtained Schaeffer's home address from the Department of Motor Vehicles. Bardo then went to Schaeffer's apartment building and rang the doorbell. When Schaeffer came out, he stuck a gun to her heart and fired at point blank range.

In another case documented by an anonymous victim for presentation at the California District Attorneys Association (CDAA) Conference on Domestic Violence, the victim detailed how she met her unwanted pursuer

40. Id.
41. Id.
42. See generally Antistalking Hearing, supra note 5 (testimony of victims and victims' families).
43. Id.
44. Id.
46. Id.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
at a night club. The acquaintance began leaving a rose on her door every day. He continued to ask her out and said that he would not take no for an answer. He appeared at her door during a vulnerable time just after the Loma Prieta earthquake, thus manipulating the victim’s fragile state of mind to gain her confidence. After much persistence, the victim acquiesced and started dating the stalker. His behavior was too possessive and suffocating, however, and the victim broke off the relationship. He threatened suicide.

The stalker called the victim repeatedly and demanded that she see him. He threatened to kill himself in various ways if the victim did not see him. The stalker continued to leave flowers on the victim’s doorstep and followed her on a daily basis. When the victim dated another man, the stalker traced the date’s license plate and found out where he lived. On the anniversary of the earthquake, the stalker left numerous gifts on the victim’s porch. After the victim returned the gifts to his apartment complex office, the stalker was furious and said that the next time he tried to commit suicide he would not be going alone.

The notes and messages became even more threatening. Despite the victim’s repeated rebuffs and pleas to be left alone, the stalker persisted, stating that he would never stop. When the victim said that she would get a restraining order, the stalker replied that that would be the mistake of her life.

When the victim in this case did obtain a restraining order, the stalker’s behavior stopped for a while. He requested that some items he had given the victim be returned to him. They were all items that the victim had returned to the stalker when he had first given them to her, yet the victim found these items in various locations throughout her house. The stalker told her where each item could be found, leading the victim to conclude that the stalker had been in her house on many occasions without her knowledge. On the second anniversary of the earthquake, the stalker broke into the victim’s house and held her hostage overnight. She was able to convince him that she would not call the police if he would leave. After worried friends came to the victim’s house, the police were called and the stalker was apprehended.

The above accounts do not fully capture the feelings of constant fear under which victims of stalking live. They do not convey the sense of having one’s life completely disrupted and controlled by a deranged person. They also do not illustrate the sense of helplessness that these victims feel. Prior to the enactment of stalking legislation, when the police were summoned to the scene of a stalking, victims were told, “[t]here’s

nothing we can do until he does something."54 Thus, the stalking law will be evaluated in terms of its efficacy in dealing with the legal impasse created by the stalker who harasses without touching the victim or casting an overt threat.

B. THE CALIFORNIA STALKING LAW

In 1990, when California lawmakers were developing an anti-stalking bill, they were essentially creating a new crime. Actions that had previously been within the bounds of the law would now, within a certain context and when specific factors are present, constitute criminal activity. Because this legislation broke new ground and was created very quickly, the legislature has felt the need to amend it three times, with a fourth modification going into effect in 1996.55 An examination of these amendments, beginning with a survey of the original law, will convey the legal and efficacy issues involved in developing legislation against stalking.

The stalking law that was passed in 1990 stated in pertinent part:

Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking, punishable by imprisonment in a county jail for no more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.56

The original law also stated that if a person violates subdivision (a) when there is a temporary restraining order in effect, the perpetrator can face up to one year in a county jail or be fined up to $1,000, or both, or be imprisoned in the state prison.57 Thus, the unamended 1990 law made stalking a misdemeanor only, while stalking with a restraining order against the perpetrator could be treated as either a misdemeanor or a felony58 (commonly known as a "wobbler"). A subsequent conviction for stalking within seven years of a prior conviction against the same victim and involving an act of violence or a credible threat of violence, was also punishable as either a misdemeanor or felony.59

