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## “STALK TALK”: A FIRST LOOK AT ANTI-STALKING LEGISLATION

Robert John Bardo, a nineteen year old unemployed fast food worker from Tucson, Arizona, was obsessed with television actress Rebecca Schaeffer, co-star of the series “My Sister Sam.”<sup>1</sup> He carried a publicity photo of the actress with him, called her publicity agency several times, and sent her fan mail.<sup>2</sup> After obtaining her address from the state Department of Motor Vehicles, on July 18, 1989, Bardo culminated his obsession by shooting Schaeffer in the chest after she opened the security door to her Los Angeles apartment.<sup>3</sup> That same year five Orange County, California women were killed in a six week period by former husbands or boyfriends after courts had issued restraining orders against the men to prevent harassment.<sup>4</sup> In response to these murders, California enacted the nation’s first ‘stalking’ law in 1990.<sup>5</sup> Section 646.9 of the California Penal Code, effective January 1, 1991, makes it a crime to repeatedly follow or harass someone.<sup>6</sup>

California is no longer the only state to criminalize this threatening behavior. In 1992 through mid-1993, an additional forty-eight states passed stalking laws, including Colorado, Florida, Illinois, Massachusetts, Michigan, Ohio, Virginia, and Washington.<sup>7</sup> In mid-1993, similar legislation was

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1. Robert Welkos & George Ramos, “Obsessive Fan” Seized in Tucson in Actress’ Slaying, L.A. TIMES, July 20, 1989, at 1.

2. *Id.*

3. *Id.*; Denise Hamilton, *Trial to Begin in Stalking of Weatherman*, L.A. TIMES, Feb. 25, 1993, at J1.

4. Michael Connelly, *Ex-Boyfriend Jailed Under ‘Stalking’ Law*, L.A. TIMES, June 10, 1991, at B1.

5. See James Quinn, *Man Who Stalked Ex-Girlfriend Sent to Prison*, L.A. TIMES, Apr. 9, 1992 at B3 and Rosalind Resnick, *States Enact ‘Stalking’ Laws*, NAT’L L.J., May 11, 1992, at 3 (discussing California’s stalking law).

6. CAL. PENAL CODE § 646.9 (West Supp. 1993). See *infra* note 19 (giving partial text of California’s stalking law).

7. The states that passed anti-stalking legislation in 1992 and 1993 are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. See ALA. CODE §§ 13A-6-90 to -94 (Supp. 1992); ALASKA STAT. §§ 11.41.260-.270 (1993); ARIZ. REV. STAT. ANN. § 13-2921 (1993); 1993 Ark. Acts 388; COLO. REV. STAT. § 18-9-111 (Supp. 1992); CONN. GEN. STAT. ANN. §§ 53a-181c, -181d (West Supp. 1993); DEL. CODE ANN., tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. §§ 16-5-90 to -93 (Michie Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, paras. 5/12-7.3, 5/12-7.4 (Smith-Hurd 1993); IND. CODE ANN. §§ 35-45-10-1 to -5 (West Supp. 1993); IOWA CODE ANN. § 708.11 (West Supp. 1993); 1992 Kan. Sess.

pending in Oregon.<sup>8</sup> On the federal level, Congressman Ed Royce and Senator Barbara Boxer of California proposed legislation in early 1993 that would make stalking a federal crime.<sup>9</sup>

These stalking laws are part of an effort by legislators to counter the ineffectiveness of injunctions and restraining orders in preventing stalking and other domestic violence.<sup>10</sup> Some critics, however, question whether the new laws will be any more effective in deterring mentally disturbed stalkers.<sup>11</sup>

Laws 298; KY. REV. STAT. ANN. §§ 508.130-.150 (Baldwin Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1993); MD. ANN. CODE art. 27, § 121B (1993 Supp.); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993); MICH. COMP. LAWS §§ 750.411h, 750.411i (Supp. 1993); MINN. STAT. § 609.749 (1994 Supp.); MISS. CODE ANN. § 97-3-107 (Supp. 1992); H.B. 194, 87th Gen. Ass., 1st Reg. Sess., 1993 Mo. Legis. Serv.; S.B. 37, 53rd Leg., Reg. Sess., 1993 Mont. Laws ch. 292; NEB. REV. STAT. §§ 28-311.02 to .05 (Supp. 1992); 1993 Nev. Stat. ch. 233; N.H. REV. STAT. ANN. § 633:3-a (1993 Supp.); N.J. REV. STAT. § 2C: 12-10 (Supp. 1993); H.B. 8, 41st Leg., 1st Reg. Sess., 1993 N.M. Laws --; N.Y. PENAL LAW §§ 120.14, 240.25, 240.26 (McKinney Supp. 1993); N.C. GEN. STAT. § 14-277.3 (Supp. 1992); OHIO REV. CODE ANN. §§ 2903.211-.215 (Baldwin Supp. 1992); OKLA. STAT. tit. 21, § 1173 (Supp. 1993); 1993 Pa. Legis. Serv. Act 1993-28 (Purdon) (to be codified at 18 PA. CONS. STAT. ANN. § 2709 (1994)); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to -6 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); S.B. 25, 73rd Leg., Reg. Sess., 1993 Tex. Sess. Law Serv. ch. 10 (to be codified at TEX. PENAL CODE ANN. § 42.07(a)(7) (West 1993)); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); VT. STAT. ANN. tit. 13, §§ 1061-63 (1993 Supp.); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (1992); WIS. STAT. ANN. § 947.013 (West Supp. 1992); WYO. STAT. § 6-2-506 (Supp. 1993). See Henry J. Holcomb, *Florio Signs Anti-Stalking Law*, PHILA. INQUIRER, Jan. 6, 1993, at B4 (explaining New Jersey's stalking law); Mitchell Landsberg, *Stalker Laws Among Many That Will Take Effect Tomorrow*, PHILA. INQUIRER, June 30, 1992, at A5 (describing various new stalking laws); Tamar Lewin, *New Laws Address Old Problem*, N.Y. TIMES, Feb. 8, 1993, at A1 (explaining stalking laws); Elizabeth Ross, *Problem of Men Stalking Women Spurs New Laws*, CHRISTIAN SCI. MONITOR, June 11, 1992, at 6 (same); Gary Spencer, *State Tightens Penalty for Stalking*, N.Y.L.J., Aug. 20, 1992, at 1 (explaining New York's stalking law).

8. S.B. 833, 67th Legis. Ass., Reg. Sess., 1993 Or. Laws ch. 626.

9. H.R. 740, 103d Cong., 1st Sess. (1993); S. 470, 103d Cong., 1st Sess. (1993). See Bill McAllister, *Senator's Wife Urges Anti-Stalking Law*, WASH. POST, Mar. 18, 1993, at A20 (relating difficulties facing Senate Judiciary Committee in its attempt to draft federal stalking law) and Constance Sommer, *Senator, Wife Know Awful Lot About Stalkers*, L.A. TIMES, Mar. 18, 1993, at A5 (explaining details of Senator Boxer's proposed federal stalking law).

10. See e.g., Kenneth R. Thomas, *How to Stop the Stalker: State Antistalking Laws*, 29 CRIM. L. BULL. 124, 127 (1993) (explaining problems with civil protection orders); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 733 (1988) (discussing ineffectiveness of restraining orders and injunctions in preventing domestic violence); Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 514 (1984) (explaining disadvantages of injunctive relief for harassment victims); Melinda Beck, *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60, 61 (discussing difficulty in enforcing restraining orders); Ross, *supra* note 7, at 6 (discussing problems with restraining orders in protecting women from abusive husbands and boyfriends).

11. See Beck, *supra* note 10, at 61 (quoting clinical psychologist Stanton Samenow as questioning deterrent effect of imprisonment on mentally disturbed stalkers); Kevin Fagan, *New Focus on Deadly Stalkers*, S.F. CHRON., Jan. 11, 1993, at A1 (arguing that increased

Additionally, others claim that the language of many of the new statutes may be unconstitutionally overbroad or vague.<sup>12</sup> The specific provisions in certain stalking laws providing for presumption of intent,<sup>13</sup> denial of bail,<sup>14</sup> and arrest without warrant<sup>15</sup> may present other constitutional concerns. To assist the states in their efforts to draft constitutional stalking legislation, in 1992 Congress ordered the Attorney General to develop a model stalking law by September 30, 1993.<sup>16</sup>

This Note will begin by examining the California stalking law as a model for other anti-stalking legislation. It will then discuss some selected departures from the California model. A constitutional analysis of the basic California statute and unusual provisions in other states' laws will follow. After a brief discussion of the federal stalking legislation, the Note will conclude with a proposed model stalking statute.

### I. CALIFORNIA PENAL CODE SECTION 646.9

In effect since January 1, 1991, California's stalking law was the first enacted in the United States.<sup>17</sup> Due to its groundbreaking status and the notoriety surrounding its passage, the California statute has served as a model for many of the statutes enacted or pending in other states.<sup>18</sup> Because

attention on stalking has not deterred problem); Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35, 36 (quoting Illinois Public Defender Joseph V. Collina as questioning whether jail will deter stalkers); Maria Puente, *Legislators Tackling the Terror of Stalking*, USA TODAY, July 21, 1992 at 9A (citing preliminary research on celebrity stalking for proposition that 90% of stalkers suffer from mental disorders).

12. See *infra* notes 98-167 and accompanying text (reviewing selected stalking laws for overbreadth and vagueness).

13. See *infra* notes 29-39 and accompanying text (explaining details of statutory presumptions in Washington's and Michigan's stalking laws) and notes 174-91 and accompanying text (discussing constitutional validity of statutory presumptions in Washington's and Michigan's laws).

14. See *infra* notes 46-65 and accompanying text (explaining details of provisions for denying bail to stalkers in Illinois, Ohio, and Iowa) and notes 192-227 and accompanying text (discussing constitutional validity of provisions for denying bail to stalkers in Illinois, Ohio, and Iowa).

15. See *infra* notes 77-83 and accompanying text (explaining details for provisions allowing arrest without warrant in stalking laws of Florida and Ohio) and notes 228-245 and accompanying text (discussing validity of warrantless misdemeanor arrest).

16. Act of Oct. 6, 1992, Pub. L. No. 102-395, § 109(b). See *infra* notes 255-56 and accompanying text (discussing details of federal legislation); see also Seth Schiesel, *Federal Measure Would Bar Stalking*, BOSTON GLOBE, July 2, 1992, at 5 (explaining details of federal stalking bill).

17. Resnick, *supra* note 5, at 3.

18. Among the states whose stalking legislation reflects the influence of California's law are Alabama, Delaware, Idaho, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, and Utah. See ALA. CODE § 13A-6-90 to -94 (Supp. 1992); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992); 1992 Kan. Sess. Laws 298; KY. REV. STAT. ANN. § 508.130 (Baldwin Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MISS. CODE ANN. § 97-3-107 (Supp. 1992); NEB. REV. STAT. §§ 28-311.02 to .03 (Supp. 1992); N.J. REV. STAT.

of its impact, a review of the provisions of the California stalking law is appropriate.

California's stalking law makes it illegal to intentionally scare someone through repeated following, harassment, and threats.<sup>19</sup> Stalking is a misdemeanor, punishable by up to one year in a county jail or a \$1000 fine, or both.<sup>20</sup> The statute, however, treats stalking as a felony under special circumstances. For example, the sentencing court may order imprisonment in the state penitentiary if the defendant violates an existing restraining order or injunction when stalking the victim.<sup>21</sup> The court also may punish a repeat offender with a state prison term if the subsequent conviction was for stalking the same victim.<sup>22</sup> Under a 1992 amendment to the original stalking law, the court has the authority to order counseling for the convicted stalker as a condition of probation or suspended sentence.<sup>23</sup> It also may issue a restraining order prohibiting contact between the stalker and the victim for up to ten years.<sup>24</sup>

In an apparent effort to avoid invalidation on the grounds of overbreadth or vagueness, the California statute provides precise definitions of

§ 2C: 12-10 (Supp. 1993); OKLA. STAT. tit. 21, § 1173 (Supp. 1993); R.I. GEN. LAWS §§ 11-59-1 to -3 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to -6 (Supp. 1992); TENN. CODE ANN. § 39-17-315 (Supp. 1992); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992).

19. CAL. PENAL CODE § 646.9 (West Supp. 1993). Section 646.9(a) states in part: Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking. . . .

*Id.*

20. *Id.* § 646.9(a).

21. *Id.* § 646.9(b). Section 646.9(b) reads:

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

*Id.*

22. *Id.* § 646.9(c),(d). These subsections state:

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

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

*Id.*

23. *Id.* § 646.9(h).

24. *Id.* § 646.9(i).

some of the critical terms used to describe the crime of stalking.<sup>25</sup> This effort is augmented by two disclaimer clauses. The first clause states that constitutionally protected activity is not included within the meaning of any stalking "course of conduct."<sup>26</sup> The second clause states that the stalking law does not apply to conduct that occurs during labor picketing.<sup>27</sup>

## II. WASHINGTON AND MICHIGAN: PRESUMED INTENT

In contrast to California's requirement that a stalker specifically intend to scare the victim,<sup>28</sup> the stalking laws of the states of Washington and Michigan allow intent to be presumed from the stalker's conduct. Washington's stalking law, effective June 11, 1992,<sup>29</sup> provides for an alternative to specific intent; the stalker must either intend to scare the victim *or* know or reasonably be aware that the victim is scared.<sup>30</sup> The stalker's constructive

25. CAL. PENAL CODE § 646.9. California's stalking law defines "harasses" as a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose. *Id.* § 646.9(e). To further clarify the California legislature's concept of "harass," the statute defines "course of conduct" as a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. *Id.* The statute also requires the course of conduct be one that would cause a reasonable person to suffer substantial emotional distress and has actually caused the stalking victim substantial emotional distress. *Id.* Requiring the stalker's conduct to satisfy both objective and subjective criteria in determining its impact on the victim would seem to minimize the chance that a court might convict for stalking because of a victim's unusual sensitivity to harassment. The statute defines "credible threat" as one made with the intent and apparent ability to carry it out so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. *Id.* § 646.9(f). Again, the California legislature has included an objective standard by requiring the fear to be "reasonable."

