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ANTI-STALKING LEGISLATION: DOES IT PROTECT THE VICTIM WITHOUT VIOLATING THE RIGHTS OF THE ACCUSED?

I. INTRODUCTION*

> Despite the threats he has made against our lives, despite his repeated violations of restraining orders, despite the professional assessment of him as dangerous, both the District Attorney and our own attorney have said nothing can be done until he has "done something." What is the "something" they must wait for him to do? Kidnap [my daughter]? Rape her? Kill her? Would you be willing to sit back and wait for this to happen to *your* daughter or *your* son?[1]

More and more stories like Mrs. Poland's are being heard by state legislators in an effort to prompt them to pass anti-stalking laws.[2] Traditionally associated with celebrities and politicians,[3] stalking received national attention in 1989 with the shooting death of actress Rebecca Schaeffer by a man who followed her for two years.[4] In response to Ms. Schaeffer's murder, along with the slayings of four other women in Orange County within eighteen months, California passed the first piece of "anti-stalking" legislation in 1990.[5] In the past three years, forty eight states followed California's lead and passed similar legislation.[6]

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1. *Anti-Stalking Legislation, 1992: Hearings on S. 2922 Before the Senate Judiciary Comm.*, 102d Cong., 2d Sess. 43 (1992) [hereinafter *Hearings*] (statement of Mrs. Sandra Poland, victim's mother).

2. *See, e.g., id.*; *infra* notes 62-63 and accompanying text.

3. Celebrities actually comprise only 17 percent of stalking victims. *Id.* at 4 (testimony of Maine Senator William S. Cohen).

4. *Obsessed Fan Gets Life in Actress' Death*, L. A. TIMES, Dec. 22, 1991, at B5. Robert Bardo followed Schaeffer for two years, sent her letters on numerous occasions, hired a detective to get her address and enlisted the aid of his brother to buy him a gun. *Id.* He eventually shot Schaeffer to death after he rang her doorbell and she answered. *Id.* He was sentenced to life in prison without the possibility of parole. *Id.*

5. *Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) (statement of then California State Senator Edward Royce). Royce has since been elected to the United States House of Representatives and is currently involved in guiding federal anti-stalking legislation through Congress. Karen J. Cohen, *Royce Introduces Federal Stalking Bill*, States News Serv., Feb. 3, 1993, *available in* LEXIS, Nexis Library, SNS File.

6. ALA. CODE §§ 13A-6-90 to -94 (Supp. 1993); 1993 Alaska Sess. Laws 40 (to be codified at ALASKA STAT. §§ 11.41.260-.270); ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1993); 1993 Ark. Acts 379; CAL. PENAL CODE § 646.9 (West Supp. 1993); COLO. REV. STAT. § 18-9-111 (Supp. 1993); CONN. GEN. STAT. ANN. §§ 532-181c to -181d (West Supp. 1993); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE. ANN. §§ 16-5-90 to -91 (Michie Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, paras. 5/12-7.3 to -7.4 (Smith-Hurd 1993); 1993 Ind. Legis. Serv. 242 (West) (to be codified at IND. CODE § 35-45-10); IOWA CODE ANN. § 708.11 (West 1993); 1992 Kan. Sess. Laws 298; KY. REV. STAT. ANN. § 508.130-150 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); 1993 Me. Legis. Serv. 475 (West); 1993 Md. Laws 205 (to be codified at MD. CODE § 27-121B); MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op Supp. 1993); MICH. COMP. LAWS ANN.

The rapid response by so many states confirms that a problem existed with the application of traditional criminal laws to stalking situations. Certain behavior by stalkers, while understandably threatening to the victim, did not rise to a level of culpability sufficient to allow for legal action.[7] Critics of anti-stalking laws, however, fear any legal intervention will criminalize other constitutionally-protected activity.[8] In September 1992, the Senate Judiciary Committee was prompted by Senator William Cohen to recognize the need for federal guidance in drafting constitutionally sound legislation to provide relief for stalking victims.[9] As a result, the National Institute of Justice conducted its own research into the issues and

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§§ 750.411h-.411i (West Supp. 1993); MINN. STAT. ANN. § 609.747 (West Supp. 1993) (harassment); 1992 Miss. Laws 532; 1993 Mo. Legis. Serv. 194 (Vernon); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. §§ 28-311.03 to .04 (Supp. 1992); 1993 Nev. Stat. 233; 1993 N.H. Laws 173; N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. § 30-3A-3 (Michie Supp. 1993); N.Y. PENAL LAW §§ 120.13-15, 240.25 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3 (Supp. 1992); 1993 N.D. Laws 120; 1992 Ohio Laws 234; OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); 1993 Pa. Legis. Serv. 28 (Purdon); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1992); 1992 S.C. Acts 417; S.D. CODIFIED LAWS ANN. § 22-19A (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993); UTAH CODE ANN. §§ 76-5-106.5 to -108 (Supp. 1993); 1993 Vt. Laws 95; VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (Supp. 1993); WIS. STAT. ANN. § 947.013 (West Supp. 1992) (harassment); WYO. STAT. § 6-2-506 (Supp. 1993).

7. Kenneth R. Thomas, *Anti-Stalking Statutes: Background and Constitutional Analysis*, CRS REP. FOR CONG., Sept. 26, 1992, at 1. *See infra* part I discussing inadequacies of both civil and criminal laws prior to stalking legislation enactment.

8. *See, e.g., Sonya Live: Stalker Laws, supra* note 4 (statement of Loren Siegel, ACLU). Ms. Siegel, concerned about potential abuse of the new laws, makes specific reference to types of activities which may violate the stalking laws but may not be unconstitutional. *Id.* Those activities include an investigative reporter seeking out the public figure who is the subject of the report and a father, denied visitation rights to his children, who sits in a parked car outside their school to make sure they are safe. *Id.*

9. S. 2922, 102d Cong., 2d. Sess. (1992), states:

> (A) FINDINGS AND DECLARATIONS. - The Congress finds and declares that - (1) The Criminal Act of stalking other persons is a problem of deep concern; (2) previously available legal recourse against stalking, such as restraining orders, have proven largely ineffective; (3) anti-stalking legislation has been enacted or proposed by several of the states; (4) the constitutionality of several of the states' anti-stalking statutes may be in question; and (5) the Congress has an interest in assisting the states in enacting anti-stalking legislation that is constitutional and enforceable.
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> (B) EVALUATION - The Attorney General, acting through the Director of The National Institute of Justice, shall - (1) evaluate anti-stalking legislation and proposed anti-stalking legislation in the states; (2) develop model anti-stalking legislation that is constitutional and enforceable; (3) prepare and disseminate to state authorities the findings made as a result of the evaluation; and (4) not later than 1 year after the date of enactment of this Act, report to the Congress the findings and the need or appropriateness of further action by the Federal Government.
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> (C) EXPENSES - Expenses incurred in conducting the evaluation and developing model legislation under subsection (B) shall be paid out of funds that are available to the National Institute of Justice for fiscal year 1992.

Id.

Senator Cohen introduced the bill on July 1, 1992. *Id.* On September 29, 1992, the Senate Judiciary Committee held hearings on the bill with testimony or statements offered by the following: Senator William S. Cohen (Maine), Congresswoman Nancy Pelosi (California), Ms. Jane McAllister (victim), Mrs. Sandra Poland (victim's mother), Honorable Perry Bullard (chairman, House Judiciary Committee, Michigan State Legislature), and Mr. Charles B. Dewitt (Director National Institute of Justice). *Hearings, supra* note 1, at iii.

was scheduled to present model legislation to Congress by September 30, 1993.[10] During the spring of 1993, two other major pieces of federal legislation were introduced - one to define stalking as a federal offense[11] and one to reduce the incidence of stalking.[12]

This Note analyzes the various anti-stalking measures in effect with specific attention to the constitutional issues presented. Part II discusses the traditional criminal and civil measures available to stalking victims, and the deficiencies of these measures. Part III surveys the types of anti-stalking statutes passed and the areas they address. Part IV explores constitutional questions raised by the statutes surveyed. Finally, this Note concludes that a delicate balance must be struck between the rights of the victim and of the accused in order for anti-stalking legislation to be effective and constitutional.

II. BACKGROUND

A. *The Inadequacies of Traditional Criminal and Civil Domestic Violence Remedies*

Estimates indicate 4600 reported stalking incidents in the United States in 1991.[13] Stalkers threaten, follow, or harass approximately

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10. Matt Neufield, *Area Officials Praise U.S. Support for Anti-Stalking Laws*, WASH. TIMES, Dec. 25, 1992, at B3. The Justice Department announced in 1992 that it would help fund the project. *Id.* The project is being run by the private nonprofit National Criminal Justice Association, the Federal National Institute of Justice, the American Civil Liberties Union and at least ten other groups. *Id. See* Lynne Marek, *Caucus Pushes for More Female Appointees*, CHI. TRIB., Apr. 25, 1993, at 11. The federal project will study existing domestic violence and anti-stalking laws, mental health commitment statutes, telephone harassment laws and anti-trespassing ordinances as well as gather information on stalking cases before submitting its report to Congress. *Area Officials Praise U.S. Support for Anti-Stalking Laws, supra* note 9. As of the date of this publication, the model legislation and the report to Congress are almost complete. Telephone Interview with Charles Lauer, National Institute of Justice (Aug. 5, 1993).

11. S. 470, 103d Cong., 1st Sess. (1993). Democratic Senator Robert Kreuger from Texas, himself a stalking victim, cosponsored S. 470. *See id.; Washington Briefs*, DALLAS MORNING NEWS, Mar. 3, 1993, at 6A. The bill defines stalking as threats and harassment that occur on federal property such as military bases or Indian reservations and through the use of telephones, the mail or other interstate commerce. S. 470; *see* Cohen, *supra* note 3. Penalties range from two to five years for a first offense and five to ten years for a second offense. S. 470.

12. H.R. 840, 103d Cong., 1st Sess. (1993). The bill was introduced February 4, 1993 by Joseph Kennedy, a Democratic Representative from Massachusetts, and requires all states to enact anti-stalking legislation by September 30, 1994 or lose 25% of their Crime Act Funding. *Id.* Given that 49 states have already passed anti-stalking laws, Kennedy's goal seems well within reach.

