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# I'll Be Watching You: Strengthening the Effectiveness and Enforceability of State Anti-Stalking Statues

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# COMMENTS

## "I'LL BE WATCHING YOU": STRENGTHENING THE EFFECTIVENESS AND ENFORCEABILITY OF STATE ANTI-STALKING STATUTES

### I. INTRODUCTION

*Ten years ago in Vermont, Rosealyce Thayer's 11-year-old daughter, Caty, was stalked by a man for 19 months and the police did nothing. One day Mrs. Thayer found Caty organizing her dolls. When her mother asked her what she was doing, the little girl said she was deciding which dolls would go to various friends after the man killed her.*

*Despite Rosealyce Thayer's efforts to protect her daughter when the police would not, little Caty was kidnapped and later found dead. She had been raped repeatedly and stabbed.*[1]

Being a celebrity has its price. Fans and other interested observers regularly invade the private lives of public figures, including entertainment figures. But upon occasion the invasion becomes more than a mere interest—it goes one step too far. The fan or other observer may become obsessed with the subject,[2] harassing, threatening, or otherwise placing a psychological stronghold on the victim. This type of behavior has generally become known as stalking.[3] At the hands of a deranged fan, Rebecca Schaeffer, of the television series *My Sister Sam,* paid the price of fame with her life.[4] But while stalking "can happen to a star like David

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1. 138 CONG. REC. S9527 (daily ed. July 1, 1992) (legislative day June 16, 1992) (statement of Sen. Cohen).

2. *See infra* note 51 and accompanying text.

3. While the described behavior is loosely termed "stalking," each of the state anti-stalking statutes contains a specific definition of what shall constitute "stalking" in that state. *See* discussion *infra* part III (describing the anti-stalking statutes in seven states).

4. Rosalind Resnick, *States Enact 'Stalking' Laws; California Takes Lead,* NAT'L L.J., May 11, 1992, at 3. The stalker obtained the actress' address from Department of Motor Vehicles records. Denise Hamilton, *Trial to Begin in Stalking of Weatherman,* L.A. TIMES, Feb. 25, 1993, at J1.

Letterman, Johnny Carson, or Olivia Newton-John,"[5] it can also happen "to the girl next door."[6]

The statistics are alarming. According to one major psychiatric study, there are an estimated 200,000 people in this country who are presently stalking someone.[7] The Senate Judiciary Committee has further determined that twenty percent of all women will be victims of a stalker at some point in their lifetimes.[8] It is also estimated that "90 percent of all stalkers suffer from at least one kind of mental disorder, which can include different forms of obsession and delusion."[9]

Further, "Los Angeles may be the nation's capital of stalkings. The city 'is a built-in playground for these . . . cases because of the number of celebrities and prominent people,' says police Lt. John Lane, head of the nation's only police anti-stalking squad."[10] Indeed, "so many celebrities live in . . . Southern California . . . because they will be noticed less than if they were living nearly any other place in the United States."[11] Therefore, it is not surprising that California pioneered the first anti-stalking law in 1990.

Unfortunately, the introduction of most state anti-stalking bills has been inspired by local tragedies.[12] California is no exception. Its anti-stalking legislation was passed only "after four women in Orange County were killed despite temporary restraining orders against men who were following them"[13] and after the well-publicized murder of Hollywood actress Rebecca Schaeffer by an obsessed fan who had been stalking her.[14]

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5. *Sonya Live: Stalking* (CNN television broadcast, Oct. 2, 1992).

6. *Id.*

7. *News: Stalking Victims Turn to Congress for Help* (CNN television broadcast, Sept. 29, 1992). *See also* Patricia Davis, *New Stalking Law Flushing the Crime Into the Open in Va.*, WASH. POST, Jan. 24, 1993, at B1 (statement of Cheryl Tyiska, director of victim services for the National Organization for Victim Assistance in the District: "It's almost numbing how common it is . . . . It's not new; it's just got a new name.").

8. *All Things Considered: News* (NPR radio broadcast, Sept. 29, 1992).

9. Louise Palmer, *Maine Woman Stalked For Eight Years,* States News Serv., Sept. 29, 1992, *available in* LEXIS, Nexis Library, Currnt File.

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

11. *Celebrity Lives Not All Glamour,* UPI, Aug. 14, 1992, *available in* LEXIS, Nexis Library, UPI File.

12. Melinda Beck et al., *Murderous Obsession,* NEWSWEEK, July 13, 1992, at 60.

13. *'Anti-Stalking' Laws of Several States in Effect this Week,* L.A. TIMES, June 29, 1992, at A14.

14. Resnick, *supra* note 4, at 3.

A number of states have followed suit in enacting their own versions of anti-stalking laws,[15] and California has since amended its original statute.[16] These statutes have been variously criticized not only for being ineffective in solving the problems of stalking victims and their families, but also for being, as one critic put it, "patently unconstitutional."[17]

In response, a federal bill has been passed which directs the Attorney General, acting through the National Institute of Justice, to develop model anti-stalking legislation for the states that is constitutional and enforceable.[18] The Attorney General has "1 year after . . . enactment of this Act [to] report to Congress the findings and the need or appropriateness of further action by the Federal Government."[19] The possible future enactment of federal anti-stalking legislation has also been suggested.[20] In the meantime, however, the various states must independently struggle with drafting effective and enforceable anti-stalking laws to help protect and assist those who experience the terror of being stalked.

This Comment begins with a discussion of the existing requirement of physical harm and ineffectiveness of civil restraining orders as factors which give rise to the need for anti-stalking laws, and identifies the profiles of those who are stalkers and those who are stalked.[21] This Comment then reviews various state anti-stalking laws beginning with California, which passed the nation's first anti-stalking law and recently amended its

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15. The following states have passed anti-stalking statutes as of January 1, 1993: California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. As this Comment goes to press, several additional states have anti-stalking statutes under consideration, including Arkansas, Georgia, Indiana, Minnesota, Maryland, Pennsylvania, and Texas.

16. *See* discussion *infra* part III.A.2.

17. *Sonya Live: Stalking*, *supra* note 5 (comment of Bob Hassler, National Organization For Men).

18. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 109(b)(2), 106 Stat. 1828, 1842 (1992) (introduced by Sen. Cohen on July 1).

19. *Id.* § 109(b)(4).

20. *See* Paul Hoversten, *Hot Lines for Cutting Government Waste*, USA TODAY, Mar. 3, 1993, at 4A (referring to bill introduced in Congress on March 2, 1993, by Sens. Barbara Boxer and Bob Krueger, which would make stalking a federal crime: "[T]he bill . . . would cover federal property, crossing of state lines or use of the telephone or mail to harass someone. Penalties would range from $5,000 fine and up to two years in jail for a first offense to five to 10 years in jail and up to $200,000 fine for repeat offenders."). A detailed discussion of *federal* anti-stalking legislation is beyond the scope of this Comment.

21. *See* discussion *infra* part II.

pioneering legislation.[22] Certain provisions of the anti-stalking laws in six additional states—including Connecticut, Florida, Illinois, Michigan, Oklahoma, and West Virginia—are also reviewed.[23] Next, this Comment analyzes basic common issues of the various laws, including possible deficiencies regarding their effectiveness and constitutionality.[24] For example, some statutes may be deemed ineffective because they are too narrow, while others may be found unconstitutional due to overbreadth, vagueness, or failure to meet the requirements of procedural due process.[25] Finally, this Comment offers some recommendations for the development of model anti-stalking legislation that may help future state laws become more effective and enforceable.[26]

## II. BACKGROUND

> *For eight years, Sandra Poland's daughter Kimberly has been hounded by a criminally insane man who has sealed his threats of kidnapping with letters, phone calls and a bloody arrow lodged in a tree at the end of her driveway.*
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> *Although the man has tracked Kimberly from state to state, hounded family and friends, and been arrested and convicted four times, the law does not allow the police to protect [Kimberly] from her stalker, whom she does not know.*
>
> . . . .
>
> *. . . Kimberly has been unable to finish college or pursue her career, which would involve advertising her whereabouts.*[27]

### *A. Is There a Need for Anti-Stalking Laws?*

#### 1. Existing Requirement of Physical Harm

"Many stalking victims seek police or court protection but are frequently told that nothing can be done until they are physically harmed . . . . And the judicial system traditionally classifies such violence in the

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22. *See* discussion *infra* part III.A.
23. *See* discussion *infra* part III.B.
24. *See* discussion *infra* part IV.
25. *See* discussion *infra* part IV.
26. *See* discussion *infra* part V.
27. Palmer, *supra* note 9.

category of a 'domestic dispute.'"[28] Such domestic disputes have been frequently ignored because of a misplaced emphasis on the privacy of the relationship.[29] However, "[i]t is estimated that 4 . . . to 8 million women are victims of domestic violence each year, and that nearly 1,500 women are killed by their husbands or boyfriends. In fact, domestic abuse may be responsible for more injuries to women than minor automobile accidents, rapes and muggings combined."[30] These shocking statistics have prompted one observer to note that "[d]omestic violence is something that is so ingrained in our society it will take generations to undo the problem."[31]

"The police worked with me to prevent an assault, but, in the final analysis said there was nothing they could do until an assault occurred," one stalking victim observed.[32] The problem is compounded by being not only legal in nature, but also societal. As one trained listener put it, "[t]he problem is [that] women aren't believed until something physical or visible happens."[33]

Kimberly's mother, too, was told by authorities that the family "must wait for the stalker to do something."[34] Kimberly's mother eloquently responded, "[w]hat is the something that they must wait for him to

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28. Louise Palmer, *Cohen's Anti-Stalking Bill Passes Senate*, States News Serv., Sept. 16, 1992, *available in* LEXIS, Nexis Library, Currnt File. Police are usually trained only to look for physical evidence of violence. According to Thomas Jurkanin, executive director of the Illinois Police Training Board, in Illinois, "all [police] officers are trained to look for cuts and bruises on a victim's body, particularly those that might not be readily apparent . . . to quickly assess the situation, and make an arrest if there is sufficient physical evidence that an assault has occurred." Joseph Kirby, *Stalking Law Sends a New Signal: Police Upgrading Efforts to Prevent Domestic Violence*, CHI. TRIB., Aug. 13, 1992, News, at 1.

29. Joseph Kirby, *Law Enforcement Takes a New Approach to Domestic Violence*, HOUS. CHRON., Aug. 23, 1992, at A3 ("what went on between a couple was regarded as nobody else's business").

30. Kirby, *supra* note 28, at 1. The American Medical Association has reported that "[n]early one-quarter of the women in the United States—more than 12 million—will be abused by a current or former partner at some time during their lives." Lara Gold, *Women Who Leave Abusive Men Sometimes Pay Lethal Price*, Gannett News Serv., Aug. 4, 1992, *available in* LEXIS, Nexis Library, Currnt File.

31. Gold, *supra* note 30 (quoting Rita De Young, executive director of the Hubbard House, a shelter and counseling center in Jacksonville, Florida).

32. *Women Ask Congress to Protect Victims of Stalkers*, Reuters, Limited, Sept. 29, 1992, *available in* LEXIS, Nexis Library, Currnt File.