The original statute defined "harasses" as a "knowing and willful course of conduct directed at a specific person which seriously alarms，“

54. Antistalking Hearing, supra note 5, at 33 (prepared statement of Congresswoman Nancy Pelosi).
56. CAL. PENAL CODE § 646.9(a) (West Supp. 1994) (added by ch. 1527, § 1 (1990)).
57. Id. § 646.9(b).
58. Id.
59. Id. § 646.9(c).
annoy, or harasses the person, and which serves no legitimate purpose."60 "Course of conduct," as originally defined, meant a pattern of conduct composed of a series of acts over a period of time which evidences a continuity of purpose.61 The "course of conduct" description invoked an objective test of that which would cause a reasonable person to suffer substantial emotional distress, and a subjective component, requiring that the threat actually cause this distress.

The last provision was that defining "credible threat."62 Subdivision (e) defines "credible threat" as "a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety.53 The threat must be against the life of, or a threat to cause great bodily injury to a person. . . ."64

The law has since been amended three times. The first amendment, passed in 1992, made the following changes:65

1. expanded the definition of the crime of stalking to include threats relating to family members;
2. provided that a second or subsequent conviction for stalking is a felony rather than a wobbler; and
3. "credible threat" was redefined to include any threat made in any manner or context that would cause the recipient to reasonably fear for her safety or for the safety of her immediate family.

The 1993 amendment provided that:66

1. state prison terms were increased from a range of sixteen months to three years, to a range of two to four years;
2. a first time offense could be a felony or misdemeanor, thereby removing the requirement that for a first time offense to be designated a felony, there must have been a restraining order issued against the perpetrator;
3. a first time violation of the statute while there was a restraining order issued against the perpetrator would be a felony punishable in state prison for up to four years;
4. if the perpetrator committed a subsequent violation of this statute against anyone, not limited to the same victim, within seven years of the first conviction, the subsequent conviction would be

60. Id. § 646.9(d).
61. Id.
62. Id.
63. Id. § 646.9(e).
64. Id.
65. Id.
66. Id. (amended by ch. 627 § 1 (1992)).
a felony punishable by imprisonment in state prison for up to four years;
5. "immediate family" was expanded to include any spouse, parent, child, any person related by consanguinity or affinity within second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household;
6. "credible threat" was expanded to include a threat which could be:

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

7. a treatment provision was added, giving the court discretion to recommend that the stalker undergo rehabilitative treatment.

The amendment passed in 1994 provided that:

1. a notification requirement that the victim, her family and witnesses be notified 15 days prior to the stalker's release;
2. any information about a person who receives notification of the stalker's release will be confidential; and
3. present incarceration of a person making a threat under this statute shall not be a bar to prosecution for that crime, thereby allowing for the prosecution of stalkers who continue to threaten their victims from jail.

Finally, the most recent and drastic amendment to the stalking law took effect in January of 1996. Assembly Bill 985, passed in the 1995-96 regular session, removes the specific intent requirement, mandating only an objective standard of fear on the part of the victim, in addition to the following changes:

1. the threat must be made with the intent to place the person who is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat;

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67. Id. (emphasis added).
68. Id. (amended by ch. 12 § 1-2 (1994)).
2. the sentencing court can now order that a person convicted of felony stalking register as a sex offender pursuant to Penal Code section 290 (a)(2)(E) if the court finds that the person committed the offense as a result of a sexual compulsion or for the purpose of sexual gratification;
3. the stalking law, Penal Code section 646.9, has been added to the list of crimes under the California Public Records Act which prohibits state and local law enforcement agencies from disclosing specified information regarding victims of the listed crimes; and
4. the five year general limitation on the length of a restraining order that a sentencing court can impose on a stalking defendant is revoked.