H.R. 840 also requires the Bureau of Justice to establish a national database on stalking and domestic violence to permit tracking stalkers from state to state and improve communications between jurisdictions. *Id.* This provision seems particularly helpful for enforcement of restraining orders against stalkers who follow their victims into other states where officials are unaware of existing restraining orders. *See* Penny Bender, *Biden Chastises Delaware on Actions in Stalking Cases*, Gannett News Serv., Mar. 17, 1993, *available in* LEXIS, Nexis Library, GNS File.

13. *Illinois Governor Signs Anti-Stalking Bill*, UPI, July 13, 1992, *available in* LEXIS, Nexis Library, UPI File.

200,000 people each year.[14] Although stalking incidents against men do occur, most victims are women stalked either by strangers or even more likely, by former husbands or boyfriends.[15] In 1992, 1500 women died at the hands of their husbands or boyfriends,[16] — ninety percent of whom may have been stalked prior to the fatal attack.[17] Park Dietz, an expert in clinical psychiatry, predicts that five percent of women in the general population will experience harassment at some time during their lives.[18]

The activity of stalking involves repeated following, harassing, or threatening another or acting in such a way as to create a credible threat of harm in the mind of the victim.[19] Evidence of physical abuse is unnecessary.[20]

Domestic violence, however, is generally defined as any act carried out with the intention of, or perceived intention of, *physically* injuring one's spouse.[21] Examples include, *inter alia*, slapping, hitting, punching, kicking, or throwing objects,[22] all involving an immediate physical presence between the abuser and the victim.

The insufficiency of domestic violence laws in the stalking context are readily apparent. Domestic violence requires a physical component that most often does not exist in stalking cases until it is too late.[23] In addition, stalkers may or may not know their victims, unlike domestic abuse situations.[24] Yet, prior to 1990, the only remedies available to a stalking victim

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14. Penny Bender, *Survivors Ask for Federal Anti-Stalking Legislation*, Gannett News Serv., Mar. 17, 1993, *available in* LEXIS, Nexis Library, GNS File.

15. Melinda Beck et al., *Murderous Obsession*, NEWSWEEK, July 13, 1992 at 60. A tragic example is recounted by the surviving parents of Glenn Beach and Karen Erjavec. *See id.* Karen met Ken Kopecky a wedding. *Id.* Even though Karen was already dating Glenn Beach, Ken Kopecky became infatuated with Karen. *Id.* After months of harassment and vandalism, Ken Kopecky entered the Beaches' home and shot Glenn six times in the back and stabbed him twice. *Id.* Karen was shot in the head at close range. *Id.*

16. Joseph Kirby, *Law Enforcement Takes a New Approach to Domestic Violence*, CHI. TRIB., Aug. 23, 1992, at A3. A study released by the Centers for Disease Control in Atlanta reported that four to eight million women are victims of domestic violence each year and that domestic abuse may be responsible for more injuries to women than minor auto accidents, rapes and muggings combined. *See id.* The Justice Department reports that of all violent acts perpetrated against women, 9% are by husbands, 35% are by ex-husbands and 32% are by boyfriends. *See Nightline: Anti-Stalking Laws*, (ABC television broadcast, Sept. 3, 1992).

17. *See* Beck et al., *supra* note 15, at 60.

18. Maria Puente, *Legislators Tackling the Terror of Stalking, But Some Experts Say Measures Are Vague*, USA TODAY, July 21, 1992, at 9A.

19. *See infra* notes 64-66 and accompanying text.

20. *See infra* part I.A.

21. *See* Steven M. Cook, *Transition: Domestic Abuse Legislation in Illinois and Other States: A Survey and Suggestions for Reform*, 1983 U. ILL. L. REV. 261 n.2 (1983).

22. *Id.*

23. *See, e.g.*, Beck et al., *supra* note 15 (young couple murdered by known stalker, no prior attempted physical injury); *Obsessed Fan Gets Life in Actress' Death*, *supra* note 4 and text therein (actress murdered by stalker after two years of stalking and no prior attempted physical injury or contact); *Sonya Live: Stalker Laws*, *supra* note 5 (police told stalking victim "[l]et us know when he attacks you physically, and then we can get involved").

24. *See* Rene Riley-Adams, *Can Laws Stop the Obsessed?*, The Times, Feb. 22, 1993, *available in* LEXIS, Nexis Library, Times File. Stalkers typically emanate from three different scenarios: those who create a relationship with someone whom they have never met, usually a celebrity; those who exaggerate a cursory relationship into something obsessive; and, those who cannot let go of an actual soured relationship. *See id.*

came from existing domestic violence laws.[25] These traditional remedies, designed to rescue women from abusive boyfriends or spouses, quickly proved inadequate to victims of stalkers.[26]

1. Criminal Remedies

Prior to the enactment of stalking laws, virtually no criminal sanctions existed to protect the victim. While stalkers engaged in behavior obviously threatening to the victim, their conduct did not always rise to the level of a criminal violation.[27] The crime of assault, for example, requires an individual who attempts to place or places another in reasonable apprehension of being subjected to *immediate* physical harm.[28] In most instances of stalking, unlike domestic violence, the proximity requirement for assault does not exist.[29] As long as the stalker remained far enough away from the victim that a reasonable person would not feel immediately threatened, no assault occurred.

Types of conduct often reported by victims of stalkers include: harassing letters and threatening phone calls, repeated driving by the victim's house, sitting in a car watching the victim, following the victim down the street, and appearing at all times and all places.[30] None of this conduct is a *per se* violation of the law except perhaps the phone calls.[31] Gathered together in the mind of one person, however, these activities cause great

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25. California enacted the first anti-stalking legislation in 1990. CAL. PENAL CODE § 646.9 (West Supp. 1993).

26. *See Hearing of the Senate Judiciary Committee*, Fed. News Serv., Mar. 10, 1993, *available in* LEXIS, Nexis Library, Fednew File. In her confirmation hearings, Janet Reno stated that "under the laws that existed prior to the anti-stalking law, it was impossible to perfect — or develop evidence sufficient to prosecute." *Id.*

27. Thomas, *supra* note 7, at 3.

28. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 163 (3d ed. 1982).

29. *See, e.g.*, Beck et al., *supra* note 15 (young couple murdered by known stalker who mailed threatening letters, made threatening phone calls, and vandalized property).

30. *See generally*, Michael Matza, *When Attraction Turns Obsessive It May Seem Harmless. But to Victims, Stalking Means a Life of Fear*, PHILA. INQUIRER, May 23, 1993, at A1 (discussing need for anti-stalking law where stalking occurs under similar situations); Beck, *supra* note 15, at 60 (discussing legislatures' responses to similar acts); Max Albright, *Tired of Not Living at All; Amarillo Woman's Plight Highlights Need for Stalking Law*, HOUS. CHRON., Dec. 13, 1992, at 3 (stalker's repeated phone calls, following the victim, coming to her house, and ignorance of peace bonds highlighted need for anti-stalking legislation in Texas); *Sonya Live: Stalker Laws*, *supra* note 5 (discussing California's stalking law); *Sonya Live: Stalking*, (CNN television broadcast, Oct. 2, 1992) (discussing whether stalking should be a crime).

One stalking victim is Tammy Acker, now 19, who received numerous letters and gifts over the last four years from a man she knew casually through a church group. Matza, *supra*. One note, written to Tammy's sister when Tammy was fifteen, requested explicit information about Tammy. *Id.* The note read, "I need numbers (example 36-24-36) so that I can buy her nice things and maybe a few naughty things for a honeymoon," and was eventually traced to a man who drove a gold Chevrolet Beretta repeatedly past Tammy's house. *Id.* Tammy was unable to get a restraining order against her harasser because they were never romantically involved. *Id.*

31. TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993). In Texas, telephone harassment is a Class B misdemeanor punishable by six months in jail and a $1500 fine. TEX. PENAL CODE ANN. § 12.22 (West 1993); *See also* Albright, *supra* note 31, at 3. A federal violation may result in up to $50,000 in fines or six months imprisonment, or both. 47 U.S.C. § 223(a) (1988).

fear and intimidation.[32] Such fear certainly acts to infringe upon one's individual freedoms.[33]

Those who did violate the law, perhaps under telephone harassment laws, usually committed only misdemeanors and ended up with fines or probation.[34] The resulting arrest without subsequent prosecution or incarceration often served to aggravate the circumstances for the victim.[35] Mr. Dietz found "as a general rule, [the arrest] is perceived by the mentally ill stalker as a confirmation of the relationship, and by the less seriously ill stalker as an angering challenge."[36] Under previous criminal laws, the stalker who continued to haunt, harass, or frighten a victim in full view of a police officer committed no crime.[37]

2. Civil Remedies

The primary civil remedy available to a stalking victim, and the only basis upon which an individual can prevent another from approaching her, her home or her work, is a protective order.[38] A court will order someone to maintain a certain distance from another upon sufficient proof of a rational fear of imminent harm in the mind of the victim.[39] Violations of the order generally result in contempt proceedings with penalties ranging from six months to a year in jail.[40] In some states, a violation constitutes a misdemeanor and/or contempt or, a felony and/or contempt.[41]

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32. *See e.g., Sonya Live, supra* note 5. Fifteen year-old Erin Tavegia reported to the police every time she was followed home from school by a 49 year old man over a 14 month period. *Id.* He offered her money and rides home. *Id.* The police had an eight-inch thick file on the stalker but he had not broken any laws, and all the police could tell Erin's mother was to protect her. *Id.* Erin's mother said of the stalking, "It was absolutely terrifying." *Id.*

33. A stalker's actions may violate certain fundamental constitutional rights because of the constant following and spying. Freedom to associate and privacy are constitutionally protected rights. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1964); NAACP v. Alabama, 357 U.S. 449, 462 (1957).

34. Thomas, *supra* note 7, at 3-4.

35. *See* Puente, *supra* note 18.

36. *Id.*

37. *See, e.g., Sonya Live: Stalker Laws, supra* note 5. The police had a video tape of the stalker on three separate occasions offering fifteen year old Erin Tavegia money, speaking to her, always bordering on being sexual. *Id.* Despite the existence of an eight inch thick file on the stalker, the police refused to act and merely warned her mother to "protect her." *Id.*

38. Thomas, *supra* note 7, at 3-4. Other remedies may include common law actions for damages grounded in trespass, invasion of privacy, assault, or intentional infliction of emotional distress. Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 997 (1993).