26. *Id.* § 646.9(e).

27. *Id.* § 646.9(g).

28. *Id.* § 646.9(a).

29. John White, *New State Laws Take Effect Tomorrow*, SEATTLE POST-INTELLIGENCER, June 10, 1992, at B2 (explaining Washington's stalking law).

30. WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993). Washington's new stalking law reads in part:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly follows another person to that person's home, school, place of employment, business, or any other location, or follows the person while the person is in transit between locations; and

(b) The person being followed is intimidated, harassed, or placed in fear that the stalker intends to injure the person or property of the person being followed or of another person. The feeling of fear, intimidation, or harassment must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person being followed; or

(ii) Knows or reasonably should know that the person being followed is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

*Id.*

knowledge that he scared the victim appears sufficient to satisfy the law's intent requirement, because a lack of intent to scare the victim is not a defense to the crime.<sup>31</sup> Even though it allows for the conviction of a stalker without a finding of specific intent, the Washington stalking statute further assists the prosecution by treating attempts by the stalker to contact or follow the victim after being asked to stop as a presumption of an intent to harass or intimidate.<sup>32</sup>

Michigan's stalking law, effective January 1, 1993,<sup>33</sup> requires a willful course of conduct by the stalker but does not explicitly require an intent to threaten or harass the victim.<sup>34</sup> Rather than turning on the assailant's intent, the classification of the harassing conduct as stalking depends on whether the victim is scared and whether that reaction is reasonable.<sup>35</sup> The requirement that the victim be scared may be presumed if the stalker continues after being warned to stop.<sup>36</sup>

In Michigan, the assailant does not have to expressly threaten the victim to be charged with stalking.<sup>37</sup> A stalker who makes a credible threat against the victim or a member of the victim's family is guilty of the more serious offense of aggravated stalking, a felony punishable by up to five years imprisonment or a \$10,000 fine, or both.<sup>38</sup> The Michigan legislature also

31. *Id.* para. 2. Paragraph 2 states:

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person being followed did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person being followed.

*Id.*

32. *Id.* para. 4. Paragraph 4 states: "Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person." *Id.*

33. See Amber Arellano, *Law Lets Police Charge Suspect in Stalking*, DETROIT FREE PRESS, Jan. 21, 1993, at 1B (describing Michigan's stalking law).

34. MICH. COMP. LAWS. § 750.411h (Supp. 1993). Section 411h(1)(d) reads: "'Stalking' means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." *Id.*

35. *Id.*

36. *Id.* § 411h(4).

Section 441h(4) reads:

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

*Id.* (emphasis added).

37. *Id.* § 411h.

38. *Id.* § 750.411i. Stalking a victim in violation of an injunction or restraining order;

has made provisions to allow the stalking victim to institute a civil action for damages against the stalker.<sup>39</sup>

### III. ILLINOIS, OHIO, IOWA, AND MASSACHUSETTS: PREVENTIVE DETENTION

Although California's statute has served as a model for many other states' anti-stalking legislation,<sup>40</sup> Illinois, Ohio, and Iowa have departed from the model by providing for limitations on bail for the accused or convicted stalker. Illinois enacted its stalking law, one of the nation's toughest, on July 12, 1992.<sup>41</sup> The state classifies stalking as a Class 4 felony,<sup>42</sup> punishable by up to three years in prison.<sup>43</sup> A stalker who harms, confines, or restrains the victim or violates an injunction, protection order, or temporary restraining order is guilty of aggravated stalking,<sup>44</sup> a Class 3

in violation of a condition of probation, pretrial release, or appeal bond; or with a previous stalking conviction also qualifies as aggravated stalking. *Id.*

39. *Id.* § 600.2954. See also *Engler Signs Bill to Stop Stalkers*, DETROIT FREE PRESS, Dec. 12, 1992, at 17A (describing details of Michigan's stalking law). Wyoming also has provided for civil actions against stalkers. WYO. STAT. § 1-1-126 (Supp. 1993).

40. See *supra* note 18 (listing stalking statutes with language very similar to California's statute).

41. ILL. ANN. STAT. ch. 720, paras. 5/12-7.3, 5/12-7.4 (Smith-Hurd 1993). See *Anti-Stalking Bill Signed In Illinois*, CLEVELAND PLAIN DEALER, July 13, 1992, at 8A (explaining details of and history behind Illinois stalking law); Kolarik, *supra* note 11, at 35 (explaining provisions of Illinois stalking law).

42. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993). Section 12-7.3 states:

(a) A person commits stalking when he or she 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 two 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.

(b) Sentence. Stalking is a Class 4 felony. A second or subsequent conviction for stalking is a Class 3 felony.

(c) Exemption. This section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute.

*Id.*

43. *Id.* ch. 730, para. 5/5-8-1(7):

44. *Id.* ch. 720, para. 5/12-7.4. Section 12-7.4 reads:

(a) A person commits aggravated stalking when he or she, 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 in subsection (b)(1) of the Section 214 of the Illinois Domestic Violence Act of 1986.

(b) Sentence. Aggravated stalking is a Class 3 felony. A second or subsequent conviction for aggravated stalking is a Class 2 felony.

(c) Exemption. This section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute.

*Id.*



felony punishable by up to five years in prison.<sup>45</sup>

The most unusual element of the Illinois stalking legislation is its provisions for denial of bail before trial.<sup>46</sup> These provisions have been a subject of controversy in the Illinois legal community since the law's passage.<sup>47</sup> Under the new Illinois law, state courts have the authority to deny bail to a defendant charged with stalking or aggravated stalking, a power historically restricted to capital and life-imprisonment offenses.<sup>48</sup> If the state alleges that the accused stalker poses a threat to the victim, the court must hold a hearing to determine whether it should deny bail.<sup>49</sup> If the defendant has not yet been released on bail and requests a continuance to prepare for the hearing, the court may hold him in custody during the continuance.<sup>50</sup> The state may hold an unreleased defendant in custody during a state-requested continuance if the defendant previously has violated a protection order or been convicted of assault, battery, stalking, or sexual assault against the alleged victim.<sup>51</sup> The procedures for the bail detention hearing are similar to those of a criminal trial, with one major exception:

45. *Id.* ch. 730, para. 5/5-8-1(6).

46. *Id.* ch. 725, para. 5/110-6.3. Another unusual feature of the Illinois stalking legislation package is its mental health treatment section. The sentencing court may order the parole board to consider requiring the convicted stalker to undergo mental health treatment as a condition of parole or probation. *Id.* ch. 730, para. 5/3-14-5. Similarly, Hawaii's stalking law gives a sentencing court the authority to order counseling for the convicted stalker. HAW. REV. STAT. § 711-1106.5 (Supp. 1992).

47. See Joseph V. Collina, *Stalking Law Is Bad Legislation*, CHI. DAILY L. BULL., July 31, 1992, at 5 (containing public defender's criticism of bail provisions in Illinois stalking law).

48. ILL. ANN. STAT. ch. 725, para. 5/110-4 (Smith-Hurd 1993). Paragraph 5/110-4 reads in part:

(a) All persons shall be bailable before conviction, except the following offenses where the proof is evident or the presumption great that the defendant is guilty of the offense: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, 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 any person or persons; or *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.*

*Id.* (emphasis added).

49. *Id.* para. 5/110-6.3. Paragraph 5/110-6.3(a) reads:

Upon verified petition by the State, the court shall hold a hearing to determine whether bail should be denied to a defendant who is charged with stalking or aggravated stalking, when it is alleged that the defendant's admission to bail poses a real and present threat to the physical safety of the alleged victim of the offense, and denial of release on bail or personal recognizance is necessary to prevent fulfillment of the threat upon which the charge is based.

*Id.*

50. *Id.* para. 5/110-6.3(a)(2). The defendant's continuance may not exceed five calendar days. *Id.*

51. *Id.* The state's continuance cannot exceed three days. *Id.*

the rules governing admissibility of evidence do not apply.<sup>52</sup> Thus, the prosecution may use evidence obtained as a result of an illegal search and seizure in its efforts to deny the accused stalker bail.<sup>53</sup> The Illinois statute provides that the court may deny bail once it determines that: (1) it is evident or presumed that the defendant committed the stalking offense; (2) the defendant poses a threat to the victim; (3) denial of bail is necessary to prevent fulfillment of the threat; and (4) no combination of conditions can reasonably assure the victim's safety.<sup>54</sup> If the court denies bail, it must bring the detained defendant to trial within ninety days of the detention order.<sup>55</sup>

Ohio's stalking legislation also contains limitations on bail for an accused stalker.<sup>56</sup> If the accused stalker violates a restraining order in his contact with the victim or has a previous conviction for stalking or a similar crime involving the same victim, the court must consider a number of factors when deciding on the amount and conditions of bail, including the stalker's mental state and the threat to the victim.<sup>57</sup> In addition to any restriction imposed by bail, the victim may move for an "anti-stalking protection order" as a condition of the accused stalker's pretrial release.<sup>58</sup> The court may issue such an order if it finds that the continued presence of the accused stalker threatens the victim, and that order may include a requirement that the accused stalker not enter the residence, school, or workplace of the alleged victim.<sup>59</sup> Violation of an anti-stalking protection

52. *Id.* para 5/110-6.3(c)(1)(A). "The rules concerning the admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing." *Id.*

53. *Id.* para. 5/110-6.3(c)(1)(B). Paragraph 5/110-6.3(c)(1)(B) reads:

A motion by the defendant to suppress evidence or to suppress a confession shall not be entertained. Evidence that proof may have been obtained as the result of an unlawful search and seizure or through improper interrogation is not relevant to this state of the prosecution.

*Id.*

54. *Id.* para. 5/110-6.3(b). Among the numerous factors the court may consider in evaluating the defendant's threat to the victim are: the nature and circumstances of the offense charged; the history and characteristics of the defendant; the age and physical condition of the victim; and the defendant's propensity for violent behavior. *Id.* para. 5/110-6.3(d).

55. *Id.* para. 5/110-6.3(f).

56. OHIO REV. CODE ANN. §§ 2903.211-.215 (Baldwin Supp. 1992).

57. *Id.* § 2903.212. The factors the Ohio court must consider when deciding on bail for an accused stalker are:

- (1) Whether the person has a history of violence toward the complainant or a history of other violent acts;
- (2) The mental health of the person;
- (3) Whether the person has a history of violating the orders of any court or governmental entity;
- (4) Whether the person is potentially a threat to any other person;
- (5) Whether setting bail at a high level will interfere with any treatment or counseling that the person is undergoing.

*Id.*

58. *Id.* § 2903.213.

59. *Id.*

order is a separate statutory offense.<sup>60</sup> If that violation caused physical harm to the victim or the victim's property, or caused the victim to believe that such harm would result, the court has the authority to confine the accused stalker until it completes a mental evaluation.<sup>61</sup>

Iowa's provisions for denying stalkers bail are more limited than those of Illinois or Ohio. First, Iowa makes no provision for denial of bail before trial; the Iowa law is restricted to those defendants already convicted of stalking who are awaiting sentencing or who are appealing.<sup>62</sup> Second, while the statute presumes the convicted stalker is ineligible for bail, the court may release the stalker if it determines that the release will not result in a failure to appear at subsequent proceedings and will not jeopardize the safety of others.<sup>63</sup> Third, the presumption of ineligibility for bail applies only to a third or subsequent stalking offense.<sup>64</sup> After a first or second

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60. *Id.* § 2903.214. Violation of an anti-stalking protection order with no previous convictions for stalking is a fourth degree misdemeanor; violation with one previous stalking conviction is a first degree misdemeanor; violation with two or more previous stalking convictions is a fourth degree felony. *Id.*

61. *Id.* § 2903.215. Section 2903.215 reads in part:

(A) If a defendant is charged with a violation of [an anti-stalking protection order] or of a municipal ordinance that is substantially similar to that section, and if the court determines that the violation of the anti-stalking protection order allegedly involves conduct by the defendant that caused physical harm to the person or property of the person covered by the order or conduct by the defendant that caused the person covered by the order to believe that the defendant would cause physical harm to that person or his property, the court may order an evaluation of the mental condition of the defendant. The evaluation shall be completed no later than thirty days from the date the order is entered . . . .

(C)(1) The court may order a defendant who has been released on bail to submit to an examination . . . . If such a defendant refuses to submit to an examination or a complete examination as required by the court or the center, program, facility, or examiners involved, the court may amend the conditions of the bail of the defendant and order the sheriff to take him into custody . . . for purposes of the examination.

*Id.*

62. IOWA CODE ANN. § 811.1 (West Supp. 1993). Section 811.1 reads in part:

[A] defendant awaiting judgment of conviction and sentencing following either a plea or verdict of guilty of, or appealing a conviction of . . . [a third or subsequent offense for 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.*

63. *Id.*

64. *Id.* § 811.1(3). Section 811.1(3) reads in part:

While the presumption of ineligibility for bail . . . shall not apply to a . . . [first or second stalking offense], in considering bail for a defendant awaiting judgment of conviction and sentencing following a plea or verdict of guilty of, or appealing a conviction of a . . . [first or second stalking offense], the court shall consider the likelihood of the defendant reestablishing contact with the victim of the violation.