These amendments reflect the difficulties encountered in developing legislation for this newly-recognized crime. The difficulty arises because the primary purpose of the legislation is to allow the police to intervene before the perpetrator hurts the victim; to allow law enforcement to respond preemptively rather than reactively. Legislators are struggling to determine at what point certain behavior should become criminal, while at the same time preserving constitutionally-protected speech and conduct. As a result, the four amendments to the stalking law are attempts to fine-tune an effective response to this crime.

1. The Credible Threat and Specific Intent Provisions

The most pointed controversy in developing stalking legislation is in determining what level of intent to require of the offender. Law enforcement officers and prosecutors have had a difficult time arresting and prosecuting perpetrators under the original statute because of the credible threat requirement. Because the stalker must have made an actual threat, the police were often unable to arrest him under this statute. Lieutenant John Lane of the LAPD's Threat Management Unit states, "[i]t has been our experience to date that many of our suspects don't [make overt threats]. They do everything but, and they scare the heck out of our victims." Gavin de Becker, a security expert who advises the victims of unwanted pursuers about protective measures, likewise states that often times a stalker is "too clever to break that law in his terror campaign. He [knows] enough not to mail her threats that might be actionable, but his conduct [is] threatening to her nonetheless." De

70. See generally Combating Stalking Hearing, supra note 4.
71. Antistalking Hearing, supra note 5, at 69, 72 (testimony of Lt. John Lane).
72. Id.
73. Id. at 72.
74. Id. at 87-88 (prepared statement of Gavin de Becker).
Becker further illustrates the problem by noting that in fourteen years of dealing with ten thousand stalking cases, 1421 stalkers have shown up at the victim's home, work place or some other location where they knew their victims to be. 75 "The vast majority of these cases offered law enforcement no way to effectively manage the situation," states de Becker, because no overt threat accompanied the intrusive behavior. 76

Further, prosecutors had found it difficult to win convictions under the original stalking law because of the credible threat requirement. For instance, Rhonda Saunders, a Los Angeles deputy district attorney, explained that judges interpreted the original statute to mean that unless the defendant had actually uttered the words, "I am going to kill you," it was not considered a threat as defined by the statute. 77 Saunders estimated that out of twenty-five stalking cases she had handled prior to 1994, only half had been suitable for felony prosecution under the original statute. 78

In order to surmount this enforcement difficulty, the credible threat requirement was amended in 1993 to include a pattern of conduct such that a threat is implied from the conduct, or from a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat. 79 Thus, the amended law allows for unwanted pursuit or harassing behavior to be actionable despite the absence of an overt verbal or written threat. The conduct alone can be so threatening that it is considered a "credible threat" in and of itself.

Yet, some legislators felt that this modification of the credible threat requirement left the stalking law too narrowly-tailored. 80 Because the law still required specific intent on the part of the stalker to carry out a threat, the law continued to be unenforceable against the many stalkers who do not make a credible threat as defined by the statute. 81 This is especially true for love obsessiona1 and erotomanic stalkers who feel their conduct simply demonstrates their love for their victims, that they know what is best for them, and believe that their victims will begin to love them with

75. Id.
76. Id.
77. Cristina Carmody, Deadly Mistakes; After Well-intentioned Anti-stalking Laws Turned out to be Ineffective, Legislators are Adopting New Measures that Please Prosecutors but Test the Constitution, A.B.A. J., Sept. 1994 at 68-69 (noting Saunders' experience in prosecuting stalking cases under the current legislation).
78. Marsha Ginsburg, Tougher Law Takes New Aim at Stalkers; Another Attempt to Protect Victims after 3-year-old State Statute was Found Ineffective, S.F. EXAMINER, Jan. 2, 1994, available in LEXIS, Nexis Library, Current News File (discussing the shortcomings of the original statute).
79. CAL. PENAL CODE § 646.9(e) (West 1992) (amended by ch. 581 § 1 (1993)).
81. Id.
enough coaxing.\textsuperscript{82} Indeed, for precisely these reasons, the National Institute of Justice's Model Anti-stalking Code ("Model Code") specifically excludes "credible threat" language from the model anti-stalking statute.\textsuperscript{83} The National Institute of Justice (NIJ) and the National Criminal Justice Association (NCJA) were commissioned by the U.S. Senate Committee on the Judiciary to study the issue of stalking and to develop legislation on which states could model bills or current laws.\textsuperscript{84} The Model Code is the product of that study.\textsuperscript{85}