33. Janice Turner, *When Women are Stalked: Being Constantly Watched and Followed is Called One of the Most Serious Problems Faced by Many Women, Who Argue Authorities Can't Wait Until There's Outright Violence Before Stepping In to Stop It*, TORONTO STAR, Aug. 15, 1992, at F1 (according to a worker with the Assaulted Women's Helpline in Toronto).

34. *All Things Considered: News*, *supra* note 8.

do—kidnap Kimberly, rape Kimberly or kill her? Would you be willing to sit back and wait for that to happen to your son or your daughter?"[35]

### 2. Ineffectiveness of Civil Restraining Orders

"Though the court-issued order of protection is the most common legal recourse women seek, it has proved to be largely ineffective."[36] The increase in the issuance of such orders has been variously attributed to increased domestic violence "due to economic pressures prompted by the recession[,]"[37] and to "the fact that women are less intimidated by the court system and more aware of their legal options."[38] However, "increased public awareness about the availability of civil restraining orders and the perception that court officials are more willing than ever to process them may be lulling some women who obtain the orders into a false sense of security at the most dangerous time of their lives."[39] Although it is not entirely clear why, the unfortunate reality is that the issuance of restraining orders often triggers the violent events they are intended to avoid.[40] Such violent reactions sometimes even result in fatalities.[41]

Moreover, one legislator has stated, "[w]e now know in Massachusetts that civil restraining orders do not work . . . . With more than 44,000 receiving restraining orders in the last year, we know it is impossible for law enforcement and the criminal justice system to take care of every one

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35. *Id.*

36. John W. Fountain & Joseph Kirby, *Stalking Victims Find Laws Are Little Help,* CHI. TRIB., Aug. 5, 1992, News, at 1. "Illinois State Police figures show 35,346 reported violations of orders of protection in a five-month period this year. Nearly 8,000 violations occurred in the month of June alone . . . ." *Id.* Massachusetts reports show that nearly 1,000 women a week are obtaining restraining orders in that state, an increase of twenty percent from an estimated 840 per week last year. Bob Hohler, *Court's Shield Can Draw a Bullet,* BOSTON GLOBE, Oct. 7, 1992, Metro, at 1. *But see id.* ("The system works for many thousands of women . . . .").

37. Adrian Walker, *Restraining Orders Are at Record High,* BOSTON GLOBE, Sept. 23, 1992, Metro, at 1.

38. *Id.*

39. Hohler, *supra* note 36, at 1.

40. *Id. See also* Kiley Armstrong, *Hate Abounds in the Name of Love,* CHI. TRIB., Nov. 23, 1992, News, at 8 ("the obsessive almost is never a 'focused, reality-oriented' person"); Puente, *supra* note 10, at 9A ("[A]rresting but failing to prosecute or imprison the stalker . . . [is] perceived . . . by the less seriously ill stalker as an angering challenge," according to Park Dietz, a clinical psychiatrist who has studied stalking behaviors.).

41. *See, e.g.,* Hohler, *supra* note 36, at 1 (citing example of murder of girlfriend by boyfriend less than eight hours after court had handed down a restraining order requested by girlfriend); Beck, *supra* note 12, at 60 ("[Restraining] orders are notoriously hard to enforce, and all too often, the first violation is fatal.").

of them."[42] In fact, "about 150 men a week are violating the restraining orders" in Massachusetts.[43] Thus, while "'[e]verybody kept telling the victim to run down and get a restraining order . . . it wasn't worth the paper it was written on' because men who violated the orders were rarely picked up by police."[44]

Nevertheless, proponents of restraining orders counter that such court orders have the potential to be effective; the problem, they argue, is that they are not enforced.[45] To this end, prosecutors in Colorado's Arapahoe County are the first in the country to test the use of an electronic monitoring system to improve the effectiveness of court restraining orders.[46] In this county, "[s]talkers accused of violating restraining orders for the second time can volunteer to wear an electronic ankle bracelet and forego jail time . . . will have to pay the $10 daily cost for the bracelet. . . . [and] [w]hile wearing the bracelet, . . . go through a 12-week 'stabilization' program and enter therapy."[47] Upon a violation of a court order, an alarm will electronically alert both the victim and a private monitoring company that will in turn notify the police.[48] However, because most receivers are not mobile, the victim is still vulnerable to approach by the stalker when away from home.[49]

In the end, "[w]hen rage takes over, no document can be an effective shield. . . . Everybody feels so helpless . . . . Even if a woman has an order of protection, she'd have to have a bodyguard (to stay safe). And who can afford a bodyguard?"[50] However, anti-stalking statutes may provide some means of intervention before the situation reaches this critical stage.

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42. Hohler, *supra* note 36, at 1 (statement of Rep. Barbara E. Gray).

43. *Id.* (statement of Thomas C. Rapone, Massachusetts' Secretary of Public Safety).

44. Turner, *supra* note 33, at F1 (statement of Carol Hanson, Florida State Representative).

45. *See, e.g., Nightline: Anti-Stalker Laws* (ABC television broadcast, Sept. 3, 1992) (statement of Professor Jonathan Turley, George Washington University).

46. *Electronic Beeper Eyed for Stalkers,* CHI. TRIB., Aug. 11, 1992, News, at 6. The device has been characterized by the under-sheriff of Arapahoe County as being "superb." Cheong Chow, *Abused Women Gain a Weapon; High-Tech Warning System Now on the Market,* BOSTON GLOBE, Dec. 5, 1992, Metro, at 13. A committee of the chief justice's office in Massachusetts is also studying this idea. Beck, *supra* note 12, at 60.

47. *Electronic Beeper Eyed for Stalkers, supra* note 46, at 6.

48. *Id.*

49. *Id.* Advances in technology now allow a small, hand-held receiver to be used, thus protecting the victim at a mall, workplace, or anywhere else. Chow, *supra* note 46, at 13.

50. Joseph Kirby & Flynn McRoberts, *Only Bullet Halted Rage of Stalker,* CHI. TRIB., Aug. 4, 1992, News, at 1 (quoting Barbara Green, a volunteer at LifeSpan, a women's advocacy and counseling group in Des Plaines).

### *B. Who Are the Stalkers?*

Forensic psychiatrists have examined profiles of stalkers, and at least one has identified that 9.5% of stalkers studied are obsessed with erotomania (i.e., the stalker "falsely believes that the target, usually someone famous or rich, is in love with the stalker"); 43% are love obsessed (i.e., the stalker "is a stranger to the target but is obsessed and mounts a campaign of harassment to make the target aware of the stalker's existence"); and 47% are suffering from simple obsession (i.e., the stalker, "usually male, knows the target as an ex-spouse, ex-lover or former boss, and begins a campaign of harassment").[51]

### *C. Who Are the Stalked?*

Forensic psychiatrists have also studied profiles of stalking victims, and at least one has identified that 49% of the victims are celebrities and other entertainment figures (with 32% being lesser known entertainment figures and 17% being highly recognizable celebrities); 38% are ordinary citizens; and 13% are former employers and other professionals.[52]

## III. THE STATUTES

> *"When I hit the light switch, I was looking him eye to eye. He had a claw hammer drawn back in his hand and he came down on my head with force. He had a stun gun or an electric shocker or something. He stuck me in my chest, in my legs. Then he picked the hammer up and then he beat me."*
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> *Jimmie suffered severe head injuries. Several days later, she told a counselor that she had begged authorities for protection before the attack but was told no laws had yet been broken.*[53]

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51. Puente, *supra* note 10, at 9A (specifying the source as Michael Zona, forensic psychiatrist).

52. *Id.* Anti-stalking statutes are aimed at protecting various classes of persons, such as "youths who reject gang membership and suffer harassment as a result[,]" Julie Mason, *Stalking Ordinance Proposed*, HOUS. CHRON., Dec. 10, 1992, at A34; abortion providers who suffer harassment from anti-abortion protestors, Bob Ortega, *Stalking Laws Used to Fight Abortion Woes*, WALL ST. J., Apr. 7, 1993, at B1; and judges who suffer harassment from defendants they have sentenced. *The Judge as Victim; She Tells Her Own Story to Push Anti-Stalking Bill*, STAR TRIB. (Minneapolis), Feb. 20, 1993, at 1A.

53. *World News Tonight with Peter Jennings* (ABC television broadcast, Aug. 11, 1992).

### A. The California Statute

#### 1. The Pioneering Statute

##### a. Notable Characteristics

California passed the nation's first anti-stalking law in 1990.[54] Its legislators' pioneering efforts focused on following or harassment activity which is intentional, repeated, accompanied by a credible threat of death or great bodily injury, and causes the victim substantial emotional distress which is both actual and reasonable.[55] Conduct that occurs during labor picketing[56] or otherwise serves a "legitimate purpose,"[57] a term which is not defined in the statute, was excepted from coverage.

##### b. Summary of Statute

The original California statute defined stalking as "willfully, maliciously, and repeatedly follow[ing] or harass[ing] another person and . . . mak[ing] a credible threat with the intent to place that person in reasonable fear of death or great bodily injury . . . ."[58] The term "harasses" was defined to mean

> a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. 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.[59]

A "credible threat" was defined to mean "a threat made with the intent and the apparent ability to carry out the threat so as to cause . . . 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 great bodily injury to, a person

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54. CAL. PENAL CODE § 646.9 (West 1992) (added by 1990 Cal. Stat. 1527, § 1); Resnick, *supra* note 4, at 3.

55. *See infra* notes 58-59 and accompanying text.

56. *See infra* note 61 and accompanying text.

57. *See infra* note 59 and accompanying text.

58. CAL. PENAL CODE § 646.9(a) (West 1992).

59. *Id.* § 646.9(d). The phrase "course of conduct" was defined to mean, "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." *Id.* The statute specifically excludes "[c]onstitutionally protected activity" from the meaning of the phrase "course of conduct." *Id.*

. . . ."[60] "Conduct which occurs during labor picketing" was specifically exempted from the purview of the statute.[61]

The California statute provided for increased penalties for violation when a temporary restraining order or injunction was in effect at the time of the violation,[62] or where there was a second or subsequent conviction against the same victim.[63] However, even the first or lowest level of conviction provided for the possibility of imprisonment.[64]

### 2. Recent Amendment

California recently passed an amendment to its anti-stalking statute.[65] The bill made a number of changes to the existing statute, broadening its scope and generally bolstering its effectiveness. The bill redefined "credible threat" to encompass threats made not only to a given person, but also to a member of that person's immediate family.[66] A second or subsequent conviction against the same person or a member of that person's family is now a straight felony, rather than a discretionary felony or misdemeanor.[67] Also, a conviction in violation of any court order, not limited to a temporary restraining order or an injunction, results in a misdemeanor or a felony, as specified by the statute.[68] Additionally, probation shall be conditioned on "participat[ion] in counseling, as

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60. *Id.* § 646.9(e).

61. CAL. PENAL CODE § 646.9 (West 1992).

62. The California statute provides that "when there is a temporary restraining order or an injunction, or both, in effect prohibiting [stalking] against the same party, [stalking] 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 . . . or by both that fine and imprisonment, or by imprisonment in the state prison." *Id.* § 646.9(b).