39. *See* Thomas, *supra* note 7, at 3-4. A typical restraining order prevents the stalker from coming within two hundred yards of the victim. *See, e.g.*, George Lardner, Jr., *The Stalking of Kristin; The Law Made It Easy for My Daughter's Killer*, WASH. POST, Jan. 22, 1992, at C1.

40. Cook, *supra* note 21, at 272, 272 n.78 and statutes cited therein.

41. *See, e.g.*, COLO. REV. STAT. §§ 14-4-105, 18-1-106, -6-803.5 (Supp. 1993) (sentences range from six months to eighteen months in duration and may constitute a misdemeanor or felony and also permits recourse under civil or criminal contempt); KAN. STAT. ANN. § 60-3110 (1983) (no sentence stated for contempt); N.D. CENT. CODE §§ 12.1-32-01, 14-07.1-06 (1985 & Supp. 1993) (sentences range from one year to five years and violation is both a misdemeanor and contempt or felony and contempt).

Protective order legislation was initially enacted to provide immediate relief to victims of domestic abuse.[42] Thought to be the perfect solution, such orders offered victims physical protection as well as ordering the offender to provide financial support where the offender previously provided the household income.[43] Problems quickly surfaced, however, which made the effectiveness of protective orders in stalking situations clearly inadequate.[44]

First, unlike criminal remedies that place the burden on the criminal justice system to seek out violators and prosecute them, civil protection orders require the victim to come up with sufficient evidence of an imminent threat.[45] The victim must keep track of constant "violations" by the stalker and be able to present enough evidence to satisfy the court to issue a restraining order.[46]

In domestic violence cases, the plaintiff must show the defendant attacked, beat, molested, or otherwise threatened bodily harm.[47] Often times the plaintiff wears her evidence to court as a black eye or a swollen lip. No similar physical evidence exists for stalking victims upon which to base the need for protection.[48] Many stalking victims resort to keeping track of letters received, phone calls or visits from the stalker in order to capture the court's attention.[49] Sometimes the victim's word against the stalker's offers the only proof available. The victim's word alone may be unconvincing if a judge or prosecutor harbors any lingering attitudes about unnecessary domestic violence claims.[50]

A second and perhaps greater problem involves the enforcement of restraining orders, sometimes referred to as "paper shields."[51] According to a federal study done by the Urban Institute in Washington, D.C., only twenty percent of restraining orders violated result in arrests.[52] All too

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42. Cook, *supra* note 21, at 272.

43. *Id.* at 273-74. Typical relief includes support payments for any children and restitution for out-of-pocket expenses incurred by the victim. *Id.* Because each state's legislation varies significantly in its scope of relief, the reader should review her own applicable state statute. *Id.* at 274 n.84.

44. Thomas, *supra* note 7, at 4.

45. *Id.*

46. *See id.* Senator Robert Krueger and his wife endured visits, calls in the middle of the night, and threatening notes for four years before the police could arrest the man responsible. Bender, *supra* note 14. Senator Krueger has a "pile of letters and answering machine tapes . . . many with threats that were obscene and graphic." *Id.*

47. *See* Rebecca S. Bromley, *Injunctive Remedies for Interpersonal Violence*, 18 COLO. LAW. 1743 (1989); Cook, *supra* note 21, at 261 n.2, 272.

48. *See supra* notes 21, 28-29 and accompanying text.

49. *Nightline*, *supra* note 16; *see e.g.*, *supra* note 46 and accompanying text.

50. *See* Cook, *supra* note 21, at 269; *see generally*, Guy, Jr., *supra* note 38, at 999 ("Prosecutors sometimes are hesitant to press for harassment convictions because the punishment is too light to effect deterrence."). Many judges, when faced with domestic abuse cases, do not feel the court should get involved in family arguments, and believe that reconciliation within the family is preferred to criminal punishment of the husband. *See* Cook, *supra*, at 269. These same judges, when presiding over the case of a woman being stalked by her ex-husband, may also refuse to get the courts involved. *See id.*

51. *See* Kevin Fagan, *New Focus on Deadly Stalkers*, S. F. CHRON., Jan. 11, 1993, at A1.

52. Fawn Germer, *Arrests Rare for Abusers Who Violate Orders*, ROCKY MTN. NEWS, Aug. 29, 1993, at 4A.

often enforcement happens too infrequently and too late.[53] Most stalkers know that restraining orders are rarely enforced.[54] Others discover that some protective orders only last for a limited period of time, and simply wait them out.[55]

In the minds of those desperate for attention from their prey, restraining orders present no real barrier. To those victims of stalking desperate for some relief from the incessant fear, the orders prove similarly meaningless.

III. A SURVEY OF STATE STALKING LEGISLATION

In response to the murder of four young women in California within a month and a half, California enacted the first anti-stalking law in order to bridge the gap between existing domestic violence remedies and the needs of stalking victims.[56] Each had obtained temporary restraining orders against her attacker; each communicated with her family, her friends, and the police that she thought she was going to be killed.[57] Despite all the resources available to protect these women, they all died.[58]

As of August 1993, forty-eight other states have followed California's lead.[59] Oregon's statute, the only one yet to be enacted, is currently pending in committee.[60] Sadly, the approval for these statutes often came only after a violent and brutal attack on a member of that community.[61] Some

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53. *See* Beck et al., *supra* note 15, at 60. Kristin Lardner, whose death motivated Senator Cohen to propose federal anti-stalking legislation, sought and received a one-year protection order against her ex-boyfriend in mid-May 1992. *Hearings, supra* note 1, at 15. He shot and beat her to death on a Boston street on May 30, 1992. *Id.*

54. *See* Cook, *supra* note 21, at 275; Thomas, *supra* note 7, at 5. When originally written, most domestic abuse legislation did not provide police with proper procedures for enforcement of civil protective orders. *See* Cook, *supra*, at 275 nn.94-95. Some statutes did not provide any authority to enforce them and, as a result, police officers either felt or were powerless to arrest the violator. *See id.* In addition, police officers, like some judges, were traditionally more concerned with making peace in the household than in making an arrest. *See* Kirby, *supra* note 16, at A3. These attitudes have changed more recently. *See id.*

55. *See Sonya Live: Stalker Laws, supra* note 5. Temporary restraining orders generally last about 48 hours. *Id.*; *see generally* Cook, *supra* note 22, at 273 n.81 for citations to various state statutes.

56. CAL. PENAL CODE § 646.9 (West Supp. 1993). See *infra* note 172 for full text of statute.

57. *Sonya Live: Stalker Laws, supra* note 5.

58. *See id.* One woman had been stalked for ten years. *Id.* The stalker followed her from Germany and threatened to kill her if she ever got married. *Id.* The stalker murdered her even though she had obtained a temporary restraining order against him. *Id.*

59. *See* statutes cited *supra* note 6.

60. Or. S. 833, 67th Leg., Reg. Sess. (1993).

61. *See, e.g., Illinois Governor Signs Anti-Stalking Bill, supra* note 13. Steven Johnson allegedly stalked his estranged wife, then shot her in the parking lot of a suburban Chicago store on July 7, 1992. *Id.* Illinois' anti-stalking law passed on July 12, 1992. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd 1993).

Colorado's legislature approved a bill to discourage stalkers in response to the shooting of a Fort Collins woman by her ex-husband on the steps of the police station where she sought refuge. Peggy Lowe, *Bracelet Designed to Deter Stalkers of Women*, L.A. TIMES, Sept. 27, 1992, at B6. Wisconsin acted after a stalking victim was fatally stabbed 19 times and Virginia responded to a mother's account of a stalker who murdered then burned her daughter's body. Beck et al., *supra* note 15, at 60.

states passed laws which took immediate or emergency effect.[62] This section presents a general survey of the types of statutes passed and the issues they address.

A. *"Stalking" Defined*

Typically, the offense of stalking involves a particular course of conduct coupled with the requisite intent. Most statutes define the conduct as willful, malicious and repeated following or harassing of another person.[63] The intent requirement usually includes either a credible threat of violence towards the victim,[64] or knowingly placing the victim in fear of death or bodily injury.[65]

Some states use broader language to define both elements of stalking,[66] while others are more specific.[67] Initially, West Virginia had the most narrowly drawn provision, requiring the defendant to:

> intentionally and closely follow, lie in wait, or make repeated threats to cause bodily injury to any person with whom that person formerly resided or cohabited or with whom that person formerly engaged in a sexual or intimate relationship, with the intent to cause said person emotional distress or place said person in fear of his personal safety.[68]

The previous relationship requirement presented some concerns in relation to prosecution under this statute because the stalker and victim often

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62. *See* COLO. REV. STAT. § 18-9-111 (Supp. 1993); HAW. REV. STAT. § 711.1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1993); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd 1993) OKLA. STAT. ANN. tit. 21 § 1173 (West Supp. 1993); 1993 Pa. Laws 28; TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993).

63. *See, e.g.,* CAL. PENAL CODE § 646.9 (West Supp. 1993); MASS. ANN. LAWS ch. 265, § 43; 1992 Ohio Laws 234; WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993).

64. *See, e.g.,* CAL. PENAL CODE § 649.9. "Credible threat" is most often defined 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. *See id.* Many states also protect the immediate family members subject to any credible threat by the defendant. *See, e.g., id.*; IDAHO CODE § 18-7905 (Supp. 1992); OKLA. STAT. ANN. tit. 21, § 1173(A) (West Supp. 1993); WYO. STAT. § 6-2-506 (Supp. 1993). Hawaii broadens the definition to include harm to the victim or "another." HAW. REV. STAT. § 711-1106.5 (Supp. 1992).

65. *See, e.g.,* ALA. CODE § 13A-6-90 (Supp. 1993). New Hampshire requires the stalker to threaten death or bodily injury. 1993 N.H. Laws 173.

66. *See, e.g.,* KY. REV. STAT. ANN. § 508.130 (Michie/Bobbs-Merrill Supp. 1992) (defining the offense of stalking as engaging in an intentional course of conduct directed at a specific person(s) which seriously alarms, annoys, intimidates or harasses the person, and which serves no legitimate purpose); TENN. CODE ANN. § 39-17-315(a)(1) (Supp. 1992) (stalking occurs when a person "[i]ntentionally and repeatedly follows a specific person; . . . or [i]ntentionally commits a series of other acts evidencing a continuity of purpose to seriously alarm, annoy or harass a specific person. . . . "). Virginia's statute reaches further to one who "engages in conduct with intent to cause emotional distress to another person by placing that person in reasonable fear of death or bodily injury. . . . " VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993).

