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Dawn A. Morville

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STALKING LAWS: ARE THEY SOLUTIONS FOR MORE PROBLEMS?

INTRODUCTION

The past two years have seen a dramatic increase in the number of legislative proposals seeking to criminalize the act of "stalking,"¹ which is generally defined as repeatedly following or harassing another person.² In 1992 and early 1993, thirty-two states enacted anti-stalking statutes,³

1. Prior to 1990, no state had a criminal law which proscribed "stalking." California, in 1990, was the first state to enact such a law. Donna Hunzeker, *Stalking Laws* STATE LEGIS. REP. (Nat'l Conf. of St. Legislatures, Denver, Co.), Oct. 1992, at 1. Hunzeker, the criminal justice program manager for the National Conference of State Legislatures, has compiled a brief summary of each state's reaction to stalking and has included an appendix that shows how states have classified stalking in their criminal codes and the penalties created in state stalking laws. *Id.* A copy of her article is available for \$8 from the National Conference of State Legislatures, 1560 Broadway, Suite 700, Denver, Colorado, 80202.

Many states, which have not enacted "stalking" laws, have "trespass" and "harassment" crimes which encompass the same behavior that stalking statutes address. *Id.*; *See, e.g.*, MINN. STAT. ANN. §§ 609.605 and 609.02 (West 1987 & West Supp. 1993). Apparently, an early version of Minnesota's 1987 harassment bill included the word "stalking," but the term was determined to be too vague. Hunzeker, *supra* at 1. Arizona created the crime of harassment in 1992, which includes language similar to other states' stalking statutes. *Compare* AZ LEGIS 241 (Westlaw 1992) *with* ALLEGIS 2SS 92-675 (Westlaw 1992). Also, in Maine, "terrorizing" is a crime when a person makes threats of violence. ME. REV. STAT. ANN. tit. 17-A, § 210 (West 1983). There is a pending proposal in the state legislature to expand the crime of harassment to more clearly cover conduct known as stalking. *See* 1993 ME H.P. 328 (Westlaw) (introduced Feb. 9, 1993). However, a Maine lawmaker also introduced legislation in 1993 to create the crime of stalking, using the California statute as a model. *See infra* note 4.

2. States vary in how they define "stalking," but most have defined it as willful, malicious and repeated following or harassing or both of another person. The distinction between statutes that require both and statutes that require only harassment could be critical because it may mean a state can punish someone for merely following someone. *See infra* Part III. Some require the stalker to make a "credible threat" of violence and the victim to have a reasonable fear of death or great bodily injury. *See infra* notes 3, 45-74 and accompanying text.

3. These states are Alabama, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. ALA. CODE § 131-6-90 (Supp. 1992) (defines "stalking" as intentionally and repeatedly following or harassing and requires that the stalker pose a "credible threat" of serious injury or death); COLO. REV. STAT. ANN. § 18-9-111 (West 1990 & Supp. 1992) (defines "stalking" as repeatedly following or communicating after making a credible threat); 1992 Conn. Legis. Serv. 701 (West) (defines "stalking" as repeatedly following or lying in wait & victim must reasonably fear own safety); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992) (proscribes repeatedly following or harassing or stalker must pose a credible threat); FLA. STAT. ANN. § 784.048 (West Supp. 1992) (proscribes following or harassing and making a credible threat);

and several other states are considering anti-stalking legislation.⁴ These

HAW. REV. STAT. § 711-1106.5 (Supp. 1992)) (proscribes pursuing or conducting surveillance on another person; victim must have reasonable fear of safety); IDAHO CODE § 18-7905 (proscribes repeatedly following or harassing); ILL. COMP. STAT. ANN. ch. 720, para. 12-7.3) (1993) (proscribes following or placing a person under surveillance); 1992 Iowa Legis. Serv. 408 (West) (to be codified at IOWA CODE § 708.11) (proscribes following, pursuing or harassing and making a credible threat); KS LEGIS 298 (Westlaw 1992) (proscribes following or harassing); KY. REV. STAT. ANN. §§ 508.120-.150 (Michie/Bobbs-Merrill Supp. 1992) (proscribes alarming, annoying, intimidating or harassing); LA. REV. STAT. ANN. § 14:40.2 (West. Supp. 1992) (proscribes following or harassing and making a credible threat); MA LEGIS 31 (Westlaw 1992) (to be codified at MASS. GEN. L. ch. 31, § 43) (proscribes following or harassing); MICH. COMP. LAWS ANN. §§ 750.411h and 750.411i (Supp. 1993) (proscribes repeated harassing); MISS. CODE ANN. § 97-3-107 (Supp. 1992) (proscribes following or harassing or making a credible threat); MT LEGIS 292 (Westlaw 1992) (proscribes following or harassing); NEB. REV. STAT. § 28-311.02 (Supp. 1992) (proscribes following or harassing and making a credible threat); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1992) (proscribes following or making a credible threat); NY LEGIS 345 (Westlaw 1992) (to be codified at N.Y. PENAL LAW §§ 120.13-.15 & 240.25-.30) (proscribes following or harassing); NM LEGIS 86 (Westlaw 1993) (proscribes following or harassing and making credible threat); N.C. GEN. STAT. § 14-277.3 (Supp. 1992) (proscribes following); ND LEGIS 1237 (Westlaw 1993) (proscribes harassing, intimidating or frightening); OH LEGIS 234 (Westlaw 1992) (to be codified at OHIO REV. CODE ANN. § 2903.211) (proscribes knowingly causing another to believe the defendant will cause physical harm); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993) (proscribes following or harassing and making a credible threat); R.I. GEN. LAWS §§ 11-59-1,2 (Supp. 1992) (same); SC LEGIS 417 (Westlaw 1992) (to be codified at S.C. CODE ANN. § 16-3-1070) (same); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to 22-19A-6 (Supp. 1992) (same); TENN. CODE ANN. § 39-17-315 (Supp. 1992) (same); 1993 TX LEGIS 10 (Westlaw 1993) (proscribes following or harassing); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992) (proscribes following or harassing and making a credible threat); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992) (proscribes engaging in conduct with intent to cause emotional distress); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993) (proscribes following and harassing); W. VA. CODE § 61-2-9a (1992); WI LEGIS 194 (Westlaw 1992) (to be codified at WIS. STAT. § 947.013) (proscribes following or harassing and making a credible threat); WY LEGIS 92 (Westlaw 1993) (to be codified at WYO. STAT. § 6-2-506) (proscribes harassing).

