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B. Benjamin Haas

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1994]

THE FORMATION AND VIABILITY OF ANTI-STALKING LAWS

I. INTRODUCTION

After the 1989 murder of Rebecca Schaeffer, a popular television star, the crusade for the enactment of anti-stalking laws began.¹ Today, all fifty states and the District of Columbia have enacted anti-stalking statutes.²

1. See Rosalind Resnick, *California Takes Lead: States Enact 'Stalking' Laws*, NAT'L L.J., May 11, 1992 at 33. California passed the first anti-stalking statute in 1990 after the murders of Rebecca Schaeffer and five other women were attributed to stalking-type behavior. *Id.*; see Miles Corwin, *When the Law Can't Protect*, L.A. TIMES, May 8, 1993, at A1 (recounting stories of four women killed within five week period). In Schaeffer's case, the murderer had sent her several threatening letters, followed her on countless occasions, attempted to gain entry into her work place and hired a private detective to find her address before he shot her to death in the doorway of her apartment. *Id.* at A1; see Andrea Ford, *Suspect on Tape Tells of Actress's Last Words*, L.A. TIMES, Oct. 22, 1991, at B3.

2. See, e.g., ALA. CODE §§ 13A-6-90 to -94 (1994); ALASKA STAT. §§ 11.41.260 to .270 (Supp. 1994); ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1994); ARK. CODE ANN. § 5-71-229 (Michie 1994); CAL. PENAL CODE § 646.9 (West Supp. 1995); COLO. REV. STAT. § 18-9-111 (Supp. 1994); CONN. GEN. STAT. ANN. §§ 53a-181c to -181d (West Supp. 1994); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1994); FLA. STAT. ANN. § 784.048 (West Supp. 1995); GA. CODE ANN. §§ 16-5-90 to -93 (Supp. 1994); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to .4 (Smith-Hurd 1995); IND. CODE ANN. §§ 35-45-10-1 to -5 (West Supp. 1994); IOWA CODE ANN. § 708.11 (West Supp. 1994); KAN. STAT. ANN. § 21-3438 (Supp. 1993); KY. REV. STAT. ANN. §§ 508.130 to .150 (Michie/Bobbs-Merrill Supp. 1994); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1994); ME. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1994) (including stalking as part of abuse); MD. ANN. CODE art. 27, § 121B (Supp. 1994); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1994); MICH. COMP. LAWS §§ 750.411h to 411i (Supp. 1994); MINN. STAT. § 609.749 (Supp. 1995); MISS. CODE ANN. § 97-3-107 (1994); MO. ANN. STAT. § 565.225 (Vernon Supp. 1994); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. §§ 28-311.02 to .05 (Supp. 1994); NEV. REV. STAT. § 200.575 (Supp. 1993); N.H. REV. STAT. ANN. § 633:3-a (Supp. 1994); N.J. REV. STAT. § 2C:12-10 (Supp. 1994); N.M. STAT. ANN. § 30-3A-1 to -4 (Michie Supp. 1993); N.Y. PENAL LAW §§ 120.13-14, 240.25-.26 (McKinney Supp. 1995) (calling crime menacing or harassment rather than stalking); N.C. GEN. STAT. § 14-277.3 (Supp. 1993); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1993); OHIO REV. CODE ANN. §§ 2903.211 to .215 (Anderson Supp. 1994); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1995); OR. REV. STAT. § 163.730-32 (Supp. 1994); 18 PA. CONS. STAT. ANN. § 2709(b) (Supp. 1994); R.I. GEN. LAWS §§ 11-59-1 to -3 (1994); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 22-19A-1 to -7 (Supp. 1994); TENN. CODE ANN. § 39-17-315 (Supp. 1994); TEX. PENAL CODE ANN. § 42.07(a)(7) (West 1994) (describing stalking in section entitled harassment); UTAH CODE ANN. § 76-5-106.5 (Supp. 1994); VT. STAT. ANN. tit. 13, §§ 1061-63 (Supp. 1994); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1994); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1995); W. VA. CODE § 61-2-9a (Supp. 1994); WIS. STAT. ANN. § 947.013 (West Supp. 1994) (addressing stalking under section entitled harassment); WYO. STAT. § 6-2-506 (Supp. 1994); see also Tamar Lewin, *New Laws Address Old Problem*, N.Y. TIMES, Feb. 8, 1993, at A5 (explaining anti-stalking laws).

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These states designed the statutes to give law enforcement officials a more meaningful mechanism to protect stalking victims than provided by traditional civil and criminal remedies.³

Since their inception, however, stalking laws have raised constitutional questions.⁴ Some state trial courts found stalking laws to be unconstitutionally vague or overly broad.⁵ Other states criticized anti-stalking laws for being too narrow or ineffective.⁶ In response to the questions

3. See Kenneth R. Thomas, *Anti-Stalking Statutes: Background and Constitutional Analysis*, CONG. RES. SERVICE 92-735 A, at 3 (Sept. 26, 1992). It is estimated that "at least 200,000 people report being stalked by persons who threaten them with violence, even death." *Larry King Live: Stalker, Their Victims, and the Law* (CNN television broadcast, May 12, 1993). For a discussion of traditional civil remedies to stalking-type behavior, see *infra* notes 21-30 and accompanying text. For a discussion of traditional criminal remedies for stalking type behavior, see *infra* notes 31-40 and accompanying text.

4. *Nightline: Anti-Stalker Laws* (ABC television broadcast, Sept. 3, 1992) (reporting comments of Jonathan Turley, Professor of Law, Georgetown University).

5. See, e.g., M. Katherine Boychuk, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769 (1994) (applying void-for-vagueness doctrine to anti-stalking laws); Robert N. Miller, *"Stalk Talk": A First Look at Anti-Stalking Legislation*, 50 WASH. & LEE L. REV. 1303 (1993) (discussing constitutionality of stalking laws); Silvija A. Strikis, *Stopping Stalking*, 81 GEO. L.J. 2771 (1993) (discussing constitutional boundaries of anti-stalking legislation); Gera-Lind Kolarik, *Stalking Laws Proliferate*, 78 A.B.A. J. 35 (Nov. 1992) (discussing constitutionality of various states' stalking laws).