*Id.* The Iowa statute does not specify whether the previous stalking convictions must have involved the same victim.

stalking conviction, however, the court must consider the likelihood of the convicted stalker's re-establishing contact with the victim when deciding on bail.<sup>65</sup>

Massachusetts's stalking law says nothing about denying an accused stalker bail.<sup>66</sup> However, it does limit the accused stalker's pretrial activity through its provision prohibiting any "continuance without a finding."<sup>67</sup> That phrase describes a common Massachusetts trial court practice in which a judge will postpone a case for a lengthy period of time, typically a year, without making a finding that the accused is guilty.<sup>68</sup> The judge usually will impose certain conditions on the defendant; if the defendant complies with the conditions during the continuance, the court dismisses the complaint or indictment.<sup>69</sup> This form of informal pretrial diversion allows the defendant to avoid a criminal conviction (and the resulting punishment) and allows the Commonwealth to save prosecutorial resources by avoiding a trial.<sup>70</sup> The Supreme Judicial Court of Massachusetts has approved the trial courts' use of this technique as an effort to help reduce court backlogs.<sup>71</sup>

Massachusetts's stalking law, however, prohibits using this practice in the case of an accused stalker who is a repeat offender or who has violated an injunction or restraining order.<sup>72</sup> This prohibition is intended to protect the victim by limiting the stalker's opportunity to engage in stalking behavior while waiting for trial.<sup>73</sup>

#### IV. FLORIDA AND OHIO: ARREST WITHOUT WARRANT

The state of Florida has enacted what journalists have described as the toughest anti-stalking law in the nation.<sup>74</sup> Although modeled on the California statute, Florida's law is much more severe. Stalking, defined as willful, malicious, and repeated following or harassment, is a misdemeanor; the stalker is not required to make any threats against or to intentionally scare the victim.<sup>75</sup> Stalking coupled with a credible threat intended to scare the victim or in violation of an injunction is aggravated stalking, a third

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65. *Id.*

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

67. See *A Turnabout on Stalkers*, BOSTON GLOBE, May 28, 1992, at 16 (describing details of Massachusetts's stalking law).

68. See *Commonwealth v. Duquette*, 438 N.E.2d 334, 338 (Mass. 1982) (explaining practice of "continuance without a finding"); *Rosenberg v. Commonwealth*, 360 N.E.2d 333, 335 n.5 (Mass. 1977) (same).

69. *Duquette*, 438 N.E.2d at 338; *Rosenberg*, 360 N.E.2d at 336 n.5.

70. *Duquette*, 438 N.E.2d at 340-41.

71. See *id.* at 341 (approving trial courts' use of continuance without finding).

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

73. *A Turnabout on Stalkers*, *supra* note 67, at 16.

74. See Karen Branch, *Stalkers to Face Jail for Harassment*, MIAMI HERALD, July 1, 1992, at 6B (describing details of Florida's stalking law); Resnick, *supra* note 5, at 3 (explaining background behind Florida's stalking law).

75. FLA. STAT. ANN. § 784.048 (West Supp. 1993); see *infra* note 130 (giving edited text of Florida's stalking statute).

degree felony punishable by up to five years in prison and a \$5000 fine.<sup>76</sup>

The most controversial part of the Florida stalking law is its provision for arrest without warrant.<sup>77</sup> The statute authorizes a police officer to arrest without a warrant any person the officer has probable cause to believe has stalked.<sup>78</sup> However, other Florida law requires a warrant for an arrest on a misdemeanor not committed in the officer's presence,<sup>79</sup> with some specific exceptions for acts of domestic violence.<sup>80</sup> Stalking is not currently one of those enumerated exceptions, making it appear that the two statutes are in conflict.

Ohio's stalking legislation contains a similar provision for arrest without judicial determination of probable cause.<sup>81</sup> A police officer has authority to arrest anyone the officer has probable cause to believe is guilty of stalking.<sup>82</sup> A written statement by the alleged victim qualifies as sufficient probable cause for the arrest.<sup>83</sup>

#### V. MISCELLANEOUS DEPARTURES FROM THE CALIFORNIA MODEL

Although the influence of the California stalking statute has been extensive, some states have enacted interesting departures from its provi-

76. FLA. STAT. ANN. § 784.048(3),(4); *id.* §§ 775.082 -.084.

77. *See Beck supra* note 10, at 61 (quoting Miami criminal defense attorney Jeffrey Weiner's allegation that arrest without warrant provision is unconstitutional); Puentes, *supra* note 11, at 9A (quoting Senator Cohen of Maine relaying criticism of Florida's arrest without warrant provision).

78. FLA. STAT. ANN. § 784.048(5). "Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." *Id.*

79. FLA. STAT. ANN. § 901.15. Section 901.15 reads in part:

A law enforcement officer may arrest a person without a warrant when:

(1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

*Id.*

80. *Id.* § 901.15(6)-(8).

81. *See New Law Makes Stalking A Crime*, CLEVELAND PLAIN DEALER, Aug. 8, 1992, at 2C (explaining provisions of Ohio's stalking law).

82. OHIO REV. CODE ANN. § 2935.03 (Baldwin Supp. 1992). Section 2935.03(b) reads in part:

When there is reasonable ground to believe that . . . the offense of menacing by stalking . . . has been committed . . . [the police officer] may arrest and detain until a warrant can be obtained any person whom he has reasonable cause to believe is guilty of the violation. For purposes of this division, the execution of a written statement by a person alleging that an alleged offender has committed the offense of . . . menacing by stalking . . . constitutes reasonable ground to believe that . . . the person alleged to have committed the offense is guilty of the violation.

*Id.* The section also gives police the authority to make an arrest without a warrant for child enticement, public indecency, and domestic violence. *Id.*

83. *Id.*

sions. In addition to the prohibition of continuance without a finding discussed above,<sup>84</sup> Massachusetts's stalking law provides for mandatory minimum sentences for convicted stalkers.<sup>85</sup> A stalker who violates a restraining order or an injunction faces a mandatory minimum prison term of one year;<sup>86</sup> a repeat offender must serve a two year mandatory minimum.<sup>87</sup> The statute does not allow reduced or suspended sentences, probation, parole, work releases, or furloughs for stalkers serving mandatory minimum sentences.<sup>88</sup>

West Virginia has placed an unusual and arguably unnecessary restriction in its stalking law. The accused stalker formerly must have lived with or had an intimate relationship with the victim to be convicted of the crime.<sup>89</sup> A person who stalks a neighbor, acquaintance, celebrity, or any other person with whom the stalker has had no intimate relationship could not be prosecuted under the present statute.

Three states have exceptions in their stalking laws to allow private detectives to conduct surveillance. Delaware and Washington make express exceptions for private detectives.<sup>90</sup> Tennessee describes the exception as "following another person during the course of a lawful business activity."<sup>91</sup>

Two states require previous action by the victim before authorities may charge the assailant with stalking. Nebraska requires the victim to obtain a temporary restraining order, injunction, or no-contact order against the accused stalker.<sup>92</sup> North Carolina requires the victim to warn or ask the stalker to stop.<sup>93</sup>

Connecticut emphasizes the protection of children in its stalking law by imposing a harsher penalty on those who stalk minors.<sup>94</sup> Stalking an adult is a misdemeanor, punishable by up to one year in prison.<sup>95</sup> Stalking a

84. See *supra* notes 66-73 and accompanying text (discussing prohibition on continuance without finding in Massachusetts's stalking law).

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

86. *Id.* § 43(b).

87. *Id.* § 43(c).

88. *Id.*

89. W. VA. CODE § 61-2-9a (1992). Section 61-2-9a reads in part:

(a) Any person who shall intentionally and closely follow, lie in wait, or make repeated threats to cause bodily injury to any person with whom that person formerly resided or cohabited or with whom that person formerly engaged in a sexual or intimate relationship, with the intent to cause or causing said person emotional distress or placing said person in fear of his or her personal safety shall be guilty of a misdemeanor . . . .

*Id.* (emphasis added).

90. DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); WASH. REV. CODE ANN. § 9A.46.110(3) (West Supp. 1993).

91. TENN. CODE ANN. § 39-17-315 (Supp. 1992).

92. NEB. REV. STAT. § 28-311.03 (Supp. 1992).

93. N.C. GEN. STAT. § 14-277.3 (Supp. 1992).

94. CONN. GEN. STAT. ANN. § 53a-181c (West Supp. 1993); see also Spencer, *supra* note 7, at 1 (discussing New York's and Connecticut's stalking laws).

95. CONN. GEN. STAT. ANN. § 53a-181d; *id.* § 53a-36.

victim under the age of sixteen is a felony, punishable by up to five years in prison.<sup>96</sup>

## VI. CONSTITUTIONALITY OF STALKING LAWS

Because the vast majority of states have enacted their stalking laws only recently, cases challenging the constitutionality of those laws are still at the trial court level and have not yet reached the appellate courts.<sup>97</sup> Some authorities, however, argue that the laws are constitutionally vulnerable.<sup>98</sup> These vulnerabilities derive from overbroad or vague language, statutory presumptions, preventive detention, misdemeanor arrests without a warrant, and mandatory minimum sentences.

### A. Overbreadth

The United States Supreme Court has recognized that the First Amendment needs "breathing space" to ensure that people are not afraid to exercise their rights of expression because of the threat of criminal penalty.<sup>99</sup> The overbreadth doctrine states that a law intended to punish conduct or speech not protected by the First Amendment must be carefully drawn so it will not incidentally inhibit constitutionally protected expression.<sup>100</sup> The Supreme Court, however, generally will not find a law that proscribes constitutionally unprotected activity overbroad unless its potential application to First Amendment activities is substantial.<sup>101</sup> Additionally, in evalu-

96. CONN. GEN. STAT. ANN. § 53a-181c; *id.* § 53a-35a.

97. The first constitutional challenges to stalking laws have occurred in Florida, Illinois, and Virginia. See George Lardner Jr., *Anti-Stalking Laws Proliferate; Several Face Court Challenges*, WASH. POST, Apr. 30, 1993, at A2 (discussing early challenges to stalking laws in Florida, Illinois, and Virginia).

98. See Kiley Armstrong, *Tortured Suitors*, CHI. DAILY L. BULL., Nov. 12, 1992, at 3 (relaying Columbia Law School Vice Dean Vivian Berger's concern that anti-stalking laws may infringe on free speech and movement); Kolarik, *supra* note 11, at 36 (quoting George Washington University Law Professor Jonathan Turley's criticism that many new stalking laws are unconstitutionally vague); Puente, *supra* note 11, at 9A (quoting American Civil Liberties Union spokesman Phil Gutis that vague stalking laws may infringe on civil liberties); Ross, *supra* note 7, at 6 (quoting ACLU director of public education Loren Siegel that new stalking laws may be overly broad); Schiesel, *supra* note 16, at 5 (quoting Senator William S. Cohen of Maine that new stalking statutes may be unconstitutionally overbroad).

99. *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973); *Gooding v. Wilson*, 405 U.S. 518, 521 (1972); *NAACP v. Button*, 371 U.S. 415, 433 (1963).

100. See *Grayned v. City of Rockford*, 408 U.S. 104, 114-15 (1972) (explaining principles behind overbreadth doctrine); *Gooding*, 405 U.S. at 520-22 (same). A statute that imposes a direct restriction on First Amendment activity is more susceptible to challenge for overbreadth. See *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984) (explaining relaxed standing requirements for facial overbreadth challenges). See generally Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

101. See *Munson*, 467 U.S. at 964-65 (explaining criterion of "substantial overbreadth"); *Broadrick*, 413 U.S. at 615 (stating that statute's potentially unconstitutional applications must be substantial when compared to its legitimate uses in order for statute to be void for overbreadth); *Gormley v. Director*, 449 U.S. 1023, 1024 (1980) (White, J., dissenting) (arguing

ating overbreadth challenges the Court distinguishes between speech and conduct, showing more deference to those laws which proscribe conduct rather than speech.<sup>102</sup>

California's overbreadth analysis is similar to that of the federal courts. California courts generally will uphold a statute challenged as overbroad if its terms are reasonably susceptible to a constitutional interpretation.<sup>103</sup> A reviewing court will attempt to construe the challenged law so as to limit its effect to actions the state may regulate or prohibit.<sup>104</sup> Additionally, a California court will not declare a statute unconstitutional unless it is substantially overbroad, particularly when the law regulates conduct rather than speech.<sup>105</sup> Thus, a statute directed primarily at the regulation of conduct that incidentally impinges on First Amendment rights is generally safe from challenge.<sup>106</sup>

In attempting to predict the constitutionality of California's stalking law, it is difficult to discern a clear pattern in the California courts' recent overbreadth analyses of similar harassment and threat statutes. However, the distinction between speech and conduct appears to be the critical factor. Recent case law suggests that a court is more likely to find unconstitutional statutes that regulate activity the court decides is "speech."<sup>107</sup> Laws prohib-

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Connecticut telephone harassment statute was potentially overbroad because it clearly prohibited some constitutionally protected communications); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-27 (2d ed. 1988). Professor Tribe suggests that an overbreadth challenge can be successful only when protected activity is a significant part of the law's target and there is no way of severing the law's unconstitutional applications from its legitimate ones. *Id.*

102. See *Broadrick*, 413 U.S. at 615 (noting distinction between speech and conduct in overbreadth analysis); see also Note, *supra* note 10, at 530 n.115 (listing state court decisions distinguishing between speech and conduct in overbreadth analysis).