67. *E.g.,* GA. CODE ANN. § 16-5-90 (Michie Supp. 1993) (outlining the type of threat required and specifying that the suspect must physically appear near the victim somewhere other than at the defendant's home); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993) (same). Illinois also requires the appearance to occur on more than one occasion. ILL. ANN. STAT. ch. 720, para. 5/12-7.3.

68. W. VA. CODE § 61-2-9a (1992).

times do not know one another.[69] West Virginia has since adopted a more victim-favorable statute.[70] Some states, such as Minnesota, specifically provide that the relationship between the stalker and victim does not matter.[71]

A minority of jurisdictions provide that the mere occurrence of particular conduct under the statute, without any threat or intent to harm, constitutes stalking.[72] Both Florida and Mississippi define stalking as willfully, maliciously and repeatedly following or harassing another person *or* making a credible threat.[73] Statutes, like Florida's, present particular potential constitutional dilemmas with regard to vagueness.[74]

The harshest stalking law to date exists in Michigan where the victim need only establish a reasonable fear of harm to meet the statute's requirement.[75] In order to avoid some of the enforcement concerns raised about other states' laws, the Michigan State Legislature chose to focus on the harm to the victim rather than the mind of the defendant.[76] This eliminates the need for victims to convince authorities that the stalker intends to harm them.[77]

Other states, including Arizona,[78] Maine,[79] Minnesota,[80] and New York,[81] passed laws which do not specifically address stalking, but essen-

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69. *See* Puente, *supra* note 18, at 9A; Riley-Adams, *supra* note 24; *Hearings, supra* note 1, at 34 (statement of Sandra Poland).

70. 1993 W. Va. Acts 30 (to be codified at W. VA CODE § 61-2-9a). The amendment to the stalking statute, in pertinent part, provides:

> Any person who knowingly, willfully and repeatedly follows and harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or serious bodily injury shall be guilty of a misdemeanor and, upon conviction thereof, shall be incarcerated in the county jail for not more than six months or fined more than one thousand dollars, or both.

Id.

71. *See, e.g.*, MINN. STAT. ANN. § 609.748(1) (West Supp. 1993).

72. *See, e.g.*, DEL. CODE ANN., tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West. Supp. 1993); IDAHO CODE § 18-7905 (Supp. 1992); 1992 Miss. Laws 532; TENN. CODE ANN. § 39-17-315 (Supp. 1992). Kansas, while not requiring any threat from the stalker, narrowly defines the conduct necessary to commit stalking as "willful, malicious and repeated following *and* harassment. . . ." 1992 Kan. Sess. Laws 298 (emphasis added).

73. FLA. STAT. ANN. § 784.048 (Supp. 1993); 1992 Miss. Laws 532.

74. *See* discussion *infra* part III.A.

75. MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993).

76. *Hearings, supra* note 1, at 64 (statement of Michigan State Representative Perry Bullard). Statutes that require an intent to harm rely on the mental state of the defendant. *See, e.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1993). The victim must convince the authorities that the requisite intent existed in the stalker's mind. *See, e.g., id.* Michigan's legislature decided to ease the burden on the victim by relying instead on the victim's "reasonable fear." *See CNN News: Michigan Legal System Takes Stalking Very Seriously* (CNN television broadcast, Jan. 1, 1993).

77. *CNN News, supra* note 76.

78. ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1993).

79. 1993 Me. Legis. Serv. 475 (West).

80. MINN. STAT. ANN. § 609.748 (West Supp. 1993).

81. N.Y. PENAL LAW § 240.25 (McKinney Supp. 1993). The New York statute, in pertinent part, states:

> A person is guilty of harassment in the first degree when he or she intentionally and repeatedly harasses another person by following such person in or about a public place or places by engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury.

tially apply to the same type of conduct. For example, Minnesota's "harassment" law involves repeated, intrusive, or unwanted acts, words or gestures intended to adversely affect the safety, security or privacy of another.[82] Maine's legislature expanded their harassment law to prohibit engaging in behavior associated with stalking after a warning by any "sheriff, deputy sheriff, constable, police officer or justice of the peace," or by court order.[83]

B. *Types of Conduct*

Generally the conduct involved includes some type of pattern over a period of time with a specific continuity of purpose.[84] Some statutes require the conduct to occur on more than one occasion.[85] Some exceptional provisions include harassment by telephone,[86] fax,[87] or "placing an object on, or delivering an object to, property owned, leased or occupied by that person."[88] Due to potential constitutional vagueness or First Amendment issues,[89] most statutes highlight specific areas of activity not included, most importantly "constitutionally protected conduct."[90] Unfortunately, this phrase alone does little to offset any vagueness concerns.[91] Other types of conduct explicitly excluded from prosecution under anti-stalking laws include: labor picketing;[92] that in furtherance of law enforcement;[93] of a reporter;[94] of a private detective;[95] of a process server;[96] or, during the course of a lawful business activity.[97]

Id. The New York law is designed to address "the repetitive type of stalking conduct" previously unrecognized. Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J., Aug. 20, 1992, at 1.

82. MINN. STAT. ANN. § 609.748 (West Supp. 1993).

83. 1993 Me. Legis. Serv. 475 (West).

84. *See, e.g.*, CAL. PENAL CODE § 646.9(d) (West Supp. 1993).

85. *See, e.g.*, HAW. REV. STAT. § 711-1106.5 (Supp. 1992); MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993).

86. 1993 Alaska Sess. Laws 40; MONT. CODE ANN. § 45-5-220 (1993); WYO. STAT. § 6-2-509 (Supp. 1993).

87. 1993 Alaska Sess. Laws 40; WYO. STAT. §'6-2-509.

88. 1993 Alaska Sess. Laws 40.

89. *See* discussion *infra* part III.A.

90. *See, e.g.*, IDAHO CODE § 18-7905 (Supp. 1992); KY. REV. STAT. ANN. § 508.130 (Michie/Bobbs-Merrill Supp. 1992). Michigan State Representative Perry Bullard, testifying before the Senate Judiciary Committee, believed that his legislature drafted an anti-stalking law which was both enforceable and constitutional. *Hearings, supra* note 1, at 64. See MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993). Although conduct previously legal would now be illegal under the law, Bullard stressed that the legislature included a detailed set of definitions which focus on the harm to the victim rather than the specific mental intent of the stalker. *Id. See* n.97 *infra* and accompanying text.

91. *See* discussion *infra* part III.A.

92. CAL. PENAL CODE § 646.9 (West Supp. 1993); DEL. CODE ANN tit. 11, § 1312A (Supp. 1992) (creates a rebuttable presumption against stalking if during labor activity); ILL. ANN. STAT. ch. 720, Para. 5/12-7.3, 7.4 (Smith-Hurd 1993); NEB. REV. STAT. § 28-311.05 (Supp. 1992).

93. DEL. CODE ANN. tit. 11, § 1312A.

94. 1993 Nev. Stat. 233.

95. *Id.*

96. 1993 Ark. Acts 379.

97. *See, e.g.*, GA. CODE ANN. § 16-5-92 (Michie Supp. 1993); TENN. CODE ANN. § 39-17-315 (Supp. 1992).

C. *Penalties*

1. Jail and Fines

Thirty-six out of the forty-nine states with stalking laws provide both misdemeanor and felony classifications.[98] A first offense may draw up to one year in jail and a $1000 fine.[99] Subsequent offenders sometimes incur higher penalties ranging from two to five years[100] in jail and $1,000 to $10,000 in fines.[101] The range of subsequent penalties depends on such factors as: whether a protective order was violated,[102] the victim's age,[103] or whether a deadly weapon was involved.[104]

Nine states provide only misdemeanor classifications,[105] with Utah requiring only six months in jail per offense.[106] In contrast, Alabama, Arkansas, Delaware, and Illinois maintain felony classifications with penalties ranging from six months to twenty years.[107]

Few statistics exist regarding prosecutions and convictions under stalking laws because they are so new. The Judicial Council of California

98. 1993 Alaska Sess. Laws 40; CAL. PENAL CODE § 646.9 (West Supp. 1993); CONN. GEN. STAT. ANN. §§ 532-181c to -181d; FLA. STAT. ANN. §§ 784.048(2), (3) (West Supp. 1993). GA. CODE. ANN. §§ 16-5-90 to -91 (Michie Supp. 1993); IDAHO CODE § 18-7905 (Supp. 1992); 1993 Ind. Legis. Serv. 242 (West) (to be codified at IND. CODE § 35-45-10); IOWA CODE ANN. § 708.11 (West 1993); KY. REV. STAT. ANN. § 508-130-150 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); 1993 Me. Legis. Serv. 475 (West); MASS. ANN. LAWS. ch. 265, § 43 (Law. Co-op Supp. 1993); MICH. COMP. LAWS ANN. §§ 750.411h-.411i (West Supp. 1993); MINN. STAT. § 609.748 (West Supp. 1993); 1992 Miss. Laws 532; 1993 Mo. Legis. Serv. 194 (Vernon); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. §§ 28-311.03 to -311.04 (Supp. 1992); 1993 Nev. Stat. 233; 1993 N.H. Laws 173; 1993 N.M. STAT. ANN. § 30-3A-3 (Michie Supp. 1993); N.Y. PENAL LAW §§ 120.13-.15, 240.25 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3 (Supp. 1992); 1993 N.D. Laws 120; 1992 Ohio Laws 234; OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); 1993 Pa. Legis. Serv. 28 (Purdon); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1992); S.D. CODIFIED LAWS ANN. § 22-19A (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993); 1993 Vt. Laws 95; WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); WIS. STAT. ANN. § 947.013 (West Supp. 1992); WYO. STAT. § 6-2-506 (Supp. 1993).

99. *See, e.g.*, Idaho Code § 18-7905(b), 1992 S.C. Acts 417.

100. *E.g.*, MASS. ANN. LAWS ch. 265, § 43.

101. *See* CAL. PENAL CODE § 646.9; WASH. REV. CODE ANN. § 9A.46.110

102. *E.g.*, CONN. GEN. STAT. ANN. §§ 532-181c, 181d; KY. REV. STAT. ANN. § 508.130.