The Michigan statute was part of a legislative package that includes a civil cause of action for stalking. Michigan state representative Perry Bullard called the civil action "experimental legislation." Such legislation allows the victim to sue the stalker for damages, whether the stalker is convicted or not. MICH. COMP. LAWS ANN. § 600.2954 (West Supp. 1993).

Some states have classified their anti-stalking legislation as "emergency" action. *See, e.g.*, IDAHO CODE § 18-7905 (Supp. 1992) (compiler's notes); MA LEGIS 31 (West law 1992) (to be codified at MASS. GEN. L. ch. 31, § 43); MD LEGIS 1237 (Westlaw 1993). Other states, such as Alabama, Hawaii, Illinois, New Jersey and Rhode Island, passed laws to take immediate effect. *See supra* note 3. While this may "underscore[] the peril of victims . . . and the urgent need to protect them[.]" Hunzeker, *supra* note 1, at 3, such urgency may raise a question whether the public has constitutional notice about the new statute. However, courts have given great deference to state legislatures in this area. *See United States v. Casson*, 434 F.2d 415, 422 (D.C. Cir. 1970) (finding that public had opportunity for actual notice by publicity and Congressional proceedings about criminal statute in District of Columbia); *cf. Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982) (court deemed state legislature's grace period before law became effective as adequate).

4. Legislative proposals for stalking laws are pending in all the remaining states: Alaska, Georgia, Indiana, Maine, Maryland, Minnesota, Missouri, Nevada, New Hampshire, Oregon, Penn-

states have followed the lead of California, which in 1990 enacted the Nation's first anti-stalking statute.⁵ The rush to enact these statutes has been prompted, at least in part, by highly-publicized stalking incidents.⁶ The haste with which these statutes have been enacted has raised concerns regarding the constitutionality of these new statutes.⁷ None of these laws has faced a court challenge.⁸ Concerns about vagueness⁹ and overbreadth¹⁰ in stalking statutes prompted Congress to enact a uniform

sylvania and Vermont. See 1993 AK H.B. 63 (Westlaw) (introduced Jan. 15, 1993); 1993 GA S.B. 13 (Westlaw) (sent to Governor on March 25, 1993); 1993 IN S.B. 97 (Westlaw) (both House & Senate adopted the conference committee report on April 23, 1993); 1993 ME H.P. 387 (Westlaw) (introduced Feb. 16, 1993); 1993 MD H.B.433 (sent to Governor on April 12, 1993); 1993 MN H.F. 396 (Westlaw); 1993 NV A.B. 199 (Westlaw) (passed Assembly and sent to Senate on April 5, 1993); 1993 NH H.B. 476 (Westlaw) (passed House and sent to Senate on March 3, 1993); 1993 OR H.B. 2412 (Westlaw) (introduced Jan. 15, 1993); 1993 PA H.B. 3 (Westlaw) (introduced Jan. 25, 1993, and passed House Feb. 10, 1993) and 1993 PA S.B. 369 (Westlaw) (introduced February 5, 1993, and passed Senate on March 3, 1993); 1993 VT. S.B. (Westlaw) (sent to conference committee on April 22, 1993).

5. CAL. PENAL CODE § 646.9 (West Supp. 1992). See discussion *infra* Part II.

6. See *infra* notes 33-35 and 45, 47 and accompanying text. While beyond the scope of this Recent Development, it is interesting to note that stalking laws have recently been touted as a possible tool against anti-abortion activists in the wake of the March 10, 1993 murder of a Florida doctor who performed abortions. See Ted Appel, *Bill Would Sharpen California's Stalking Law*, UPI, March 8, 1993, available in LEXIS, Nexis Library, UPI File [hereinafter Appel]; Erik Christianson & Tim Jones, *Abortion Issue Returns To The Capitol Spotlight*, CHI. TRIB., March 18, 1993, at 1, available in LEXIS, Nexis Library; Ross Ramsey & Kim Cobb, *Anti-stalking Bill Becomes Texas Law*, HOUS. CHRON., March 20, 1993, at A25, available in LEXIS, Nexis Library; William Recktenwald, *Stalking Law May Be Used On Abortion Protestors*, CHI. TRIB., March 20, 1993, at 11, available in LEXIS, Nexis Library (Cook County State's Attorney "will not hesitate to use" the law if someone threatens an abortion clinic worker with a serious credible threat, places them under surveillance and follows them). It is likely that such protestors could be successfully prosecuted under many states' stalking measures, given the broad language in many of them. The National Abortion Federation has reported that stalking is a new form of harassment experienced by abortion providers, staff or patients away from the clinic. Lynn Smith, *Bowed, But Unbroken?*, L.A. TIMES, March 22, 1993, at E1, available in LEXIS, Nexis Library.

7. See *infra* Parts IV and V. Despite concerns about constitutionality, the laws have generated little or no opposition in state capitols. Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J. Aug. 20, 1992, at 1.