Following the standard set forth in the Model Code, Assembly Bill 985 eliminates the specific intent requirement as part of the definition of credible threat.\textsuperscript{86} This bill, which was authored by Assembly Member Brooks Firestone, was passed by the Assembly and the Senate and is effective January 1996. To be convicted of stalking under this amendment, the the stalker's course of conduct must cause a reasonable person to fear for her safety.\textsuperscript{87} Thus, this legislation adopts the Model Code's language, which calls for a minimal scienter requirement on the part of the perpetrator.\textsuperscript{88}

2. Constitutional Issues

Under this amendment, the only required element regarding the stalker's intent is that he "willfully ... follows or harasses."\textsuperscript{89} Therefore, prosecutors will no longer have to prove that the stalker acted with the intent to carry out either an explicit threat or a threat implied by his pattern of conduct. Critics, such as the ACLU and some defense lawyers, believe that this approach is too vague, and that there is too great a potential for encroachment on a person's freedom of expression.\textsuperscript{90}

For a law to be constitutional, it must pass constitutional tests regarding both vagueness and overbreadth.\textsuperscript{91} The vagueness test states that the proscribed conduct in a statute must be clearly defined so that a person of average intelligence does not have to guess at its meaning.\textsuperscript{92} Overbreadth is judged by the standard of whether the statute allows for

\textsuperscript{82} Model Code, supra note 1, at 48.
\textsuperscript{83} Id. at 45.
\textsuperscript{84} Antistalking Hearing, supra note 5, at 1 (opening statement of Chair. Joseph Biden).
\textsuperscript{85} Model Code, supra note 1, at iii.
\textsuperscript{87} Id.
\textsuperscript{88} Model Code, supra note 1, at 43, 48 ("As long as a stalking defendant knows or should know that his actions cause fear, the alleged stalker can be prosecuted for stalking.").
\textsuperscript{90} Carmody, supra note 77, at 70.
\textsuperscript{92} Connally, 269 U.S. at 391.
arbitrary enforcement. In addition, when dealing with speech protected by the First Amendment, a statute is overbroad if, in its efforts to proscribe activities that are not constitutionally protected, it sweeps within its coverage speech or conduct protected by the First Amendment.

Since the California stalking law specifically defines the behavior that is prohibited, there is little likelihood that it will be considered void on vagueness grounds. The statute may, however, be challenged as being overbroad. Some critics charge that, just as with the federal RICO statute, the stalking law will be applied to situations beyond its intended scope, such as landlord-tenant disputes, political protests, and minor, personal quarrels. But, the California statute specifically states that "course of conduct" does not include constitutionally protected activity, thereby avoiding being overinclusive. Thus, legal activity, ranging from investigators tailing a subject to lawful political demonstrations, cannot be hindered by this law.

The specific intent requirement in the original statute prevented the law from being considered a content-based regulation, which suppresses expressive conduct and constitutionally-protected speech. By requiring a specific intent by the stalker to place the victim in reasonable fear for her safety, constitutionally protected conduct, such as letter writing, telephoning, and following a person become acts that are within the state's interest to proscribe, as the harmful effect on the victim outweighs any incidental free speech value. Without this specific and well-defined scienter element, however, the statute is at risk of proscribing activities that are regarded as within the protection of the First Amendment and, therefore,