103. *E.g.*, CONN. GEN. STAT. ANN. § 532-181c. Connecticut upgrades stalking in the second degree, a misdemeanor, to a first degree felony offense if the victim is under sixteen years of age. *Id.*

104. *E.g.*, KY. REV. STAT. ANN. § 508.130.

105. ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1993); COLO. REV. STAT. § 18-9-111 (Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); 1992 Kan. Sess. Laws 298; 1993 Md. Laws 205 (to be codified at MD. CODE § 27-121B); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); 1992 S.C. Acts 417; UTAH CODE ANN. § 76-5-106.5 (Supp. 1993); W. VA. CODE § 61-2-91 (Supp. 1993).

106. UTAH CODE ANN. § 765-106.5 (1992).

107. *See* ALA. CODE §§ 13-A-6-90 to -91 (Supp. 1993); 1993 Ark. Acts 379; DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to -7.4 (Smith-Hurd 1993). Illinois created a higher level of felony for "aggravated stalking" committed by a stalker who causes bodily harm, confines or restrains a victim or violates a court order. *Id.* A second or subsequent conviction for aggravated stalking may result in up to seven years of imprisonment. *See* Donna Hunzeker, *Stalking Laws*, 17 ST. LEGIS. REP. 19, Oct. 1992, at 1. Alabama also has an aggravated stalking statute. ALA. CODE § 13-A-6-91. A violation constitutes a class B felony punishable for up to twenty years in prison. *Id.* at § 13-A-5-6 (1975).

reports that through December 31, 1991 ten persons received convictions and sentences under California's 1990 stalking law.[108] In November 1992, Chicago sentenced its first defendant under the new Illinois law to two years in prison after he pled guilty.[109]

In December 1992, the first trial under Illinois' statute resulted in the defendant's acquittal.[110] The jury's verdict confirmed some critics' fears about the filing of false claims.[111] The defendant's wife accused him of telephoning and threatening to kill her and intimidating her at her place of employment.[112] The defense argued that she was angry that her ex-husband failed to appear at their divorce proceedings.[113] The jury deliberated for less than an hour.[114] By that time, the defendant had already spent 132 days in jail.[115]

2. Bail Provisions

In some states, a judge protects alleged or potential victims through the bail process by increasing the likelihood of the defendant's detention.[116] In Ohio, courts must consider certain factors before establishing bail such as: the alleged perpetrator's history of violence, mental health, history of violating court orders, the level of the threat, and how detention interferes with treatment or counseling for the alleged perpetrator.[117]

In Illinois, a court may deny bail if the release of the defendant "poses a real and present threat to the physical safety of the alleged victim of the offense, and denial of release on bail or personal recognizance is necessary to prevent fulfillment of the threat upon which the charge is based."[118] These provisions present unique problems regarding the defendant's due process rights.[119] In Georgia, as a condition of bail the court may prohibit the defendant from appearing at the victim's school, work or other location where the victim may be present.[120]

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108. Hunzeker, *supra* note 107, at 3. The first person sentenced in California, Mark David Bleakley, received probation and was ordered to serve time in a psychiatric facility. Beck et al., *supra* note 15, at 60. He wandered away from the facility and appeared outside the victim's health club where police apprehended him. *Id.* His subsequent conviction yielded three years in prison. *Id.*

109. Terry Wilson, *Stalking Law Sees First Conviction; Man Gets 2-Year Sentence for Terrorizing Ex-Girlfriend*, CHI. TRIB., Nov. 25, 1992, at 3.

110. Curtis Lawrence, *First Stalking Trial Results in Acquittal*, CHI. TRIB., Dec. 19, 1992, at 6. All previous defendants pled guilty and thus no trials ensued. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *See, e.g.*, ILL. ANN. STAT. ch. 725, Para. 5/110-6.3 (Smith-Hurd 1993).

117. 1992 Ohio Laws 536.

118. ILL. ANN. STAT. ch. 725, para. 5/110-6.3(a); *see also* GA. CODE ANN. § 17-6-1(b)(3)(B) (Michie Supp. 1993) ("the judge of a court of inquiry may impose such conditions on the defendant which may be necessary to deter further stalking of the victim, including but not limited to denying bail or pretrial release"). These types of provisions may give victims the courage to file charges against a stalker. *See Nightline*, *supra* note 16.

119. *See* discussion *infra* part III.D.

120. GA. CODE ANN. § 17-6-1(b)(3)(A).

3. Warrantless Arrest

A number of states allow police to arrest alleged stalkers without a warrant as long as the officer has probable cause to believe the stalking occurred.[121] New Hampshire requires the officer to believe the stalking incident occurred within six hours in order to arrest without a warrant.[122] Many states like Maine and Minnesota also provide for arrest without a warrant where the stalker violates a restraining order already in place.[123] The constitutionality of these warrantless arrest provisions is discussed below.[124]

4. Probation

If the offense of stalking occurs in violation of a protection order in Massachusetts, the defendant must serve the mandatory sentence with no eligibility for probation, parole, furlough, work release, or sentence reduction for good conduct.[125] Under Michigan's law, a misdemeanor conviction yields a maximum of five years probation while a felony conviction results in a mandatory five years probation.[126] Texas prohibits the granting of any furloughs to defendants convicted of stalking.[127]

5. Other Provisions

Michigan, in focusing on the needs of the victim, provides for a rebuttable presumption that stalking occurred where the defendant's actions took place after the victim asked the defendant to discontinue any contacts.[128] In addition, victims in Michigan may file a civil suit for damages against their stalkers.[129]

Colorado's law creates an express duty for peace officers to respond to stalking complaints and to cooperate with the victim.[130] This provision could prove very useful given the number of restraining orders that are not enforced.[131]

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121. *See, e.g.*, FLA. STAT. ANN. § 784.084 (West Supp. 1993) ("Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section"); 1992 Ohio Laws 234 (allowing for specified peace officers to arrest and detain, pending a warrant, any person believed to be guilty of committing menacing by stalking or aggravated trespass). *See also* 1993 Ind. Legis. Serv. 242 (West) (to be codified at IND. CODE § 35-45-10); 1993 Md. Laws 205 (to be codified at MD. CODE § 27-121B); 1993 Pa. Legis. Serv. 28 (Purdon).

122. 1993 N.H. Laws 173.

123. *E.g.*, 1993 Me. Legis. Serv. 475 (West); MINN. STAT. ANN. § 609.748 (West Supp. 1993).

124. *See* discussion *infra* part III.C.

125. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

126. MICH. COMP. LAWS ANN. § 771.2 (West 1982).

127. TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993).

128. MICH. COMP. LAWS ANN. §§ 750.411h-.411i (West Supp. 1993).

129. *Id.* at § 600.2954.

130. COLO. REV. STAT. § 18-9-111(6) (Supp. 1993). This provision should address any concerns similar to those expressed in Lardner, *supra* note 38.

131. *See supra* note 51 and accompanying text.

Colorado also recently began an experimental program to decrease the number of domestic violence offenders.[132] In Arapahoe County, a known offender wears an electronic bracelet that sounds an alarm if the offender goes near the person who filed the harassment complaint.[133] The device broadcasts a simultaneous signal to the police through a communications center.[134] The victim, knowing the police are on the way, receives training in how to handle the offender should he come near.[135]

At pretrial and upon conviction, the offender is given the option of wearing the bracelet, going to jail, or posting bond.[136] In addition, offenders receive treatment while wearing the bracelet to discourage any further obsessive behavior.[137]

Some states require the court to notify the victim at certain junctures during sentencing or incarceration.[138] Georgia provides notice to any stalking victim of: 1) any bail hearing scheduled for the defendant; 2) the defendant's release from custody; and 3) the defendant's escape from prison.[139] These provisions permit a stalking victim to appear at the bail hearing to argue for higher bail and also provide the victim notice when the stalker is back on the streets.

Other provisions empower the court to request a psychiatric evaluation or some type of counseling for the defendant.[140] Montana even holds the defendant liable for all medical, counseling, or other costs incurred by the victim as a result of being stalked.[141]

IV. ARE STALKING LAWS CONSTITUTIONAL?

The wide variety of statutes passed by state legislatures raises concerns about the differing provisions, penalties, and effects. Critics of the legislation primarily voice concern over the constitutionality and effectiveness of these statutes.[142] Four main constitutional issues exist to date: 1) are the statutes void because they are unconstitutionally vague; 2) do the statutes criminalize conduct otherwise protected by the First Amendment thereby making them overbroad; 3) do warrantless arrest provisions such as Florida's violate the Fourth Amendment; and, 4) do some statutes contain provisions which violate the defendant's due process rights?

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132. Lowe, *supra* note 61, at B6.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See, e.g.*, Mont. Code Ann. § 46-9-108 (1993); TEX.PENAL CODE ANN. § 42.07 (West Supp. 1993).
139. GA. CODE ANN. § 16-5-93 (Michie Supp. 1993).
140. *See, e.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1993); GA. CODE ANN. § 42-835.3 (Michie Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); ILL. ANN. STAT. ch. 730, para. 5/3-14-5 (Smith-Hurd 1993); MICH. COMP. LAWS ANN. §§ 750.411h-.411i (West Supp. 1993); 1992 Ohio Laws 234.
141. MONT. CODE ANN. § 45-5-220 (1993).
142. Guy, Jr., *supra* note 38, at 1009-22. *See generally Nightline, supra* note 16 (discussing the pros and cons of recent anti-stalking legislation towards the accused).

A. *Vagueness*

Under the due process requirements of the Fifth and Fourteenth Amendments, federal and state statutes must be written with sufficient clarity or they will be declared unconstitutionally vague.[143] As articulated by the Supreme Court, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily differ as to its application, violates the first essential of due process of law."[144] Two primary issues are analyzed to determine if a particular statute is vague: whether the statute provides adequate notice to the individual so that she may conform her conduct to the requirements of the law;[145] and more importantly as viewed by the Supreme Court, whether the language of the statute leaves room for arbitrary and discriminatory law enforcement.[146]

1. Notice

The concept of notice is grounded in notions of fairness,[147] and holds a constitutionally-protected status in relation to the individual.[148] Conduct must be defined by the government as criminal before the government treats it as such.[149] Otherwise, any law enforcement agent could declare anyone's conduct a crime at any time.[150] Such discretionary power would wreak havoc on any civilized or organized society.[151]

Notice requirements are realistic, however, in that the Court does not place specificity requirements on the legislature that are impossible to

143. Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

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

145. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *see generally* John C. Jeffries, Jr., *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205 (1985).