8. The National Conference of State Legislatures in Denver, Colorado, which is monitoring the stalking legislation nationwide, reports no court challenges so far to the new laws. Hunzeker, *supra* note 1, at 3.

9. "Vagueness doctrine" declares that "a law . . . which does not fairly inform a person of what is commanded or prohibited is unconstitutional as violative of due process." BLACK'S LAW DICTIONARY 1549 (6th ed. 1990). Under "void for vagueness doctrine," a law is void on its face if it is so vague that people "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The doctrine is discussed more fully in LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31 (2d ed. 1988).

10. The "overbreadth doctrine . . . requires that a statute be invalidated if it is fairly capable of

anti-stalking bill as a model for states.¹¹

The federal and state stalking statutes have been both praised and criticized. Proponents applaud legislatures for moving to deter the kind of behavior that they believe often precedes more violent acts, usually against women by their former spouses or boyfriends.¹² Critics, however, contend that stalking laws are poorly defined, highly subjective and difficult to enforce.¹³ Critics also see a tremendous potential for misuse of the new statutes, particularly in marital disputes.¹⁴

Part I of this Recent Development describes the history of stalking and the old mechanisms for protecting victims before stalking laws were enacted. Part II analyzes California's statute and explains why it serves as a model for other states enacting similar statutes. Part III surveys the

being applied to punish people for constitutionally protected speech or conduct." BLACK'S LAW DICTIONARY 1102 (6th ed. 1990). The doctrine says that a law is void on its face if it "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that . . . constitute an exercise" of protected expressive or associational rights. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) (statute prohibiting all picketing is void on its face because it bans peaceful picketing protected by the First Amendment).

Professor Tribe states:

A plausible challenge to a law as *void for overbreadth* can be made only when (1) the protected activity is a significant part of the law's target, and (2) there exists no satisfactory way of severing the law's constitutional from its unconstitutional applications so as to excise the latter clearly in a single step from the law's reach.

TRIBE, *supra* note 9, § 12-27, at 1022.

11. See *infra* Part IV. The bill was introduced on July 1, 1992, and Congress approved it three months later on Oct. 1, 1992. See *infra* note 75 and accompanying text. Anne Seymour, an official of the National Victim Center, a group which advocates anti-stalker legislation, explains that legislatures have passed stalker laws with such expediency because law enforcement officials have previously been unable to protect stalking victims. *Nightline: Anti-Stalker Laws* (ABC television broadcast, Sept. 3, 1992) (transcript available in LEXIS, Nexis Library) [hereinafter *Nightline*]. Deborah P. Kelly, chair of the American Bar Association's committee on victims, thinks the rash of legislation means that legislators have given more attention to the plight of crime victims. Rosalind Resnick, *States Enact Stalking Laws: California Takes Lead*, NAT'L L.J., May 11, 1992, at 3.

The pace with which both states and Congress acted on this issue in 1992 may also reflect election year politics. "It allows the governors and legislatures to say, 'We did somethin,' and it doesn't cost them anything," commented Phil Gutis, spokesman for the American Civil Liberties Union. Maria Puente, *Legislators Tackling the Terror of Stalking*, USA TODAY, July 21, 1992, at 9A. The issue of stalking laws was debated in at least one congressional race. In Massachusetts, two Republican candidates, vying for the same congressional seat debated the need for a national stalking law. Don Aucoin, *Past and Route to Future Split 6th District GOP Rivals*, BOSTON GLOBE, Sept. 4, 1992, at 20.

12. See *infra* Part V.

13. See *infra* Part V.

14. Marvin Greene, *Prosecutors Unhappy With Test of Kentucky Stalking Law*, GANNETT NEWS SERV., Sept. 2, 1992, available in LEXIS, Nexis Library (stalking laws will effect every divorce).

legislation that exists in other states. Part IV examines Congress' response to the varied state statutes and explores one possible legislative drafting option. Finally, Part V examines contrasting perspectives of the stalking legislation and concludes that some additional action may be needed.

I. HISTORY OF STALKING

Stalking is not a new problem. Stalking is an old problem with a new name.¹⁵ Stalking occurs most often in connection with acts of domestic violence. Often, a spurned lover or estranged spouse, who is usually a male, follows and harasses the former partner.¹⁶ Likewise, after a battered woman leaves her abusive boyfriend or husband, the man may begin to follow and threaten her at home, at work, on the street.¹⁷ Stalking presently precedes more violent acts, such as murder, when stalkers carry out their threats.¹⁸ Approximately ninety percent of women killed by their husbands or boyfriends were stalked prior to their deaths.¹⁹

No statistics exist concerning the number of people who are stalking victims.²⁰ However, the strong connection between stalking and domestic violence²¹ suggests thousands of women are stalked each year.²² Kris-

15. Tamar Lewin, *New Laws Address Old Problem: The Terror of a Stalker's Threats*, N.Y. TIMES, Feb. 8, 1993, at A1.

16. *Nightline*, *supra* note 11 (estimating 75% of female domestic violence victims were stalked by their present or former husband or boyfriend); Lewin, *supra* note 15, at A2 (estimating 75%-80% of stalking cases arise in domestic context).

17. *Nightline*, *supra* note 11.

18. Arthur Higbee, *American Topics: Officer, That Man Keeps Following Me*, INT'L HERALD TRIB., June 6, 1992, available in LEXIS, Nexis Library. A pattern of threats or harassment often precedes violent acts such as assault, rape, child molestation and murder. Melinda Beck et al. *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60.

19. Beck, *supra* note 18, at 61 (approximately one-third of all women killed are killed by their husbands or boyfriends).