Constitutional challenges to anti-stalking laws have occurred in Florida, Illinois, Connecticut, Massachusetts and New York. See, e.g., *Champagne v. Gintick*, 871 F. Supp. 1527 (D. Conn. 1994); *State v. Culmo*, 642 A.2d 90 (Conn. Super. Ct. 1993); *Bouters v. State*, 634 So. 2d 246 (Fla. Dist. Ct. App. 1994); *People v. Krawiec*, 634 N.E.2d 1173 (Ill. App. Ct. 1994); *Commonwealth v. Kwiatkowski*, 637 N.E.2d 854 (Mass. 1994); *People v. Payton*, 612 N.Y.S.2d 815 (N.Y. Crim. Ct. 1994); see generally *Judge: Anti-Stalking Law Unconstitutional*, MIAMI HERALD, May 21, 1993, at B5 (explaining that Hardee County Circuit Judge Dennis Maloney declared Florida's anti-stalking law unconstitutional on basis that it is "vague and overly broad"); *George Lardner Jr., Anti-Stalking Laws Proliferate; Several Face Court Challenges*, WASH. POST, Apr. 30, 1993, at A2 (discussing constitutional challenges to stalking statutes in Florida, Illinois and Virginia); *Jerry Shnay, Old Stalking Law Ruled Unconstitutional*, CHI. TRIB., Aug. 26, 1993, at SW1 (stating that Will County Circuit Judge William Penn declared Illinois stalking law unconstitutionally vague due to its failure to define word "follows" or phrase "in furtherance of"); *Jill J. Spitz, Decision Delivers Blow to Florida's Anti-Stalking Law; Circuit Judge Jerry T. Lockett Ruled that a Section of the New Law, Applied to the 'Crime of the 90's,' is Unconstitutional Because it is Vague*, ORLANDO SENTINEL, Aug. 3, 1993, at A1 (stating that Circuit Judge Jerry T. Lockett ruled definition of "harass" in Florida's anti-stalking law unconstitutionally vague). For a discussion of the Florida anti-stalking statute, see *infra* notes 65-77 and accompanying text.

6. See, e.g., Boychuk, *supra* note 5, at 769-802 (discussing constitutionality of stalking laws); *Macon Morehouse, New Anti-Stalking Law Questioned by Judge for Lack of 'Guidelines'*, ATLANTA J. & CONST., June 4, 1993, at G3 (noting Fayette County Judge White's interpretation that prosecutors need evidence that victim was in "emotional distress or in fear of death or bodily harm" before they can charge defendant with crime); *Richard Seven, Stalking Law Too Narrow, Lawyers, Victims Complain*, SEATTLE TIMES, July 6, 1993, at B1 (noting lawyers' complaints that law too narrowly defines stalking); *Jill J. Spitz, Many Feel State Stalking Law Doesn't Do Much Protecting*, ORLANDO SENTINEL, May 30, 1993, at A10 (stating that many law

arising under the newly formulated anti-stalking laws, Congress directed the National Institute of Justice to develop a Model stalking law which would be both constitutional and effective.⁷

This Comment analyzes the formation and viability of anti-stalking laws. Initially, this Comment examines the traditional approach to stalking-type behavior and the failure of this approach to adequately protect victims.⁸ This Comment then analyzes the California, Florida and Pennsylvania anti-stalking statutes as models of the various approaches taken by the state legislatures in this area.⁹ This Comment also reviews federal bills that would make stalking a federal crime.¹⁰ This Comment compares the

enforcement officers have trouble understanding Florida's stalking law and therefore arrest only those who make violent threats); *California Looking at Anti-Stalking Law's Failures* (CNN television broadcast, Sept. 2, 1993) (stating that California's law requires "credible threat of bodily injury or death" in its definition of stalking, making it difficult for prosecutors to charge suspect with stalking before actual injury occurs). For a discussion of the California anti-stalking statute, see *infra* notes 45-64 and accompanying text. For a discussion of Florida's anti-stalking statute, see *infra* notes 65-77 and accompanying text.

7. H.R. 8750, 102d Cong., 2d Sess. (1992). The Bill provides, in relevant part: § 101. ANTI-STALKING LEGISLATION.

(A) Findings and Declarations—The Congress finds and declares that—

- (1) the criminal act of stalking other persons is a problem of deep concern;
- (2) previously available legal recourse against stalking, such as restraining orders, have proven largely ineffective;
- (3) anti-stalking legislation has been enacted or proposed in several States;
- (4) the constitutionality of several of the States' anti-stalking statutes may be in question; and
- (5) the Congress has an interest in assisting the States in enacting anti-stalking legislation that is constitutional and enforceable.

(B) Evaluation—The Attorney General, acting through the Director of the National Institute of Justice, shall—

- (1) evaluate anti-stalking legislation and proposed anti-stalking legislation in the States;
- (2) develop model anti-stalking legislation that is constitutional and enforceable;
- (3) prepare and disseminate to State authorities the findings made as a result of the evaluation; and
- (4) not later than 1 year after the date of enactment of this Act, report to the Congress the findings and the need or appropriateness of further action by the Federal Government.

Id.; see George Lardner, Jr., *Federal Task Force Suggests States Make Stalking a Felony Offense*, WASH. POST, Sept. 12, 1993, at A19 (discussing congressional proposal for model anti-stalking law). For a discussion of the Model Statute, see *infra* notes 170-77 and accompanying text.

8. For a discussion of the traditional approach to stalking-type behavior and the failure of traditional remedies to adequately protect victims of stalking, see *infra* notes 21-40 and accompanying text.

9. For a discussion of the California, Florida and Pennsylvania statutes, see *infra* notes 41-89 and accompanying text.

10. For a discussion of the federal bills, see *infra* notes 90-111 and accompanying text.

statutes and bills and then reviews the constitutionality of the California, Florida and Pennsylvania anti-stalking statutes.¹¹ In addition, this Comment also discusses the possible failure of these anti-stalking laws to guard against stalking behavior.¹² This Comment then analyzes how Congress' Model statute has attempted to address the various problems identified in the statutes discussed.¹³ Lastly, this Comment concludes by addressing the need for statutes drafted to deal more specifically with stalking.¹⁴

II. BACKGROUND

In most cases, persons who stalk were involved in a former relationship with the victim or believed they were involved in a relationship and became obsessed with their victim.¹⁵ The conduct of stalkers toward their victims varies in intensity and form.¹⁶ Some cases involve constant "follow-

11. For a comparison of the three state statutes and the federal bills, see *infra* notes 112-25. For a discussion of the constitutionality of the California, Florida and Pennsylvania statutes, see *infra* notes 126-65 and accompanying text.

12. For a discussion of the possible failure of the California, Florida and Pennsylvania anti-stalking laws to guard against stalking behavior, see *infra* notes 166-69 and accompanying text.

13. For a discussion of how Congress' Model statute has attempted to address the various problems identified in the statutes discussed, see *infra* notes 170-77 and accompanying text.

14. For a discussion of the need for drafting statutes to deal more specifically with stalking, see *infra* notes 178-80.

