
THE JUSTIFICATION FOR CRIMINAL PUNISHMENT UNDER THE STALKING AND HARASSMENT PREVENTION ACT: RETHINKING INSTITUTIONAL DESIGN IN TAIWAN

Liu, Yu Wei, Associate Professor, Department of Law, Hsuan Chuang University, Taiwan
(R.O.C.).

ABSTRACT

The Stalking and Harassment Prevention Act advances the point at which the state intervenes. Its justification, however, cannot rest solely on public fear generated by incidents of severe violence. This article argues that harm already inflicted and the risk of future harm must be assessed separately, and that the relationship among the conditions for criminal liability, protective measures, and interventions directed at perpetrators should be restructured accordingly. The Act's existing requirements of a nexus to sex or gender and repeated or continuous conduct serve to delimit the scope of criminalization, yet may not accurately reflect either the extent of interference with individual freedom or the need for protection. Reform should center on substantial interference with autonomy in everyday life, reconsider the exclusionary effects of the sex-or-gender nexus requirement, and make repetition or continuity a qualified rather than an absolute requirement. This would allow serious single incidents to fall within the statutory framework governing stalking and harassment, taking into account the severity of the infringement, the degree of control exerted, and the specific danger posed. Criminal punishment should be determined by proven wrongdoing and culpability, whereas preventive measures should be tailored to specific risks and necessity. Therapeutic interventions must likewise comply with the principle of proportionality and procedural safeguards. Ultimately, the effectiveness of the statutory framework should be evaluated by whether the intrusive conduct ceases, whether contact shifts to alternative forms or channels, and whether victims can resume their everyday lives.

Keywords: stalking and harassment; anticipatory criminalization; sex-or-gender nexus; continuity of conduct; therapeutic interventions.

I. Framing the Problem

Stalking and harassment involve a distinctive pattern of harm. Taiwan enacted the Stalking and Harassment Prevention Act in 2021. A single message, an instance of waiting for someone, or the delivery of an item may, viewed in isolation, fail to reveal the seriousness of the conduct. When different forms of contact become interconnected, however, leaving victims in constant anticipation of renewed approaches, surveillance, or interference, the perpetrator may gradually come to dictate the organization of their everyday lives. Victims may alter their commutes, withdraw from social activities, restrict their internet use, or even leave their jobs to avoid contact. Their freedom may thus be substantially curtailed before any physical injury occurs.

Such harm warrants a legal response, but it does not follow that every unwelcome contact should fall within the scope of criminal punishment. The central question for Taiwan's Stalking and Harassment Prevention Act is what harm already inflicted justifies punishment and what demonstrable risk justifies preventive intervention. Unless these grounds are distinguished, predictions of future harm may expand the reach of criminal punishment, while protective measures may be delayed pending proof of a criminal offense. The statutory framework therefore faces the twin risks of excessive punishment and inadequate protection.

II. Anticipatory Criminalization Requires Adequate Justification

Article 1 of Taiwan's Stalking and Harassment Prevention Act provides: "This Act is hereby enacted to protect personal physical and mental safety, freedom of movement, personal privacy and information privacy, avoid being stalked and harassed, and maintain personal dignity". This provision identifies physical and mental safety, freedom of movement, the private sphere, and information privacy among the interests the Act seeks to protect. Articles 3[1] and 18[2] of the Stalking and Harassment Prevention Act jointly establish the statutory basis for the offense of stalking and harassment. The punishability of stalking and harassment therefore need not depend entirely on whether the conduct ultimately culminates in violence. Persistent, unwelcome interference in another person's life may itself undermine individual self-determination and security within the private sphere.

The legislative rationale invokes the concept of endangerment offenses to explain the policy of earlier intervention. A preventive purpose in criminal legislative policy, however,

does not, by itself, settle the offense's doctrinal classification. Which legally protected interests the offense principally safeguards, whether it requires a specified result, and whether danger must be established through concrete evidence remain questions to be resolved by examining the structure of the statutory provisions. In particular, the fact that punishment precedes serious violence does not justify characterizing stalking and harassment as a preparatory offense to a violent crime: the requisite intent and constituent elements of the two offenses differ. Of particular concern is a mode of reasoning in which the possibility of future violence is invoked to justify punishment despite insufficient proof of present harm, while the victim's past discomfort is treated as evidence of dangerousness despite the absence of concrete information substantiating future risk. Such reasoning allows two independently deficient grounds to reinforce one another, ultimately producing a basis for punishment that is difficult to refute. It risks shifting criminal punishment away from the traditional model of act-based criminal law toward an offender-based model.

III. Gaps in Protection Arising from the Sex-or-Gender Nexus Requirement

3.1. Alignment Between Protected Legal Interests and the Criteria for Protection

Article 3, paragraph 1 of the Stalking and Harassment Prevention Act in Taiwan, requires that the conduct be related to sex or gender. Paragraph 2 extends protection to certain persons connected to the targeted individual; it does not encompass all intrusive conduct unrelated to sex or gender. Although this design reflects the legislature's concern with gender-based violence, its normative implications warrant scrutiny. If two cases both involve persistent surveillance and severe restrictions on freedom in everyday life, yet are directed into different protective frameworks solely because one involves romantic possessiveness while the other arises from retaliation, workplace conflict, or another dispute, is that differential treatment sufficiently connected to the purposes of protection?