103. See *Spiritual Psychic Science Church v. City of Azusa*, 703 P.2d 1119, 1129 (Cal. 1985) (reviewing rules of California overbreadth analysis); *Welton v. City of L.A.*, 556 P.2d 1119, 1123 (Cal. 1976) (same).

104. *Science Church*, 703 P.2d at 1129; *Welton*, 556 P.2d at 1123.

105. See *In re Duncan*, 234 Cal. Rptr 877, 884 (Ct. App.) (upholding child sexual exploitation statute against overbreadth challenge), *cert. denied*, 484 U.S. 985 (1987).

106. *Welton*, 556 P.2d at 1124.

107. *Ketchens v. Reiner*, 239 Cal. Rptr. 549, 552 (Ct. App. 1987). In *Ketchens*, a California Court of Appeal held that laws making it a misdemeanor to insult or abuse a teacher in front of students were unconstitutionally overbroad. The *Ketchens* court determined that the statutes punished "pure speech." *Id.* While the court admitted that many abusive statements made to a teacher would qualify as unprotected "fighting words," it also presented hypothetical expressions of opinion about a teacher that did not. *Id.* Because the ordinances could possibly prohibit protected speech, and because their defect could not be cured by a narrow judicial construction, they were unconstitutionally overbroad. *Id.* at 553. In *In re Elias*, another California Court of Appeal held the state's telephone harassment statute to be unconstitutionally overbroad. 252 Cal. Rptr. 348, 355 (Ct. App. 1988). Because of the telephone's primary purpose of disseminating speech, the *Elias* court focused on the statute's effect on speech rather than conduct. *Id.* at 353. Like the *Ketchens* court, the *Elias* court provided examples of constitutionally protected speech that would be illegal under the law. *Id.* at 352.



iting activity that the reviewing court sees as "conduct" will survive the overbreadth challenge.<sup>108</sup>

When reviewed under the overbreadth criteria developed by the United States Supreme Court and the California courts, California's stalking statute is most likely not unconstitutionally overbroad.<sup>109</sup> The wording of the statute suggests that the California legislature specifically designed the law to regulate conduct and not speech,<sup>110</sup> making it more likely a reviewing court would uphold the law. Additionally, the statute specifies intent and types of prohibited behavior.<sup>111</sup> Finally, constitutionally protected activity is not a significant target of the law; in fact, the statute specifically exempts "constitutionally protected activity" from prohibition as stalking conduct.<sup>112</sup> California's anti-stalking statute gives the appearance of a law carefully drafted to defeat overbreadth challenges.

In contrast to California, the new stalking provisions of Colorado's harassment statute may be vulnerable to charges of overbreadth.<sup>113</sup> Overbreadth analysis in the Colorado courts begins with the determination of whether the challenged statute regulates protected or unprotected speech.<sup>114</sup> Statutes that directly regulate or substantially impair constitutionally protected speech are facially overbroad.<sup>115</sup> If the court cannot place a limiting

108. *People v. Hernandez*, 283 Cal. Rptr. 81 (Ct. App. 1991). In *Hernandez*, a Court of Appeal upheld the amended version of the telephone harassment statute invalidated in *Elias*. This time the reviewing court decided the amended statute prohibited conduct rather than speech, and applied the more deferential "substantially overbroad" language from *Broadrick v. Oklahoma*. *Hernandez*, 283 Cal. Rptr. at 83-84.

In *People v. Hudson*, the same court that decided *Hernandez* held the California statute prohibiting terrorist threats was not overbroad. 6 Cal. Rptr. 2d 690 (Ct. App. 1992). While the *Hudson* court did not explicitly categorize the prohibited activity as conduct rather than speech, the language of the opinion suggests the court saw a "terroristic threat" as closer to an act like assault than a form of expression. *Id.* at 693.

109. CAL. PENAL CODE § 646.9 (West Supp. 1993); see *supra* note 19 (quoting partial text of California's stalking law).

110. CAL. PENAL CODE § 646.9.

111. *Id.*

112. *Id.* § 646.9(e).

113. COLO. REV. STAT. § 18-9-111 (Supp. 1992); see Carl Hilliard, *More Than 80 Laws Take Effect July 1*, ROCKY MOUNTAIN NEWS, June 22, 1992, at 12 (discussing new stalking section of Colorado's harassment law); John Sanko, *Police Get New Weapon*, ROCKY MOUNTAIN NEWS, June 5, 1992, at 33 (same).

114. *Hansen v. People*, 548 P.2d 1278, 1280 (Colo. 1976). Unprotected speech includes obscenity, libel, incitement, invasion of substantial privacy interests of the home, and "fighting words." *Id.* at 1281; *People ex rel VanMeveren v. County Court*, 551 P.2d 716, 718 (Colo. 1976). Some Colorado case law has also suggested that attempting to force another person to submit to an unwanted association is unprotected activity under the First Amendment. *People in re C.S.M.*, 570 P.2d 229, 230 (Colo. 1977).

115. See *VanMeveren*, 551 P.2d at 719 (holding section of Colorado harassment statute that made it illegal to repeatedly insult, taunt, or challenge another in manner likely to provoke violent or disorderly response not facially overbroad because it was limited to "fighting words"); *Hansen*, 548 P.2d at 1281 (holding Colorado disorderly conduct statute that made it illegal to make coarse and offensive utterance in public facially overbroad because it was not limited to "fighting words").

construction on the statute to cure its overbreadth, it will declare the law unconstitutional.<sup>116</sup> When the statute is not facially overbroad, however, a defendant can raise a charge of overbreadth only if the law is unconstitutional as applied to the defendant's conduct.<sup>117</sup> A defendant whose activity is at the core of the interests the facially valid statute seeks to protect cannot attack the statute as overbroad.<sup>118</sup>

The new stalking section of Colorado's harassment statute makes it illegal to make any form of communication with another person in connection with a credible threat.<sup>119</sup> A Colorado court might see this new section as a facially overbroad direct regulation of constitutionally protected speech, though a "credible threat" most likely would qualify as unprotected activity like invasion of a privacy interest or fighting words. Even if the Colorado legislature intended the stalking provisions to proscribe only unprotected speech, whether the phrase "any form of communication" is drawn narrowly enough to proscribe only that speech is doubtful.<sup>120</sup> It is clearly possible for constitutionally protected speech to fall under the language of the statute. For example, a striking union worker's taunts toward an incoming nonunion replacement might qualify as stalking in Colorado. Unlike California's stalking statute,<sup>121</sup> Colorado has no disclaimers for labor picketing or other constitutionally protected activity. In the past the Supreme Court of Colorado has struck down language in the state's harassment statute the court felt was not narrowly tailored.<sup>122</sup> Given the court's critical view of the

116. *Hansen*, 548 P.2d at 1281.

117. *See* *People v. McBurney*, 750 P.2d 916, 918 (Colo. 1988) (explaining standing requirements for overbreadth challenges); *People v. Weeks*, 591 P.2d 91, 94 (Colo. 1979) (same).

118. *McBurney*, 750 P.2d at 918; *Weeks*, 591 P.2d at 94.

119. COLO. REV. STAT. § 18-9-111 (Supp. 1992). Section 18-9-111(4) reads in part: [A] person commits harassment by stalking if such person:

(I) Makes a credible threat to another person and, in connection with such threat, repeatedly follows that person; or

(II) Makes a credible threat to another person and, in connection with such threat, repeatedly makes any form of communication with that person, whether or not a conversation ensues.

(b) For the purposes of this subsection, "credible threat" means a threat that would cause a reasonable person to be in fear for the person's life or safety, and "repeatedly" means on more than one occasion.

*Id.*

120. *Id.*

121. CAL. PENAL CODE § 646.9(e),(g) (West Supp. 1993).

122. *Bolles v. People*, 541 P.2d 80, 82-83 (Colo. 1975). In *Bolles*, the Court held that section 1(e) of the harassment statute was unconstitutionally overbroad. *Id.* at 82-83. That section had prohibited communication intended to harass, annoy, or alarm which was made "in a manner likely to harass or cause alarm." *Id.* at 81. The *Bolles* court focused its analysis on the words "annoy" and "alarm," determining that while the statute might punish obscene, libelous, or riotous communications, one could also be guilty of harassment if he communicated a storm warning or unpopular political message. *Id.* at 83. Because the statute could be used to punish constitutionally protected speech, it was overbroad. *Id.*

harassment statute in the past,<sup>123</sup> the language of the new stalking provisions is potentially overbroad.<sup>124</sup>

Florida's stalking statute also is potentially overbroad.<sup>125</sup> Like other courts, the Supreme Court of Florida has made a distinction between speech and conduct in its overbreadth analysis; statutes regulating conduct must be "substantially overbroad" to be invalid.<sup>126</sup> In reviewing overbreadth challenges to statutes prohibiting harassment and similar conduct, the Supreme Court of Florida has favored narrowly tailored statutes with time, place, and manner restrictions that avoid bringing constitutionally protected activity within the scope of the statute's prohibitions.<sup>127</sup> More importantly, the court also prefers statutes requiring an intent to harass by the defendant and a lack of consent by the victim.<sup>128</sup>

This precedent makes the language of the Florida stalking law vulnerable to charges of overbreadth.<sup>129</sup> The statute makes it a crime to willfully follow or harass another person.<sup>130</sup> With the statute written in the disjunctive,

123. See *id.* at 82-83; *People v. Norman*, 703 P.2d 1261 (Colo. 1985) (holding another section of Colorado harassment statute to be unconstitutionally vague).

124. For a different view of the Colorado stalking legislation, see Thomas, *supra* note 10, at 132 n.30 (suggesting that Colorado law is safe from charges of vagueness and overbreadth).

125. FLA. STAT. ANN. § 784.048 (West Supp. 1993).

126. See *Carricarte v. State*, 384 So. 2d 1261, 1262 (Fla.) (holding that statutes punishing only speech are subject to stricter scrutiny), *cert. denied*, 449 U.S. 874 (1980); *State v. Elder*, 382 So. 2d 687, 690 (Fla. 1980) (quoting language from *Broadrick* that statute prohibiting conduct must be substantially overbroad).

127. See *State v. Keaton*, 371 So. 2d 86, 92 (Fla. 1979) (holding telephone obscenity statute overbroad due to lack of requirement that there be an unwilling listener); *McCall v. State*, 354 So. 2d 869, 872 (Fla. 1978) (holding statute that made it illegal to upbraid, abuse, or insult teacher unconstitutional because it was not narrowly tailored to exclude constitutionally protected speech).

128. Compare *Elder*, 382 So. 2d at 691 (holding telephone harassment statute not overbroad because it contained requirements for improper intent and nonconsensual contact) with *Keaton*, 371 So. 2d at 92 (holding obscenity section of same statute overbroad because proscription was not limited to unwilling listener).

129. For a short discussion of the potential constitutional problems in the Florida stalking statute, see Thomas, *supra* note 10, at 130-33.

130. FLA. STAT. ANN. § 784.048. Section 784.048 reads:

(1) As used in this section:

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

(b) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct." Such constitutionally protected activity includes picketing or other organized protests.

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

(2) Any person who willfully, maliciously, and repeatedly follows or harasses another

either action qualifies as stalking behavior. As has California in its stalking statute,<sup>131</sup> the Florida legislature carefully has defined the term "harasses" to require the causing of emotional distress and a lack of legitimate purpose and to exclude picketing and other constitutionally protected activity.<sup>132</sup> Unlike California, however, Florida has not limited the term "follows." The Florida law does not require that the following stalker threaten or intend to harass the victim or follow without consent.<sup>133</sup> Additionally, no restrictions exist as to when, where, or how the following must take place to qualify as stalking.<sup>134</sup> Following is most accurately characterized as conduct rather than speech, so any statute regulating that activity must be substantially overbroad for a court to strike it down. Florida appellate courts have found other statutes regulating conduct overbroad, however, because they were not narrowly tailored.<sup>135</sup> They may view the stalking statute the same way.<sup>136</sup>

### B. Vagueness

It is a principle of due process that a law is void for vagueness if its prohibitions are not clearly defined.<sup>137</sup> A criminal statute is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application."<sup>138</sup> The purpose of the void-for-vagueness doctrine is to ensure that laws provide fair warning of prohibited conduct, set clear standards to prevent arbitrary and discriminatory enforce-

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person commits the offense of stalking, a misdemeanor of the first degree . . . .

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

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

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

*Id.*

131. CAL. PENAL CODE § 646.9 (West Supp. 1993).

132. FLA. STAT. ANN. § 784.048 (West Supp. 1993).

133. *Id.*

134. *Id.*

135. See *News-Press Publishing Co. v. Firestone*, 527 So. 2d 223 (Fla. Dist. Ct. App. 1988) (holding statute restricting nonvoter access within 50 feet of polling place to be unconstitutionally overbroad).

136. A Florida trial court has already decided the state's stalking law is overbroad. See *Defense Wins Challenge To State's Anti Stalking Law*, MIAMI HERALD, Mar. 9, 1993, at 2BR (detailing initial overbreadth challenge to Florida stalking law).