93. Kolender, 461 U.S. at 358.
95. The only constitutional challenge to the stalking statute as of the date of this writing involved the meaning of the word "repeatedly," in which the defendant argued that the language "repeatedly follows" was vague. People v. Heilman, 25 Cal. App. 4th 391, 30 Cal. Rptr. 2d 422 (1994). In Heilman, the court held that "repeatedly" is a word of such common understanding that its meaning is not vague and that it simply means more than once. Id.
96. Carmody, supra note 77, at 70.
97. CAL. PENAL CODE § 646.9(d), (f) (West Supp. 1994).
98. For a discussion about the speech-conduct dichotomy and the resulting categorization of challenged regulations into content-neutral and content-based tracks in First Amendment jurisprudence, see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, 1988, § 12-7.
99. See Thorne v. Bailey, 845 F.2d 241 (4th Cir. 1988), cert. denied, Thorne v. Bailey, 448 U.S. 984 (1988) (holding a telephone harassment statute constitutional, as harassment was not communication even though it was in the form of speech, and that the specific intent to harass is what made the otherwise legal activity of telephoning a properly criminalized behavior).
could be found unconstitutional. 

Proponents of A.B. 985 counter that the "willful" description of the behavior satisfies the intent element. They also argue that because there are often restraining orders issued against stalkers, the restraining order can serve as notice to the stalker that his behavior is unwanted and is causing the victim fear.

It remains to be seen whether the law will withstand constitutional challenges based on its general intent requirement. The statute's emphasis on the repetition of conduct—on a pattern of conduct being established by the prosecution—may save it from being struck down. Since it is the repetition of conduct that, in many instances, moves symbolic speech into the realm of harassment and is also that which causes the victim to fear for her safety, the statute may survive constitutional scrutiny.

II. Stalking in the Context of Domestic Violence

A. CURRENT ENFORCEMENT PROBLEMS

Statistics show that the majority of stalking crimes are committed by persons who know their victims. In fact, perpetrators stalking their former partners comprise sixty percent of all stalking cases in the Los Angeles area, according to one police estimate. In addition, ex-lover stalking cases are more likely to end in violence than any other type of stalking. Most stalkings of former partners occur in the context of an increasingly violent relationship. Frequently, the violence escalates dramatically when the woman attempts to leave or severs the relationship. Most stalkers in this category are of the mentality, "if I can't have you, no one will." Often, the stalking behavior begins with the stalker following his victim home and to work, followed by frequent, menacing, and unwanted contact, often in the form of telephone calls and letter writing.

Prior to the enactment of the stalking law, the primary recourse for victims of such harassment was to obtain a restraining order against the

101. See Tribe, supra note 98.
102. Model Code, supra note 1, at 48.
103. Antistalking Hearing, supra note 5, at 70 (testimony of Lt. John Lane).
105. Antistalking Hearing, supra note 5, at 71 (testimony of Lt. John Lane).
106. Combating Stalking Hearing, supra note 4, at 46 (prepared statement of Ruth Jones, Staff Attorney for the Nat'l Org. for Women).
107. Id. at 46 n.1 (citing Angela Browne, When Battered Women Kill 114 (1987)).
108. See generally Antistalking Hearing, supra note 5 (statements of victims and victims' families).
109. Id.
Yet, even when a victim would follow the proper legal channels to deal with an abuser, law enforcement officers frequently failed to cite or even arrest the batterer.\textsuperscript{111} Indeed, it was only eight years ago that the San Francisco Police Department began coding domestic violence under a separate classification.\textsuperscript{112} Formerly, San Francisco's police department miscoded a quarter of the homicides related to domestic violence in 1991 and 1992.\textsuperscript{113}

Part of the reason for law enforcement’s unresponsiveness is that historically, domestic discord was considered a private matter.\textsuperscript{114} It was not considered a crime against society but against a family member and, as a result, police officers did not feel comfortable intervening.\textsuperscript{115} At most, police officers perceived their role as that of counselor or mediator; most officers did not view domestic violence as a legitimate violent crime.\textsuperscript{116} In addition, for some officers, there remains an awkwardness in removing a man from his own home.\textsuperscript{117}