15. See Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 995 (1993) (stating that "a great deal of stalking is related to domestic violence and former intimate relationships gone awry"); see also *Federal Anti-Stalking Bill Introduced in Senate*, REUTERS, Mar. 2, 1993, at B1 (stating that "[m]ost stalking cases involve women threatened by present or former husbands or boyfriends or rejected suitors"); Bill McAllister, *Senator's Wife Urges Anti-Stalking Law*, WASH. POST, Mar. 18, 1993, at A20 (noting that "[i]n most cases . . . it is former spouses, ex-boyfriends or former co-workers who are terrorizing women"); Rene Riley-Adams, *Can Law Stop the Obsessed?*, THE TIMES (London), Feb. 22, 1993, at A1 (stating that most cases of stalking involve stalkers "who refuse to give up real relationships that have gone awry; [] who become obsessed with a superficial relationship established through work or leisure activities; and . . . who invent completely artificial relationships with someone . . . whom they have never met").

Stalking as used in this Comment is defined as "the act of following, harassing, bothering, frightening and otherwise interfering with the private lives [of people] by [one who has] even more sinister intentions toward them." *Stalking the Wild Stalker Law*, WASH. TIMES, Sept. 20, 1993, at A22. The definition of stalking varies by statute. For a list of the state statutes defining stalking, see *supra* note 2.

16. See Rosalind Wright, *They Send Their Victims Letters, Menace Them - And Sometimes Even Kill Them. You May Not Think Stalkers Prey On Women Like You, But They Do. How Can They Be Stopped?*, LADIES HOME J., Apr. 1994, at 153 (recounting various stories of persons that have been stalked). According to Lieutenant John Lane of the Los Angeles Police Department's Threat Management Unit, stalkers fall into three broad categories. *Id.* at 218.

A little under 10 percent [of stalkers] suffer from *erotomania*, the delusional belief that one is passionately loved by the object of one's desire. Most often women, . . . these predators usually target famous people, such as actors or politicians. Another 43 percent—mostly men—suffer

ing” and surveillance.¹⁷ Other cases involve repeated unsolicited phone calls, numerous unwanted mailings, and repeated visits to the victims’ home or work place.¹⁸ Still other cases involve “lying in wait,” followed by physical violence.¹⁹ The impact of stalking on victims is equally varied. Some stalking victims have had to quit their jobs, relocate, or remove their children from school.²⁰

A. *Traditional Approach to Stalking-Type Offenses*

1. *Civil Remedies*

a. *Restraining Orders*

In most states, before the enactment of stalking laws, a stalker could not be prosecuted unless the victim suffered some type of physical harm.²¹ Consequently, injunctions and restraining orders were the most widely used protection mechanisms available to victims.²² Former spouses or former girlfriends frequently requested restraining orders to thwart continued advances by their ex-partner.²³ Because police often cannot or will

from *love obsession*, believing they can make the person love them if given the chance.

The largest group of stalkers are affected by *simple obsession*. Also primarily men, these pursuers know their victims personally—ex-wives, former employees—and are the ones most likely to turn violent.

Id.; see generally Guy, *supra* note 15, at 994-1000 (discussing nature of stalking behavior).

17. See, e.g., *Larry King Live*, *supra* note 3 (discussing stalking case where Kathleen Krueger was followed and “watched over” for nine years by her husband’s former employee).

18. See, e.g., Melinda Beck et al., *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 60 (discussing stalking case where young couple, Glenn Beach and Karen Erjavec, received numerous bizarre and threatening letters, phone calls and visits from casual acquaintance of Karen’s before they were murdered).

19. See, e.g., Bryan Miller, *Thou Shalt Not Stalk*, CHI. TRIB., Apr. 18, 1993, at C14 (discussing stalking case where Dawn Wilson was approached and then beaten by her former husband as she exited store).

20. See S.K. Bardwell & Stephen Johnson, *Driver, 39, is Accused of Stalking*, HOUS. CHRON., June 29, 1993, at A11 (noting remarks by State Representative Debra Danburg that, due to drastic measures victims often feel forced to take, stalking itself is harmful even if no physical harm results).

21. See *Federal Anti-Stalking Bill Introduced in Senate*, *supra* note 15, at B1 (noting that “in many cases victims have been told by police that they cannot stop a stalker until an attack occurs”); *Stalkers Need Laws and Treatment*, THE PLAIN DEALER, May 22, 1993, at B4 (noting that prior to enactment of anti-stalking law, under Ohio law, stalkers could not be prosecuted until victim was physically harmed); *Larry King Live*, *supra* note 3 (recording comments by Kathleen Krueger, stalking victim, relating police response to her problem: “I’m sorry, there’s nothing we can do until he physically tries to hurt you.”).

22. This Comment uses the terms injunction, protective order and restraining order interchangeably to mean: a court order prohibiting the stalker from coming into contact with the complainant or victim. BLACK’S LAW DICTIONARY 784, 1223, 1314 (6th ed. 1990).

23. See Dana Parsons, *Fear Becomes a Lifelong Companion For Stalking Victims*, L.A. TIMES, May 9, 1993, at B1 (“[Los Angeles County’s] domestic violence pro-

not make an arrest in these situations, restraining orders provide victims with some hope that the justice system has not failed them. Many inadequacies, however, accompany restraining orders. First, in order to obtain a restraining order, most jurisdictions require that the applicant pay a filing fee.²⁴ Second, offenders often ignore restraining orders.²⁵ In addition, after victims successfully obtain a restraining order and the offender violates it, the offender is met with an extremely lax enforcement mechanism.²⁶ For the foregoing reasons, restraining orders do not provide adequate protection against stalkers.

b. Tort Remedies

In addition to injunctive relief, stalking victims have several tort remedies available. For instance, a victim may file a common-law suit against the stalker for invasion of privacy, intentional infliction of emotional distress, or assault or battery, depending on the circumstances.²⁷ However,

gram in recent years has been receiving about 200 requests a month for restraining orders.”). Furthermore, a recent study showed that “90 percent of all those murdered by their intimate partners called police at least once [and] more than half had called five times or more” yet the police could do nothing. 138 CONG. REC. S13,469, S13,470 (1992) (comments by Senator Cohen (D-ME), citing studies conducted in Detroit and Kansas City).

24. See generally Corwin, *supra* note 1 (discussing murder of woman who could not afford restraining order filing fee of \$182 until payday, which turned out to be the day after she was murdered).