20. See Joseph Kirby, *Stalking Law Sends A New Signal*, CHI. TRIB., Aug. 13, 1992, § 1 at 1. Park Dietz, a clinical psychiatrist, has conducted the only major study of stalking. He estimates approximately 200,000 people in the United States are currently stalking someone. He estimates about five percent of women in the general population will be harassed at some point in their lives. Puente, *supra* note 11, at 9A.

21. See Beck, *supra* note 18, at 61 and accompanying text.

22. According to a study by the Centers for Disease Control in Atlanta, an estimated 4 million to 8 million women are victims of domestic violence each year. Nearly 1,500 women are killed by their husbands or boyfriends. The study also concluded that domestic violence may cause more injuries to women than the total number of minor automobile accidents, rapes and muggings combined. Kirby, *supra* note 20, at 1. Some experts go so far as to say unequivocally that the "leading cause of injury among American women is being beaten at home by a man." Colman McCarthy, *Better Protection For Women In Danger*, WASH. POST, June 13, 1992, at A21.

tin Lardner was one such woman. Her ex-boyfriend fatally shot her on a suburban Boston street.²³ Only weeks earlier, Lardner had obtained a restraining order against him because he had been stalking her and had assaulted her.²⁴

But stalking law supporters argue that Lardner's death occurred because existing law was inadequate to prevent stalking.²⁵ Prior to the enactment of anti-stalking legislation, the act of stalking did not violate a criminal statute.²⁶ Existing criminal law proscribing harassment and assault, for example, failed to criminalize stalking.²⁷ The offender usually had to commit an overt attack before he could be arrested or prosecuted.²⁸ Moreover, the typical civil remedy—a protection order or restraining order²⁹—often failed to protect the victim adequately because restraining orders cannot be enforced on an hourly basis.³⁰ Even if a civil

23. McCarthy, *supra* note 22, at A25. Lardner was a 21-year-old art student and the daughter of veteran Washington Post reporter George Lardner. Her murder prompted U.S. Sen. William Cohen to draft federal legislation on the issue. See *infra* note 75.

24. The boyfriend, Michael Cartier, 23, had beaten and kicked Lardner until she was unconscious. Lardner then ended their relationship, but Cartier continued to threaten her. After shooting Lardner on May 30, 1992, Cartier committed suicide. At the time of the killing, Cartier was on probation for beating a previous girlfriend, who also had a restraining order against him. McCarthy, *supra* note 22, at A25. Ironically, Lardner's death occurred two weeks after Massachusetts' anti-stalking law took effect. Puente, *supra* note 11, at 9A. Massachusetts subsequently instituted more reforms, including computerizing records of restraining orders and violations. The state also began studying the possibility of requiring stalkers to wear electronic monitoring devices that alert victims when the stalker approaches. Beck, *supra* note 11, at 63. See *Electronic Beeper Eyed for Stalkers*, CHI. TRIB., Aug. 11, 1992, at 6, available in LEXIS, Nexis Library (discussing Colorado's innovative program as first in country to require violator's of protective orders to wear monitoring devices).

25. *Nightline*, *supra* note 11.

26. Kenneth R. Thomas, *Anti-Stalking Statutes: Background and Constitutional Analysis*, CONG. RES. SERV. 92-735 A, at 3 (Sept. 26, 1992).

27. *Id.* A person commits an assault when that person "attempts or places a person in reasonable apprehension of being subjected to immediate physical violence." *Id.* While a stalker may intend or threaten physical violence, the stalker does not commit an assault unless there is such "proximity" between the perpetrator and victim that the victim anticipates immediate violence. Stalking behavior which threatens potential future harm does not generally constitute an assault. *Id.* Trespass laws also fail to deter stalkers. A stalker who follows someone does not necessarily violate trespass laws. *Id.*

28. *Nightline*, *supra* note 11.

29. Courts may order a person to stay away from another person. If a person violates the order, a court can hold the violator in contempt and levy fines or incarceration. Thomas, *supra* note 26, at 34.

30. Thomas, *supra* note 26, at 4-5. In the court arena, the victim must initiate the proceedings, prove her case, obtain an order, and then seek to enforce the order. If the stalker violates the order, the victim usually must return to the court to seek sanctions. Moreover, often police will not arrest the stalker for violating the order. Thomas, *supra* note 26, at 4-5.

protection order were effective, many victims lack the ability to attain one. The likely attorney fees, court costs, and time required to obtain a restraining order deters many victims from seeking one.³¹ In contrast, upon criminalizing stalking, the state becomes responsible for investigating the crime, initiating the proceedings, providing the evidence, and seeking punishment.³²

II. CALIFORNIA'S RESPONSE: CRIMINALIZE STALKING

California enacted its stalking law in 1990 in response to several highly publicized stalking incidents, including the murder of actress Rebecca Schaeffer by an obsessed fan,³³ the stalking and brutal stabbing of actress Theresa Saldana,³⁴ and the murders of four women in Orange County, each of whom had a temporary restraining order against her assailant.³⁵

The California law,³⁶ which at least one analyst argues is the most constitutionally sound of those enacted thus far,³⁷ is narrowly written. It prohibits an individual from willfully, maliciously, and repeatedly fol-

31. Thomas, *supra* note 26, at 4.

32. Thomas, *supra* note 26, at 4. However, even with stalking laws, the victim must initially file a complaint against the stalker. Moreover, the victim will need to testify at trial.

33. Robert John Bardo murdered Schaeffer, 21, co-star of the TV comedy "My Sister Sam," in 1989. He was subsequently sentenced to life in prison without parole. Bardo had videotaped every episode of her TV series, kept photographs of her, written her over 40 letters and composed songs about their fantasy relationship. Her killing led the Los Angeles Police Department to form a special unit to investigate stalkers. Cheryl Laird, *Laws Confront Obsession that Turns Fear into Terror and Brings Nightmares to Life*, THE HOUS. CHRON. May 17, 1992, at 1, available in LEXIS, Nexis Library.