The impetus for the change in dealing with domestic violence has been the increase in homicides resulting from domestic violence in recent years.\textsuperscript{118} The San Francisco Commission on the Status of Women

110. See generally COSW HOMICIDE STUDY, supra note 10.
116. See generally \textit{Domestic Violence Hearing, supra note 115.} See also Bureau of Justice Statistics, U.S. Dep’t of Justice, \textit{Violence Against Women: A Nat’l Crime Victimization Survey Report} 9-10, Table 17 (1994), in which data showed that the police were more likely to respond within five minutes to a victim’s call if the assailant was a stranger than if he was someone known to the victim. The report also stated that the police were more likely to take a formal report if the offender was a stranger rather than an intimate. \textit{Id}.
117. Nelson & Carr, supra note 111.
118. COSW HOMICIDE STUDY, supra note 10, Appendix B (statement of Jacqueline Agtuc, Senior Program Specialist, Family Violence Prevention Fund). The American Medical Association also recognized that domestic violence is a major medical and public health issue in the U.S. \textit{DV as Public Health Issue Hearing, supra note 114} (prepared
(COSW), in conjunction with the Family Violence Prevention Fund, researched the San Francisco Police Department homicide records for the years 1991 and 1992. From this investigation, COSW compiled the Study of Family and Domestic Violence Homicide Cases in San Francisco in 1993. The study revealed that in San Francisco the leading cause of death of women was domestic violence homicide. In fact, sixty-one percent of all solved female homicides were committed by the victims' current or former husbands or boyfriends. In addition, the majority of homicide-suicide cases involved a husband killing his wife and then killing himself.

Further, the study found that domestic violence/family-related homicides "were preventable based on the pattern of escalating violence indicated in many cases." The study cites numerous domestic violence homicides in which the victim had called the police on more than one occasion. The most notorious incident was the case of a San Francisco woman who made a total of twenty-eight domestic violence reports over a two-year period before she was killed by her abuser. None of the reports resulted in a conviction. The lack of legitimacy accorded domestic violence is further exemplified by the fact that out of 9286 domestic violence complaints received in 1991, only five and four tenths percent resulted in the filing of criminal charges.
The extreme nature of this last statistic is due to a number of factors. Often, the police do not arrest or cite the abuser. Also, if the abuser is arrested, the victims fail to “follow-up,” by going down to the police station and filing a report, which is a necessary step in processing the charge. This occurs because, in some instances, the police fail to inform victims that they must follow-up.

The same pattern of enforcement regarding domestic violence laws is also found in law enforcement’s approach to stalking. Many of the same problems and ineffective responses that are present in domestic violence cases plague stalking cases. The SFPD only started tracking stalking as a separate crime in May of 1994. Also, until recently, there was no specialized training of law enforcement personnel for the crime of stalking. The SFPD began specialized stalking training for its officers in 1995, five years after the law was enacted.

As with domestic violence cases, the lack of coordination amongst support services, the police, the district attorney, the probation department, and the civil and criminal courts hinders the prosecution of stalking cases as well. In most jurisdictions, after a perpetrator is charged, the victim must come into the police station and follow-up on the complaint. Police investigators then assemble as much evidence as possible. The case then goes to the charging district attorney who investigates the case and makes a preliminary determination of whether that office will pursue the charge. The case then goes to an arraignment attorney who prepares the case for the arraignment or probable cause hearing. Finally, the case is handed over to the prosecuting district attorney, who ultimately prosecutes the case. As a result of this filtering system, which places the complaint file in so many different

129. Theisen Interview, supra note 112.
130. Id.
131. Id.
132. See generally Antistalking Hearing, supra note 5.
133. Id. at 69 (testimony of Lt. John Lane).
134. Theisen Interview, supra note 112.
135. Id.
136. Id. Theisen started training the San Francisco police force in March of 1995. Theisen explains the statute in the training, indicating all of the required elements needed for a person to be arrested and convicted under the law. He emphasizes the importance of officers informing victims that they must follow-up on an arrest.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
hands, there is a lack of focused scrutiny on each individual case and thereby greater opportunity for mistakes and oversights.