3.2 Gendered Context Cannot Be Reduced to Sexual Desire Alone

In interpreting the existing law, the sex-or-gender nexus should not be reduced to whether the perpetrator acknowledges a romantic pursuit or acts out of sexual desire. The content of communications, power relations, demands for control, and the context of the parties' interactions may all inform an assessment of the conduct's gendered significance. Conversely, the fact that the parties are of different genders, were previously in a relationship, or have

experienced conflict cannot dispense with the need to establish the requisite nexus in the individual case. Both unduly narrow and overly broad presumptions undermine the statutory requirement's susceptibility to evidentiary scrutiny. Cases involving mixed motives expose the costs of this limitation with particular clarity. Relationship breakdown, property disputes, and retaliatory motives may interact, yet the inquiry can become mired in disputes over the perpetrator's "true motive," delaying a response to the already evident danger posed by stalking and harassment.

IV. Repetition or Continuity Should Be a Qualified Requirement

4.1 Continuity as the Ordinary Basis for Identifying Harm

Repetition or continuity helps distinguish isolated contact from cumulative intrusion. Its normative significance, however, lies in identifying harm; neither frequency nor duration is, in itself, a ground for punishment. If repeated acts warrant punishment because their cumulative effect substantially constrains autonomy in everyday life, a single incident imposing an equivalent constraint should not be deemed categorically unpunishable merely because it lacks repetition. This article therefore argues that repetition or continuity should become a qualified requirement. This proposal would not eliminate continuity altogether. Rather, it recognizes that repetition or continuity may remain necessary to establish wrongdoing in ordinary cases, while allowing conduct to constitute stalking and harassment without either feature where the severity of the infringement, the degree of control exerted, or the specific danger posed reaches a sufficiently high threshold.

4.2 The Severity of the Infringement Can Compensate for a Lack of Continuity

Continuity and the severity of the infringement should not be assessed in isolation from one another. A single incident may combine highly intrusive surveillance, possession of private information, and an explicit assertion of control, immediately compelling the victim to modify their movements. The law should examine the substance of that conduct rather than require the victim to await its recurrence before qualifying for protection under stalking and harassment legislation.

4.3 An Existing Legislative Model for an Exception Based on Severity

Article 19, paragraph 2, of Taiwan's Civil Service Protection Act provides an exception for severe workplace bullying, under which continuity is not required. This provision illustrates

that continuity is not an indispensable feature of every legal framework governing intrusive or abusive conduct. Legislatures may recognize that a single grave act can itself constitute harm warranting intervention. Because stalking and harassment likewise involve external constraints on autonomy in everyday life, there are grounds for reconsidering the necessity of treating continuity as an absolute threshold.

V. Criminal Punishment and Therapeutic Interventions Require Separate Justification

5.1 Sentencing Cannot Bear the Entire Burden of Prevention

Determining punishment by reference to the perpetrator's proven wrongdoing and culpability is analytically distinct from selecting interventions to address the factors underlying the risk of renewed intrusion. Comparable degrees of wrongdoing may call for different contact restrictions or counseling interventions; comparable future risks do not necessarily entail equivalent criminal culpability for past conduct.

5.2 A Therapeutic Label Does Not Establish Therapeutic Substance

Article 12, paragraph 1, subparagraph 3, of Taiwan's Stalking and Harassment Prevention Act already authorizes courts to require completion of a therapeutic intervention program as part of a protection order [3]. The question, therefore, is not merely whether treatment is available within the statutory framework, but who requires which intervention, on the basis of what assessment, for how long, and under what conditions the intervention may be modified or terminated. Conduct constituting stalking and harassment may involve beliefs about control, deficiencies in conflict management, or other factors. Mental illness cannot be presumed in every case, nor can medical intervention be justified solely because the perpetrator evokes fear. Interventions mandated by protection orders are not equivalent to rehabilitative measures under criminal law. Nevertheless, any measure that substantively restricts liberty must be scrutinized for necessity and compliance with procedural safeguards. Taiwan's Judicial Yuan Interpretations Nos. 799 and 812 both require a clear distinction between rehabilitative measures and criminal punishment. Neither interpretation directly declares therapeutic interventions under the Stalking and Harassment Prevention Act unconstitutional; this article draws instead on their approach to constitutional scrutiny.