146. *Papachristou*, 405 U.S. at 162, 168-171; *see also* Jeffries, *supra* note 145, at 215.

147. *See* Colten v. Kentucky, 407 U.S. 104, 110 (1972). "Notice is essential to fairness. Crimes must be defined in advance so that individuals have fair warning of what is forbidden: lack of notice poses a 'trap for the innocent' and 'violates the first essential of due process of law." *Id. See also* Jeffries, *supra* note 145, at 205 (footnote omitted).

148. *See* Palmer v. City of Euclid, 402 U.S. 544, 544-46 (1971) (per curiam) (statute that failed to provide notice to an ordinary citizen that "discharging a friend at an apartment house and then talking on a car radio while parked on the street" was prohibited as unconstitutionally vague).

149. *See Papachristou*, 405 U.S. at 163; *see also* Jeffries, *supra* note 145, at 205.

150. *See Papachristou*, 405 U.S. at 165, 170.

151. The Supreme Court shunned arbitrary power under the Due Process clause as early as 1884. Hurtado v. California, 110 U.S. 516, 535-36 (1884) ("Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."). *See also* Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (conviction depended on "whether or not a policeman is annoyed"); Gregory v. Chicago, 394 U.S. 111, 120 (1969) ("To let a policeman's command become equivalent to a criminal statute comes dangerously near making our government one of men rather than laws.").

meet.[152] The Court considers the difficulties in drafting a statute in order to meet both sides of the balancing test in any vagueness challenge.[153]

2. Arbitrary and Discriminatory Enforcement

The Supreme Court historically disfavors unjustified law enforcement power.[154] In relation to the vagueness doctrine, the Court recently highlighted the prevention of arbitrary and discriminatory law enforcement as the primary goal of the doctrine.[155] *Kolender*[156] involved a California statute which required persons suspected of loitering on the street to present identification when asked by a peace officer.[157] The Court found the statute vested complete discretion in the officer to determine whether or not the identification presented was "credible and reliable," thereby making the provision unconstitutionally vague.[158] The government argued the need for stronger law enforcement to combat the increase in crime.[159] The Court, however, refused to permit such broad legislation which "necessarily 'entrusted lawmaking to the moment-to-moment judgment of the policeman on his beat.'"[160]

3. Potential Outcomes to Vagueness Challenge

In deciding whether or not a statute is unconstitutionally vague, the court must undergo a balancing test between securing the defendant's rights of notice and proper enforcement against providing enough flexibility for the law to operate.[161] Realistically, the analysis focuses on the type of conduct the legislature wants to prevent and whether the statute is

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152. *See* Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("[W]e can never expect mathematical certainty from our language.").

153. *See Colten*, 407 U.S. at 110.

154. *See* United States v. Reese, 92 U.S. 214, 221 (1876).

155. Kolender v. Lawson, 461 U.S. 352, 357-58 (1983). In his commentary, Jeffries highlights the Court's rationale in *Kolender* regarding the susceptibility of the law in question to arbitrary and discriminatory enforcement as "the most persuasive justification for vagueness review generally." Jeffries, *supra* note 145, at 218.

156. 461 U.S. 352 (1983).

157. *Kolender*, 461 U.S. at 353. CAL. PENAL. CODE. ANN. § 647(e) (West 1970) at that time provided:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by a peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

Kolender, 461 U.S. at 353 n.1.

158. *Id.* at 358.

159. *Id.* at 361.

160. *Id.* at 360 (quoting Smith v. Goguen, 415 U.S. 566 (1974)).

161. *See, e.g., Colton*, 407 U.S. at 110.

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498 (1982). "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Id.*

likely to produce the particular results intended.[162] Statutes that regulate activity within the expected reign of government usually survive vagueness challenges,[163] while statutes which extend governmental control too far usually fail.[164]

When a court finds that the statute does not meet proper notice requirements or subjects the public to arbitrary and discriminatory enforcement, it declares the law either facially vague or partially vague.[165] A facially vague law implies that the conduct demanded by the statute cannot be readily ascertained from its language. The court upholds a facial challenge only if the law is "impermissibly vague in all of its applications."[166]

A partially vague statute involves "a hard core of circumstances to which the statute unquestionably applies and as to which the ordinary person would have no doubt as to its application."[167] Under these circumstances, the court finds the law unconstitutional only as applied to a particular defendant.[168] The law will not be struck down in its entirety.[169] Instead, the court will attempt to "cure" the statute either through judicial interpretation or a scienter requirement.[170]

162. *See* Anthony G. Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). Amsterdam believes that the vagueness doctrine "is a means for securing the Court's control over the methods by which governmental compulsion may be brought to bear on the individual." *Id.* at 115.

163. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 331 (1988) (picketing at foreign embassies); Colten v. Kentucky, 407 U.S. 104, 110 (1972) (interfering with police activity); Cameron v. Johnson, 390 U.S. 611, 615-16 (1968) (picketing at courthouse).

164. *See, e.g.*, Wright v. Georgia, 373 U.S. 284, 292-93 (1963) (rejecting conviction of six black men under breach of the peace statute for playing basketball in a public park); NAACP v. Button, 371 U.S. 415, 433-36 (1963) (invalidating statue regulating solicitation of legal clients).

165. Amsterdam, *supra* note 162, at 109-10.

166. *Hoffman Estates*, 455 U.S. at 495. *See also* Coates v. City of Cincinnati, 402 U.S. 611, 611 n.1 (1971) (holding facially invalid a municipal ordinance making it a crime "to assemble . . . on any of the sidewalks . . . [and to] conduct [oneself] in a manner annoying to persons passing by. . .").

167. Rex A. Collings, Jr., *Unconstitutional Uncertainty — An Appraisal*, 40 CORNELL L.Q. 195, 206 (1955). *See* U.S. v. Petrillo, 332 U.S. 1, 7-8 (1947).

168. *See Hoffman Estates*, 455 U.S. at 495, 503.

169. *Id.*

170. *See id.* at 498-99.

Three types of representative stalking laws are analyzed below for vagueness: California's narrow law,[171] Florida's broad law,[172] and Michigan's intermediate provision.[173]

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171. CAL. PENAL CODE § 646.9 (West Supp. 1993). The statute currently reads:

(a) 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 or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year of by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, is punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(c) A second or subsequent conviction occurring within seven years of a prior conviction under subdivision (a) against the same victim, and involving an act of violence or a "credible threat" of violence, as defined in subdivision (f), is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(d) Every person who, having been convicted of a felony under this section, commits a second or subsequent violation of this section against the same victim and involving an act of violence or "a credible threat" of violence, as defined in subdivision (f), is punishable in state prison, for 16 months, two or three years and a fine up to ten thousand dollars ($10,000).

(e) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "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. Constitutionally protected activity is not included within the meaning of "course of conduct."

(f) For the purposes of this section, "a credible threat" means 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 or the safety of his or her immediate family. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

(g) This section shall not apply to conduct which occurs during labor picketing.

(h) If probation is granted, or the execution or imposition of a sentence is suspended, for any person convicted under this section, it shall be a condition of probation that the person participate in counseling, as designated by the court. However, the court, upon a showing of good cause, may fined that the counseling requirement shall not be imposed.

(i) The court shall also consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family. The duration of the restraining order may be longer than five years only in an extreme case, where a longer duration is necessary to protect the safety of the victim or his or her immediate family.

Id.

172. FLA. STAT. ANN. § 784.048 (West Supp. 1993). See *infra* note 180 for full text of Florida's statute.

173. MICH. COMP. LAWS ANN. § 750.411h-.411i (West Supp. 1993). See *infra* note 193 for full text of Michigan's statute.

a. California

In California, stalking requires the conduct of willful, malicious, and repeated following or harassing of a person, plus a credible threat with intent to place that person in reasonable fear of death or bodily injury.[174] The law links the conduct of following or harassing with a "credible threat"—behavior otherwise punishable under criminal law.[175] Given that the underlying offense of making threats does not violate vagueness requirements, the inclusion of willful following or harassing with making threats should satisfy constitutional standards of notice.[176]

In addition, California's statute defines relevant terminology such as "to harass" and "a credible threat."[177] Therefore, those charged with enforcement of the law can refer to the definitions to determine whether specific conduct is prohibited. This should prevent arbitrary or discriminatory enforcement.[178] California's law should withstand any challenges to vagueness.[179]

b. Florida

Florida's law, on the other hand, criminalizes the act of willfully, maliciously, and repeatedly following or harassing another person.[180] This

174. CAL. PENAL CODE § 646.9.

175. See CAL. PENAL CODE §§ 701-703 (West 1985).

176. *See* Guy, Jr., *supra* note 38, at 1014. The threat requirement makes it possible to distinguish innocent conduct from criminal conduct. *Id.* This is an example of how addition of a scienter requirement mitigates against vagueness. *See id.* ("The threat provision strongly mitigates against vagueness in the statute because it requires that the stalker demonstrate a tangible intent to cause emotional harm.").

177. CAL. PENAL CODE § 646.9 (West Supp. 1993). "'[H]arasses' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses or terrorizes the person, and which serves no legitimate purpose." *Id.* at § 649.9(e) "'[A] credible threat' means 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. . . ." *Id.* at § 649.9(f).

178. *See* Guy, Jr., *supra* note 38, at 1015-16. This article contains an analysis of all potentially vague terms in the California statute, resolving that California's statute should survive any vagueness challenges. *Id.*

179. *Id.*

180. FLA. STAT. ANN. § 784.048(2) (West Supp. 1993). Florida's law currently provides:

(1) As used in this section:

(a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.

(b) "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. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

(c) "Credible threat" means a threat made with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause bodily injury to, a person.