Additionally, both domestic violence and stalking crimes involve the collection of piecemeal information regarding a perpetrator's illegal behavior, which collectively can amount to an arrest and, more importantly, charges that stick. This information is critical for prosecutors to develop a strong, winnable case that is built on admissible, well-documented evidence. As a result, the filtering system is seriously flawed and severely debilitates the successful prosecution of domestic violence and stalking cases.

Lack of coordination also hinders the effectiveness of restraining orders in domestic violence and stalking cases. For instance, a common problem that arises in obtaining a protective order centers on the fact that civil courts do not have access to the criminal records of persons against whom a protective order is sought. Thus, the judge reviewing the protective order application is not aware of the perpetrator's criminal history or outstanding arrest warrant. As a result, commensurate action against a repeat offender is not given, and the victim ends up starting from scratch over and over again.

B. PROPOSED SOLUTIONS

Advocacy groups and lawmakers have proposed recommendations to address the problems outlined above. Because of law enforcement's significance as the initial contact between the victims and the law, the most urgent changes needed are in police officers' attitudes and in their training in stalking and domestic violence crimes. In order for victims to have confidence that the legal system can protect them from perpetrators' menacing behavior, the police must respond to initial reports of these crimes with seriousness and commitment. Police must inform victims that they have an active role in bringing charges and prosecuting their assailants. The San Francisco Police Department has responded to this call by issuing referral cards to victims of stalkings and domestic

143. Id.
144. Id. See also, Combating Stalking Hearing, supra note 4, at 2 (opening statement of Chair. Joseph Biden).
145. Combating Stalking Hearing, supra note 4, at 2-3 (opening statement of Chair. Joseph Biden). Chairperson Biden is sponsoring the Stalker and Family Violence Enforcement Act (SAFVE Act) which would "give all judges in all courts that deal with stalking and domestic violence access to the Federal criminal history records now available only to State criminal justice officials."
146. Id.
147. Id.
148. Theisen Interview, supra note 112.
violence that outline what steps the victim must take to press charges after the assailant has been arrested and that list available support services.149

Specialized training is crucial and has been proven effective in encouraging officers to enforce domestive violence and stalking laws.150 An example of this efficacy is in the issuance of emergency protective orders in San Francisco.151 Emergency protective orders are based upon police assessments of a situation and police recommendations for a restraining order once the officer has been called to a situation.152 Upon the officer's recommendation, an on-call judge is contacted who then either denies or approves the assessment.153 If the recommendation is approved, an emergency protective order is issued on the spot, and the assailant must stay away from the victim.154 Since the emergency order is effective for only 48 hours,155 the victim must then file for a protective order in civil court within the next few days to get a restraining order of longer duration. In San Francisco, after police officers were specifically trained on how to use emergency protective orders, one thousand were issued during the next year, compared to only three in the year prior to the training.156 An analogous result is anticipated with regard to the stalking training that was implemented this year.157

Another recommended change is that the filtering system within the district attorney's office be modified.158 Advocacy groups suggest a vertical prosecution system in which one prosecutor handles a case from the time that the office receives it through the course of all judicial proceedings.159 The Commission on the Status of Women notes that vertical prosecution is proven as an effective technique in prosecuting domestic violence crimes.160 Since the prosecution of stalking cases also benefits from compiled information managed by one official, the use of this technique should be extended to these cases as well.