34. Arthur Richard Jackson became obsessed with Saldana after seeing her in the movie *Raging Bull*. He stalked her and stabbed her 10 times. While serving his sentence, he vowed to carry out his "divine mission" to kill her so they could "escape" together in the afterlife. Laird, *supra* note 33, at 1. Saldana founded the national organization Victims for Victims. Laird, *supra* note 33, at 1. For a synopsis of the facts in the case, see *People v. Jackson*, 199 Cal. Rptr. 848, 849-50 (Cal. Ct. App. 1984). The case says the defendant saw Saldana in the movie *Defiance*. *Id.* at 849.

35. The four women were killed over a period of a month and a half. Each had a restraining order and had told their family and friends they thought they were going to be killed. In each case, the police had told the victims they could get involved only after a physical attack. *Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) (transcript available in LEXIS, Nexis Library) [hereinafter *Sonya*] (interview with federal legislation sponsor Edward Royce).

Royce, a Republican, was elected to Congress in the fall 1992 election. The murders were committed in Royce's state legislative district, which was one reason he was interested in the issue. Telephone interview with Joan Bates, Chief of Staff for State Sen. Edward Royce, Sacramento, Calif. (Nov. 10, 1992) [hereinafter Bates].

36. CAL. PENAL CODE § 646.9 (West Supp. 1992) (current version at CAL. PENAL CODE § 646.9 (West Supp. 1993)); see also 22 PAC. L.J. 500 (summary of 1990 legislation).

37. See, e.g., Thomas, *supra* note 26, at 10.

lowing or harassing³⁸ a person while making a "credible threat" to that person's safety.³⁹ The offender must intentionally cause the victim to fear death or great bodily injury, and the victim's fear must be "reasonable."⁴⁰ The "credible threat" definition has already been expanded to include fearing the death of or serious injury to an immediate family member.⁴¹ Despite this expansion, the California statute appears to be on firm constitutional ground. There have been several convictions⁴² but no constitutional challenges,⁴³ perhaps due to the care that went into drafting the language.⁴⁴

III. STATE SURVEY OF STALKING LEGISLATION

Although the catalyst for the California legislation included the stalking of celebrities,⁴⁵ Hollywood stars are not the only victims.⁴⁶ The im-

38. "Harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "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.

CAL. PENAL CODE § 646.9(d) (West Supp. 1992) (current version at CAL. PENAL CODE § 696.9(e).

39. "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. The threat must be against the life of, or a threat to cause great bodily injury to, a person. . . .

Id.

40. CAL. PENAL CODE § 696.9(e) (West Supp. 1992) (current version at CAL. PENAL CODE § 696.9(f) (West Supp. 1993)).

41. CAL. PENAL CODE § 696.9(e) (West Supp. 1993). The statute has undergone other revisions as well. CAL. PENAL CODE § 696.9 (West Supp. 1993). These revisions were made to eliminate various loopholes. Bates, *supra* note 35.

42. Under the latest statistics available, the Judicial Council of California reports that through December 31, 1991, 10 people were convicted and sentenced under the 1990 stalking law. Hunzeker, *supra* note 1, at 3.

43. Thomas, *supra* note 26, at 6. Bates, *supra* note 35.

44. Royce had two colleagues, both California judges, who helped him draft the legislation. Bates, *supra* note 35.

45. See *supra* notes 33-35. Other celebrity victims include talk show hosts David Letterman and Johnny Carson, singer/actress Olivia Newton-John, and actor Michael J. Fox. Maria Puente, *What To Do If You Can't Afford To Hire Protection*, USA TODAY, July 21, 1992, at 9A. Such celebrities often pay more than \$200,000 per year for private security firms to analyze and monitor potential stalkers and provide protection if needed. *Id.* Michael Zona, a forensic psychiatrist with the Los Angeles police, has compiled statistics on stalkers and their victims: 9.5 percent of the stalkers falsely believe that the victim loves the stalker; 43 percent of the stalkers are strangers to the victims but are obsessed with them; 47 percent of the stalkers, usually male, know the target as an ex-spouse, ex-lover or former boss; 38 percent of stalking victims are ordinary citizens; 32 percent are lesser known entertainment figures; 17 percent are highly recognizable celebrities; and 13 percent

petus for the legislation enacted in other states came from local tragedies.⁴⁷ These states have not, however, uniformly adopted language from the California statute. Rather, legislatures have crafted statutes that differ significantly from state to state.⁴⁸ The statutes range from narrow laws which apply only to clearly dangerous actions to broad laws which may punish non-dangerous or even constitutionally-protected activity.⁴⁹ States drafting anti-stalking measures must balance their desire to punish a broad range of stalking behavior with the goal of crafting legislation which will not punish constitutionally-protected behavior.⁵⁰

States with narrowly drafted legislation include California, Colorado, and Tennessee.⁵¹ These statutes are considered narrow in scope because they prohibit stalking only when linked with a threat of physical violence.⁵² These statutes appear to be the most constitutionally sound. However, a stalker who refrains from making a verbal threat may still be able to follow or harass a person without being subject to these laws.⁵³

Broadly drafted legislation exists in Florida, Idaho and Delaware.⁵⁴ These states, as well as others, appear to punish a person for merely following another person. Florida, for example, has a misdemeanor version of stalking that criminalizes willfully, repeatedly or maliciously following

of the victims are either former employers of the stalker or other professionals. Puente, *supra* note 11, at 9A.