63. The California statute provides that

> [a] second or subsequent conviction occurring within seven years of a prior conviction under [the stalking statute] against the same victim, and involving an act of violence or "a credible threat" of violence, as defined in subdivision (e), 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 . . . , or by both that fine and imprisonment, or by imprisonment in the state prison.

CAL. PENAL CODE § 646.9(c) (West 1992).

64. *Id.* § 646.9(a).

65. S. 1342 (introduced by Sen. Royce on Jan. 29, 1992) (passed the California Assembly July 20, 1992 and passed the California Senate on Aug. 13, 1992), codified at CAL. PENAL CODE § 646.9 (Deering Supp. 1993).

66. *Id.* § 1(a).

67. *Id.* § 1(d).

68. *Id.* § 1(b).

designated by the court. However, the court, upon a showing of good cause, may find that the counseling requirement shall not be imposed."[69] Finally, the court may issue a restraining order effective for up to 10 years.[70] In considering the length of such a restraining order, the court must consider "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."[71]

### *B. Other Representative Statutes*

#### 1. Connecticut

##### a. Notable Characteristics

The Connecticut statute, approved June 9, 1992, does not contain a credible threat requirement.[72] The statute is two-tiered,[73] specifying stalking a child under sixteen years of age constitutes a more serious crime.[74]

##### b. Summary of Statute

The two levels of stalking identified in the Connecticut statute result in the application of either misdemeanor or felony penalties, depending on the level of crime committed.[75] Stalking in the second degree is classified as a misdemeanor,[76] while stalking in the first degree is classified as a felony.[77] Stalking in the second degree requires that a person "with intent to cause another person to fear for his physical safety, . . . wilfully and repeatedly follows or lies in wait for such other person and causes such other person to reasonably fear for his physical safety."[78] Stalking in the first degree requires that a person "commit[] stalking in the second degree

69. *Id.* § 1(h).
70. CAL. PENAL CODE § 646.9 (Deering Supp. 1993).
71. *Id.*
72. *See* discussion *infra* part III.B.1.b.
73. *See infra* notes 76-77 and accompanying text.
74. *See infra* note 79 and accompanying text.
75. 1992 Conn. Pub. Acts 237.
76. *Id.* § 2(b).
77. *Id.* § 1(b).
78. *Id.* § 2(a).

. . . and (1) . . . [have] previously been convicted [of a stalking offense], or (2) such conduct violat[ing] a court order in effect at the time of the offense, or (3) the other person [being] under sixteen years of age."[79]

### 2. Florida

#### a. Notable Characteristics

The Florida statute, approved April 13, 1992,[80] has been described as being "one of the toughest in the nation."[81] A credible threat is not required for simple stalking.[82] The statute does not require that a victim's reaction be reasonable or limited to fear of physical harm; rather, any form of substantial emotional distress actually experienced by the victim is encompassed.[83] The Florida statute also allows warrantless arrests for misdemeanor violations upon a showing of probable cause, without catching the suspect in the act,[84] a provision which critics have described as unconstitutional.[85]

#### b. Summary of Statute

The preamble to Florida's anti-stalking statute states the legislative finding that "the traditional protections currently available under criminal statutes are not always applicable to stalking."[86] Under the Florida statute, stalking, a misdemeanor of the first degree, occurs when a person "willfully, maliciously, and repeatedly follows or harasses another person."[87] And aggravated stalking, a felony of the third degree, occurs when a person commits stalking "and makes a credible threat with the

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79. *Id.* § 1(a).

80. *See* discussion *infra* part III.B.2.b.

81. *Stalking Law May Be Strengthened,* UPI, Sept. 11, 1992, *available in* LEXIS, Nexis Library, Currnt File.

82. *See infra* note 87 and accompanying text.

83. *See infra* note 87 and accompanying text.

84. *See infra* note 90 and accompanying text.

85. *See, e.g.*, Resnick, *supra* note 4, at 3.

86. 1992 Fla. Sess. Law Serv. 208 (West).

87. *Id.* § 2. The term "harasses" is defined under the Florida statute to mean, "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." *Id.* § 1(a).

intent to place that person in reasonable fear of death or bodily injury"[88] or "after an injunction for the protection against repeat violence . . . or an injunction for the protection against domestic violence . . . or after any other court imposed prohibition of conduct toward the subject person or that person's property[.]"[89] The Florida statute provides for warrantless arrests whereby "[a]ny law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this [statute]."[90]

### 3. Illinois

#### a. Notable Characteristics

The Illinois statute, approved July 12, 1992,[91] limits its scope to situations where the requisite threat precedes repeated instances of following or surveillance activity.[92] In this state, all stalking offenses are classified as felonies.[93] Illinois enumerates several criteria that its courts may consider in setting bail for accused stalkers.[94]

#### b. Summary of Statute

The Illinois law creates the offenses of stalking (a class four felony, with second or subsequent convictions resulting in a class three felony)[95] and aggravated stalking (a class three felony, with second or subsequent

88. *Id.* § 3. The term "credible threat" is defined under the Florida statute to mean "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." *Id.* § 1(c).

89. 1992 Fla. Sess. Law Serv. 208, § 4 (West).

90. *Id.* § 5.

91. *See* discussion *infra* part III.B.3.b.

92. *See infra* note 98 and accompanying text.

93. *See infra* notes 95-96 and accompanying text.

94. *See infra* note 102 and accompanying text.

95. 1992 Ill. Laws 870, § 12-7.3(b). The sentence for a class four felony "shall be not less than 1 year and not more than 3 years." ILL. ANN. STAT. ch. 38, para. 1005-8-1(a)(7) (Smith-Hurd Supp. 1992). The sentence for a class three felony "shall be not less than 2 years and not more than 5 years." *Id.* at para. 1005-8-1(a)(6).

convictions resulting in a class two felony).[96] For either crime, an exemption exists for "picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute."[97] The crime of stalking requires a threat first, followed by at least two instances of following or placing the victim under surveillance.[98] The crime of aggravated stalking is committed when a person "in conjunction with committing the offense of stalking, also does any of the following: (1) causes bodily harm to the victim; (2) confines or restrains the victim; or (3) violates a temporary restraining order, an order of protection, or an injunction prohibiting the behavior described . . . ."[99]

The Illinois statute allows the court to deny bail for "stalking or aggravated stalking, where the court, after a hearing, determines that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim of the offense and denial of bail is necessary to prevent fulfillment of the threat upon which the charge is based."[100] The burden of proof for denial of bail is upon the State.[101] In determining whether a defendant poses a real and present threat to the physical safety of the alleged victim of the case, the court may consider a number of factors.[102]

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96. 1992 Ill. Laws 870, § 12-7.4(b). *See supra* text accompanying note 95 (specifying sentence for class three felony). The sentence for a class two felony "shall not be less than 3 years and not more than 7 years." ILL. ANN. STAT. ch. 38, para. 1005-8-1(a)(5) (Smith-Hurd Supp. 1992).

97. 1992 Ill. Laws 870, §§ 12-7.3(c), 12-7.4(c).

98. "Stalking" is committed when:

> [a person] transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions: (1) follows the person, other than within the residence of the defendant; (2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.

*Id.* § 12-7.3(a). "He could follow her, or go to her house, but that's not stalking, even if he does it 50 times, until there's a threat." Jennifer Lenhart, *Cops Beginning to Get Handle on Stalking Law*, CHI. TRIB., Nov. 30, 1992, Chicagoland, at 1.

99. 1992 Ill. Laws 870, § 12-7.4(a).

100. *Id.* § 110-4(a). *Cf.* 1992 Iowa Legis. Serv. 2025, § 2 (West) (approved Apr. 29, 1992) (creating a presumption, in Iowa, of ineligibility for bail in felony cases of stalking).

101. 1992 Ill. Laws 870, § 110-4(d).

102. The factors that an Illinois court may consider in setting bail are:

> (1) the nature and circumstances of the offense charged;
> (2) the history and characteristics of the defendant including:
> (a) any evidence of the defendant's prior criminal history indicative of violent, abusive or assaultive behavior, or lack of that behavior. . . . ;

The Illinois statute also provides for possible mental health treatment for defendants found guilty of stalking or aggravated stalking whereby "the court may order the Prisoner Review Board to consider requiring the defendant to undergo mental health treatment . . . as a condition of parole or mandatory supervised release."[103]

### 4. Michigan

#### a. Notable Characteristics

The Michigan statute, effective January 1, 1993, is the most recent of those examined in this Comment, and also the broadest in scope.[104] It does not require a credible threat for simple stalking, but instead focuses on repeated "unconsented contact" as the basis for the crime.[105] Unconsented contact includes not only physical approaching, but also approaching by telephone, mail, electronic media, or other means.[106] The statute encompasses all forms of significant emotional harm as long as such harm is actually and reasonably experienced by the victim.[107] The penalties specified are among the stiffest of any state anti-stalking statutes.[108] The statute does not specify an intent requirement.[109]

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(b) any evidence of the defendant's psychological, psychiatric or other similar social history that tends to indicate a violent, abusive, or assaultive nature, or lack of any such history.

(3) the nature of the threat which is the basis of the charge against the defendant;

(4) any statements made by, or attributed to the defendant, together with the circumstances surrounding them;

(5) the age and physical condition of any person assaulted by the defendant;

(6) whether the defendant is known to possess or have access to any weapon or weapons;

(7) whether, at the time of the current offense or any other offense or arrest, the defendant was on probation, parole, mandatory supervised release or other release from custody pending trial, sentencing, appeal or completion of sentence for an offense under federal or state law;

(8) any other factors . . . deemed by the court to have a reasonable bearing upon the defendant's propensity or reputation for violent, abusive or assaultive behavior, or lack of that behavior.

*Id.* § 110-6.3(b)(4)(D).

103. *Id.* § 3-14.5.

104. *See* discussion *infra* part III.B.4.b.

105. *See infra* notes 112-15 and accompanying text.

106. *See infra* note 114 and accompanying text.

107. *See infra* note 113 and accompanying text.

108. *See infra* note 111 and accompanying text.

### b. Summary of Statute

The Michigan anti-stalking statute has two tiers: stalking, which is classified as a misdemeanor, and aggravated stalking, which is classified as a felony.[110] If convicted of aggravated stalking, a defendant faces up to five years in prison, a $10,000 fine, or both.[111]

The first tier, "stalking," requires a series of "two or more separate noncontinuous acts, evidencing a continuity of purpose"[112] of "unconsented contact" which would cause a reasonable person to experience fear or significant mental suffering, and that actually causes subjective fear or significant mental suffering on the part of the victim.[113] "Unconsented contact" is defined to include not only following or physical approaching, but also contact by telephone, mail, or electronic communications, as well as placing an object on or delivering an object to property owned, leased, or occupied by the victim.[114] Intent to cause such fear or significant mental suffering is not required under the law.[115]

The second tier, "aggravated stalking," requires stalking activity plus: (1) violation of a restraining order of which the defendant had actual notice, an injunction, or a preliminary injunction; (2) violation of a condition of probation, pretrial release, or release on bond pending appeal; (3) making of one or more credible threats of death or physical injury against the victim, a member of the victim's family, or another individual living in the victim's household; or (4) a previous conviction under the state's anti-stalking statute.[116]

The Michigan anti-stalking law provides that repeated unconsented contact with the victim, after being asked by the victim to discontinue the contact, results in a rebuttable presumption that the victim experienced subjective fear or emotional distress.[117]

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109. *See* discussion *infra* part IV.C.