25. See 138 CONG. REC. S13,469 (1992) (noting Senator Cohen's of Maine discussion of failure of restraining orders). Senator Cohen reiterated the story of Kristin Lardner, a 21 year-old woman killed by her ex-boyfriend, Michael Cartier, despite a restraining order. *Id.* Three weeks before Cartier murdered Kristin, she obtained a restraining order against Cartier after he had beaten her and left her unconscious on a Boston street. *Id.* Cartier had “bragged to Kristin that [a] restraining order would do no good” and on May 30, 1992, he showed he was right by shooting her to death. *Id.*

In some cases, restraining orders may actually provoke the stalker to become violent. See McAllister, *supra* note 15 (quoting Helen M. Lardner that “the restraining order her sister [Kristin Lardner] obtained even may have provoked the man to kill her”); see also Spitz, *supra* note 6 (citing case where man under injunction appeared at battered women shelter where his victim was located).

26. See Lardner, *supra* note 7 (explaining nature of lax enforcement mechanism for restraining orders). “According to a recent study in Quincy, Massachusetts, only 18% of the men arrested for violating a restraining order or for assaulting a woman repeatedly were sent to jail.” *Id.* A probation officer in the Quincy District Court added that he would be surprised if even 2% of such violators throughout the state were incarcerated. *Id.* “[I]t [is] recognized, as a 1990 Justice Department study put it, that ‘enforcement is the Achilles’ heel’ of the [protection order] process.” *Id.*; see also Miller, *supra* note 19 (stating that protection order process is plagued by inadequate enforcement mechanism). Dawn Wilson had her ex-husband, Christopher Wilson, arrested nine times for violating a protection order to no avail. *Id.* Wilson continued to stalk Dawn, and it was only after he beat her on two separate occasions, the second of which caused Dawn facial disfiguration, that he was incarcerated for 15 months. *Id.*

27. See Matthew J. Gilligan, Note, *Stalking the Stalker: Developing New Laws to Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285, 288-90 (1992) (noting civil

the same problems that face a victim when obtaining a restraining order are also prevalent in tort actions. First, the victim must have the financial stability to bring and maintain the suit.²⁸ In addition, the victim may face problems in proving the elements of the tort.²⁹ Moreover, the threat of monetary damages generally do not pose a significant deterrent to the stalker who may be indigent or mentally ill.³⁰ Therefore, traditional tort remedies do not provide a solution to the stalking problem because they fail to adequately protect victims or deter stalkers.

2. Criminal Remedies

a. Harassment

Traditionally, harassment statutes were the mechanism by which the criminal system dealt with stalking-type behavior. Harassment has been defined as "a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose."³¹ Although harassment statutes attempt to deter stalking-type behavior, some statutes only criminalize harassment by the use of the phone or verbal harassment.³²

claims may be alleged against stalkers, but with limited utility); Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 516-17 (1984) (noting statutory and common-law civil relief may be available to harassment victims).

28. See Gilligan, *supra* note 27, at 292 (noting that prohibitive filing costs in civil suits will discourage many stalking victims from asserting civil claims against their stalker); see also Janice L. Grau, Comment, *Restraining Order Legislation for Battered Women: A Reassessment*, 16 U.S.F. L. REV. 703 (1982) (describing financial, as well as other, barriers battered women face when seeking restraining orders).

29. See Gilligan, *supra* note 27, at 289-91 (noting difficulty stalking victims have in proving claims of invasion of privacy and intentional infliction of emotional distress). For instance, to successfully win a case against the stalker for invasion of privacy, the stalker must have threatened to invade or actually invaded the victim's home or work environment. *Id.* at 289-90. Since a majority of the stalking occurs in public, this element is difficult to prove. *Id.*

30. See Gilligan, Note, *supra* note 27, at 292-93 (noting that monetary damages, while discouraging some stalking behavior, will likely not stop determined stalkers from carrying out their deranged desires).

31. BLACK'S LAW DICTIONARY 717 (6th ed. 1990) (citing 18 U.S.C.A. § 1514(c)(1)); see also Robinson, *supra* note 27, at 507 (defining harassment as "the persistent and unwelcome communication of demands or feelings" and discussing difficulty legal system has in dealing with harassment type behavior).

32. See, e.g., CAL. PENAL CODE § 653m (West Supp. 1993); DEL. CODE ANN. tit. 11, § 1311 (Supp. 1994); HAW. REV. STAT. §§ 711-1106 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 135/1-1 (Smith-Hurd 1993); KAN. STAT. ANN. § 21-4113 (1988); LA. REV. STAT. ANN. § 14:285 (West 1986); see also Robinson, *supra* note 27, at 523-25 (discussing statutes that encompass solely telephonic harassment and statutes that also prohibit nontelephonic harassment). Until the Georgia anti-stalking law was put into effect "the Dekalb Solicitor's Office was able to prosecute only the simple battery and harassing phone calls charges [the victim] lodged against [her stalker]." Anne Rochell, *Man Arrested Under New Anti-Stalking Law*, ATLANTA J. & CONST., June 4, 1993, at J1.

Furthermore, the majority of criminal harassment statutes do not define what "following" means, a central characteristic of stalking behavior.³³ Even those statutes that do prohibit acts of "following" suffer from two inherent defects which make them incapable of deterring stalkers. First, the penalties for violations of the harassment statutes are not stern enough to dissuade a determined stalker.³⁴ Second, there are no provisions en-

33. See, e.g., FLA. STAT. ANN. § 784.048(1)(a) (West Supp. 1995); ME. REV. STAT. ANN. tit. 17-A, § 506-A (West 1992); N.Y. PENAL LAW § 240.25 (McKinney 1987) (amended to include following in 1988); see generally Kathleen G. McAnaney, Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 884-86 (1993) (discussing shortcomings of harassment statutes to effectively deal with stalking-type behavior).

Many states have used the Model Penal Code as a guide for their harassment statutes. The Model Penal Code provides:

Harassment: A person commits a petty misdemeanor if, with purpose to harass another, he:

- (1) makes a telephone call without purpose of legitimate communication; or
- (2) insults, taunts or challenges another in a manner likely to provoke violent or disorderly response; or
- (3) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively course language; or
- (4) subjects another to an offensive touching; or
- (5) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

MODEL PENAL CODE § 250.4 (1980); see ME. REV. STAT. ANN. tit. 17-A, § 506-A (West Supp. 1994); N.Y. PENAL LAW § 240.25 (McKinney 1987) (amended 1988); see generally Gilligan, *supra* note 27, at 297-99 (discussing applicability of harassment statutes to stalking-type behavior).