VI. A Typology of Conduct Should Inform Individualized Interventions and Sanctions

The eight forms of conduct listed in Article 3 of the Stalking and Harassment Prevention Act differ in how they inflict harm, the extent to which they impair protected legal interests, and the factors that sustain them. A typological analysis should therefore inform the design of sanctions and interventions responsive to individual differences. The purpose of such an analysis is to identify how different forms of conduct produce harm and to guide the selection of appropriate legal responses. For example, surveillance, following, and tailing involve tracking a person's movements and physical proximity. Responses should therefore emphasize prohibitions on approaching the victim, requirements to maintain a specified distance from particular locations, and measures to prevent opportunities for contact. Intrusive communications, unwelcome pursuit, and the sending of items call for restrictions on communication tailored to the channels of intrusion, alongside appropriate counseling addressing difficulties in accepting rejection, recognizing personal boundaries, and relinquishing beliefs that justify control. Threats, denigration, and the use of reputational information to exert pressure require particular attention to the degree of coercion, power relations, and the risk of escalation to violence. Misuse of personal data and the placement of orders in another person's name call for restrictions on data use, measures to stop the intrusion at its source, and remedies for the resulting harm. These measures can be integrated with the protection orders authorized by Article 12 of the Stalking and Harassment Prevention Act, including prohibitions on specified conduct, requirements to stay away from particular locations, and therapeutic interventions.

Differentiation should not, however, entail predetermining the severity of punishment solely by reference to the label attached to the conduct, nor should each category be mechanically assigned a single intervention. The severity of punishment should depend on the wrongfulness of the conduct committed and the perpetrator's culpability. Protective measures and interventions, by contrast, should be tailored to individual needs through a comprehensive assessment of the relational context, motives, capacity to gain access to the victim, and specific risks. Where a perpetrator uses multiple forms of intrusion or switches methods after a particular channel is blocked, interventions must be adjusted as circumstances evolve. Their effectiveness should be assessed by whether the intrusion actually ceases and whether the victim can resume everyday life. Only then can the classification of the eight statutory forms of conduct provide a substantive basis for calibrating sanctions and individualizing

interventions.

VII. Conclusion

Reform of the legal framework governing stalking and harassment should begin by separately establishing the grounds for punishment and the need for protection. Where autonomy in everyday life has already been infringed, the state must specify the nature of the wrongdoing and prove each element of the offense. Where a prospective danger requires preventive intervention, the state must provide a factual basis open to scrutiny and respond with necessary and proportionate measures. These functions are complementary, but neither can substitute for the other.

As regards the scope of protection, the gaps resulting from the mandatory sex-or-gender nexus should be reassessed. Repetition or continuity should become a qualified requirement, allowing single incidents to fall within the statutory framework where the severity of the infringement, the degree of control exerted, or the specific danger posed reaches a sufficiently high threshold. In addition, a typological analysis of the eight forms of conduct listed in Article 3 of the Stalking and Harassment Prevention Act should inform the design of sanctions and interventions tailored to individual circumstances.

Ultimately, the law should enable victims to maintain their everyday lives without having to secure their safety through self-isolation. The statutory framework cannot therefore be regarded as having fulfilled its purpose merely because a warning has been issued, a judgment has become final, or an intervention has concluded. It remains necessary to assess whether the intrusion has ceased, whether the conduct has shifted to other forms or channels, and whether freedom has genuinely been restored. Only by combining clearly defined boundaries of criminal liability with sustained and effective protection can the law meet victims' safety needs while respecting the limits that the rule of law places on the exercise of state power.

Reference:

- [1] The stalking and harassing behaviors specified in this Act refer to any of the following behaviors through the use of persons, vehicles, tools, equipment, electronic communications measures, the Internet, or any other methods to repeatedly or continue to exert anything sexual or gender-related towards a specific person against his/her will, which intimidates such specific person and sufficiently affects his/her daily life or social activities:
1. Monitoring, observing, tracking or learning the whereabouts of the specific person.
 2. Approaching the specific person's residence, place of residence, school, workplace, frequently-visited places by stalking, keeping watch, tailing or any other similar methods.
 3. Warning, threatening, mocking, insulting, discriminating, hateful, disparaging or using other similar words or actions against the specific person.
 4. Interfering with the specific person by telephone, fax, electronic communication measures, the Internet, or other equipment.
 5. Asking for date, to maintain contact, or to pursue the specific person.
 6. Sending, retaining, displaying, or broadcasting texts, pictures, audios, images, or any other items of the specific person.
 7. Notifying or presenting information to the specific person or items that may be harmful to the specific person's reputation.
 8. Misuse of the specific personal data or ordering goods or services for the specific person without his/her consent.

This Act is also applicable to the stalking and harassing behaviors through the use of any of the methods specified in the preceding paragraph to exert anything sexual or gender-related on any specific person's spouse, immediate relatives, cohabiting relatives, or anyone having a close social relationship with such specific person against their will, which intimidates them and sufficiently affects their daily life or social activities.

- [2] Anyone who conducts stalking and harassment may be sentenced to imprisonment of not more than one year or detention; in lieu thereof, or in addition thereto, a fine of not more than one hundred thousand New Taiwan Dollars may be imposed.
- [3] After the conclusion of the hearings, if the court recognizes that stalking and harassment is factually established and intervention is required, it shall issue a protection order including one or more of the following items upon request or per its authority:
3. Order the accused to fully participate in a course of treatment.