110. 1992 Mich. Pub. Acts 261; *News: Michigan Legal System Takes Stalking Very Seriously* (CNN television broadcast, Jan. 1, 1993).

111. 1992 Mich. Pub. Acts 261, § 1(3).

112. *Id.* § 1(1)(A).

113. *Id.* § 1(1)(E).

114. *Id.* § 1(1)(F).

115. *See News: Michigan Legal System Takes Stalking Very Seriously, supra* note 110 ("The law sponsor says intent is not a requirement before a suspect can be arrested.").

116. 1992 Mich. Pub. Acts 261, § 1(2).

117. *Id.* § 1(5).

### 5. Oklahoma

#### a. Notable Characteristics

The Oklahoma statute, approved April 20, 1992,[118] expands the general class of persons who may be considered a target of stalking by encompassing activity directed not only against a specific person but also against a member of that person's immediate family.[119] A definition of the phrase "member of the immediate family" is offered to provide guidance in interpretation.[120]

#### b. Summary of Statute

In Oklahoma, stalking is committed when a person "willfully, maliciously, and repeatedly follows or harasses[121] another . . . and . . . makes a credible threat [against another] . . . ."[122] The crime of stalking may be committed not only against a particular person, but also against a member of that person's immediate family.[123] The phrase "member of the immediate family" is defined to mean, "any spouse, parent, child, person related within the third degree of consanguinity or affinity or any other person who regularly resides in the household or who regularly resided in the household within the prior six (6) months."[124]

Under a related Oklahoma statute, "[i]n addition to any other penalty specified . . . , the court may require a defendant to undergo the treatment

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118. *See* discussion *infra* part III.B.5.b.

119. *See infra* note 123 and accompanying text.

120. *See infra* note 124 and accompanying text.

121. The term "harasses" is defined under the Oklahoma statute as:

> [A] knowing and willful course of conduct directed at a specific person which seriously alarms or annoys 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 distress to the person.

1992 Okla. Sess. Law Serv. 107, § 1(E)(1) (West).

122. *Id.* § 1(A). The term "credible threat" is defined under the Oklahoma statute as:

> [A] threat made with the intent and the apparent ability to carry out the threat so as to cause . . . the target of the threat to reasonably fear for his or her safety or for the safety of a member 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.

*Id.* § 1(E)(3).

123. *Id.*

124. *Id.* § 1(E)(4).

or participate in the counseling services necessary to bring about the cessation of . . . stalking . . . the victim."[125]

### 6. West Virginia

#### a. Notable Characteristics

The West Virginia statute, enacted in 1992,[126] is notable because it restricts application of its provisions to activities directed against former cohabitants or sexual or intimate partners only.[127] Also, conviction of any form of stalking committed in this state results only in misdemeanor penalties.[128]

#### b. Summary of Statute

West Virginia also uses a two-tiered approach to stalking crimes, with enhanced penalties for violation of the statute when a temporary restraining order, restraining order, or both, are in effect at the time the crime is committed.[129] However, violation of either tier of the stalking crime results only in misdemeanor penalties.[130] The West Virginia statute by its own terms limits the application of its stalking law to crimes committed against a former cohabitant or sexual or intimate partner.[131]

## IV. ANALYSIS

*"He threatened and terrified me for months. The police told me he's being treated as a schizophrenic. I talked to a psychologist, and he told me that a schizophrenic is not someone to fool around with."*

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125. 1992 Okla. Sess. Law Serv. 42, § 5(E) (West).

126. *See* discussion *infra* part III.B.6.b.

127. *See infra* note 131 and accompanying text.

128. *See infra* notes 129-30 and accompanying text.

129. W. VA. CODE § 61-2-9a(b) (1992).

130. *Id.* § 61-2-9a(a), (b).

131. The West Virginia statute provides that "stalking" is committed when "[a]ny person who . . . intentionally and closely follow[s], lie[s] in wait, or make[s] repeated threats to cause bodily injury to any person with whom that person . . . formerly engaged in a sexual or intimate relationship, with the intent to cause . . . said person emotional distress or . . . fear of . . . personal safety . . . ." *Id.* § 61-2-9a(a).

. . . .

*. . . [T]he only charge Nancy could bring against him was telephone harassment, a misdemeanor.*

. . . .

*The judge decided that Nancy and the obscene, threatening caller should go to mediation.*

. . . .

*. . . What sort of agreement do you strike with a stranger who makes obscene, menacing phone calls? Does a woman say: "OK, I'll listen to you pant for two minutes if you agree not to call when I'm sleeping or at my place of employment, and if you sign a contract saying you will never jump out of the gangway and hit me on the head. Deal?"*[132]

### *A. Effectiveness*

#### 1. Persons Affected Under the Statutes

Some state anti-stalking statutes may be too narrow, and thus, lacking in effectiveness. Some may be overly narrow with respect to potential defendants. For example, West Virginia's statute applies only to defendants who commit crimes against a former cohabitant or sexual or intimate partner.[133] The statute ignores the reality that many stalkers approach persons with whom they have not lived or been intimate with, let alone ever met. Thus, stalkers who harass certain other common victims, such as former employers, celebrities, and even former dates who have not been sexual or intimate partners, would not be punished under the West Virginia statute.[134] To be more effective, some of the applicable statutes may need to be broadened to include a larger class of defendants, and not only

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132. Mike Royko, *Mediation Order is an Obscene Call*, CHI. TRIB., Sept. 18, 1992, News, at 3. The judge in this case, who said he gets 150 cases per day, initially did not remember the case but then said, "I was told there was a relationship, . . . I thought there was some relationship," *id.*, "[b]ut Nancy has no relationship with the man, other than to pick up the phone and get scared out of her wits." *Id.*

133. W. VA. CODE § 61-2-9a(b) (1992).

134. "[M]ost stalking cases break down into three categories: domestic violence, work-place harassment, or stalking of a famous person such as a movie star." Elizabeth Ross, *Problem of Men Stalking Women Spurs New Laws*, CHRISTIAN SCI. MONITOR, June 11, 1992, at 6 (statement of Alana Bowman, deputy city attorney and supervisor of the domestic violence unit in Los Angeles).

defendants who approach former spouses and cohabitants. Statutes drafted in this manner would more accurately reflect actual stalking behavior.[135]

Also, some of the statutes may be overly narrow with respect to who may be considered targets of stalking. While some of the anti-stalking statutes as drafted provide recourse for family members of victims or other persons close to the victims, including the statutes in Oklahoma and California, many do not.[136] Opponents to the proposition of enlarging the statutes to provide recourse for family members and certain other individuals might argue that it is sufficient if victims themselves are adequately protected under the statutes. However, this fails to address harm that is likely present for an individual when, for example, threats are made against that individual's child or close relative. As will be discussed *infra,* statutes can be effectively drafted to address this potential harm.[137]

### 2. "Credible Threat" Requirement

Another example of why most state anti-stalking statutes may be considered overly narrow is the inclusion of a "credible threat" requirement.[138] The threat required is typically that of death or great bodily injury to the victim.[139] Proponents of a credible threat requirement might argue that without such a requirement innocent activity or mistakes could be punished.[140] The focus of such a complaint would likely be that what

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135. *See supra* note 52 and accompanying text.

136. *See supra* notes 123-24 and accompanying text (Oklahoma statute); note 66 and accompanying text (California statute, as amended).

137. *See infra* notes 259-62 and accompanying text.

138. *See, e.g.*, discussion *supra* part III.A (California statute). The Connecticut, Florida and Michigan statutes are notable exceptions. *See* discussion *supra* part III.B.1 (Connecticut statute); part III.B.2 (Florida statute); part III.B.4 (Michigan statute).

139. *See, e.g., supra* note 60 and accompanying text (California statute). Illinois specifically requires that a threat precede surveillance or following activity. *See supra* note 98 and accompanying text.

140. *See, e.g., Morning Edition: Anti-Stalking Laws Considered by Virginia* (NPR radio broadcast, Mar. 10, 1992).

> [A] lot of innocent people may end up being victimized by this type of a statute. If you have, for instance, a domestic dispute where a husband or a wife is angry at the other spouse, they can call the police and say, "Well, my spouse or my former spouse walked around the house and he knew that I would be frightened by this and it scared me."

*Id.* (statement of Nina Ginsberg, National Association of Criminal Defense Lawyers). *See also Nightline, supra* note 45 (statement of Professor Jonathan Turley, George Washington University: "[T]his system essentially criminalizes mere presence . . . in an area, when coupled with reasonable fear in the accusing parties . . . .").

is or is not following, "harassing, annoying or bothersome" activity "is merely a question of one's own interpretation."[141] One state court which has reviewed such an argument has stated that, "[p]resumably what appellant means . . . is that . . . the defendant will never know if he is committing a crime or not. The fallacy in this theory is that the victim's subjective ideas on what is or is not harassing are not in issue."[142] In dismissing the appellant's constitutional challenge, the court noted, "[t]he point is that the defendant . . . *intend[s]* to harass and the defendant certainly knows if he is doing that."[143] Therefore, if anti-stalking statutes are drafted to contain specific requirements of intent, the argument that innocent activity or mistakes might be punished under the statutes is greatly weakened.

Moreover, there are two significant reasons why the requirement of a credible threat in anti-stalking legislation is particularly troubling. First, recent scientific studies[144] have shown that, despite most people's intuition, there may be no association or even a negative association between the sending of threatening and otherwise inappropriate letters to Hollywood celebrities and members of the United States Congress, respectively, and actual approach behavior.[145] Behavior which indicates the likelihood of an individual approaching a subject can be thought of as

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141. Constantino v. State, 255 S.E.2d 710, 713 (Ga. 1979).

142. *Id.*

143. *Id.* (emphasis in original). *See also* United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978) (quoting Screws v. United States, 325 U.S. 91, 101-02 (1945) ("[W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law.")).

144. *See, e.g.*, Park E. Dietz et al., *Threatening and Otherwise Inappropriate Letters to Hollywood Celebrities*, 36 J. FORENSIC SCI. 185 (Jan. 1991) [hereinafter *Hollywood Study*]. While the studies are fairly thorough, being based on six years of research, *id.* at 186, the results are subject to certain research limitations. The authors have identified certain systematic biases in the studies as being probable, including the following:

> (1) the most severely disorganized letter writers may be underrepresented because they more often fail to mail, address, or stamp their letters; (2) the most subtle degrees of inappropriateness are probably underrepresented because they do not meet the screener's threshold for referral; and (3) the most overtly threatening, ominous, and fear-arousing letters are probably overrepresented.

*Id.* at 189.

145. *See id.* at 208; Park E. Dietz et al., *Threatening and Otherwise Inappropriate Letters to Members of the United States Congress*, 36 J. FORENSIC SCI. 1445, 1466 (Sept. 1991) [hereinafter *Congressional Study*].