In contrast to the Model Penal Code, some state harassment statutes do provide for the act of "following". See, e.g., 18 PA. CONS. STAT. ANN. § 2709 (Supp. 1994). The Pennsylvania statute provides:

(a) Harassment— A person commits the crime of harassment when, with intent to harass, annoy or alarm another person:

- (1) he strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same; or
- (2) he follows a person in or about a public place or places; or
- (3) he engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.

Id. (emphasis added).

34. See, e.g., 18 PA. CONS. STAT. ANN. § 2709 (Supp. 1994) (making harassment summary offense). Before Pennsylvania enacted its anti-stalking statute, stalking was considered harassment, which is a summary offense punishable by only a maximum sentence of 90 days in jail and a \$300 fine. *Id.* § 2709(c)(1). Other states similarly have lenient penalties for harassment. See, e.g., KY. REV. STAT. ANN. § 525.070 (Baldwin 1992) (providing that harassment is punishable by only \$250 fine); N.Y. PENAL LAW § 240.25 (McKinney 1993) (providing that harassment is punishable by not more than 15 days in jail); *O'Pake Seeks Prompt Casey Signature of Anti-Stalking Bill*, PR NEWSWIRE, June 10, 1993 (noting that current Pennsylvania harassment law calls for only 90 days in jail and \$300 fine).

hanging penalties for repeat offenders which, by definition, include stalkers.³⁵

b. Other Criminal Remedies

In addition to harassment statutes, a variety of other criminal laws prosecute stalking-type behavior. For example, where the stalker has physically harmed the victim, authorities may prosecute the stalker for either simple assault or aggravated assault.³⁶ Where the stalker has threatened the victim with violence or with the intent to terrorize the victim, the stalker may be prosecuted for terroristic threats.³⁷ Trespassing statutes also aided in apprehending stalkers before the enactment of stalking laws.³⁸

These traditional criminal remedies, however, suffer from the same deficiencies as harassment statutes. First, the penalties imposed by the various statutes, with the exception of aggravated assault which may be classified as a felony, do not pose a significant deterrent to stalkers.³⁹ In addition, provisions for repeat offenders are not present, which also diminishes the deterrent effect of these laws.⁴⁰

35. See, e.g., 18 PA. CONS. STAT. ANN. § 2709(a) (1983) (providing no enhancement in penalties for repeat offenders) (amended in 1993 to escalate repeat offenses to third degree felony).

36. See, e.g., *id.* § 2701 (1983 & Supp. 1994) (criminalizing simple assault); *id.* § 2702 (Supp. 1994) (criminalizing aggravated assault). The classification of the assault depends on the severity of the harm suffered and the intent of the stalker. *Id.*

37. See, e.g., MODEL PENAL CODE § 211.3 (1980); 18 PA. CONS. STAT. ANN. § 2706 (1983); see also McAllister, *supra* note 15, at A20 (stating that law enforcement officials were finally able to arrest stalker after he left threatening telephone message which was "specific enough for the FBI to act under [] federal extortion law that makes explicit death threats by telephone illegal").

38. See, e.g., FLA. STAT. ANN. §§ 810.08 to .09 (West Supp. 1994) (trespassing statute); see also Stu Smith, *Cooperative Agreement to Develop Model State Anti-Stalking Law*, U.S. NEWSWIRE, Dec. 23, 1992 (stating that "[e]xisting laws against trespassing and harassing are helpful but frequently insufficient to completely protect potential [stalking] victims until it is too late").

39. See, e.g., FLA. STAT. ANN. §§ 810.08 to .09 (West Supp. 1994) (providing crime of trespassing as misdemeanor); 18 PA. CONS. STAT. ANN. § 2701 (1983 & Supp. 1994) (providing crime of simple assault is punishable as misdemeanor); *id.* § 2706 (1983) (providing crime of terroristic threats as misdemeanor). *But see* MODEL PENAL CODE § 211.3 (1980) (grading terroristic threats as felony). Aggravated assault is graded as a felony depending on the circumstances. See 18 PA. CONS. STAT. ANN. § 2702 (Supp. 1994) (providing conditions for aggravated assault as felony in first and second degrees); see generally Gilligan, *supra* note 27, at 295-99 (discussing lack of deterrence of traditional criminal remedies).

40. See, e.g., MODEL PENAL CODE § 211.3 (1980); FLA. STAT. ANN. §§ 810.08 to .09 (West 1994); 18 PA. CONS. STAT. ANN. § 2702 (Supp. 1994); *id.* § 2701 (1983 & Supp. 1994); *id.* § 2706 (1983).

B. *Anti-Stalking Statutes*

California enacted the first anti-stalking law in 1990, setting in motion a trend to combat stalking that continues today.⁴¹ Florida followed California's lead and enacted its own anti-stalking law, thought to be one of the toughest in the country.⁴² Moreover, Pennsylvania was one of the most recent states to enact an anti-stalking law.⁴³ In addition, Congress introduced a bill, entitled the Federal Anti-Stalker Act of 1993, that would make stalking a federal crime.⁴⁴ The combination of the three states' statutes and the federal bill provide an equitable representation of anti-stalking laws throughout the country. This Comment will examine these statutes separately in order to analyze the viability of anti-stalking laws generally.

1. *The California Statute*

In an attempt to thwart stalking, California's anti-stalking statute prohibits repeated following or harassment by someone who makes an intentional credible threat toward another.⁴⁵ Accordingly, the statute requires two distinct and separate actions on the part of the stalker. First, the stalker must repeatedly follow or harass his or her victim.⁴⁶ However, the statute does not define "follows" presumably because its meaning is clear.⁴⁷ The statute defines "harassment" as a course of conduct by the stalker, directed at the victim, causing the victim serious annoyance or fear and serving no legitimate purpose.⁴⁸ In addition, the statute

41. CAL. PENAL CODE § 646.9 (West Supp. 1995). For a discussion of the California statute, see *infra* notes 45-64 and accompanying text.

42. See James Thomas Tucker, Note, *Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statutes Section 784.048*, 45 FLA. L. REV. 609, 611 (discussing Florida's anti-stalking statute); see also FLA. STAT. ch. 784.048 (1994). For a discussion of the Florida statute, see *infra* notes 65-77 and accompanying text.

43. 18 PA. CONS. STAT. ANN. § 2709(b), (c)-(f) (Supp. 1994). For a discussion of the Pennsylvania statute, see *infra* notes 78-89 and accompanying text.

44. H.R. 740, 103d Cong., 1st sess. (1993). For a discussion of the federal bill, see *infra* notes 90-107 and accompanying text.

45. CAL. PENAL CODE § 646.9 (West Supp. 1995). The statute provides: (a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year 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.