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalk-

raises two concerns. First, no threat or intent to harm is required, thus punishing the mere presence of a person. This makes distinguishing legal from illegal behavior difficult.[181] For example, an investigative reporter following the subject of his story on more than one occasion engages in proscribed conduct under this statute.[182]

Second, while the statute does define "to harass," no definition of "following" exists.[183] What then constitutes following? How far must one "follow" to break the law? How closely must one follow? Could trailing behind a person for a few blocks to get a better view because she looked familiar constitute stalking? One commentator noted that even a football player chasing an opponent may satisfy "willful, malicious and repeated following."[184] This ambiguity suggests the statute fails to meet the Supreme Court's standard of definiteness and clarity.[185]

Florida's law also leaves room for arbitrary and discriminatory enforcement. The statute's ambiguity forces police to rely on the perception of the person stalked because the statute fails to provide adequate criteria for determining the alleged stalker's intent. Under this law, a distraught victim escaping from a stalker who has repeatedly followed her may enlist the aid of a beat cop nearby. So too may an over sensitive woman command the sympathies of the same police officer against someone who innocently walked behind her for some distance. This latter example clearly does not meet the legislature's intention to protect from the "needless torment caused by stalking."[186]

Moreover, Florida's law provides for police officers to arrest stalking suspects without a warrant,[187] compounding the discretion given to the police. This gives the officer the power to arrest someone based purely on his own suspicions or on the word of the victim. The Supreme Court explicitly prohibits such unbridled discretion through the vagueness doc-

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ing, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) Any person who, after an injunction for protection against repeat violence pursuant to s. 784.046, or an injunction for protection against domestic violence pursuant to s. 741.30, or after any other court-imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully, maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(5) Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section.

FLA. STAT. ANN. § 784.048.

181. *See Nightline*, *supra* note 16. *Accord* Guy, Jr., *supra* note 38, at 1017.

182. *See* FLA. STAT. ANN. § 784.048(1)(a).

183. *See* FLA. STAT. ANN. § 784.048.

184. Thomas, *supra* note 7, at 9.

185. *See also*, Guy, Jr., *supra* note 38, at 1017. "[P]olice officers, prosecutors, and juries have no standards by which to determine that [a defendant] has violated the stalking statute. Whether certain conduct constitutes stalking becomes a matter of discretion." *Id. Cf.* Kolender v. Lawson, 461 U.S. 352, 361 (1983) (holding unconstitutional a statute requiring persons who loitered on the streets to identify themselves and account for their presence to a police officer upon request).

186. *See* FLA. STAT. ANN. § 784.048, pmbl.

187. *Id.* at § 784.048(5).

trine.[188] Ultimately, Florida's anti-stalking law does not clarify what activities as a whole are prohibited,[189] and its ambiguity allows for arbitrary and discriminatory enforcement. Therefore, this law will most likely fall to a facial attack.[190]

c. Michigan

Michigan's law, more similar to California's than Florida's, involves a "willful course of conduct" that would cause reasonable fear in the victim and does cause such fear.[191] While California's law focuses on the actions

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188. *See Kolender*, 461 U.S. at 357-58, Papachristou v. City of Jacksonville, 405 U.S. 156, 162-70 (1972).

189. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

190. At least three Florida judges have ruled Florida's law is unconstitutionally vague. Jill J. Spitz, *Decision Delivers Blow to Florida's Anti-Stalking Law*, ORLANDO SENTINEL, Aug. 3, 1993, at 1; *Judge Anti-Stalking Law Unconstitutional*, MIAMI HERALD, May 21, 1993, at B5; *Defense Wins Challenge to State's Anti-Stalking Law*, MIAMI HERALD, Mar. 9, 1993, at 2. *But see* Guy, Jr., *supra* note 38, at 1017-19. The author found that Florida's statute is unconstitutionally vague where it proscribes malicious following, but survives vagueness challenges where it proscribes harassment. *Id.* He also determined that Florida's aggravated stalking provision is sufficient. *Id.*

Other states facing constitutional challenges to their stalking laws include Georgia, Illinois, and Virginia. *See* Macon Morehouse, *New Anti-Stalking Law Questioned by Judge for Lack of Guidelines*, ATLANTA J. AND CONST., June 4, 1993, at G3; Charles Mount, *Stalking Law Survives 1st Test*, CHI. TRIB., June 18, 1993, at 4; Cathryn Creno, *Victims of Abuse Call for Legal Help*, ARIZ. REPUBLIC, May 18, 1993, at E1.

191. MICH. COMP. LAWS ANN. § 750.411h-.411i (West Supp. 1993). These sections state:

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to fell terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public or on a private property.

(iii) Appearing at the workplace or residence of that individual.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(2) An individual who engages in stalking is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(3) The court may place an individual convicted of violating subsection (2) on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:

(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

(4) In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(5) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

Section 750.411i, Aggravated stalking provides:

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.

(b) "Credible threat" means a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety or the safety of another individual.

(c) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

(d) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(e) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(f) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual may, but does not necessarily require, medical or other professional treatment or counseling.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at the workplace or residence of that individual.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(g) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

of the stalker in making a credible threat,[192] Michigan's law focuses more on the perspective of the victim in feeling some "reasonable fear."[193] Reliance on the subjective feelings of the victim, however, makes it difficult for the defendant to predict what behavior will be found threatening. The statute compensates for this subjective element by including a list of representative contacts which qualify as violative behavior in order to put a potential defendant on notice.[194] That list includes: approaching or confronting the person in a public or private place, following or appearing within sight of the person, or appearing at the person's workplace.[195] The sufficient notice requirements are therefore satisfied because a person is able to ascertain whether his conduct violates the statute.

In addition, the law requires two or more separate noncontinuous acts evidencing a continuity of purpose on the part of the defendant.[196] While following someone to get a closer look may cause fear in the mind of the person being followed, no violation occurs if it happens only once.[197] Plus, arrest comes only after *two* events within the same scheme, significantly narrowing the circumstances under which enforcement oc-

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(2) An individual who engages in stalking is guilty of aggravated stalking if the violation involves any of the following circumstances:

(a) The actions constituting the offense are in violation of a restraining order and the individual has received actual notice of that restraining order, or the actions are in violation of an injunction or preliminary injunction.

(b) The actions constituting the offense are in violation of a condition of probation, a condition of pretrial release, or a condition of release on bond pending appeal.

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the victim's household.

(d) The defendant has been previously convicted of a violation of this section or section 411h. [FN1]

(3) Aggravated stalking is a felony, punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both.

(4) The court may place an individual convicted of violating this section on probation for any term of years, but not less than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:

(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling, and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

(5) In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(6) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct.

192. See *supra* notes 174-79 and accompanying text.

193. MICH. COMP. LAWS ANN. § 750.411h(c), (d).

194. *Id.* at §§ 750.411h(e)(i)-(vii), 411i(f)(i)-(vii).

195. *Id.*

196. *Id.* at §§ 750.411h(a), 411i(a).

197. *See id.*

curs.[198] This precludes arbitrary or discriminatory enforcement. Michigan's law, therefore, should not fail for vagueness.[199]

B. *Overbreadth*

The overbreadth doctrine is one exception to the rule requiring that in order for a statute to be facially vague it must be vague under every applicable application.[200] Overbreadth concerns enactments with "a governmental purpose to control or prevent activities constitutionally subject to state regulation [which] may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of [constitutionally] protected freedoms."[201] The Supreme Court demands a higher standard of precision in drafting legislation affecting individual rights because citizens will "'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'"[202]

A defendant's challenge to this type of enactment, even if her conduct clearly violates it, will go forward due to the court's sensitivity to issues such as First Amendment freedoms.[203] In order to win a facially overbroad attack, the plaintiff must show: 1) the protected activity is a significant part of the law's target, and 2) that no satisfactory method exists of severing the law's unconstitutional applications from its constitutional ones.[204] If a court finds the statute infringes upon constitutionally protected freedoms beyond necessity and no feasible means of severing the unconstitutional language exists, the law will be struck down even if enacted for a legitimate state purpose.[205]

Clearly the government's purpose in enacting anti-stalking legislation is legitimate. In order to address concerns regarding the statute's effect on activities protected by the First Amendment, most stalking laws provide exceptions for applications to "constitutionally protected conduct."[206] Some laws go further and specify what conduct is exempt from prosecution.[207] Are these exceptions enough? Or do they subsequently make the laws unconstitutionally vague? Could a legislature draft these provisions more narrowly?[208]

The phrase "constitutionally protected conduct" by itself seems redundant.[209] If the activity falls under constitutional protection, the statute

198. *See id.*
199. For similar analysis regarding Connecticut's stalking statute, see Guy, Jr., *supra* note 38, at 1020-22.
200. *See* Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 (1982).
201. NAACP v. Alabama, 377 U.S. 288, 307 (1964).
202. *Hoffman Estates*, 455 U.S. at 494 n.6 (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).
203. *See Hoffman Estates*, 455 U.S. at 495.
204. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-24 (1978).
205. *See NAACP*, 377 U.S. at 307-08.
206. *See supra* notes 85-91 and accompanying text.
207. *See supra* notes 92-97 and accompanying text.
208. For an example of one author's proposed stalking statute, see Guy, Jr., *supra* note 38, at 1022-27.
209. Thomas, *supra* note 7, at 10.

cannot change that. Additionally, the Supreme Court requires only statutes which regulate conduct in a substantially overbroad manner to be struck down.[210] If the statute only affects occasional unconstitutional applications while maintaining a close nexus between the legislative intent and the allowable level of enforcement, the statute may not be invalidated.[211]

The concerns raised about civil liberties and stalking laws,[212] assuming these laws do not fail for other vagueness reasons, seem exaggerated given the requirements for overbreadth. Any false claims against the investigative reporter, or the father who watches from his parked car the children he lost custody of, will most likely be struck as individual unconstitutional applications. But, ultimately the nexus between government interests and the interests of the legislature to protect from stalking behavior should prove strong enough to survive.

C. *Fourth Amendment*

Civil rights experts fear that anti-stalking laws such as Florida's, which authorize arrests without a warrant, may violate the Fourth Amendment.[213] Florida's stalking law provides, "an officer may arrest without a warrant, any person he or she has probable cause to believe violated the act."[214] Critics argue the provision allows police to falsely arrest a suspect merely upon an alleged victim's word.[215] Under the statute, an angry wife may conceivably file stalking charges against her cheating husband solely to see him get arrested.