149. Id.
150. COSW HOMICIDE STUDY, supra note 10, at 19.
151. Theisen Interview, supra note 112.
152. California Family Code section 6250 states in pertinent part: "A judicial officer may issue an ex parte emergency protective order where a law enforcement officer asserts reasonable grounds to believe either . . . [t]hat a person is in immediate and present danger of domestic violence, based on the person's allegation of a recent incident of abuse or threat of abuse." CAL. FAM. CODE § 6250 (Deering 1994).
153. Id.
154. CAL. FAM. CODE § 6253 (Deering 1994).
155. CAL. FAM. CODE § 6256 (Deering 1994).
156. Theisen Interview, supra note 112.
157. Id.
158. COSW HOMICIDE STUDY, supra note 10, at 19.
159. Id. See also Finnie, supra note 128.
160. Finnie, supra note 128 (quoting Rosario Novarette, COSW Homicide Study Program Coordinator and Editor).
Likewise, an information network among the police, the district attorney's office, the probation department and social service agencies needs to be implemented.\textsuperscript{161} Often, an incomplete record will be forwarded from the police department to the district attorney.\textsuperscript{162} This in turn affects the charges brought against a repeat offender.\textsuperscript{163} The information network should be structured so that every piece of information that is compiled against an offender, including all calls to the police regardless of whether a report or an arrest was made, is found in one place and is easily accessible to all offices and agencies.\textsuperscript{164} In addition, civil courts should have access to the criminal history of a person against whom a restraining order is sought.\textsuperscript{165}

In criminal cases, judges should also have access to this information. If the documentation of the pattern of violence is in their hands, judges can then make bail assessments accordingly. Judicial officers should be better educated about domestic violence generally, and accord more weight to the progressive nature of domestic violence and the resulting continued risk to victims when rendering bail and sentencing decisions.\textsuperscript{166}

Because of the enforcement and prosecutorial similarities between domestic violence and stalking cases, the shortcomings and proposed modifications in the handling of domestic violence crimes should be scrutinized so as to avoid similar problems with the stalking law, a statute in its infancy. As stalking is so often a menacing expression of domestic violence, these cases should be handled under the same unit of law enforcement. Agencies that aid abused women should expand their programs to educate victims about the stalking law and teach the victims how to use the law as another tool in stopping intimate assailants.\textsuperscript{167}

\section*{III. Conclusion}

California's six-year-old stalking law has already undergone major changes since its enactment. As this statute is attempting to define an

\begin{itemize}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id. See also} CHARAN INVESTIGATION, \textit{supra} note 126, at 9.
\item \textsuperscript{163} Finnie, \textit{supra} note 128.
\item \textsuperscript{164} \textit{See generally} CHARAN INVESTIGATION, \textit{supra} note 126, Recommendations and Initial Responses, at 17-38.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} Combating Stalking Hearing, \textit{supra} note 4, at 48.
\item \textsuperscript{167} In San Francisco, some county agencies have begun to incorporate the recommendations that resulted from the Charan Investigation. CHARAN INVESTIGATION, \textit{supra} note 126. The San Francisco District Attorney's Domestic Violence Unit has implemented a vertical prosecution system. In addition, the San Francisco Police Department created a Domestic Violence Response Unit in October of 1995. This unit is comprised of six investigators who exclusively handle domestic violence cases. Both the district attorney and police domestic violence units incorporate stalking into their protocols as a possible statute under which to charge an abuser.
\end{itemize}
entirely new crime, it will continue to be modified and fine-tuned. Some other difficulties have been encountered because the law is preemptive, calling for intervention before a victim is seriously injured or killed. This approach involves carving out of otherwise legal behavior, actions which, because of a variety of factors, are assigned criminal classification.

In addition, the social attitudes that play into this crime, a crime committed almost exclusively against women, affect the enforceability of this legislation. As domestic violence is now starting to be recognized as a serious and legitimate crime, there is hope that the stalking of an intimate partner will not be dismissed by police officers as a private dispute or given low priority in the district attorney’s office. Law enforcement personnel must be trained to take stalking crimes seriously, and must realize that early intervention can be the difference between life and death.
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