46. Puente, *supra* note 11, at 9A. Even in Los Angeles, which might be the Nation's stalking capital with its large number of rich and famous citizens, approximately 38 percent of stalking victims are average citizens. *Id.*

47. Behind almost every state stalking bill has been at least one local tragedy. Beck, *supra* note 18, at 60. For example, in Wisconsin, Shirley Lowery's ex-boyfriend fatally stabbed her 19 times in a Milwaukee courthouse where she sought to get a protective order. Beck, *supra* note 18, at 60. In Virginia, Pernell Jefferson stalked Regina Butkowski, whom he met at a health club, for six months. *Id.*; Puente, *supra* note 11, at A9. He eventually shot her, set her body on fire and dumped it in a creek. Puente, *supra* note 11, at A9. In Pennsylvania, a bill was introduced after a male stalker killed a woman whom he had abused and harassed for months. In Florida, Gail Manning told lawmakers that a neighbor had made unwanted advances for six years and he was so eager to learn details of her personal life that he occasionally went through her garbage. Resnick, *supra* note 11, at 3.

48. *Nightline*, *supra* note 11 (interview with George Washington University Professor Jonathon Turley); Hunzeker, *supra* note 1, at 2; Thomas, *supra* note 26, at 2. For a listing of the various state statutes, see *supra* note 3.

49. Thomas, *supra* note 26, at 6.

50. Thomas, *supra* note 26, at 6-7.

51. Thomas, *supra* note 26, at 86 n.30.

52. Thomas, *supra* note 26, at 8.

53. Thomas, *supra* note 26, at 7.

54. Thomas, *supra* note 26, at 8.

or harassing another person.⁵⁵ These statutes are the most constitutionally suspect because they appear to punish constitutionally protected behavior. The Florida law has been criticized for its provision allowing police to make arrests without warrants or without actually witnessing an illegal act.⁵⁶

State definitions of stalking vary considerably.⁵⁷ Some contain specific definitions pertaining to stalking,⁵⁸ and some have no specific definitions.⁵⁹ Some states, in an attempt to preserve the constitutionality of their laws, have expressly excluded constitutional activity from the purview of their statutes.⁶⁰ States not only differ on the behavior to be proscribed, but they also differ as to whether a stalker is entitled to notice that his or her actions constitute stalking. North Carolina requires that the victim ask the stalker to stop following him or her before the stalker can be charged under the law.⁶¹ Washington, however, explicitly states the opposite: "it is not a defense that the stalker was not given actual notice that the person being followed did not want to be contacted or followed."⁶²

Most state statutes apply to any stalker. However, West Virginia's statute only applies to stalkers with whom the victim has either lived or has engaged in intimate relations.⁶³ States also differ with respect to their treatment of alleged and convicted stalkers. In Iowa, for example, the statute contains a presumption that a defendant guilty of felonious stalking is ineligible for bail while awaiting sentencing.⁶⁴ The Illinois

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

56. Puente, *supra* note 11, at 9A. Ohio's law has a similar provision. OH LEGIS 234 (Westlaw 1992). The constitutionality of warrantless arrests of alleged stalkers has been questioned by the criminal defense bar, but no legal challenges have yet been made. Hunzeker, *supra* note 1, at 3.

57. See *supra* note 3.

58. See, e.g., CAL. PENAL CODE § 646.9 (West Supp. 1993) and *supra* notes 36-41 and accompanying text.

59. See 1992 Conn. Legis. Serv. 701 (West); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992).

60. See, e.g., ALA. CODE § 13A-6-90 (Supp. 1992) ("constitutionally protected conduct is not included within the definition"); DEL. CODE ANN. tit. 11, § 18-9-11 (Supp. 1992).

61. N.C. GEN. STAT. § 14-277.3 (Supp. 1992). This seems to contravene the purpose of these laws and would force contact between the victim and stalker.

62. WASH. REV. CODE ANN. (West Supp. 1993).

63. W. VA. CODE § 61-2-9a (1992). Specifically, "any person who shall intentionally and closely follow . . . [a victim] with whom [the stalker] formerly resided or cohabited or with whom [the stalker] formerly engaged in a sexual or intimate relationship. . . ." *Id.*

64. 1992 Iowa Legis. Serv. 408 (West) (to be codified at IOWA CODE § 708.11). The court can release the defendant on bail if the judge determines the release "will not jeopardize the safety of another person." *Id.*

statute allows a judge to deny bail, based on the judge's discretion concerning the threat to the victim's physical safety.⁶⁵ Proponents argue that the no-bail provisions give victims the courage to file charges against an alleged stalker because they know their attacker will not be back to haunt them.⁶⁶ Critics counter that putting a stalker in jail immediately only aggravates the problem and could lead to more violence.⁶⁷

Most states have both misdemeanor and felony stalking classifications.⁶⁸ The typical penalty ranges from six months⁶⁹ to one year in prison⁷⁰ on the low end of the scale to five years⁷¹ imprisonment on the high end. Subsequent offenses can lead to sentences of seven years or more.⁷²

In addition to passing stalking laws, many states have strengthened their domestic violence laws.⁷³ Ohio has even written a new procedure into its statute for filing an "anti-stalking protection order" that is effective until the disposition of the criminal proceeding arising out of the complaint on which it is based. Law enforcement agencies are required to keep an index of such orders.⁷⁴

65. ILL. COMP. STAT. ANN. ch. 725, para. 5/110-6.3 (1993). The law requires the state to file a petition and then the court holds a bail hearing to determine if the defendant's release poses "a real and present threat" to the victim's physical safety. *Id.* The Illinois statute requires the court to make certain findings at the hearing, including "proof" or the "presumption" that the defendant committed stalking and that other alternatives, such as mental health treatment for the defendant, would not reasonably assure the victim's safety. *Id.* The law also contains many factors the judge must consider in determining the threat to the alleged victim, including: nature of the offense, defendant's prior criminal history indicative of violent behavior, evidence of mental health problems, nature of the defendant's threat, age and condition of victim, whether the defendant has any weapons, and any other factors the court thinks have a reasonable bearing on the defendant's propensity for violent behavior. *Id.* Although not as strict as Illinois, Ohio's statute contains similar factors for a judge to consider when setting bail. OH LEGIS 234 (Westlaw 1992) (to be codified at OHIO REV. CODE ANN. § 2903.212).