137. See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (explaining void-for-vagueness doctrine).

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

ment by police and courts, and do not inhibit the exercise of First Amendment rights.<sup>139</sup> While precise tests for vagueness do not emerge from the case law,<sup>140</sup> void-for-vagueness challenges are most successful when the persons challenging the law consulted the statute in advance and then relied on their interpretation of the unclear law,<sup>141</sup> and it clearly was possible for the legislature to have drafted the law more precisely.<sup>142</sup> Because vagueness is not calculable with precision, the Supreme Court ordinarily will not invalidate a statute because its language covers some extreme hypothetical situations.<sup>143</sup>

In California the courts require only reasonable certainty to survive a vagueness challenge.<sup>144</sup> A statute must be definite enough to provide a standard of conduct for those whose activity it proscribes as well as a standard for the courts to ascertain guilt.<sup>145</sup> The reviewing court, however, is not obligated to consider every conceivable situation that might arise under the language of the statute.<sup>146</sup> In order to succeed in a vagueness challenge to a statute that does not threaten First Amendment rights, the party must demonstrate that the law is impermissibly vague in all its applications.<sup>147</sup> When a law potentially impacts First Amendment rights, however, the Supreme Court of California requires greater precision.<sup>148</sup>

In evaluating the stalking law for vagueness, the California legislature appears to have learned from its earlier mistakes. In contrast to the terrorism statute found void for vagueness in *People v. Mirmirani*,<sup>149</sup> stalking cannot

139. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974); *Grayned*, 408 U.S. at 108-09; WALTER R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.3(a) (2d ed. 1986); TRIBE, *supra* note 101, § 12-31. See generally Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) [hereinafter *Void-for-Vagueness*]. While the doctrines of vagueness and overbreadth are both concerned with ensuring freedom of expression, vagueness is specifically concerned with the effects that imprecise laws and arbitrary enforcement will have on such expression. See Note, *supra* note 10, at 529 n.111 (explaining difference between overbreadth and vagueness).

140. LAFAVE & SCOTT, *supra* note 139, § 2.3(a); Note, *supra* note 10, at 529.

141. See *Void-for-Vagueness*, *supra* note 139, at 87 n.98 and cases collected therein.

142. *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

143. See *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963) (holding federal law making it illegal to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" not to be void for vagueness); *United States v. Harriss*, 347 U.S. 612, 617-18 (1954) (holding Federal Regulation of Lobbying Act, which required reports to Congress from persons receiving contributions or spending money for purpose of influencing legislation, was not too vague to meet requirements of due process).

144. *People v. Buice*, 40 Cal. Rptr. 877, 885 (Dist. Ct. App. 1964).

145. *People v. Smith*, 678 P.2d 886, 893 (Cal. 1984).

146. See *In re John V.*, 213 Cal. Rptr. 503, 508 (Ct. App. 1985) (holding that statute that made it illegal to use offensive words in public place which are inherently likely to provoke immediate violent reaction was not void for vagueness).

147. *Evangelatos v. Superior Court*, 753 P.2d 585, 592 (Cal. 1988).

148. See *People v. Mirmirani*, 636 P.2d 1130, 1134-35 (Cal. 1981) (holding California "terrorism" statutes void for vagueness); *Ketchens v. Reiner*, 239 Cal. Rptr. 549, 553 (Ct. App. 1987) (holding laws making it illegal to upbraid, insult, or abuse public school teacher void for vagueness).

149. 636 P.2d 1130 (Cal. 1981). In *Mirmirani*, the Supreme Court of California held that

consist of pure speech. Stalking in California requires following or harassing the victim in addition to any communicated threat.<sup>150</sup> Additionally, the legislature has defined carefully what it means by "harass" and "threat."<sup>151</sup> These definitions convey adequate warning as to what conduct is prohibited. California's stalking law provides sufficient guidance to both potential offenders and law enforcement officials and should survive any vagueness challenges.

In Virginia, a statute is not unconstitutionally vague if its terms, when measured by common understanding and practices, sufficiently warn a person as to what behavior the law prohibits.<sup>152</sup> The standard for measuring vagueness is not fixed; because criminal statutes bring more severe penalties than civil statutes, Virginia courts are less tolerant if the former are imprecise.<sup>153</sup> If the statute does not threaten First Amendment rights, the defendant may challenge the law's guidelines for vagueness only as they apply to the defendant. The court will not evaluate the law based on how it might apply in some hypothetical situation.<sup>154</sup> The burden is on the challenger to demonstrate the vagueness, and the reviewing court may construe the statute to have a limited application if such a construction will make the law constitutional.<sup>155</sup> Like other states, Virginia appellate courts also seem more willing to sustain vagueness challenges when the law threat-

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the state's "terrorism" statutes were unconstitutionally vague. *Id.* at 1138. Those laws had made it a felony to terrorize another by threatening death or injury in an effort to achieve "social or political" goals. *Id.* at 1133 n.5. The *Mirmirani* court initially decided that the crime could consist of pure speech and thus was subject to stricter standards for vagueness. *Id.* at 1135. The court focused its analysis on the phrase "social or political goals," determining the phrase to be all-inclusive because it was impossible to determine what conduct could not in some way be construed as an attempt to achieve a social or political goal. *Id.* The *Mirmirani* court felt that the phrase was too vague to provide guidance to citizens, police, or judges and juries. *Id.* at 1136. Because the phrase "social or political goals" was vital to the statute, its vagueness invalidated the entire law. *Id.* at 1138.

150. CAL. PENAL CODE § 646.9. At the time of *Mirmirani*, section 422.5 of the California Penal Code read: "terrorize means to create a climate of fear and intimidation by means of threats or violent action causing sustained fear for personal safety in order to achieve social or political goals." *Mirmirani*, 636 P.2d at 1133-34 n.5. Section 646.9(a) says: "Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury . . . is guilty of the crime of stalking."

151. CAL. PENAL CODE § 646.9. "'Harasses' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose." *Id.* § 646.9(e). "'A credible threat' means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety." *Id.* § 646.9(f).

152. *Stein v. Commonwealth*, 402 S.E.2d 238, 241 (Va. Ct. App. 1991).

153. *Jackson v. W.*, 419 S.E.2d 385, 392 (Va. Ct. App. 1992); *Turner v. Jackson*, 417 S.E.2d 881, 889 (Va. Ct. App. 1992).

154. *See Jackson v. W.*, 419 S.E.2d at 391 (evaluating vagueness challenge to child abuse guidelines on as-applied basis); *Turner v. Jackson*, 417 S.E.2d at 888 (same).

155. *Perkins v. Commonwealth*, 402 S.E.2d 229, 233 (Va. Ct. App. 1991); *Coleman v. City of Richmond*, 364 S.E.2d 239, 241 (Va. Ct. App. 1988).

ens First Amendment rights of expression or assembly.<sup>156</sup> Statutes requiring a specific intent appear to be less susceptible to vagueness charges.<sup>157</sup>

Despite this precedent, Virginia's stalking law<sup>158</sup> is potentially void for vagueness.<sup>159</sup> Although the statute requires a specific intent, it does not specify clearly what conduct it prohibits. Under the language of the statute, *any* conduct intended to cause emotional distress through a fear of death or injury qualifies as stalking.<sup>160</sup> Unlike other states, Virginia has not specified what kinds of conduct (harassment, following, threats, or intimidation, for example) must accompany this criminal intent.<sup>161</sup> Virginia's stalking law essentially proscribes any conduct intended to scare. In the language of a Virginia appellate court opinion describing an earlier vague statute, "[t]he public is not adequately apprised of the behavior that is proscribed . . . . If no particular act is proscribed, those wishing to conform to the ordinance do not know what conduct to avoid."<sup>162</sup> By focusing on the victim's reaction rather than the assailant's conduct, the Virginia legislature has made its stalking law vulnerable to challenge for vagueness.<sup>163</sup>

The same language that makes Florida's stalking law potentially overbroad<sup>164</sup> also creates vagueness problems. Any person who willfully, maliciously, and repeatedly follows or harasses another person is potentially guilty of stalking in Florida.<sup>165</sup> With the statute written in the disjunctive, either harassment or following alone can qualify as stalking. Because the term "follows" is not defined or limited, it may be difficult for both citizens and the courts to determine exactly when following becomes stalk-

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156. Compare *Coleman*, 364 S.E.2d at 243-44 (Va. Ct. App. 1988) (holding city ordinance making it illegal to loiter in public place under circumstances manifesting intent to engage in prostitution to be void-for-vagueness) with *Stein*, 402 S.E.2d at 241 (holding extortion statute not to be vague).

157. See *Perkins*, 402 S.E.2d at 234 (holding telephone harassment statute requiring intent to coerce, intimidate, or harass not to be unconstitutionally vague).

158. VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992). Section 18.2-60.3 reads in part: "Any person who on more than one occasion engages in conduct with the intent to cause emotional distress to another person by placing that person of reasonable fear of death or bodily injury shall be guilty of a Class 2 misdemeanor." *Id.*

159. See Laurence Hammack, *Stalker Given 6 Months in Jail*, ROANOKE TIMES & WORLD-NEWS, Oct. 17, 1992, at 1, 2 (quoting statement by Assistant Public Defender Gerald Teaster that Virginia stalking law may be vague).

160. VA. CODE ANN. § 18.2-60.3.

161. See, e.g., ILL. ANN. STAT., ch. 720, para. 5/12-7.3 (Smith-Hurd 1993) (requiring stalker to follow or place victim under surveillance in furtherance of threat); IOWA CODE ANN. § 708.11 (West Supp. 1993) (requiring stalker to follow, pursue, or harass victim while making credible threat).

162. *Coleman v. City of Richmond*, 364 S.E.2d 239, 243-44 (Va. Ct. App. 1988).

163. A Virginia trial court has already decided the state's stalking statute is unconstitutionally vague. See Wynne Wooley, *Stalking Law Ruled Invalid*, RICH. TIMES-DISPATCH, Apr. 10, 1993, at 1.

164. FLA. STAT. ANN. § 784.048(2) (West Supp. 1993). For a discussion of the overbreadth problems in Florida's stalking law, see *supra* notes 125-36 and accompanying text.

165. FLA. STAT. ANN. § 784.048(2).

ing.<sup>166</sup> The Florida Supreme Court has held that a statute must convey a sufficiently definite warning as to what conduct it proscribes to survive a vagueness challenge.<sup>167</sup> Put another way, a Florida statute is unconstitutionally vague if "its language is so unclear or ambiguous that persons of reasonable intelligence must guess at what conduct is proscribed."<sup>168</sup> Its imprecision makes the Florida stalking law potentially void for vagueness.<sup>169</sup>

The language of Ohio's stalking law also appears vague because it does not specify any prohibited conduct or required intent.<sup>170</sup> However, Ohio's menacing law, the language of which suggests it was the model for the stalking law,<sup>171</sup> has been in effect for almost twenty years without any record of vagueness challenges.<sup>172</sup> Based on Ohio court opinions construing

166. Early reports suggest police and prosecutors in Florida may also be confused as to what constitutes stalking. One of the first people prosecuted under Florida's stalking law was a 66 year old man who never threatened the victim but who called her repeatedly and appeared uninvited at her door. Andy Friedburg, *Elderly Man May Be First Charged Under Florida Stalking Law*, HOUSTON CHRON., July 12, 1992, at 16. Another early case was a twelve year old boy who followed a girl in his seventh-grade class. See *Boy, 12, Accused as Stalker*, N.Y. TIMES, Dec. 17, 1992, at B21.

167. *State v. Rodriguez*, 365 So. 2d 157, 159 (Fla. 1978); *Zachary v. State*, 269 So. 2d 669 (Fla. 1972).

168. *State v. Cohen*, 568 So. 2d 49, 52 (Fla. 1990) (quoting *State v. Ferrari*, 398 So. 2d 804, 807 (Fla. 1981)).

169. See Laura Griffin, *Stalking Law Under Attack*, ST. PETERSBURG TIMES, Jan. 25, 1993, at 1B (discussing initial vagueness challenge to Florida stalking law); Laura Griffin, *Stalking Law Upheld*, ST. PETERSBURG TIMES, Jan. 26, 1993, at 3B (same); Trevor Jensen, *Lawyers Denied; Anti-Stalking Law Stands*, FT. LAUDERDALE SUN-SENTINEL, May 12, 1993, at 3B (discussing later vagueness challenge to Florida stalking law).

170. OHIO REV. CODE ANN. § 2903.211 (Baldwin Supp. 1992). Section 2903.211 says:

(A) No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

(B) Whoever violates this section is guilty of menacing by stalking, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section involving the same person who is the victim of the current offense, menacing by stalking is a felony of the fourth degree.

(C) As used in this section:

(1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

(2) "Mental distress" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment.

*Id.*; See France Griggs, *Experts Say Stalking Law Can Hurt Innocent People*, CINCINNATI POST, June 24, 1993, at 10A (discussing early vagueness challenge to Ohio's stalking law).

171. *Id.* § 2903.22. Section 2903.22 reads:

(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family.

(B) Whoever violates this section is guilty of menacing, a misdemeanor of the fourth degree.

*Id.*

172. *Id.*



similar language, adding the phrase "engaging in a pattern of conduct" to the menacing statute to create the stalking statute does not appear to make it more vulnerable to vagueness charges.<sup>173</sup> Assuming that its menacing law has survived for reasons other than oversight, Ohio's stalking law is most likely not void for vagueness.