"approach positive" behavior.[146] Similarly, behavior which indicates that an individual is less likely to approach a subject can be considered "approach negative" behavior.[147]

In a study of persons sending threatening and otherwise inappropriate letters to Hollywood celebrities [hereinafter *Hollywood Study*], "[t]he most important of the negative findings [was] the lack of association between verbal threats and approach [positive] behavior."[148] And in another study of persons sending threatening letters to members of the United States Congress [hereinafter *Congressional Study*], individuals "were significantly *less* likely to pursue a face-to-face encounter with him or her. Subjects who sent inappropriate letters that contained no threats were significantly more likely to pursue a face-to-face encounter."[149] In the *Congressional Study*, although certain factors may seem counter-intuitive,

> [e]ach of the following aspects of threats, taken alone, was significantly associated with [approach negative behavior]: threatening any kind of harm toward any public figure; threaten-

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146. The authors of the scientific studies explain their classification system for approach positive behaviors, as follows:

> A subject was classified as "approach positive" if known to have (1) visited a location believed to be the home of the celebrity; (2) visited any agency believed to represent the celebrity; (3) visited a location believed to be the home or business address of any acquaintance, friend, relative, or intimate of the celebrity; (4) approached within five miles of any of the above locations with the expressed intent of seeing, visiting, or confronting any of the above parties; (5) traveled more than 300 miles to see the celebrity or any of the above parties, even in a public appearance; or (6) behaved in any manner out of the ordinary at any public appearance of the celebrity.

*Hollywood Study*, *supra* note 144, at 187. *See also Congressional Study*, *supra* note 145, at 1447 (explaining similar classification system for behavior by persons toward members of Congress).

147. The authors of the scientific studies explain their classification system for approach negative behaviors, as follows:

> A subject was classified as "approach negative" if he or she had sent inappropriate materials to the celebrity but had not met any of the above criteria for an approach-positive case. A subject who had written and who also attended a public performance would still be classified as approach negative if the subject traveled less than 300 miles to see the celebrity and behaved appropriately there.

*Hollywood Study*, *supra* note 144, at 187. *See also Congressional Study*, *supra* note 145, at 1447 (explaining similar classification system for behavior by persons toward members of Congress).

148. *Hollywood Study*, *supra* note 144, at 208. Moreover, "[t]his finding held true through many attempts to disprove it by testing every aspect of threatening statements for which we could create a measure." *Id.* *See also* Fountain & Kirby, *supra* note 36, at 1 (statement of Lt. John Lane, Los Angeles Police Department, Threat Management Unit: "The problem is that oftentimes suspects don't overtly communicate a credible threat to our victims . . . .").

149. *Congressional Study*, *supra* note 145, at 1466 (emphasis in original).

> ing to kill any public figure or those around a public figure; indicating that a threat would be executed by the subject or his agent; indicating that a threat would be executed by someone other than the subject or his agent; making any direct threat;[150] making any veiled threat;[151] making any conditional threat;[152] and making any implausible threat.[153]

Similar studies have not yet been undertaken with respect to inappropriate mail sent to religious or business leaders or to private individuals.[154]

Therefore, "[t]hose who rely on the presence or absence of threats in making judgments about what to do are making a serious mistake."[155] Of course, such a notion "contradicts a vast body of assumptions that is relied on each day in judging whether harassing communications warrant concern, notification of the police, security precautions, or investigation."[156] But, "[u]nfortunately, this error is codified in the criminal law, which recognizes various types of verbal threats as unlawful but does not accord equal recognition to harassment without threats, even though the latter often poses an equal or greater danger of harm to persons or property."[157]

The second reason why the inclusion of a credible threat requirement in most anti-stalking statutes is troubling is that severe emotional distress felt by a victim absent an explicit threat of physical harm is simply left unaddressed. There are many situations where extreme emotional distress may occur without an explicit threat of physical violence. For example, if an individual receives multiple telephone calls a day from a silent or screaming caller, and also repeatedly receives upsetting doorstop deliveries

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150. A "direct threat" includes "straightforward and explicit statements of an intention to commit harm that do not state conditions that might avert the harm (for example, 'I'm going to kill you')." *Hollywood Study*, *supra* note 144, at 203.

151. A "veiled threat" includes "indirect, vague, or subtle statements suggesting potential harm that do not state conditions that might avert the harm (for example, 'There's no saying what might happen')." *Id.*

152. A "conditional threat" includes "statements portending harm and specifying either conditions to be met in order to avert the harm or conditions under which the threat will be carried out; usually such threats use the words, 'if,' 'if not,' 'or,' 'or else,' 'unless,' or 'otherwise.'" *Id.* at 204.

153. *Congressional Study*, *supra* note 145, at 1463. An "implausible threat" includes "curses or hexes, [threats] evidenc[ing] a psychotic notion of causation, or . . . [threats which are] technically impossible." *Hollywood Study*, *supra* note 144, at 204.

154. *Hollywood Study*, *supra* note 144, at 208. "[I]t remains to be seen whether the results can be generalized to communications received by other groups of public figures, such as . . . religious, or business leaders." *Id.*

155. *Id.*

156. *Id.*

157. *Id.* *See also supra* note 148 and accompanying text.

(such as a chocolate box filled with spiders), that individual would likely be found to suffer continuing severe emotional distress even under a stringent reasonable person standard.[158]

### 3. Other Approach-Positive[159] Factors

A number of factors other than "credible threat," which have been shown by studies to be linked to stalking, appear not to have been considered by various legislators in drafting the new anti-stalking laws.[160] A consideration of such additional factors would likely result in a better understanding of the problem and in the drafting and passage of more effective laws.

The *Hollywood Study* identified certain factors as being associated with approach positive behavior:

> [A] duration of correspondence of one year or longer; the . . . expressi[on] [of] a desire for face-to-face contact with the celebrity; a specific time announced when something would happen to the celebrity; a specific location announced where something would happen to the celebrity; repeated mention of entertainment products; . . . telephoning in addition to writing; and the presence of two or more geographically different postmarks.[161]

Approach negative factors were also noted in the *Hollywood Study*, including the following:

> [T]he subject's using tablet-like paper; providing his or her full address; expressing a desire to marry, have sex with, or have children with the celebrity; enclosing commercial pictures; attempting to instill shame in the celebrity; indicating sexual interest in the celebrity; repeatedly mentioning other public figures; and mentioning any sexual activity.[162]

The number of communications sent was "associated with approach as an inverted-U shaped function; the subjects who sent a total of 10 to 14 communications were those most likely to have approached."[163]

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158. *See* Mark Tait, *Gunshot Frightens Family*, CALGARY HERALD, Sept. 29, 1992, at B4.

159. *See supra* notes 146-47 (specifying characteristic "approach positive" and "approach negative" behaviors).

160. *See infra* notes 161, 164 and accompanying text.

161. *Hollywood Study*, *supra* note 144, at 208.

162. *Id.*

163. *Id.*

Similarly, the *Congressional Study* revealed the following approach positive factors identified in its sample group:

> [R]epetitive letter writing; providing any identifying information; telephoning in addition to writing; closing letters appropriately; politeness in letters; taking the role of a special constituent; casting the member of Congress in a benefactor role, including the roles of rescuer, benefactor, or potential benefactor; repeatedly mentioning love, marriage, or romance; expressing a desire for face-to-face contact with the member; and expressing a desire for rescue, assistance, valuables or recognition.[164]

Certain approach negative factors were also noted in the *Congressional Study*, including the following:

> [C]ursive writing; taking an enemy role, including the roles of assassin, persecutor, and condemning judge; casting the Congress member in an enemy role, including the roles of persecutor and conspirator; attempting to instill fear in the member; attempting to provoke upset in the member; attempting to instill worry in the member; and making any threat.[165]

Legislators have yet to draft anti-stalking bills which utilize these approach positive and approach negative factors to identify the potentially dangerous stalking behavior targeted by the legislation. While many of the approach positive factors taken alone do not constitute dangerous behavior, these studies show that when the same factors are present in varying combinations, the results can lead to serious stalking behavior.[166] Continued research is needed in this area to help guide and shape future legislation and make the anti-stalking laws more effective than they are at present.

### 4. Lack of Endangered Third Party Notification

In the *Hollywood Study*, "[t]hirty-six percent . . . mentioned some public figure other than the celebrity to whom they had written. This finding is one of several indications that [those] who harass or threaten one public figure present a risk of harassing or threatening another public

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164. *Congressional Study*, *supra* note 145, at 1463.

165. *Id.*

166. *See supra* notes 159-65 and accompanying text.

figure."[167] Moreover, "this is also true of many of those who attack public figures."[168] At least two examples can readily be cited:

> John Hinckley sent and delivered multiple communications to actress Jodie Foster and called her on the telephone long before the shooting of President Reagan and his party. Likewise, Chet Young was known to the Secret Service for threatening the President before he murdered the father of the singing Lennon Sisters.[169]

Thus, "important indicators of risk to a public figure [may appear] long before an attack on a public figure, but [are either] not received by those who needed the information or [are] not recognized as warnings."[170]

These facts underscore the need for a "central repository of information,"[171] particularly since "individual celebrities receive communications from multiple subjects and [since] subjects writing more than a single letter corresponded for a median duration of 11 months."[172] In order "[t]o encompass [the most dangerous subjects] whose pursuit of public figures will bring them within striking distance," the repository must "include all inappropriate communications, whether threatening or not, and [records of] all persons making inappropriate visits in search of the public figure, whether at the true location of the public figure or not."[173]

Admittedly, however, the maintenance of such a central repository would "pose[] significant legal and policy problems . . . including those governing the sharing of information and the keeping of intelligence files on persons who have not committed a crime."[174]

### 5. Effectiveness As Compared With Court Protective Orders

Previously, law enforcement officials and the courts relied largely on restraining and other protective orders to protect potential victims of stalking.[175] Often, a violation of a protective order led to actual harm to the subject of protection before the police could take affirmative action.[176]

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167. *Hollywood Study*, *supra* note 144, at 207.
168. *Congressional Study*, *supra* note 145, at 1466.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Hollywood Study*, *supra* note 144, at 206.
173. *Congressional Study*, *supra* note 145, at 1466-67 (emphasis omitted).
174. *Id.* at 1466.
175. *See supra* note 36 and accompanying text.
176. *See supra* notes 32-33 and accompanying text.