46. *Id.*

47. See *id.* (defining crime of stalking without defining word "follows").

48. *Id.* The statute provides:

(d) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a

does not delineate a specific period of time for the phrase "course of conduct."⁴⁹

Second, the stalker must make a "credible threat" with the intent to place the victim in fear for his or her safety or the safety of his or her family.⁵⁰ A "credible threat" encompasses both verbal and implied threats made with the intent to cause the victim to fear for his or her safety or the safety of others.⁵¹ To narrow the scope of "credible threats," the California statute explicitly excludes constitutionally protected activities from its definition of "course of conduct."⁵² In addition, the statute specifically excludes labor picketing from its scope.⁵³

The California statute, like the majority of other anti-stalking statutes, provides for enhanced punishment for repeat offenders.⁵⁴ If the stalker violates a court order forbidding him or her from contacting the victim and is subsequently found guilty of stalking under the statute, the stalker may also be subjected to enhanced punishment.⁵⁵ When a stalker, who was previously convicted of a felony under the statute, is subsequently con-

reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person.

Id. § 646.9(d).

49. See CAL. PENAL CODE § 646.9(d) (failing to define specific period of time for purposes of establishing course of conduct). The statute merely provides that the phrase "'[c]ourse 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."

Id. (emphasis added).

50. *Id.* § 646.9(a).

51. *Id.* § 646.9 (e). The statute provides:

(e) For purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family.

Id.

52. *Id.* § 646.9(d). The statute provides that "[c]onstitutionally protected activity is not included within the meaning of 'course of conduct.'" *Id.*

53. *Id.* § 646.9(f). The statute provides that "[t]his section [§ 646.9] shall not apply to conduct which occurs during labor picketing." *Id.*

54. CAL. PENAL CODE § 646.9(c). The statute provides: "[e]very person who, having been convicted of a felony under this section, commits a second or subsequent violation of this section shall be punished by imprisonment in the state prison for two, three, or four years." *Id.* In addition, the statute indicates that if the stalker is sentenced to the state prison he may not be fined in addition to that sentence whereas if he were sentenced to the county prison he may be subjected to both the prison term and the fine. *Id.* § 646.9(a).

55. *Id.* § 646.9(b). The statute provides:

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) [of section 646.9] against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

Id.

victed of stalking, the stalker is subject to much harsher penalties.⁵⁶ For example, the repeat stalker could be sentenced to a term of up to four years in state prison.⁵⁷

The California statute also provides for mandatory counseling if the court sentences the stalker to a period of probation.⁵⁸ However, a court may determine, upon a showing of good cause, that counseling need not be imposed.⁵⁹ In addition, the statute gives the court authority to issue a restraining order for a period of up to ten years.⁶⁰

The California anti-stalking statute provides law enforcement with a more powerful tool to prosecute stalkers than prior penal statutes such as harassment statutes.⁶¹ In addition, the anti-stalking statute reaches repeated harassment as well as repeated "following."⁶² The state legislature recognized the need for enhanced punishment for both repeat offenders and for offenders who violate restraining orders.⁶³ However, the statute does require that a "credible threat" be present, and that may be difficult to establish in some cases.⁶⁴

56. *Id.* § 646.9(c) (providing imprisonment in state prison for up to four years for felons who commit subsequent violations of anti-stalking statute).

57. *Id.* The stalker could be sentenced to the state prison for two, three or four years if previously convicted of a felony under the statute. *Id.*

58. *Id.* § 646.9(g). The statute provides:

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

Id.

59. *Id.* § 646.9(g). However, the statute provides no guidelines as to what constitutes "good cause." *Id.*

60. *Id.* § 646.9(h). The statute provides:

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

Id.

61. Compare *id.* § 646.9 (including repeated "harassment" behavior within meaning of "stalking") with *id.* § 653m (omitting "stalking"-type behavior from meaning of "harassment" in criminal harassment statute).

62. See *id.* § 646.9(a)-(c) (reaching repeated harassment and imposing enhanced sentences).

63. *Id.* § 646.9(b)-(c).

64. CAL. PENAL CODE § 646.9(b)-(c); see also Corwin, *supra* note 1, at A1 (discussing California case in which stalker harassed and followed victim for one year but did not threaten her until one week prior to killing her).

2. *The Florida Statute*

Following California's lead, the legislature for the State of Florida enacted a similar anti-stalking statute in 1992.⁶⁵ The Florida statute contains two distinct crimes within its parameters. First, the statute criminalizes "stalking," which is defined as repeated following or harassing.⁶⁶ Such

65. FLA. STAT. ch. 784.048 (1994). The Florida statute provides:

(1) As used in this section:

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

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

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

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

(3) Any person who willfully, maliciously, and repeatedly follows or harasses another person, and makes a credible threat with the intent to place that person in reasonable fear of death or bodily injury, commits the offense of aggravated stalking, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

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

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

Id.

66. *Id.* ch. 784.048(2). The statute provides that "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking . . ." *Id.* As in the California statute, "follows" is not defined presumably because its meaning is clear. *See id.* ch. 784.048 (failing to define "follows"). For a discussion concerning the lack of a definition for the term "following" in the California statute, see *supra* text accompanying note 47.

The Florida statute defines "harasses" as a course of conduct which causes substantial emotional distress and furthers no legitimate purpose. FLA. STAT. ch. 784.048(1)(a). This definition is similar to California's definition of "harassment." *See CAL. PENAL CODE* § 646.9(d). For a discussion of the term "harassment" as defined in the California statute, see *supra* note 48 and accompanying text.

The Florida statute's definition of "course of conduct" also does not include a specified time frame. FLA. STAT. ch. 784.048(1)(b). Therefore, as in the California statute, the course of conduct can take place over any period of time, however short. For a discussion of the time frame of the phrase "course of conduct" under the California statute, see *supra* note 49 and accompanying text.

stalking is punishable under the statute as a misdemeanor of the first degree.⁶⁷ Second, the statute criminalizes aggravated stalking, a separate but related offense.⁶⁸ Aggravated stalking requires the presence of a credible threat, and is punishable as a third degree felony.⁶⁹

Although the Florida statute does not provide for enhanced punishment of repeat offenders, it elevates stalking to the crime of aggravated stalking when the offender stalks a victim in violation of an injunction or other court-imposed prohibition of conduct toward a victim.⁷⁰ The lack of a repeat offender provision may be rendered insignificant because, presumably, when an offender is sentenced for violating the stalking statute, an injunction will be issued against him or her, forbidding future contact with the victim. However, after that injunction expires, the enhanced punishment provision is no longer applicable and thus the repeat stalker is treated as a first time offender.