### C. Presumption of Intent

Legislatures often create statutory presumptions in an effort to relieve the prosecution of the burden of proving some fact that is difficult to establish, such as the defendant's intent.<sup>174</sup> These statutory presumptions may conflict with the Fourteenth Amendment's Due Process Clause requirement that the state prove every essential element of a criminal offense beyond a reasonable doubt.<sup>175</sup>

One type of statutory presumptions is a permissive inference. A permissive inference suggests to the jury a possible conclusion it may draw if the state proves predicate facts, but it does not require the jury to draw that conclusion.<sup>176</sup> In testing the constitutionality of permissive inferences, the Supreme Court has held that some rational basis for the inference must exist in the facts already proven to the jury.<sup>177</sup> In theory, the burden of proof remains with the prosecution and the jury is free to accept or reject the presumption.<sup>178</sup> However, such an inference may disadvantage the accused by misleading the jury into believing it may convict solely upon proof of the predicate fact, rather than taking into account all the surrounding circumstances.<sup>179</sup>

173. See *State v. Brown*, 528 N.E.2d 523 (Ohio 1988) (holding statute authorizing death penalty when offense is part of course of conduct involving killing of two or more persons not to be unconstitutionally vague), *cert. denied*, 489 U.S. 1040 (1989); *State v. Benner*, 533 N.E.2d 701 (Ohio 1988) (holding course-of-conduct specification in rape murder statute not to be void for vagueness), *cert. denied*, 494 U.S. 1090 (1990).

174. See *LAFAYE & SCOTT*, *supra* note 139, § 2.13 (discussing statutory presumptions).

175. See *Francis v. Franklin*, 471 U.S. 307, 317 (1985) (holding jury instruction that "the law presumes a person intends the ordinary consequences of his voluntary acts" to be unconstitutional burden shifting presumption on essential element of intent); *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (same); *Mullaney v. Wilbur*, 421 U.S. 684, 702 (1975) (holding Maine rule requiring murder defendant to prove he acted in heat of passion on sudden provocation in attempting to reduce charge to manslaughter unconstitutional for shifting burden of proof on element of intent); *In re Winship*, 397 U.S. 358, 364 (1970) (stating that Fourteenth Amendment Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

176. *Francis*, 471 U.S. at 314; *County Court of Ulster v. Allen*, 442 U.S. 140, 157 (1979).

177. *Francis*, 471 U.S. at 314-15; *Ulster*, 442 U.S. at 157.

178. *Francis*, 471 U.S. at 314. "A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." *Id.*; see also *Ulster*, 442 U.S. at 157 (stating that permissive inference does not shift burden of proof).

179. *LAFAYE & SCOTT*, *supra* note 139, § 2.13(b).

A mandatory rebuttable presumption requires the jury to find the presumed fact unless the defendant is able to persuade the jury that such a finding is unwarranted.<sup>180</sup> Such presumptions are unconstitutional if they shift to the defendant the burden of persuasion on an element of the offense, such as intent.<sup>181</sup>

Michigan's stalking law uses a mandatory rebuttable presumption. In that state, a stalker's continued harassment of a victim after being asked to stop raises the presumption that the continued behavior caused the victim to feel scared.<sup>182</sup> Moreover, causing the victim to feel scared is an essential element of the offense.<sup>183</sup> The Supreme Court of Michigan has held such mandatory rebuttable presumptions unconstitutional when used in jury instructions where the presumed fact was a necessary element of the offense.<sup>184</sup> Because causation is an essential element of the offense, and because the law provides for a mandatory rebuttable presumption of causation, Michigan's stalking law appears to be in violation of the Fourteenth Amendment's Due Process Clause.

In the state of Washington, courts use a three part test for determining the constitutionality of a statutory presumption in a criminal case: (1) the presumption must not shift the ultimate burden of persuasion to the defendant; (2) the presumed element must follow beyond a reasonable doubt from the facts already proven; and (3) the court must inform the jury that the presumption is permissive and not mandatory.<sup>185</sup> In determining whether or not a presumption meets this test, the court may use its common

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180. *Francis v. Franklin*, 471 U.S. 307, 314 n.2. (1985).

181. See *supra* note 175 (listing cases that held mandatory rebuttable presumptions unconstitutional because they shifted burden of proof on essential elements of offense).

182. MICH. COMP. LAWS § 750.411h (Supp. 1993). Section 411h reads in part:

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

*Id.* (emphasis added). See *supra* notes 33-39 and accompanying text (explaining details of Michigan's stalking law).

183. MICH. COMP. LAWS § 750.411h. Section 411h, paragraph (1)(d) reads: "'Stalking' means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." *Id.* (emphasis added).

184. See *People v. Woods*, 331 N.W.2d 707, 720-21 (Mich. 1982) (holding jury instructions that people normally are presumed to intend consequences of their acts to be unconstitutional burden-shifting presumption on intent element of offense), *cert. denied*, 462 U.S. 1134 (1983); *People v. Wright*, 289 N.W.2d 1, 6-7 (Mich. 1980) (holding jury instruction that intent is presumed from doing of wrongful act to be unconstitutional).

185. See *State v. Roberts*, 562 P.2d 1259, 1261 (Wash. 1977) (defining Washington State test for determining constitutionality of statutory presumptions); *State v. Vandiver*, 584 P.2d 978, 982-83 (Wash. Ct. App. 1978) (same).

experience as well as empirical data and evidence.<sup>186</sup> Washington's "beyond a reasonable doubt" standard, applicable to both permissive inferences and mandatory rebuttable presumptions, appears to be a stricter standard than the "rational basis" test applied to permissive inferences by the United States Supreme Court.<sup>187</sup>

Washington's stalking statute contains a statutory presumption<sup>188</sup> that uses language state appellate courts have found to create an unconstitutional mandatory presumption in similar statutes.<sup>189</sup> Even if a Washington court were to construe the language in the statute as raising a permissive inference rather than a mandatory presumption, the "beyond a reasonable doubt" standard still applies.<sup>190</sup> The presumption of an intent to intimidate or harass would have to follow beyond a reasonable doubt from proof that the accused stalker continued to contact or follow the victim after being asked to stop. Most statutory presumptions reviewed by the Washington appellate courts have failed to meet this "reasonable doubt" standard.<sup>191</sup> With this precedent, the statutory presumption in Washington's stalking law may not withstand review by the state's supreme court.

#### D. Preventive Detention

In recent years preventive detention—the pretrial custody of a defendant for the purpose of protecting some other person or the community at large—has become increasingly popular.<sup>192</sup> The federal Bail Reform Act of 1984, for example, permits the detention of arrestees charged with crimes of violence, capital or life-imprisonment offenses, or serious drug offenses if, after a hearing, the magistrate determines that "no condition or com-

186. *Roberts*, 562 P.2d at 1262; *State v. Alcantara*, 552 P.2d 1049, 1051-52 (Wash. 1976).

187. See *supra* notes 176-79 and accompanying text (discussing Supreme Court's rational basis test for permissive inferences).

188. WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993). Washington's new stalking law concludes:

"(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person."

*Id.*

189. See *State v. Rogers*, 520 P.2d 159, 161 (Wash.) (holding statutory presumption that being armed constituted prima facie evidence of intent to commit crime of violence was unconstitutional), *cert. denied*, 419 U.S. 1053 (1974); *In re Gilbert*, 617 P.2d 455, 457 (Wash. Ct. App. 1980) (construing same statutory presumption as mandatory).

190. *State v. Roberts*, 562 P.2d 1259, 1261 (Wash. 1977).

191. See *id.* at 1262 (holding that jury instruction that killing without justification is presumed to be second degree murder was invalid); *State v. Alcantara*, 552 P.2d 1049, 1052 (Wash. 1976) (holding statutory presumption of intent to commit larceny from mere failure to return rental equipment was unconstitutional); *Rogers*, 520 P.2d at 161 (holding statutory presumption of intent to commit crime of violence from fact of being armed was unconstitutional); *State v. Odom*, 520 P.2d 152, 157 (Wash.) (same), *cert. denied*, 419 U.S. 1013 (1974).

192. See WALTER R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 12.3(a) (2d ed. 1992) (discussing District of Columbia's preventive detention law and federal Bail Reform Act of 1984).

mination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."<sup>193</sup> While no state has adopted a similar full-scale preventive detention scheme, many states consider the defendant's dangerousness in the pretrial release determination or deny bail entirely for defendants charged with certain serious noncapital offenses.<sup>194</sup> Despite a number of potential constitutional arguments against the procedure,<sup>195</sup> the Supreme Court has upheld the constitutionality of preventive detention statutes.<sup>196</sup>

Under the Illinois Constitution, an accused person traditionally has had the right to release on bail, with an exception for capital offenses.<sup>197</sup> The Supreme Court of Illinois has been zealous in its defense of this right,<sup>198</sup>

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193. 18 U.S.C. § 3142(e) (1984).

194. See, e.g., ILL. ANN. STAT. ch. 725, para. 5/110-4 (Smith-Hurd 1993) (allowing denial of bail for capital offenses, offenses which carry life sentence, and stalking); OHIO REV. CODE ANN. § 2903.212 (Baldwin Supp. 1992) (listing factors court must consider when deciding on bail for accused stalker); see also LAFAYE & ISRAEL, *supra* note 192, § 12.3(a).

195. One argument against preventive detention is that the Eighth Amendment's excessive bail clause implies a constitutional right to bail. See *Stack v. Boyle*, 342 U.S. 1 (1951) (holding that right to bail before trial is necessary to permit preparation of defense and to prevent punishment prior to conviction). Another is that preventive detention is a violation of substantive due process as a imposition of punishment before trial and conviction. In *Bell v. Wolfish*, 441 U.S. 520 (1979), however, the Supreme Court held that pretrial detention is not automatically punishment. *Id.* at 537. It identified three factors in evaluating whether pretrial detention is unconstitutional: (1) whether the detention is imposed as punishment or is incidental to some other legitimate government purpose; (2) whether the detention has a rational connection to the alternate purpose; and (3) whether the pretrial detention is excessive in relation to the alternate purpose. *Id.* at 538. Third, it is arguable that pretrial detention is a violation of procedural due process if the detention hearing does not adequately provide for counsel, cross-examination, and presentation of evidence. See *United States v. Edwards*, 430 A.2d 1321 (D.C. Ct. App. 1981) (upholding District of Columbia's preventive detention statute against due process challenge), *cert. denied*, 455 U.S. 1022 (1982).

196. *United States v. Salerno*, 481 U.S. 739 (1987). In *Salerno*, the Supreme Court upheld the federal Bail Reform Act of 1984. *Id.* at 755. The defendant, Anthony "Fat Tony" Salerno, a reputed captain in a Mafia crime family, had been confined before trial under the Act after being indicted on federal racketeering charges. *Id.* at 743. Salerno challenged the pretrial detention provisions as a violation of Fifth Amendment substantive due process and as excessive bail under the Eighth Amendment. *Id.* at 744.

Applying the factors from *Bell*, 441 U.S. at 538, the Court upheld the provisions as permissible regulation rather than impermissible punishment. *Salerno*, 481 U.S. at 746-47. It found that the government's interest in community safety outweighed the defendant's individual liberty interest. *Id.* at 748. The Court also noted the care the Act took in limiting the circumstances where detention would be allowed and the extensive procedural safeguards provided. *Id.* at 750-52.

The Court also rejected the Eighth Amendment challenge. Following its holding in *Carlson v. Landon*, 342 U.S. 524 (1952), the *Salerno* Court interpreted the excessive bail clause as not requiring release on bail under all circumstances. *Salerno*, 481 U.S. at 753. Even more significantly, the Court decided that bail could be denied for compelling reasons other than the traditional one of preventing flight by the defendant. *Id.* at 754.

197. ILL. CONST. art. II, § 7, amended by ILL. CONST. art. I, § 9. Prior to 1986, section 7 read: "All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great." *Id.*

198. See *People ex rel. Hemingway v. Elrod*, 322 N.E.2d 837, 840 (Ill. 1975) (holding

and, in dictum, has rejected the idea of preventive detention.<sup>199</sup> In the last ten years, however, the Illinois legislature has amended the state constitution and code of criminal procedure twice: first to deny the absolute right to bail to defendants accused of crimes that carry a life sentence, and later to deny an absolute right to bail to defendants accused of nonprobationable felony offenses whose release would pose a threat to others.<sup>200</sup> In conjunction with the state's new stalking law, the legislature again has amended the code—but not the state constitution—to allow courts to deny bail to those accused of stalking.<sup>201</sup>

Illinois state law, however, classifies stalking as a Class 4 felony<sup>202</sup> and aggravated stalking as a Class 3 felony.<sup>203</sup> Both classes are eligible for probation.<sup>204</sup> Under the Illinois Constitution, defendants accused of such probationable felonies are bailable.<sup>205</sup> Given the Illinois Supreme Court's strident protection of an accused's right to bail in the past, the court should find the provisions for denying an accused stalker bail invalid under the state constitution.<sup>206</sup>

Illinois' stalking legislation also includes provisions allowing the use of illegally obtained evidence at the bail hearing.<sup>207</sup> These should withstand constitutional challenge. The United States Supreme Court has held that pretrial hearings require fewer adversarial safeguards than a criminal trial.<sup>208</sup> The Court also has approved the detention hearing procedures in the federal Bail Reform Act, which, like those in the Illinois statute, exempt information presented at the hearing from the rules governing admissibility of evidence in criminal trials.<sup>209</sup> Although the Court has not ruled explicitly on the use

that defendant charged with murder but not subject to death penalty was bailable under pre-1986 state constitution); *People ex rel. Stamos v. Jones*, 237 N.E.2d 495 (Ill. 1968) (holding that defendant convicted of forcible felony was eligible for bail pending appeal).

199. See *Hemingway*, 322 N.E.2d at 841 (refusing to adopt principle of preventive detention); *People v. Ealy*, 365 N.E.2d 149, 157 (Ill. App. Ct. 1977) (citing *Hemingway*).

200. ILL. CONST. art. I, § 9; ILL. ANN. STAT. ch. 38, para. 110-4(a) (Smith-Hurd Supp. 1992). Article I, § 9 replaced Article II, § 7 as the Illinois constitutional provision governing bail.