Circumstances do exist, however, where a suspect may be legitimately arrested without a warrant.[216] Under common law, either a misdemeanor committed in the presence of an officer[217] or a felony committed in or outside the presence of an officer justifies a warrantless arrest.[218]

In addition, because the requirement that the violation occur in front of an officer originates from common law and not the Fourth Amend-

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210. Broaderick v. Oklahoma, 413 U.S. 601, 615 (1973) ("[O]verbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

211. *See, e.g.*, Cox v. Louisiana, 379 U.S. 559 (1965) (statute prohibiting picketing "near" courthouse upheld against overbreadth challenge).

212. *See Nightline, supra* note 16; Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J., at 1, Aug. 20, 1992. According to Phil Gutis, spokesman for the ACLU, his organization will watch to make sure that anti-stalking laws are not being implemented by overeager prosecutors to violate individual constitutional rights. *Id.*

213. *See Nightline, supra* note 16. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

214. FLA. STAT. ANN. § 784.048(5) (West Supp. 1993).

215. *See Nightline, supra* note 16.

216. Gerstein v. Pugh, 420 U.S. 103, 113 (1975).

217. U.S. v. Watson, 423 U.S. 411, 418 (1976).

218. *Id.*

ment, the Supreme Court held that the states may expand the power to arrest without a warrant through statute or Constitutional amendment.[219] Therefore, as long as the warrantless arrest provision does not violate the Constitution, its validity rests upon the law of the state where the arrest occurred.[220] In most states, an arrest will not require a warrant as long as the officer can establish probable cause.[221]

No specific guidelines exist to define probable cause. The Supreme Court labelled it as "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[222] When a police officer receives knowledge or information regarding facts and circumstances sufficient to cause a reasonable belief that an offense occurred, the officer may arrest the suspect without a warrant.[223]

Some states currently provide for warrantless arrests upon probable cause within their domestic abuse statutes.[224] Other states provide for warrantless arrests at the scene of the incident with probable cause that an offense was committed, or if a protective order was violated.[225] Constitutional challenges to these statutes have failed.[226] The courts held that the states' interest in protecting the health, safety, and welfare of abused women outweighed the individual defendant's right to privacy.[227]

A similar argument exists under anti-stalking legislation that the state's interests outweigh the alleged stalker's right to liberty although the balance of the scales appear much closer because the proscribed conduct is more difficult to ascertain.[228] Support for the mandatory arrest provision in domestic abuse legislation exists in every jurisdiction.[229] Given the rapid response of the states in passing anti-stalking legislation, and the states' broad power to enact laws to protect the general health, safety, and welfare of its citizens, support for mandatory arrest provisions in anti-stalking legislation may soon follow and should survive Fourth Amendment challenges.

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219. Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J., with Rehnquist, J., dissenting).

220. *See* Ker v. California, 374 U.S. 23, 37 (1963).

221. *See Watson*, 423 U.S. at 421-22 (1976); Fields v. City of S. Houston, Tex., 922 F.2d 1183, 1189 (5th Cir. 1991).

222. Illinois v. Gates, 462 U.S. 213, 232 (1983).

223. Beck v. Ohio, 379 U.S. 89, 91 (1964); Brinegar v. U.S., 338 U.S. 160, 175-76 (1949).

224. *See, e.g.*, ME. REV. STAT. ANN. tit. 19, § 770(5) (West 1981 & Supp. 1992); N.C. GEN. STAT. § 50B-4 (Supp. 1992); UTAH CODE ANN. § 30-6-8(1) (1989 & Supp. 1993).

225. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3601(B) (1989 & Supp. 1992); FLA. STA. ANN. §§ 901-15(6)-(7) (West 1984 & Supp. 1993); MINN. STAT. ANN. § 629.341 (West 1983 & Supp. 1993).

226. *See, e.g.*, Minnesota v. Errington, 310 N.W.2d 681, 682 (Minn. 1981) (holding the Minnesota Domestic Abuse Act constitutional); Missouri *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 236 (Mo. 1982) (holding the Missouri Adult Abuse Act constitutional).

227. *See, e.g., Williams*, 626 S.W.2d at 230.

228. *See supra* part III.A.

229. Greg Anderson, Sorichetti v. City of New York *Tells the Police That Liability Looms for Failure to Respond to Domestic Violence Situations*, 40 U. MIAMI L. REV. 333, 353 (1985).

D. *Due Process*

The Fourteenth Amendment to the U.S. Constitution prevents state governments from depriving individuals of "life, liberty or property without due process of law."[230] What is meant by "life" is unquestionable. The definition of property has developed through case law over the years.[231] The definition of liberty, however, remains somewhat obscure.[232] Traditional notions of liberty include one's right to be free from restraint of physical liberty along with those rights enumerated in the Bill of Rights.[233]

Once an individual's liberty interest is at issue, the court determines what procedural process is due before the individual can be deprived of that interest.[234] In *Matthews v. Eldridge*, the Court weighed three factors to determine whether any process was due: 1) the importance of the individual interest; 2) the reliability of the current process or the risk of erroneous deprivation; and 3) the importance of the government interest.[235] With regard to anti-stalking laws, the procedural due process analysis arises in two important contests - ex parte restraining orders and the denial of bail.[236]

1. Ex Parte Restraining Orders

In some states, the court can issue a protective order without notice to the offending party upon the presentment of evidence of abuse or imminent danger of abuse.[237] One domestic violence case argued that ex parte orders violated the defendant's due process rights because the defendant was not given timely notice or an opportunity to be heard before being denied access to his property and his children.[238] Although the ex parte order in this case enjoined the defendant from his home, the court held his rights were subordinate to the abused spouse's right to immediate protection from harm.[239] The court found the government's interest in protecting its citizens outweighed the individual's Fourteenth Amendment due process rights.[240]

The analysis under anti-stalking legislation involves similar interests and should obtain similar results. Whether or not there is a personal relationship between the victim and the stalker, the victim's right to be free

230. U.S. CONST. amend. XIV.

231. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (plaintiff's interest in being rehired after one year contract expired did not equal property interest); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare payments deemed a property interest protected by constitution against arbitrary withdrawal).

232. *See* Board of Regents v. Roth, 408 U.S. 564, 572 (1972) ("In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.").

233. *See* Paul v. Davis, 424 U.S. 693 (1976).

234. *See* Matthews v. Eldridge, 424 U.S. 319, 333 (1976).

235. *See id.*

236. *See id.*

237. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2950a (West Supp. 1993); MINN. STAT. ANN. § 609.748 (West Supp. 1993).

238. Boyle v. Boyle, 12 Pa.D & C.3d 767 (1979).

239. *Id.* at 773.

240. *Id.* at 774.

from harassment militates against the defendant's rights to due process. Each of the anti-stalking laws with ex parte provisions requires the victim to demonstrate the immediacy of potential harm before the order will be granted.[241] Additionally, because ex parte orders are issued only temporarily,[242] the potential for erroneous deprivation is eliminated.[243] Overall, the government's interest in protecting its citizens from harm outweighs the defendant's right to notice and extensive procedures in the short term. Therefore, these provisions for ex parte restraining orders should not raise constitutional concerns.

2. No-Bail Provisions

As noted previously, both Illinois and Georgia allow judges to deny bail to alleged stalkers in order to protect the victim.[244] Although the due process analysis requires the balancing of the same interests here as with ex parte orders, the argument on behalf of the defendant is somewhat stronger due to the extent of liberty infringed.[245]

One critic has identified the difficulty in denying bail in anti-stalking situations.[246] Susan Hillenbrand of the American Bar Association found twenty-eight states allow the denial of bail only for capitol offenses while eighteen states hold the purpose of bail is to secure the defendant's appearance in court, not to protect the community.[247] In fact, Illinois' no-bail provision was recently held unconstitutional under the Illinois Constitution.[248]

It seems likely that no-bail provisions will have a more difficult time withstanding constitutional challenges than ex-parte restraining order provisions due to the degree of liberty withheld. In order to serve the purpose of protecting the victim from future harm, legislatures may have to re-write existing policies behind the denial of bail to meet constitutional

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241. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2950a (West Supp. 1993); MINN. STAT. ANN. § 609.748 (West Supp. 1993).

242. *See, e.g.*, MINN. STAT. ANN. § 609.748(4).

243. *See Boyle*, 12 Pa.D & C.3d at 774.

244. GA. CODE ANN. § 17-6-1(b)(3)(B) (Michie Supp. 1993); ILL. ANN. STAT. ch. 725, para. 5/110-6.3 (Smith-Hurd 1992). See *supra* notes 116-20 and accompanying text.

245. The Eighth Amendment provides in part that "excessive bail shall not be required." U.S. CONST. amend VIII. In certain situations, a defendant has a right to affordable bail. *See* Stack v. Boyle, 342 U.S. 1, 5 (1951).

> Like the ancient practice of securing oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of the accused. Bail set at a figure higher than an amount *reasonably calculated to fulfill this purpose* is "excessive" under the Eighth Amendment.

Id. (emphasis added).

246. George Lardner, Jr., *Anti-Stalking Laws Proliferate; Several Face Court Challenges*, WASH. POST, Apr. 30, 1993, at A2.

247. *Id.* In recent years, however, detention to prevent further criminal acts has become permissible under certain circumstances. *See* U.S. v. Salerno, 481 U.S. 739, 748 (1987). "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individuals liberty interest." *Id.*

248. David Bailey, *Circuit Judge Finds No-Bail Provision of Stalking Law to Be Unconstitutional*, CHI. DAILY L. BULL., Feb. 5, 1993, at 1.

standards, or else lobby for stricter enforcement of restraining orders instead.[249]

V. CONCLUSION

Anti-stalking legislation offers additional recourse for victims of stalkers where prior criminal and civil remedies proved insufficient. Ultimately, the issue remains whether or not anti-stalking legislation will prove effective in preventing stalking. The likely answer is both yes and no. As with any other criminal law designed to punish and deter unacceptable behavior, some will obey the laws and some will not. Especially in circumstances where the stalker suffers from mental disturbance, the prospect of fines or short jail sentences may only serve to heighten the frenzy.

Additionally, the specific concerns relative to the constitutionality of these provisions need to be addressed. The need for protection of the victims must be weighed against the rights of the accused. Some states have begun to make the arguments and refine the language in their provisions. Other states will undoubtedly follow. Perhaps the proposed federal model legislation will assist in the discussion. Meanwhile, the recognition must be made that in the interim, a definite number of lives will be saved.

Julie Miles Walker

249. *See Salerno*, 481 U.S. at 748.