Although the Florida anti-stalking statute prohibits a broad range of behaviors, there are certain limitations built into the statute. For example, the Florida statute explicitly states that “[c]onstitutionally protected activity is not within the meaning of ‘course of conduct.’”⁷¹ Picketing and other organized protests are examples of constitutionally protected activity within the meaning of the statute.⁷² A unique provision of the Florida statute permits a law enforcement officer to arrest a person, without a warrant, when the officer has probable cause to believe that such person violated the statute.⁷³

Florida’s anti-stalking statute is broad, encompassing a wide range of behavior. The statute utilizes a two-tiered system of punishment for prohibited behavior, providing a remedy for those stalking victims who were

67. FLA. STAT. ch. 784.048(2).

68. *Id.* ch. 784.048(3). The statute provides that “[a]ny 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” *Id.*

69. *Id.* The statute defines “credible threat” as a threat which is intended to cause the threatened individual to reasonably fear for his or her safety. *Id.* ch. 784.048(1)(c). In addition, the threat must be to cause severe bodily injury or death to someone. *Id.* This definition is similar to the California statute’s definition of “credible threat.” See CAL. PENAL CODE § 646.9(e) (defining “credible threat”). For a discussion of the California statute’s definition of the term “credible threat,” see *supra* note 50 and accompanying text.

However, unlike the California statute, the Florida statute does not require the victim to subjectively believe that the stalker has the apparent ability to carry out his or her threat. See CAL. PENAL CODE § 646.9(e) (requiring target of threat to “reasonably fear” for his or her safety). For a discussion of California’s subjective intent requirement, see *supra* note 51 and accompanying text.

70. FLA. STAT. ch. 784.048(4).

71. *Id.* ch. 784.048(1)(b).

72. *Id.*

73. *Id.* ch. 784.048(5). The statute provides that “[a]ny law enforcement officer may arrest, *without a warrant*, any person he or she has probable cause to believe has violated the provisions of this section.” *Id.* (emphasis added).

never threatened by their stalker, as well as for those victims who were threatened.⁷⁴ Therefore, the Florida statute gives law enforcement officers a more potent weapon with which to fight stalking than other criminal code provisions such as harassment statutes.

In conclusion, Florida's anti-stalking statute criminalizes both harassment and "following" if done in a manner forbidden by the statute. The statute thereby provides the stalking victim with a remedy prior to the stalker making physical contact with the victim.⁷⁵ In addition, the statute authorizes law enforcement officers to arrest a suspected stalker without a warrant, thereby affording speedier relief to the victim.⁷⁶ However, the broad characteristics of the Florida statute may render it susceptible to constitutional attack.⁷⁷

3. *The Pennsylvania Statute*

In 1993, the Commonwealth of Pennsylvania enacted an anti-stalking statute.⁷⁸ The Pennsylvania statute prohibits a course of conduct or repeated acts toward another person which indicate an intent to cause that person substantial emotional distress or place that person in fear of bodily harm.⁷⁹ The statute specifically includes "following" as prohibited conduct, but, like the California and Florida statutes, fails to define it.⁸⁰ The

74. *Id.* ch. 784.048. Under the Florida statute, a stalker need not threaten a victim before a stalking violation occurs; the stalker need only follow or harass the victim. *Id.* ch. 784.048(2). However, if the victim is actually threatened by the stalker, the stalking violation is elevated to aggravated stalking. *Id.* ch. 784.048(3). See Guy, *supra* note 15 at 1003-04 (noting that Florida statute does not require credible threat for stalking offenses).

75. FLA. STAT. ch. 784.048(2). For a discussion of Florida's first degree misdemeanor of stalking, see *supra* note 66 and accompanying text.

76. *Id.* ch. 784.048 (5). For a discussion of the provision allowing law enforcement officers to arrest suspected stalkers without an arrest warrant, see *supra* note 65.

77. Tucker, *supra* note 42, at 633 (discussing constitutionality of Florida's anti-stalking statute). For a full discussion of the constitutionality of the Florida statute, see *infra* notes 146-57 and accompanying text.

78. See 18 PA. CONS. STAT. ANN. § 2709(b), (c)-(f) (Supp. 1994). The statute provides, in pertinent part:

(b) Stalking.— A person commits the crime of stalking when he engages in a course of conduct or repeatedly commits acts toward another person, including following the person without proper authority, under circumstances which demonstrate either of the following:

(1) an intent to place the person in reasonable fear of bodily injury;

or

(2) an intent to cause substantial emotional distress to the person.

Id.

79. *Id.* § 2709(b).

80. *Id.* Once again, as in the California statute and the Florida statute, "following" is not defined in the Pennsylvania statute presumably because its meaning is clear. *Id.* For a discussion of "following" in the California statute, see *supra* text accompanying note 47. For a discussion of "following" in the Florida statute, see *supra* note 66.

Pennsylvania statute defines the phrase "course of conduct" as a pattern of actions which indicate a continuity of conduct.⁸¹ The time frame for the pattern of actions is stated as only "however short."⁸² "Emotional distress" is defined as "[a] temporary or permanent state of great physical or mental strain."⁸³

Pennsylvania imposes a graduated grading system for violations of the statute.⁸⁴ As a general rule, the first stalking offense is a misdemeanor of the first degree.⁸⁵ However, a first offense may be upgraded to a third degree felony if the offender was convicted of a previous crime of violence toward the victim, the victim's family or household members, or if the offender violated a protection order.⁸⁶ The statute enumerates examples of crimes of violence, but does not specifically provide a time period within which the offender's prior conviction must have occurred.⁸⁷ Further, the statute defines "family or household member" broadly to encompass a spectrum of people ranging from former spouses to former intimate partners.⁸⁸ The statute also excludes conduct related to labor disputes and any other "constitutionally protected activity."⁸⁹

81. *Id.* § 2709(f). The statute defines "course of conduct" as "a pattern of actions composed of more than one act over a period of time, however short, evidencing a continuity of conduct." *Id.*

82. *Id.*

83. 18 PA. CONS. STAT. ANN. § 2709(f). The statute defines "emotional distress" as "a temporary or permanent state of great physical or mental strain." *Id.*

84. *See id.* § 2709(c). The statute provides:

(c) Grading.— . . .

(2) (i) An offense under subsection (b) shall constitute a misdemeanor of the first degree.

(ii) A second or subsequent offense under subsection (b) or a first offense under subsection (d) if the person has been previously convicted of any crime of violence involving this same victim, family or household members, including, but not limited to, a violation of 2701 (relating to simple assault), 2702 (relating to aggravated assault), 2705 (relating to recklessly endangering another person), 2901 (relating to kidnapping), 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse), or 3128 (relating to spousal sexual assault), an order issued under 4954 (relating to protective orders) or an order issued under 23 Pa.C.S. § 6108 (relating to relief), shall constitute a felony of the third degree.