201. ILL. ANN. STAT. ch. 725, para. 5/110-4(a) (Smith-Hurd 1993).

202. *Id.* ch. 720, para. 5/12-7.3(b).

203. *Id.* ch. 730, para. 5/12-7.4(b).

204. *Id.* ch. 730, para. 5/5-5-3(c)(2).

205. ILL. CONST., art. I, § 9.

206. Illinois trial courts have already found the no-bail provision in violation of the state constitution. See David Bailey, *Appeals Court to Rule on Challenge to Stalking Law's No-Bail Provision*, CHI. DAILY L. BULL., Dec. 11, 1992, at 1 (discussing early challenge to Illinois stalking law provision for denying accused stalkers bail); David Bailey, *Circuit Judge Finds No-Bail Provision of Stalking Law To Be Unconstitutional*, CHI. DAILY L. BULL., Feb. 5, 1993 at 1; Susan Kuczka, *Clause in Stalking Law Ruled Unconstitutional*, CHI. TRIB., Feb. 5, 1993, at NW3.

207. ILL. ANN. STAT. ch. 725, para. 5/110-6.3(c)(1); see *supra* notes 52-53 and accompanying text (explaining admissibility of evidence at bail hearings for stalkers in Illinois).

208. See *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975) (holding that determination of probable cause does not require adversary hearing or appointed counsel).

209. See *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (approving detention hearing procedures of Bail Reform Act).

of illegally obtained evidence at a bail hearing, it has approved the use of such evidence in other pretrial proceedings.<sup>210</sup> Illinois' use of illegally obtained evidence at an accused stalker's bail hearing should survive federal court review.

Illinois courts have not approved the use of illegally obtained evidence at bail hearings. However, statutes explicitly allowing the use of such evidence at bail hearings for offenses other than stalking have survived without any record of constitutional challenge since 1987.<sup>211</sup> The statute controlling denial of bail for accused stalkers uses language similar to the previously enacted laws in its discussion on the use of illegally obtained evidence.<sup>212</sup> Assuming the previously enacted statutes are valid, the Illinois courts likely will uphold the use of illegally obtained evidence at bail hearings for accused stalkers.

In Ohio, the state constitution dictates that all offenses other than capital ones are bailable before trial.<sup>213</sup> The Supreme Court of Ohio has held that this right to bail is absolute.<sup>214</sup> This absolute right to bail is more extensive than that provided by the Excessive Bail Clause of the Eighth Amendment as interpreted in *United States v. Salerno*.<sup>215</sup> Additionally, according to the state's rules of criminal procedure, the purpose of bail in Ohio is to ensure the appearance of the defendant at trial.<sup>216</sup> Bail conditions unrelated to the defendant's trial appearance are considered excessive.<sup>217</sup>

Given this strict precedent, whether Ohio's proposed stalking legislation will survive state court scrutiny is questionable. The language of the section on bail does not give the court the right to deny the accused stalker bail, so it appears to comply with the letter of the state's constitution.<sup>218</sup> However, the section does instruct the court to consider certain factors in setting the amount and conditions of that bail, factors that include the accused's

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210. See *United States v. Calandra*, 414 U.S. 338, 349-50 (1974) (approving use of illegally obtained evidence in grand jury proceedings); *Giordenello v. United States*, 357 U.S. 480, 484 (1958) (denying suppression of illegally obtained evidence at preliminary hearings).

211. ILL. STAT. ANN. ch. 725, paras. 5/110-6(f)(2), 5/110-6.1(c)(1) (Smith-Hurd 1993).

212. *Id.* ch. 725, para. 5/110-6.3.

213. OHIO CONSR. art. I, § 9. Section 9 states: "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted." *Id.*

214. *State ex rel Baker v. Troutman*, 553 N.E.2d 1053, 1055 (Ohio 1990); *Locke v. Jenkins*, 253 N.E.2d 757, 757 (Ohio 1969); *State v. Bevacqua*, 67 N.E.2d 786, 788 (Ohio 1946).

215. 481 U.S. 739 (1987); see Commentary, Article I, § 9 of the Constitution of the State of Ohio, OHIO REV. CODE ANN. (Baldwin 1990) (discussing differences in right to bail under United States and Ohio constitutions).

216. OHIO CRM. R. 46(A) (Baldwin 1988).

217. See *Troutman*, 553 N.E.2d at 1056 (holding that bail conditioned on accused's consent to forfeiting bail money for fines and costs excessive); *Bevacqua*, 67 N.E.2d at 788 (holding that keeping accused in jail by setting bail at excessive levels is unconstitutional).

218. OHIO REV. CODE ANN. § 2903.212 (Baldwin Supp. 1992).

history of violence and the potential threat to the alleged victim or others.<sup>219</sup> By making the dangerousness of the accused stalker a factor in determining the amount and conditions of bail, Ohio's new stalking laws appear to be in violation of the state's rules of criminal procedure as well as Ohio Supreme Court precedent indicating that a court may use bail only to ensure the appearance of the defendant at trial.

Iowa's provisions for denying bail to a stalker after a third conviction<sup>220</sup> should survive constitutional challenge. The United States Supreme Court has held that a defendant has no constitutional right to bail pending appeal from a conviction.<sup>221</sup> Additionally, the Iowa state constitution does not require bail after conviction.<sup>222</sup> The Supreme Court of Iowa has interpreted this provision of the state constitution to mean that any right to bail after conviction is purely statutory and thus subject to change by legislative action.<sup>223</sup> The recent statutory amendment which includes third-time stalking among the offenses presumed to be ineligible for bail after conviction<sup>224</sup> appears well within the Iowa legislature's authority.

The statute's provision making the stalker's threat to the victim a mandatory factor in deciding on bail after a first or second conviction also appears valid.<sup>225</sup> The Iowa Rules of Criminal Procedure suggest that the decision on bail for a defendant pending appeal of a conviction is within the discretion of the trial court.<sup>226</sup> Under this standard, a trial court's decision to deny bail to a convicted stalker based on the threat to the victim will most likely be upheld.<sup>227</sup>

219. *Id.* An additional section of the new legislation allows a court to impose an anti-stalking protection order that restricts the accused stalker's activity as a pre-trial release condition. *Id.* § 2903.213.

220. IOWA CODE ANN. § 811.1 (West Supp. 1993); see *supra* notes 62-65 and accompanying text (discussing denial of bail for convicted stalkers in Iowa).

221. *McKane v. Durston*, 153 U.S. 684 (1894). See also *Grady v. Iowa State Penitentiary*, 346 F. Supp. 681, 683 (N.D. Iowa 1972) (holding that person in state custody does not have Eighth Amendment right to bail pending appeal).

222. IOWA CONST. art. 1, § 12. Section 12 reads in part: "All persons shall, before conviction, be bailable, by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great." *Id.* (emphasis added); see *State v. Anderson*, 338 N.W.2d 372, 375 (Iowa 1983) (holding that defendant has no post-conviction right to bail under Iowa constitution); *Emery v. Fenton*, 266 N.W.2d 6, 7 (Iowa 1978) (same).

223. *Anderson*, 338 N.W.2d at 375; *Emery*, 266 N.W.2d at 7.

224. IOWA CODE ANN. § 811.1(3).

225. *Id.*

226. *Id.* § 813.2, Rule 23. Rule 23 of the Iowa Rules of Criminal Procedure reads in part:

(4)(d) *Custody pending appellate determination.* Pending determination by the appellate court of such appeal, the trial court shall determine whether the defendant shall remain in custody, or whether, if in custody, the defendant should be released on bail on his or her own recognizance.

*Id.* See also *State v. Thomason*, 285 N.W. 636 (Iowa 1939) (reviewing trial court's decision on bail pending appeal under abuse of discretion standard).

227. See *Grady v. Iowa State Penitentiary*, 345 F. Supp. 681, 683 (N.D. Iowa 1972) (holding decision to deny reduction in bail to convicted felon pending appeal was not violation of due process).

*E. Misdemeanor Arrest Without Warrant*

Under the common law, a police officer had the authority to make a misdemeanor arrest without a warrant only when a defendant committed a "breach of the peace" in the officer's presence.<sup>228</sup> States have expanded this common-law rule to allow arrest without warrant for any misdemeanor occurring in the officer's presence.<sup>229</sup> Additionally, courts have interpreted "in the officer's presence" to mean that the officer may make the arrest if the officer has probable cause to believe the defendant is committing the offense in the officer's presence.<sup>230</sup>

In Florida, the general rule is that an officer may make a misdemeanor arrest without a warrant only if the person has committed the offense in the officer's presence.<sup>231</sup> The officer must make the arrest immediately after commission of the offense or in fresh pursuit of the defendant.<sup>232</sup> Florida courts have interpreted the rule as requiring the arresting officer to have substantial reason to believe the person was committing the misdemeanor in his presence; the officer must base that substantial reason on personal observations.<sup>233</sup> There are, however, a number of statutory exceptions to the general rule. A law enforcement officer has the authority to arrest without a warrant anyone the officer has probable cause to believe has violated a protective injunction<sup>234</sup> or committed an act of domestic violence or child abuse.<sup>235</sup>

228. *United States v. Watson*, 423 U.S. 411, 418 (1975); *Trupiano v. United States*, 334 U.S. 699, 713 (1948) (Vinson, J., dissenting); *Carroll v. United States*, 267 U.S. 132, 156 (1925); *LAFAVE & ISRAEL*, *supra* note 192, § 3.5(a).

229. *LAFAVE & ISRAEL*, *supra* note 192, § 3.5(a).

230. *Id.*

231. FLA. STAT. ANN. § 901.15(1) (West Supp. 1993). Section 901.15 reads in part: A law enforcement officer may arrest a person without warrant when:

(1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer. An arrest for the commission of a misdemeanor or the violation of a municipal or county ordinance shall be made immediately or in fresh pursuit.

*Id.* See also *State v. Eldridge*, 565 So. 2d 787, 788 (Fla. Dist. Ct. App. 1990) (holding that presence requirement pertains to all misdemeanors); *Johnson v. State*, 395 So. 2d 594, 595 (Fla. Dist. Ct. App. 1981) (holding that police officer is limited in making warrantless misdemeanor arrests to offenses committed in his presence).

232. FLA. STAT. ANN. § 901.15(1).

233. See *Malone V. Howell*, 192 So. 224, 226 (Fla. 1939) (holding that misdemeanor must be committed in presence of officer in such manner as to be detected through officer's own senses); *State v. Stevens*, 574 So. 2d 197, 202 (Fla. Dist. Ct. App. 1991) (stating that arresting officer must have perceived all elements of misdemeanor to make warrantless arrest); *Towne v. State*, 495 So. 2d 895, 898 (Fla. Dist. Ct. App. 1986) (allowing only officer's own observations to be considered in determining probable cause to arrest), *cert. denied*, 498 U.S. 991 (1990); *Phillips v. State*, 314 So. 2d 619, 620 (Fla. Dist. Ct. App. 1975) (holding that authority for misdemeanor arrest depends on commission of offense in officer's presence); *Rosenberg v. State*, 264 So. 2d 68, 69 (Fla. Dist. Ct. App. 1972) (holding that legality of warrantless misdemeanor arrest depends on whether arresting officer had substantial reason to believe person was committing offense).

234. FLA. STAT. ANN. §§ 901.15(6),(8).

235. *Id.* § 901.15(7)(a).



Some civil libertarians and criminal defense attorneys have suggested the provisions for arrest without warrant in Florida's new stalking law are unconstitutional.<sup>236</sup> The new law gives a law enforcement officer independent authority to arrest without warrant any person he has probable cause to believe has committed stalking—a first degree misdemeanor.<sup>237</sup> Unlike domestic violence or child abuse, however, stalking is not one of the enumerated exceptions to the basic statutory requirement that the defendant commit the misdemeanor in the officer's presence to allow arrest without a warrant.<sup>238</sup> It would be logical for the Florida legislature to have included stalking among those statutory exceptions, given the similar nature of the crimes. The legislature most likely forgot to amend its arrest without warrant statute in its haste to pass a tough law prohibiting stalking.<sup>239</sup> However, this omission should not prove fatal, because the statute governing arrest without warrant disclaims limiting arrest authority conferred by other sections.<sup>240</sup> Although Florida courts have imposed stringent requirements on warrantless misdemeanor arrests in the past, this disclaimer should give the stalking law's arrest without warrant provisions sufficient support to survive a legal challenge.

Ohio statutory law states that an officer may make a misdemeanor arrest without a warrant only if the officer finds the person violating the law or ordinance.<sup>241</sup> Ohio courts have interpreted this law as requiring that the defendant commit the misdemeanor in the officer's presence.<sup>242</sup> However, the courts have made exceptions for arrests outside the officer's presence when the arresting officer clearly had probable cause.<sup>243</sup> As in Florida, there are also statutory exceptions to the presence requirement. Ohio law has provided that an officer may arrest and detain any person he has reasonable grounds to believe has committed child enticement, public indecency, or domestic violence.<sup>244</sup> The Ohio legislature has amended that law to include stalking among the misdemeanor offenses which do not require a warrant

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236. See *Law Gives Stalking Victims Hope*, CHI. DAILY L. BULL., Apr. 14, 1992, at 1 (quoting Florida ACLU staff counsel Nina E. Vinik that stalking law arrest without warrant provisions are "troubling").

237. FLA. STAT. ANN. § 784.048(5).

238. *Id.* § 901.15.