66. *Nightline*, *supra* note 11.

67. *Nightline*, *supra* note 11

68. Hunzeker, *supra* note 1 (appendix).

69. Colorado and Mississippi provide up to six months in jail. *See* COLO. REV. STAT. ANN. § 18-9-111 (West 1990 & Supp. 1992); MISS. CODE ANN. § 97-3-107 (Supp. 1992).

70. CAL. PENAL CODE § 646.9 (Supp. 1993).

71. MA LEGIS 31 (Westlaw 1992) (to be codified at MASS. GEN. L. ch. 31, § 43).

72. ILL. COMP. STAT. ANN. ch. 720, para.5/12-7.3 (1993); ILL. COMP. STAT. ANN. ch. 730, para.5158-1(5) (1993).

73. *See* ILL. COMP. STAT. ANN. ch. 750, para.60/214.

74. OH LEGIS 234 (Westlaw 1992).

IV. CONGRESS' RESPONSE TO STALKING LEGISLATION

With such an assortment of laws among the states, Congress approved legislation on October 1, 1992 to create a model state anti-stalking law.⁷⁵ The legislation instructs the National Institute of Justice⁷⁶ to: (1) evaluate state stalking laws and proposed legislation; (2) craft model stalking legislation that passes constitutional muster; (3) provide the findings to state officials; and (4) report its findings to Congress within one year of the bill's enactment.⁷⁷ This legislation was prompted by concerns that the legislation already on the books in several states was either too broad and thus unconstitutional or too narrow and thus meaningless.⁷⁸ The purpose of this legislation is to draw national attention to the problem of stalking and ensure that people will be protected by enforceable statutes, regardless of the state in which they live.⁷⁹

The National Institute of Justice will not start from scratch when it begins its task. The Congressional Research Service has already issued a report⁸⁰ that examines the background of stalking statutes and analyzes

75. U.S. Sen. William S. Cohen (R-Maine) introduced the bill in the Senate on July 1, 1992. See S. 2922, 102d Cong., 2d Sess. (1992). Kristin Lardner's murder served as Senator Cohen's motivation. He felt that Lardner's death was "disturbingly ordinary." Seth Schiesel, *Federal Measure Would Bar Stalking*, BOSTON GLOBE, July 2, 1992, at 5. A bill similar to Cohen's was introduced in the House. See H.R. 5876, 102d Cong., 2d Sess. (1992). The Senate bill's co-sponsor in the Senate was Sen. Joseph Biden (D-Del.), chairman of the Senate Judiciary Committee, which held a hearing Sept. 29, 1992, on the stalking legislation issue. After Congress passed the legislation, President Bush signed the bill into law on Oct. 6. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, 1992 U.S.C.C.A.N. (106 Stat.) 1828.

76. The institute is the government's principal research and development agency in the criminal justice field. 138 CONG. REC. S9527 (daily ed. July 1, 1992) (statement of Sen. Cohen).

77. *Id.* The fourth directive allows for future federal action by requiring the United States Attorney General to report to Congress on the need for such action. Cohen believes his bill could eventually lead to passage of federal legislation to prohibit stalking. Schiesel, *supra* note 75.

78. 138 CONG. REC. S9527 (daily ed. July 1, 1992) (statement of Sen. Cohen). In his speech on the Senate floor urging support for his bill, Cohen quoted former United States Supreme Court Justice Louis Brandeis' description of the right to privacy. Cohen said his bill was "a small but significant step in ensuring that our most comprehensive of rights is protected at the expense of no other right." *Id.* See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

79. While introducing the bill, Cohen recognized civil libertarians' concerns overly broad stalking statutes. Cohen claimed stalking is so serious a problem that the national government should help state officials draft enforceable statutes, which still protect each individual's rights of free speech and movement. According to Sen. Cohen, some state stalking statutes are so narrow that they may be "meaningless," or so broad that they may be unconstitutional. 138 CONG. REC. S9527 (daily ed. July 1, 1992) (statement of Sen. Cohen). See also Press Releases from Senator Bill Cohen (July 1, Sept. 16 and Oct. 1, 1992) (on file in Cohen's office).

80. Thomas, *supra* note 26.

the constitutional issues. The report concludes that a number of the new statutes may be unconstitutional because they provide that a person be arrested or punished for merely following another person.⁸¹ The report analyzes whether prior state statutes are unconstitutionally vague.

Under the Fourteenth Amendment's Due Process Clause,⁸² legislation must be written specifically enough so that a person of common intelligence can determine what is lawful behavior and what is not.⁸³ If a person cannot determine what behavior constitutes criminal activity under a statute, courts will strike it down as unconstitutional.⁸⁴ Generally, a court can find a statute void on its face and strike it in its entirety or hold it only unconstitutional as applied in particular cases.⁸⁵ However, when a state regulates free speech, covered by the First Amendment,⁸⁶ a court will find the statute void in its entirety.⁸⁷ Most stalking statutes appear to be too vague, thus possibly implicating the "void for vagueness" doctrine.⁸⁸ To avoid this problem, the statutes should be written more specifically. The report proposes statutory stalking language that appears to be constitutional.⁸⁹

Any person who repeatedly follows or harasses another person with the intent to place that person in reasonable fear of sexual battery, bodily injury or death; and whose actions would cause a reasonable person to suffer substantial emotional distress; and whose acts induce emotional distress to that person; is guilty of the crime of stalking.⁹⁰

The author also sought to define the various terms employed in the proposed language:

'Harasses' means a course of conduct directed at a specific person which would cause a reasonable person to fear sexual battery, bodily injury, or

81. *Id.* at 7. See Wayne F. Foster, Annotation, *Validity, Construction and Application of State Criminal Statute Forbidding Use of Telephone to Annoy or Harass*, 95 A.L.R.2d 411 (1979 & Supp. 1992).