The newly enacted anti-stalking laws provide law enforcement officials with a needed tool. Though generally applicable only in cases where a "credible threat" has been made, these laws help prevent needless and often violent harm to stalking victims. While it is too early to determine the effectiveness of the new anti-stalking laws, it is noteworthy that as of August 11, 1992, law enforcement officials in California had handled 145 stalking cases and made twelve arrests.[177] Even though the total number of arrests made may seem small, these statistics show that the prosecutorial activity in this pioneering state has been strong, with the law providing hope for many persons who would otherwise have no recourse. The statistics in Massachusetts are also impressive. A total of forty-eight people were jailed during the first six and one-half months after Massachusetts' anti-stalking law went into effect.[178]

Yet, while "[a]nti-stalking laws are welcomed by both victims and law enforcers, . . . nobody thinks they're the whole answer."[179] Realistically, "nothing but broad societal change will protect women from every potential abuser."[180] Stalkers can simply "just get sneakier."[181] Moreover, "[n]either laws nor the courts can guarantee the[] safety [of victims], especially when according to police so many stalkers have mental disorders."[182]

Nevertheless, while the anti-stalking laws may not be the entire solution, they do supply a valuable added protection for victims of stalkers. They close several loopholes that protective orders, traditionally relied upon in such cases, leave open.[183] Protective orders first require that some proscribable activity occur, and second that a court order be obtained subsequent to such activity. Needless harm to a victim could be avoided by eliminating the requirement that harmful activity occur before protection

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177. *World News Tonight With Peter Jennings*, *supra* note 53.

178. Chow, *supra* note 46, at 13 (statement of Suffolk County Sheriff Robert Rufo).

179. Puente, *supra* note 10, at 9A.

180. Hohler, *supra* note 36, at 1.

181. Linda Mae Caristone, *The Stalkers: 'Every Day Might Be My Last'; The Experts Give Advice to Abused Women*, CHI. TRIB., Sept. 13, 1992, Tempo, at 3.

182. *World News Tonight with Peter Jennings*, *supra* note 53. *See also* Bruce Rubenstein, *Stalker a Danger to Himself and Others; But He May Go Free*, ILL. LEGAL TIMES, June 1992, at 18 ("For all his insanity he [Ralph Nau, who has pursued Cher, Olivia Newton-John and Sheena Easton] is a very crafty and creative person . . . . Imagine what would happen if he got out . . . .").

183. *See* discussion *supra* part II.A.2 (discussing prior reliance on court protective orders and their ineffectiveness).

is made available to the victim,[184] and by providing an option other than the issuance of a restraining order that may actually trigger acts of violence against the victim.[185] Also, protective court orders can be less flexible, and thereby less effective, than some state anti-stalking statutes. For example, while court orders often require that a given individual stay a prescribed distance away from the protected party, under many of the anti-stalking statutes that same individual may be found guilty even if he or she always remained one step beyond the prescribed distance.[186]

### *B. Possible Constitutional Problems*

#### 1. Overbreadth

A number of state anti-stalking statutes may be subject to constitutional attack for being overbroad. A statute may be found overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also sweeps within its coverage speech or conduct which is protected by the First Amendment guarantees of free speech.[187]

Some critics have expressed concern that many of the statutes as written possess a potential for misuse which would endanger the rights of persons who were intended to be protected parties.[188] "It's possible that an overzealous prosecutor could sweep in a lot of legally protected activity and speech while prosecuting somebody for stalking . . . ."[189] Persons with possible legitimate interests who might unwittingly be punished under the various state statutes include private investigators, investigative

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184. Some of the new anti-stalking statutes have been drafted to require a minimum of only two acts against the victim before the accused can be prosecuted. *See, e.g., supra* note 112 and accompanying text (Michigan statute). Other statutes use the term "repeatedly," which may also be interpreted to require only two acts against the victim. *See, e.g., supra* notes 58-59 and accompanying text (California statute).

185. *See supra* notes 40-41 and accompanying text.

186. *See, e.g., Morning Edition: Anti-Stalking Laws Considered by Virginia, supra* note 140 (statement of Los Angeles Assistant City Attorney Alana Bowman: Many stalkers "have literally measured the distance between a home and . . . the field across the street, so they know they can stand 110 yards away [without violating a 100-yard stay-away restraining order]. What this enables the police officer to do is to make an arrest in those kind of fall-through-the-crack cases.").

187. *See* Thornhill v. Alabama, 310 U.S. 88 (1940).

188. *See, e.g., Nightline: Anti-Stalker Laws, supra* note 45.

189. Constance L. Hays, *If That Man Is Following Her, Connecticut Is Going to Follow Him*, N.Y. TIMES, June 5, 1992, at B1 (quoting Philip S. Gutis, a spokesman for the American Civil Liberties Union).

reporters, photographers acting within the scope of their professional responsibilities,[190] and "parents who have been denied custody [who wish to monitor] their children."[191]

Although there is, as yet, no reported case of a constitutional challenge to an anti-stalking statute, it is instructive to study the case law pertaining to constitutional challenges of telephone harassment statutes. This type of statute typically prohibits making telephone calls to another with the intent to harass the receiving party.[192] Several courts have addressed overbreadth challenges to these statutes and have come to differing conclusions.

A representative example of a court opinion overturning a telephone harassment statute is found in *People v. Klick*.[193] In *Klick*, the Supreme Court of Illinois held that an Illinois statute which prohibited a person from knowingly making a telephone call "[w]ith intent to annoy another"[194] was unconstitutionally overbroad. The court reasoned that the statute was not limited to "unreasonable conduct" but instead applied to "any call made with the intent to annoy."[195] The court objected that the statute "could make criminal a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product . . . [or] by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official."[196] Notwithstanding the court's invalidation of this statute, it noted that while an "intent to annoy" may not be punishable, other similar conduct was not subject to First Amendment protection.[197] The court stated that conduct proscribed by the Constitution is

> the type of unreasonable conduct which by its very nature attacks the individual's peace of mind and solitude: *e.g.*, terror caused to an unsuspecting person when he or she answers the telephone, perhaps late at night, to hear nothing but a tirade of threats, curses, and obscenities, or, equally frightening, to hear only heavy breathing or groaning. Clearly, this is not the type of conduct which is protected by the first amendment.[198]

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190. *See, e.g.*, Seth Schiesel, *Federal Measure Would Bar Stalking*, BOSTON GLOBE, July 2, 1992, National/Foreign, at 5 (journalists); Ross, *supra* note 134, at 6 (investigative reporters).

191. Schiesel, *supra* note 190, at 5.

192. *See, e.g.*, 47 U.S.C. § 223 (1991).

193. 362 N.E.2d 329 (Ill. 1977).

194. *Id.* at 331.

195. *Id.*

196. *Id.* at 331-32.

197. *Id.* at 331.

198. *Klick*, 362 N.E.2d at 331.

Similar statutes were overturned in *State v. Dronso*[199] and *State v. Blair*.[200]

Other courts which have addressed the issue of overbreadth challenges to telephone harassment statutes have reached the opposite conclusion. In *United States v. Lampley*,[201] the Third Circuit Court of Appeals upheld 47 U.S.C. § 223, which prohibited making anonymous telephone calls "with intent to annoy, abuse, threaten, or harass any person."[202] The court reasoned that

> [n]ot all speech enjoys the protection of the first amendment, and [that] in enacting [the statute] the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives.[203]

Similarly, the court in *State v. Elder*[204] upheld a Florida law much like the statute at issue in *Lampley*. The *Elder* court stressed that the proscribed conduct was not "directed at the communication of opinions or ideas, but at conduct" intended to harass others.[205]

The United States Supreme Court has only indirectly addressed the issue of whether a statute prohibiting harassment of others (or similar conduct) may be consistent with the First Amendment. In *Boos v. Barry*,[206] the Court overturned a provision in a District of Columbia code which prohibited "display [of] any flag, banner, placard, or device designed . . . to intimidate, coerce, or bring into public odium any foreign government . . . or any officer . . . within 500 feet of any building . . . used . . . as an embassy . . . or for other official purposes."[207] The Court noted that as a "content-based restriction on political speech in a public forum [the ordinance] must be subjected to the most exacting scrutiny."[208] However, while rejecting the District of Columbia ordinance, the Court cited with approval a federal statute which "subject[ed] to criminal

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199. 279 N.W.2d 710 (Wis. Ct. App. 1979).

200. 601 P.2d 766 (Or. 1979).

201. 573 F.2d 783 (3d Cir. 1978).

202. *Id.* at 785 n.2.

203. *Id.* at 787 (citations omitted).

204. 382 So. 2d 687 (Fla. 1980).

205. *Id.* at 690. *Accord* Gormley v. Director, Conn. State Dep't of Probation, 632 F.2d 938, 941 (2d Cir.) (holding that the Connecticut legislature had a compelling interest in protecting its citizens from fear or abuse inflicted by individuals whose primary purpose was not communication), *cert. denied*, 449 U.S. 1023 (1980).

206. 485 U.S. 312 (1988).

207. *Id.* at 316.

208. *Id.* at 321 (emphasis omitted).

punishment willful acts or attempts to 'intimidate, coerce, threaten, or harass a foreign official.'"[209] Thus, it seems that a statute which is intended to protect individuals from harassment may pass constitutional muster if it is sufficiently narrow in scope.

The Court addressed a similar issue in *Frisby v. Schultz*.[210] In *Frisby*, the Court upheld a Brookfield, Wisconsin, statute which made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield."[211] The Court focused upon the right of an individual to be free from unwanted communication, stating that "[t]here simply is no right to force speech into the home of an unwilling listener."[212] The Court noted that picketing targeted at an individual was "fundamentally different from more generally directed means of communication . . . [in that it did] not seek to disseminate a message to the general public, but to intrude upon the targeted resident, and to do so in an especially offensive way."[213] The Court concluded that because picketing targeted at an individual "is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it. The nature and scope of this interest make the ban narrowly tailored."[214]

It is by no means certain that the Court would uphold the anti-stalking statutes currently implemented. However, it seems likely that the conduct prohibited by these statutes, if it is considered speech at all, would be construed as speech directed at an unwilling recipient, which "the State has a substantial and justifiable interest in banning."[215]

As noted in several of the foregoing cases, a statute must be *substantially* overbroad before the law can be found to be unconstitutional.[216] Further, state courts are likely to try to save a statute by narrowing its construction, if possible, rather than entirely invalidating it.[217] Therefore,

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209. *Id.* at 324-25.

210. 487 U.S. 474 (1988).

211. *Id.* at 477.

212. *Id.* at 485.

213. *Id.* at 486.

214. *Id.* at 488.

215. *Frisby*, 487 U.S. at 488.

216. Broadrick v. Oklahoma, 413 U.S. 601 (1973). "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615.

217. *See generally* Osborne v. Ohio, 495 U.S. 103 (1990). "Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach . . . ." *Id.* at 119.

if an anti-stalking statute is drawn in a reasonably narrow fashion, it would likely withstand constitutional scrutiny if challenged for overbreadth.

### 2. Vagueness

The United States Supreme Court has held that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[218] A statute may be deemed unconstitutionally vague if the conduct forbidden by it is so unclearly defined "that men of common intelligence must necessarily guess at its meaning and differ as to its application."[219]

According to this standard, a number of state anti-stalking statutes may be subject to attack for being unconstitutionally vague.[220] Critics may argue that the statutory provisions do not adequately describe activities which are proscribed. Some statutes, for example, enumerate certain prohibited activities and then proceed to indicate an exception for activities which are in furtherance of a "legitimate purpose" without specifying what shall constitute such a "legitimate purpose."[221] Also, some statutes refer to "following" without specifying what shall constitute following or the distance at which following shall be deemed to take place.[222] A California legislative committee noted that, under its anti-stalking bill,

> if "A" is under a court order to keep 100 feet away from "X" and witnesses report seeing "A" following "X" around from a distance of 150 feet, "A" could still be prosecuted . . . if "A" had the intent to place "X" in reasonable fear of death or great bodily injury. [Thus,] . . . a person could still be prosecuted for stalking even though he or she was not violating any court order.[223]

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

219. *Id.* (citing International Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914); Collins v. Kentucky, 234 U.S. 634, 638 (1914)).