239. Interview with David De LaPaz, Assistant State Attorney, in Daytona Beach, Florida (Dec. 28, 1992).

240. FLA. STAT. ANN. § 901.15. "This subsection does not limit the arrest authority conferred on such officer by any other provision of law." *Id.*

241. OHIO REV. CODE ANN. § 2935.03(A) (Baldwin 1992).

242. *State v. Reymann*, 563 N.E.2d 749, 751 (Ohio Ct. App.), *appeal dismissed*, 536 N.E.2d 1171 (Ohio 1989); *State v. Holmes*, 501 N.E.2d 629, 633 (Ohio Ct. App. 1985).

243. See *Oregon v. Szakovits*, 291 N.E.2d 742 (Ohio 1972) (holding that arresting officer had authority to make DUI arrest after viewing scene of accident and hearing drunk driver's admissions); *City of Bucyrus v. Williams*, 46 Ohio App.3d 43, 45-46 (Ct. App. 1988) (quoting *Szakovits* for proposition that officer's probable cause is sufficient to justify warrantless misdemeanor arrest).

244. OHIO REV. CODE ANN. § 2935.03(B).

prior to arrest.<sup>245</sup> In amending its law governing warrantless misdemeanor arrests in conjunction with passage of its stalking law, Ohio appears to have avoided the controversy surrounding the Florida law.

#### F. Mandatory Minimum Sentence

The Eighth Amendment's bar on cruel and unusual punishment prohibits punishment that is out of proportion to the offense committed.<sup>246</sup> Apart from death penalty cases, however, the Supreme Court has shown considerable deference to state legislatures' judgment about penalties for specific offenses; the Court seldom has held that a term of imprisonment is unconstitutional because of its length.<sup>247</sup> In particular, the Court recently has shown great support for state legislation requiring mandatory minimum prison terms for certain offenses.<sup>248</sup>

Massachusetts courts have held that the state constitutional provisions prohibiting the infliction of cruel and unusual punishment are as broad as those in the Eighth Amendment.<sup>249</sup> Punishment may be cruel and unusual not only in its manner, but also in its length.<sup>250</sup> In deciding whether a sentence is disproportionate to the offense, a Massachusetts court will examine the nature of the offense and offender in light of the degree of harm to society, compare the sentence imposed with punishments prescribed for more serious crimes, and compare the challenged penalty with penalties for the same offense in other jurisdictions.<sup>251</sup> Like the United States Supreme

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245. *Id.*

246. *Solem v. Helm*, 463 U.S. 277, 286 (1983). In addition to affirming the principle of proportionality, the *Solem* court established three criteria for determining whether criminal sentences are disproportionate: the gravity of the offense and the harshness of the penalty; the sentences imposed for other crimes in the same jurisdiction; and the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at 290-92. For an early example of the Supreme Court's Eighth Amendment proportionality analysis, see *Weems v. United States*, 217 U.S. 349 (1910) (holding that sentence of 15 years hard labor for crime of falsifying official records was excessive under Eighth Amendment).

247. See, e.g., *Hutto v. Davis*, 454 U.S. 370 (1982) (holding that 40 year sentence for possession of less than nine ounces of marijuana was not cruel and unusual punishment); *Rummel v. Estelle*, 445 U.S. 263 (1980) (holding that mandatory life sentence after third minor felony conviction was not cruel and unusual punishment).

248. See *Harmelin v. Michigan*, 111 S. Ct. 2680 (1992) (holding that mandatory life sentence without possibility of parole for possession of more than 650 grams of cocaine is not cruel and unusual punishment); *Chapman v. United States*, 111 S. Ct. 1919 (1992) (holding that five year mandatory minimum sentence for distribution of more than one ounce of LSD is not cruel and unusual punishment); *McMillan v. Pennsylvania*, 447 U.S. 79 (1986) (holding that five year mandatory minimum sentence for commission of felony while visibly possessing firearm was not unconstitutional).

249. *Michaud v. Sheriff of Essex County*, 458 N.E.2d 702 (Mass. 1983).

250. *Commonwealth v. Jackson*, 344 N.E.2d 166, 171 (Mass. 1976); *Commonwealth v. Morrow*, 296 N.E.2d 468, 476 (Mass. 1973); *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899), *aff'd*, 180 U.S. 311 (1901).

251. *Commonwealth v. Bianco*, 454 N.E.2d 901, 905 (Mass. 1983); *Commonwealth v. Diatchenko*, 443 N.E.2d 397, 402 (Mass. 1982); *Commonwealth v. Jackson*, 344 N.E.2d 166, 171 (Mass. 1976).

Court, Massachusetts courts have shown great deference to the legislature's imposition of mandatory minimum sentences for certain offenses.<sup>252</sup> Given this judicial deference to mandatory minimum sentencing schemes, Massachusetts' requirement of a one year mandatory minimum sentence for stalking in violation of a restraining order or injunction<sup>253</sup> and two year mandatory minimum sentence for a second or subsequent stalking conviction<sup>254</sup> will most likely survive any constitutional challenge.

#### VII. FEDERAL LEGISLATION AND MODEL STATUTE

In response to the potential problems with many of the state stalking laws, in 1992 Senator William S. Cohen of Maine and Congresswoman Nancy Pelosi of California proposed an examination of these laws as a precedent to possible federal criminalization of stalking.<sup>255</sup> The enacted law instructed the Attorney General (through the National Institute of Justice) to: (1) evaluate existing and proposed anti-stalking legislation in the states, (2) develop model anti-stalking legislation that is constitutional and enforceable, (3) prepare and disseminate to state authorities the findings made as a result of such evaluation, and (4) report to the Congress the findings and the need or appropriateness of further action by the federal government by September 30, 1993.<sup>256</sup> In early 1993 Congressman Royce and Senator Boxer of California and Senator Robert Krueger of Texas introduced bills that would make stalking under certain circumstances a federal crime.<sup>257</sup>

It is difficult to predict what the model federal stalking law will look like in its final form. The law should be drafted carefully to eliminate potential overbreadth and vagueness problems like those previously discussed.<sup>258</sup> It should avoid the statutory presumptions of the Michigan and Washington statutes.<sup>259</sup> Given the nature of stalking, provisions for preven-

252. See, e.g., *Commonwealth v. Alvarez*, 596 N.E.2d 325, 331 (Mass. 1992) (upholding two year mandatory sentence enhancement for selling drugs in school zone); *Commonwealth v. Therriault*, 515 N.E.2d 1198, 1200 (Mass. 1987) (holding one year mandatory minimum for homicide by motor vehicle while intoxicated not to be cruel and unusual punishment); *Diatchenko*, 443 N.E.2d at 403 (finding mandatory life sentence for first degree murder not to be disproportionate).

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

254. *Id.* § 43(c).

255. S. 2922, 102d Cong., 2d Sess., 138 CONG. REC. S9527; H.R. 5876, 102d Cong., 2d Sess. (1992). See Schiesel, *supra* note 16, at 5 (explaining details of Cohen-Pelosi bill).

256. Act of Oct. 6, 1992, Pub. L. No. 102-395, § 109(b). See Larder, *supra* note 97, at A2 (describing conference evaluating state anti-stalking laws).

257. Both bills would require the stalker to cross state boundaries, use the mail, or commit the offense on federal land to be liable under federal law. S. 470, 103d Cong., 1st Sess. (1993); H.R. 740, 103d Cong., 1st Sess. (1993).

258. See *supra* notes 99-136 and accompanying text (discussing overbreadth problems in stalking laws) and notes 137-173 and accompanying text (discussing vagueness problems in stalking laws).

259. MICH. COMP. LAWS § 750.411h (Supp. 1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993). See *supra* notes 174-91 and accompanying text (discussing validity of statutory presumptions in Michigan's and Washington's stalking laws).

tive detention of the accused stalker may be appropriate.<sup>260</sup> It might include provisions to allow police to arrest suspected stalkers without a warrant, as in Florida and Ohio.<sup>261</sup> The law should include mandatory minimum sentences for stalkers who violate injunctions or restraining orders or are repeat offenders, as in Massachusetts.<sup>262</sup> With evidence indicating that many stalkers are mentally disturbed,<sup>263</sup> the law should contain provisions for psychological counseling as a condition of sentence or parole for a convicted stalker, as in Illinois and Hawaii.<sup>264</sup> If it incorporated all of these various features, the model federal stalking law might look like this:

1. Any person who willfully, maliciously, and repeatedly follows, contacts, or places under surveillance another person with the intent to harass that person is guilty of the crime of stalking. Stalking is a misdemeanor, punishable by imprisonment in the county jail for not more than a year or a fine of not more than \$1,000, or both.
2. Any person who violates subsection (1) and who either:
  - a. Makes a credible threat against that person or a member of that person's immediate family with the intent to place that person in reasonable fear of death or serious injury; or
  - b. Confines, restrains, or causes bodily harm to that person is guilty of aggravated stalking. Aggravated stalking is a felony punishable by imprisonment for not more than two years, or a fine of not more than \$2,000, or both.
3. Any person who violates subsections (1) or (2) when a restraining order or injunction is in effect prohibiting such behavior by that person against the same party is guilty of a felony, punishable by imprisonment in the state prison for not less than one year and not more than five years. No sentence for any violation of this subsection shall be less than the mandatory minimum term of imprisonment of one year. A person convicted under this subsection shall not be eligible for probation, parole, furlough, work release, or

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260. ILL. REV. STAT. ch. 725, para 5/110-6.3 (Smith-Hurd 1993). The validity of any provisions for preventive detention in a particular state would depend on the law governing bail in that state. *See supra* notes 192-227 and accompanying text (discussing validity of provisions for denying bail to stalkers in Illinois, Ohio, and Iowa).

261. FLA. STAT. ANN. § 784.048(5) (West Supp. 1993); OHIO REV. CODE ANN. § 2935.03 (Baldwin Supp. 1992). The validity of a provision for arresting a stalker without a warrant in a particular state would depend on whether that state's law allowed for such arrest. *See supra* notes 228-45 and accompanying text (discussing validity of provisions for arrest without warrant in Florida's and Ohio's stalking laws).

262. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993). *See supra* notes 246-254 and accompanying text (discussing mandatory minimum sentences in Massachusetts's stalking law).

263. *See supra* note 11 (citing authority questioning the deterrent effect of anti-stalking legislation on mentally disturbed stalkers).

264. ILL. REV. STAT. ch. 730, para. 5/3-14-5 (Smith-Hurd 1992); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); *see supra* note 46 (discussing psychological counseling provisions in Illinois's and Hawaii's stalking laws).

reduction of sentence until he or she has served the mandatory minimum term of imprisonment.

4. Any person who violates subsections (1),(2) or (3) within five years of a previous conviction under any of those subsections involving the same victim is guilty of a felony, punishable by imprisonment for not less than two years and not more than five years. No sentence for any violation of this subsection shall be less than the mandatory minimum term of imprisonment of two years. A person convicted under this subsection shall not be eligible for probation, parole, furlough, work release, or reduction of sentence until he or she has served the mandatory minimum term of imprisonment.

5. As used in this section:

a. "Harass" means to knowingly and willfully engage in a course of conduct directed at a specific person which seriously alarms that person and which serves no legitimate purpose.

b. "Course of conduct" means a series of acts, over time, evidencing a continuity of purpose. The course of conduct must be one that would cause a reasonable person to suffer substantial emotional distress. Constitutionally protected activity is not included within the meaning of "course of conduct."

c. "Credible threat" means a threat made with the intent and apparent ability to carry it out so as to cause the person who is the target of the threat to reasonably fear for his or her safety.

6. Any law enforcement officer may arrest and detain until a warrant can be obtained any person the officer has probable cause to believe has violated the provisions of this section. Probable cause may be based on the statements of the alleged victim.

7. On petition by the State, the arraigning court shall hold a hearing to determine whether bail should be denied to a defendant charged with stalking or aggravated stalking. The court may deny bail to the defendant after it determines that:

a. There is proof that the defendant committed the offense of stalking or aggravated stalking; and

b. The defendant poses a real and present threat to the physical safety of the alleged victim of the offense; and

c. The denial of bail is necessary to prevent fulfillment of the threat; and

d. There is no condition or combination of conditions short of denying bail that can reasonably assure the safety of the alleged victim.

8. At the hearing on bail, the defendant has the right to be represented by counsel, to testify and present witnesses on his or

her own behalf, and to cross-examine any witnesses called by the State. The defendant does not have the right to compel the appearance of the alleged victim. The rules on the admissibility of evidence at criminal trials do not apply to the bail hearing. A motion by the defendant to suppress evidence shall not be entertained. Evidence that proof may have been obtained as the result of an unlawful search and seizure is not relevant to this state of the prosecution.

9. The court may order psychological counseling as a condition of any sentence imposed under subsections (1) through (4) of this section and may order the parole board to consider psychological counseling as a condition of parole or probation for any person convicted under this section.

10. This section shall not apply to conduct which occurs during labor picketing. This section shall also not apply to conduct which occurs during the course of a lawful business activity, including, but not limited to, the activity of licensed private investigators.

11. The provisions of this section are severable. If any subsection or portion of a subsection is found unconstitutional, the rest of the section shall be presumed valid until found otherwise.

#### VIII. CONCLUSION

Although the stalking laws passed in 1992 and 1993 will not eliminate the problem of stalking, the legislation should help. It is true that some states, in their haste to enact stalking laws, could have drafted their statutes more carefully. As a group, however, the laws do not appear as constitutionally infirm as some critics have suggested. Most of the laws reviewed give the appearance of being carefully drafted to aggressively combat the problem of stalking and yet survive judicial scrutiny. When it is finished, the model federal stalking law should provide a good blueprint for those states whose stalking legislation is constitutionally vulnerable.

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