82. "No State shall . . . deprive any person of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

83. See *supra* note 9.

84. See *supra* note 9.

85. Thomas, *supra* note 26, at 6.

86. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

87. Thomas, *supra* note 26, at 6.

88. Thomas, *supra* note 26, at 6.

89. Thomas, *supra* note 26, at 10.

90. Thomas, *supra* note 26, at 10.

death, including but not limited to verbal threats, written threats, vandalism, or unconsented to physical contact.⁹¹

'Follows' means maintaining a visual or physical proximity over a period of time to a specific person in such a manner as would cause a reasonable person to have a fear of sexual battery, bodily injury, or death.⁹²

'Repeatedly' means on two or more separate occasions.⁹³

The author's proposal attempts to encompass the more serious stalking behavior while remaining within constitutional bounds. However, state legislatures may decide that problems within their own states warrant language that is more narrow or broad than that proposed. It remains to be seen whether the National Institute of Justice will adopt this language or a different statutory scheme.

V. CONTRASTING PERSPECTIVES OF STALKING LEGISLATION

The anti-stalking measures are supported by victims' rights advocates, who say they fill a void in the law,⁹⁴ but are criticized by civil-liberties experts who say stalking is poorly defined and possibly unconstitutional.⁹⁵ Proponents argue that previous laws have generally been ineffective in curbing the disturbing trend of harassment and violence after an offender made credible threats of violence.⁹⁶ Organizations lobbying for stalking legislation include the National Organization for Victim Assistance,⁹⁷ the National Victims Center,⁹⁸ and the National Battered Women's Law Project.⁹⁹ They welcome the new laws and feel women are finally being vindicated as legislators recognize the stalker's actions as criminal.¹⁰⁰

But organizations such as the American Civil Liberties Union (A.C.L.U.)¹⁰¹ and National Organization for Men¹⁰² are uneasy about the new laws because of the potential for abuse by law enforcement of-

91. Thomas, *supra* note 26, at 11.

92. Thomas, *supra* note 26, at 11.

93. Thomas, *supra* note 26, at 11.

94. *Nightline*, *supra* note 11.

95. See *infra* notes 101 and 102 and accompanying text.

96. *Nightline*, *supra* note 11.

97. Lewin, *supra* note 15, at A1.

98. *Nightline*, *supra* note 11.

99. Ross, *supra* note 6, at 6.

100. See *supra* Part I.

101. *Sonya*, *supra* note 35 (interview with Loren Siegel of the ACLU).

102. *Sonya Live* (CNN television broadcast, Oct. 2, 1992)(transcript available in LEXIS, Nexis Library) [hereinafter *Sonya Live*].

ficers. Prosecutors could use the laws, especially the broadly written ones, to suppress the rights of political dissidents and others.¹⁰³ The A.C.L.U. plans to watch carefully how the laws are implemented to make sure they are not used by overzealous prosecutors as a tool to fight constitutionally-protected activity.¹⁰⁴ The concern is that legal behavior may be indistinguishable from some illegal behavior, especially where statutes punish mere presence.¹⁰⁵ Examples typically cited by civil liberties experts as cases that could fall within the purview of these statutes are investigative reporters who follow public figures to do stories on them and fathers who are denied visitation rights and who sit in parked cars outside their children's school to see if the children are all right.¹⁰⁶ Thus, a state law that prohibits the mere act of following a person¹⁰⁷ could draw even private detectives, policemen, or suspicious neighbors within its coverage.¹⁰⁸ Washington State has recognized this possibility and its anti-stalking statute explicitly provides that a private investigator, acting within the capacity of his license, is not stalking within the meaning of the statute.¹⁰⁹

The arguments on both sides of this issue demonstrate the delicate balance that is needed when weighing the rights of victims and alleged criminals. Some of the state laws that punish mere presence or repeated following cannot pass constitutional muster. Such statutes are similar to vagrancy and anti-loitering laws which courts have invalidated due to vagueness.¹¹⁰ Other statutes, however, may be written too narrowly to provide effective protection to stalking victims. Congress and the state legislatures must be willing to rework the language of current anti-stalking measures and enact statutes that will be constitutional, enforceable, and at the same time, protective of stalking victims.

Dawn A. Morville

103. *Id.*; *Sonya*, *supra* note 35.

104. *Spencer*, *supra* note 7, at 1.

105. *Nightline*, *supra* note 11.

106. *See Schiesel*, *supra* note 75, at 5.

107. *See supra* note 55 and accompanying text.

108. *Thomas*, *supra* note 26, at 9.

109. WASH. REV. CODE ANN. § 9A.46.10 (West Supp. 1992); *see also* DEL. CODE ANN. tit. 11 § 1312A (Supp. 1992) (excluding private detectives and police officers in course of work).

110. *Sonya Live*, *supra* note 104. *See* I.J. Schiffres, Annotation, *Validity of Vagrancy Statutes and Ordinances*, 25 A.L.R.3d 792 (1969 & Supp. 1992); I.J. Schiffres, Annotation, *Validity of Loitering Statutes and Ordinances*, 25 A.L.R.3d 836 (1969 & Supp. 1983).