220. For example, the California statute leaves several terms undefined. *See* discussion *supra* part III.A.1. *See also Nightline: Anti-Stalker Laws*, *supra* note 45 (statement of Professor Jonathan Turley, George Washington University: "[S]ome legal behavior may be indistinguishable from some illegal behavior. That leaves it to the police officer to make the determination whether somebody is a stalker, whether someone is obnoxious.").

221. *See, e.g.*, discussion *supra* part III.A.1 (California statute).

222. *Id.*

223. *Proposing Establishment of New Crime of Stalking, 1990: Hearings on S. 2184 before the Cal. Assembly Comm. on Public Safety* (July 3, 1990) (statement of Judith M. Garvey, Counsel).

Yet another example of possible vagueness in some anti-stalking statutes is the lack of definition for what constitutes an act of "violence" or a credible threat of "violence."[224]

Thus, to tighten any loopholes for possible constitutional attack for vagueness, the statutes should, with greater particularity, define the meanings of certain terms used within them, such as the term "legitimate purpose."[225] However, the use of some other terms, such as "following," could be found to be satisfactory if a common definition or a reasonable person standard is applied to discern their meaning. For example, the violation of a court restraining order pertaining to distance to be kept from another person would not be a prerequisite to or determinative of a finding that one individual had been "following" another. Instead, if a reasonable person under the same circumstances would believe he or she were being followed, then "following" shall have occurred.

### 3. Procedural Due Process

Another aspect under which state statutes may be challenged is procedural due process.[226] Specifically, some statutes could be attacked on grounds of the inclusion of a provision for a warrantless arrest without catching the suspect in the act of committing the crime. The Florida anti-stalking statute, for example, allows a law enforcement officer to arrest the accused without requiring a warrant or witnessing the crime.[227]

Generally, a law enforcement official may arrest a person without a warrant when the officer has reasonable grounds to believe that a felony has

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224. *See, e.g.*, discussion *supra* part III.A.1 (California statute).

225. *See, e.g.*, *infra* notes 265-67 and accompanying text (offering the author's proposal for a definition of the term "legitimate purpose").

226. The Fourteenth Amendment of the Constitution provides that the States shall not "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Thus, criminal defendants are guaranteed that certain processes must be followed before they may be deprived of their liberty. Some of these mandated processes include: the Fourth Amendment right to be free from unreasonable search and seizure and to exclude from criminal trials any evidence illegally seized, Mapp v. Ohio, 367 U.S. 643 (1961); the Fifth Amendment right to refrain from compelled self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); and the Sixth Amendment rights to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), to a public trial, *In re* Oliver, 333 U.S. 257 (1948), to confrontation of opposing witnesses, Pointer v. Texas, 380 U.S. 400 (1965), and to compulsory process for obtaining witnesses. Washington v. Texas, 388 U.S. 14 (1967).

227. *See* discussion *supra* part III.B.2.

been committed and the person before the officer has committed it.[228] Also, an officer may make a warrantless arrest for a misdemeanor committed in the officer's presence.[229] But under the Florida law, only probable cause[230] is required to arrest someone for the crime of stalking. Thus, while the Florida statute may be constitutional when the stalking committed is a felony, the same statute may be challenged when the stalking committed is a misdemeanor.

However, an unlawful arrest by itself has no impact on a subsequent criminal prosecution. Thus, if the police improperly arrest a person (e.g., for a misdemeanor violation, without a warrant and without witnessing the act of violation), they may detain the person if they have probable cause to do so,[231] and the invalid arrest is not a defense to the offense charged.[232] The exclusionary rule, though, provides that evidence that is the product of an unlawful arrest is inadmissible against the defendant at trial.[233]

Additionally, certain anti-stalking statutes have been criticized for their bail provisions.[234] Iowa, for example, has created a presumption of ineligibility for bail in felony cases of stalking,[235] and Florida is considering adding a provision which calls for automatic denial of bail to persons arrested for stalking.[236] But pretrial detention without bail, pursuant to the Bail Reform Act of 1984,[237] has been upheld as constitutional when such detention is imposed not as a punishment for past conduct, but rather as protection of the community from reasonably predictable future con-

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228. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 479-80 (1963).

229. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 156-57 (1925). A crime is deemed committed in the officer's "presence" if the officer is aware of it through any of his or her senses. *See, e.g.*, Thomas v. United States, 412 F.2d 1095, 1096 (1969).

230. Probable cause to arrest is present when, at the time of the arrest, the officer has within his or her knowledge reasonably trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect has committed or is committing a crime. Beck v. Ohio, 379 U.S. 89 (1964).

231. New York v. Harris, 495 U.S. 14, 18 (1990).

232. Frisbie v. Collins, 342 U.S. 519, 522 (1952).

233. *See, e.g., Mapp*, 367 U.S. at 643.

234. *See, e.g.*, Gera-Lind Kolarik, *Stalking Laws Proliferate*, 78 ABA J. 36 (Nov. 1992).

235. 1992 Iowa Legis. Serv. 2025, § 2 (West) (approved Apr. 29, 1992). A defendant charged with felony stalking "is presumed to be ineligible to be admitted to bail unless the court determines that such release reasonably will not result in the person failing to appear as required and will not jeopardize the personal safety of another person or persons." *Id.*

236. *Stalking Law May Be Strengthened, supra* note 81 (according to a spokeswoman for Rep. Carol Hanson).

237. 18 U.S.C. §§ 3141-3150 (1985 & Supp. 1992).

duct.[238] Moreover, "the Supreme Court has repeatedly held that courts are able to predict dangerousness with a constitutionally acceptable risk of error."[239] Thus, if bail is denied not for the purpose of punishment, but rather, as "an incident of some other legitimate purpose," then these statutes would likely be upheld as constitutional.[240] However, there must be adequate procedural safeguards in place. Among other provisions, "[i]f detention is ordered there must be written findings of fact and a statement of reasons for the order" which follows a "prompt hearing."[241] While the complete denial of bail, which may be reasonable under certain circumstances, does not violate the Eighth Amendment prohibition against excessive bail, if bail is set it must be at a reasonable level.[242]

### C. *Other Possible Enforceability Issues*

Generally, the commission of a crime requires both an act and a state of mind.[243] If either element is not present, then a crime has not been committed.[244] Thus, if an anti-stalking statute is drafted without including the element of intent, questions are raised as to the enforceability of the statute. Such is the case with the Michigan anti-stalking law, which does not specify intent as a requirement.[245] Rather, the statute requires only reasonable and actual fear or significant emotional suffering on the part of the victim.[246] Where a crime against person or property omits mention of intent, courts will interpret the law as requiring, at a minimum, a "reckless" state of mind.[247] However, courts which have interpreted various harassment statutes have indicated that an intent requirement may

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238. United States v. Hazzard, 598 F. Supp. 1442, 1451 (N.D. Ill. 1984).

239. *Id.* at 1451-52.

240. *Id.* at 1451 (quoting Schall v. Martin, 467 U.S. 253 (1984)).

241. *Id.* at 1452 (citing the Bail Reform Act of 1984, 18 U.S.C.S. § 3142(i)(1)) (Law. Co-op. 1984).

242. U.S. CONST. amend. VIII (providing that "excessive bail shall not be required"); United States v. Salerno, 481 U.S. 739, 754-55 (1987). *See also Stalking Law May Be Strengthened, supra* note 81 (statement of Ray Markey, a prosecutor who helped draft Florida's anti-stalking law: "A person has a constitutional right to a reasonable bond . . . . You can't put bail at such a level that it amounts to no bail.").

243. *See, e.g.*, WAYNE R. LAFAVE, MODERN CRIMINAL LAW 88 (1978).

244. *Id.*

245. *See* discussion *supra* part III.B.4.

246. *Id.*

247. *See generally* Morissette v. United States, 342 U.S. 246 (1952).

be necessary for a statute to be upheld as constitutional.[248] In one case, the court held that the specific intent requirement of a telephone harassment statute "preclude[d] the proscription of mere communication."[249] In another instance, the court held that the federal telephone harassment statute did not criminalize "mere attempts to communicate" because the statute required punishable conduct be made with the intent to harass.[250] Thus, the Michigan anti-stalking statute, or any other statute drafted without including intent as an element of the crime, could be found constitutionally infirm for that reason alone.

## V. PROPOSAL

> *It was clear that this man, who is apparently crazy, was not going to let up, and the authorities were powerless to stop him. Though he was free to move about, I was living in a state of siege.*[251]

### *A. Enlarging Punishable "Stalking" Behaviors*

In an effort to consolidate the most effective elements of the existing anti-stalking statutes and to further address the problems discussed above, the following proposal is offered. The first element pertains to enlarging the potential reach of the statutes.

A primary concern with the newly created anti-stalking statutes is that they generally apply only in cases where a "credible threat" is present.[252] Limiting the application of the anti-stalking laws solely to danger of physical harm addresses only part of the problem. Stalking can equally terrorize persons who experience any form of substantial emotional distress whether or not they specifically fear physical harm. The anti-stalking statutes need to encompass all forms of substantial emotional distress, and not be limited to fear of physical harm, to more fully address the problems of victims. However, when substantial emotional harm is experienced by a victim, that harm should be reasonable to help prevent misuse of the

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248. *See infra* notes 249-50 and accompanying text. *See also supra* notes 138-43 and accompanying text (arguing that an intent requirement may help mitigate the possibility of innocent activity or mistakes being punished).

249. *Gormley*, 632 F.2d at 941 (quoting *Lampley*, 573 F.2d at 787).

250. *Lampley*, 573 F.2d at 787 (referring to 14 U.S.C. § 233).

251. *News: Stalking Victims Turn to Congress for Help*, *supra* note 7.

252. *See, e.g.*, *supra* note 60 and accompanying text (California statute).

statute. Florida takes a two-tiered approach which serves as a useful model. In Florida, stalking is a misdemeanor when a person "willfully, maliciously, and repeatedly follows or harasses another person."[253] The term "harasses" encompasses "conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose."[254] Aggravated stalking, a felony, occurs when a person commits stalking "and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury."[255] Thus, Florida's approach attaches a higher penalty in cases of threat of physical injury but also recognizes emotional harm for which a lesser degree of punishment is justified. However, Florida does not require that the substantial emotional distress experienced by the victim be reasonable, thus opening the door to possible abuse of the statute. Similarly, Michigan has a two-tiered statute which recognizes significant emotional harm, but Michigan requires that the emotional harm suffered be reasonable.[256]

Another concern is that most statutes only address physical approaching and following of victims as activities punishable under the anti-stalking statutes.[257] These statutes fail to recognize that a victim may reasonably feel fear or substantial emotional distress from unwanted contact by telephone, other electronic media, the mail, or objects otherwise placed upon the victim's property. Michigan's statute serves as a model of how these additional types of unconsented contacts can be incorporated into anti-stalking legislation to help make it more effective.[258]

Additionally, threats to the safety of not only the victim but also a member of the victim's family should be covered.[259] However, legislators need to carefully consider where the boundaries should be drawn. Should unmarried cohabitants or close acquaintances be included? California's recent amendment incorporates threats against both a given person and a member of that person's immediate family.[260] Oklahoma, too, uses the "immediate family" standard to identify the boundaries of the reach of the law in that state.[261] Oklahoma defines the phrase "member of the immediate family" to include "any spouse, parent, child, person related

253. 1992 Fla. Sess. Law Serv. 208, § 2 (West).
254. *Id.* § 1(a).
255. *Id.* § 3.
256. *See* discussion *supra* part III.B.4.b.
257. *See, e.g.*, discussion *supra* part III.B.1.b (Connecticut statute).
258. *See* discussion *supra* part III.B.4 (Michigan statute).
259. *See supra* notes 136-37 and accompanying text.
260. *See supra* notes 66-67 and accompanying text.
261. *See supra* notes 121-24 and accompanying text.

within the third degree of consanguinity or affinity or any other person who regularly resides in the household or who regularly resided in the household within the prior six (6) months."[262] This definitional approach is useful, giving clear guidance to courts and law enforcement officials. However, the six-month limitation on unrelated household members may be too brief because the "familial" characteristics gained during a period of cohabitation may remain even after six months. Therefore, legislators should consider broadening the unrelated cohabitant time limit, perhaps to one year. However, broadening the scope to include mere close acquaintances, without the requirement of those acquaintances cohabiting within the past year, should probably not be included since the likelihood of harm is so remote.

### *B. Safeguards*

While the preceding discussion argues for enlarging the scope of anti-stalking statutes, certain safeguards must also be incorporated in the statutes to protect an individual's civil liberties. Thus, the statutes should require that: (1) the acts are repetitive; (2) the acts are committed with the intent[263] to cause fear in the victim; and (3) such fear is actually and reasonably experienced by the victim.[264] The requirement of repetitiveness is central to the act of stalking; however, it remains questionable whether two acts alone should be deemed to constitute the pattern of behavior that must be shown. Perhaps a sliding scale approach could be incorporated whereby three acts would normally constitute the requisite pattern of behavior, but two acts would be sufficient if those acts were substantially severe or threatening.

### *C. Addition of Definition of "Legitimate Purpose"; Presumption*

A number of the state anti-stalking laws provide for an exception to their application when a person is acting for a "legitimate purpose," without clearly identifying what such a "legitimate purpose" might be. The use of this phrase without definition creates the potential for confusion or uncertainty as to a statute's application under given circumstances. Even if certain activities are specified as constituting a legitimate purpose

262. 1992 Okla. Sess. Law Serv. 107, § 1(e) (West).

263. *See* discussion *supra* part IV.C.

264. *See, e.g., supra* notes 58-59 and accompanying text (California statute).

generally, under certain circumstances those same activities may not or should not be deemed to be carried out for a legitimate purpose.

To remedy this problem of definition, the following provision is proposed as an addition to, or modification of, existing state stalking statutes:

> There is a rebuttable presumption that each of the following examples of activities constitutes a "legitimate purpose" under this statute:
>
> a. activities of law enforcement officials or private investigators conducted as a part of official investigations;[265]
>
> b. activities of members of the press conducted within the scope of their professional employment;[266] and
>
> c. activities of persons during picketing that is otherwise lawful.[267]

While this proposal does not limit the activities that potentially may be deemed to be carried out for a "legitimate purpose," it specifies certain activities that are presumed to be carried out for a "legitimate purpose." However, not all activities of certain classes of individuals are included. For example, some off-duty activities of law enforcement officials which are not conducted as a part of official investigations or are otherwise unlawful would fall outside the scope of the available exemption. The same would be true, for example, of activities of members of the press (including both reporters and photographers) which are not conducted within the scope of their professional employment, and with picketing that is in violation of the law. But, even if activities are conducted within the scope of the statute, there is only a presumption they are conducted for a "legitimate purpose." The burden would then revert to the plaintiff to show that the purpose was not official or was otherwise unlawful to disallow the exemption in a given case.

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265. *See, e.g., Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) ("[M]y sister was being stalked for about two years and the problem was that he was a police sergeant.").

266. *See, e.g.*, Schiesel, *supra* note 190, at 5; Ross, *supra* note 134, at 6; *Sonya Live: Stalker Laws*, *supra* note 265.

267. *See, e.g.*, CAL. PENAL CODE § 646.9 (Deering Supp. 1993) (labor picketing); 1992 Ill. Laws 870, §§ 12-7.3(c), 12-7.4(c) (labor picketing); Wayne King, *New Jersey Adopts Law On Curfews*, N.Y. TIMES, Nov. 1, 1992, §1, at 56 (picketing); *Sonya Live: Stalker Laws*, *supra* note 265 (political dissidents).

### *D. Enhanced Penalties*

Several states provide for enhanced penalties under specific circumstances. Situations where enhanced penalties are presently used include: a violation of a court order in effect at the time of the offense,[268] a violation of a condition of probation,[269] a second or subsequent conviction against the same victim,[270] a threat directed against the victim's physical safety,[271] the confinement or restraint of the victim,[272] actual physical harm suffered by the victim,[273] and stalking a person who is a minor.[274] An enhanced penalties approach is useful and would likely serve as a deterrent in a number of cases.

### *E. Bail Provisions*

While a court may entirely deny bail in certain circumstances, such denial should occur only after a prompt hearing before a judge.[275] However, if bail is to be set, the court should consider a number of factors in setting the amount of bail. Such factors should include not only whether the defendant is likely to appear at trial, but also whether the defendant has a prior violent history, whether the defendant has violated an existing restraining order, whether the defendant has violated a prior statute, and whether a minor is the subject of obsession.[276]

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268. *See, e.g., supra* note 62 and accompanying text (California statute); note 79 and accompanying text (Connecticut statute); note 89 and accompanying text (Florida statute); note 99 and accompanying text (Illinois statute).

269. *See, e.g., supra* note 116 and accompanying text (Michigan statute).

270. *See, e.g., supra* note 63 and accompanying text (California statute).

271. *See, e.g., supra* notes 88-89 and accompanying text (Florida statute); note 116 and accompanying text (Michigan statute).

272. *See, e.g., supra* note 99 and accompanying text (Illinois statute).

273. *See, e.g., id.*

274. *See, e.g., supra* note 79 and accompanying text (Connecticut statute) (where the stalker's target is under sixteen years of age).

275. *See supra* notes 234-42 and accompanying text. *See also Judges Uphold Nursing Home Tax, No-Bail on Stalking Charges*, UPI, Sept. 30, 1992, *available in* LEXIS, Nexis Library, Currnt File ("[T]he law includes a safeguard that a judge first must hold a hearing to order someone be held without bail.").

276. *See, e.g., supra* note 102 and accompanying text (Illinois statute).

### *F. Notice of Parole or Release From Jail*

Additionally, anti-stalking statutes can be drafted to include provision for notification of the victim upon the defendant's parole or release from jail.[277] Such notice would enable the victim to take appropriate measures to help prevent possible further harm.

## VI. CONCLUSION

> *Justice Louis Brandeis identified the "right to be left alone (as) the most comprehensive of rights and the right most valued by civilized men." . . . There should have been no need for little Caty of Vermont to bequeath her doll collection to friends. Indeed, no American should feel that they have no place to turn when they are the prey of stalkers.*[278]

Stalking—often directed at entertainment and other public figures—is a particularly terroristic form of crime.[279] Before enactment of the state anti-stalking laws, victims often had to experience actual physical harm before legal recourse was made available to them.[280] The most common remedy, the issuance of court protective orders, was often ineffective.[281]

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277. *See, e.g.*, Laura E. Keeton, *Senate Panel Approves Proposed Stalking Bill*, HOUS. CHRON., Feb. 10, 1993, at A20.

278. 138 CONG. REC. S9527 (daily ed. July 1, 1992) (legislative day June 16, 1992) (statement of Sen. Cohen).

279. *Psychological Assault–More Effective Laws Needed to Protect Victims of Stalkers*, SEATTLE TIMES, Nov. 7, 1992, at A11 (letter to editor) ("Stalking is one of the most terrorizing forms of violence . . . . It constitutes hunting, battering and menacing of an individual through psychological tactics. Too often, the lethal nature of this kind of abuse is ignored and leads to tragic and fatal circumstances for its victims."); *Crack Down on Stalkers*, STAR TRIB. (Minneapolis), Jan. 13, 1993, at 18A ("Stalking isn't just harassment. It's terrorism. It's also often a prelude to more violent crime."); Ann Hodges, *CBS Stalking Story Is Bizarre But True*, HOUS. CHRON., Feb. 9, 1993, Houston, at 6 (statement of Richard Thomas, actor playing villain in television stalking drama: "The thing that's so disturbing about this is that terror does not come with a terrifying mask. This guy starts out as just somebody who wants to go out to dinner. At what point does he cross the line into a psychotic situation?"). *See also* Larry Dougherty, *'I've been mentally raped,'* ST. PETERSBURG TIMES, Nov. 13, 1992, Pasco Times, at 1 ("I feel that I've been mentally raped," stated one victim whose name was withheld.).

280. *See* discussion *supra* part II.A.1.

281. *See* discussion *supra* part II.A.2.

Not only have court orders often not been enforced, but their issuance has sometimes triggered the violent acts intended to be avoided.[282]

Recognizing these limitations in the existing law, and frequently in response to local tragedies, a number of state legislatures have recently passed anti-stalking laws.[283] With the exception of California, which passed its original law in 1990,[284] virtually all states have passed their statutes during the past year.[285] Other states have bills pending.[286] In their infancy, the anti-stalking statutes have been characterized as "experimental,"[287] and some may be vulnerable to attack for their effectiveness and enforceability. They have been challenged not only for narrowness in scope and general ineffectiveness,[288] but also for overbreadth, vagueness, failure to meet procedural due process requirements, and other enforceability issues.[289] Yet, the laws can be made both more effective and enforceable, as detailed in the analysis and proposal sections of this Comment.[290] Strengthening the effectiveness and enforceability of state anti-stalking statutes is an urgent need. Tightly woven statutes can provide a solid basis for legal intervention, when it is necessary, to prevent physical or emotional harm from occurring.

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282. *See supra* notes 40-41 and accompanying text.

283. *See supra* note 15 (listing states which have passed anti-stalking statutes as of January 1, 1993, and states which have anti-stalking statutes under consideration).

284. *See supra* note 54 and accompanying text.

285. *See, e.g., supra* notes 72, 80, 91, 104, 118, 126 and accompanying text.

286. *See supra* note 15.

287. Palmer, *supra* note 9 (statement of Michigan State Representative Perry Bullard: "We are writing experimental legislation.").

288. *See* discussion *supra* part IV.A.

289. *See* discussion *supra* part IV.B.

290. *See* discussion *supra* parts IV-V.

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