Id.

85. *Id.* § 2709(c)(2)(i).

86. *Id.* § 2709(c)(2)(ii).

87. *Id.*

88. 18 PA. CONS. STAT. ANN. § 2709(f). The statute defines "family or household member" as "spouses or persons who have been spouses, persons living as spouses or who lived as spouses, parents and children, other persons related by consanguinity or affinity, current or former sexual or intimate partners or persons who share biological parenthood." *Id.* (footnote omitted).

89. *Id.* § 2709(e). The statute provides that "this section [§ 2709] shall not apply to conduct by a party to a labor dispute as defined in the act of June 2, 1937 (P.L. 1198, No. 308), known as the Labor Anti-Injunction Act, or to any constitutionally protected activity." *Id.*

The Pennsylvania statute is broad, reaching conduct that may cause only emotional distress to a victim, even if no credible threat is present. However, the scope of the statute is narrowed by its exclusion of constitutionally protected activity. Nevertheless, the upgrade provision for repeat offenders and those with a prior conviction for a violent crime or a violation of a protection order provides a formidable deterrent for potential offenders.

4. *Federal Anti-Stalking Bills*

There are currently two active Bills, one in the House (House Bill) and one in the Senate (Senate Bill), which intend to make stalking a federal offense. The House Bill defines stalking somewhat narrowly, requiring a stalker to repeatedly follow or harass a victim and make a credible threat toward the victim.⁹⁰ Although the term "following" is not defined in the House Bill, the statute defines the term "harass" as an objectionable course of conduct directed at a victim which causes the victim to suffer both subjective and objective emotional distress.⁹¹ The House Bill describes the phrase "course of conduct" as a pattern of conduct, over any period of time, that shows a continuity of purpose.⁹² To have a "credible

90. H.R. 740, 103d Cong., 1st Sess. (1993). The House Bill, entitled the Federal Anti-Stalker Act of 1993, suggests an amendment to 18 U.S.C. ch. 41 and is, referred to as § 880. The House Bill provides, in pertinent part:

880. Stalking

(a) Whoever, in a circumstance described in subsection (c) of this section willfully and maliciously—

(1) repeatedly follows or harasses another person; and

(2) makes a credible threat with the intent to place that person in reasonable fear of the death or serious bodily injury of that person or a member of that person's immediate family;

shall be punished as provided in subsection (b) of this section

(e) This section does not prohibit activity protected by the Constitution.

Id.

91. *Id.* § 880(d)(1). The Bill provides:

(d) For the purposes of this section—

(1) one harasses a person if—

(A) one knowingly engages in a course of conduct directed specifically at that person;

(B) that conduct seriously alarms, annoys, or harasses that person but serves no legitimate purpose; and

(C) the course of conduct is such as would cause a reasonable person to suffer substantial emotional distress and does in fact cause substantial emotional distress to the person against whom it is directed.

Id.

92. *Id.* § 880(d)(2). The Bill defines "course of conduct" as "a pattern or conduct [sic] composed of a series of acts over a period of time, however short, evidencing a continuity of purpose" *Id.*

threat," a threat must be made with the intent and apparent ability to carry it out and it must cause the victim to reasonably fear for his or her safety.⁹³

Three different trigger mechanisms allow the House Bill to apply to a given stalking action. First, the House Bill applies if the offender crossed state lines to commit an offense punishable under the Bill.⁹⁴ Second, the House Bill applies if "the offender in the course of the offense used the United States mail or a facility in, or instrumentality of interstate commerce."⁹⁵ Third, the House Bill applies if "the offense occurred in the special maritime and territorial jurisdiction of the United States."⁹⁶ The punishment for a violation escalates depending on whether the violation is a first offense, a second or subsequent offense against the same victim, or an offense that violated a court order prohibiting such contact with the victim.⁹⁷

The Senate Bill is similar to the House Bill, but differs in its definition of what constitutes stalking and in its penalties for stalkers.⁹⁸ To commit

93. *Id.* § 880(d)(3). The Bill defines "credible threat" as "a threat made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat a reasonable fear for that person's safety." *Id.*

94. *Id.* § 880(c). The Bill requires that "the offender crossed the border of a State during or for the purposes of the commission of the offense. . . ." *Id.*

95. *Id.* (stating a violation occurs if "the offender in the course of the offense used the United States mail or a facility in, or instrumentality of interstate commerce").

96. *Id.* (stating that violation occurs if "the offense occurred in the special maritime and territorial jurisdiction of the United States"). However, the Bill expressly provides that it is not applicable to any constitutionally protected activity. *Id.* § 880(e).

97. *Id.* § 880(b). The Bill provides:

(b) The punishment for an offense under subsection (a) of this section is—

(1) a fine under this title or imprisonment for not more than one year, or both, in the case of a first conviction under such subsection or a second or subsequent conviction not described in paragraph (2)(B); and
(2) a fine under this title or imprisonment for not more than three years, or both, if the offense—

(A) violated a restraining order or other court order in effect prohibiting the behavior; or

(B) is a second or subsequent conviction under this section and is against the same victim as a prior offense under this section.

Id.

98. S. 470, 103d Cong., 1st Sess. (1993). The Senate Bill suggesting an amendment to 18 U.S.C. ch. 41 is also referred to as § 880. The Bill provides:

880. Stalking
OFFENSES.—

(1) A person who, in the special maritime and territorial jurisdiction of the United States, in the course of interstate travel, or by the use of an instrument of interstate or foreign commerce, harasses or makes a credible threat against another person shall be imprisoned not more than 2 years, fined not more than \$5,000, or both.

(2) A person who is under a protection order who, in the special maritime and territorial jurisdiction of the United States, in the course of interstate travel, or by the use of an instrument of interstate or foreign

the offense of stalking, the stalker must harass the victim or make a credible threat against the victim.⁹⁹ "Following" is not expressly stated as prohibited behavior, but it could conceivably be included in the definition of "harass." The definitions of "harass," "credible threat," and "course of conduct" are the same as the definitions for these terms in the House Bill.¹⁰⁰ The trigger mechanism is also the same as that in the House Bill;¹⁰¹ however, the Senate Bill provides that the stalker must engage in the prohibited conduct within thirty days of entering the state in which the conduct occurs for the conduct to be considered in the course of interstate or foreign travel.¹⁰² The Senate Bill does not contain a provision for excepting constitutionally protected activity.¹⁰³

The Senate Bill provides stronger penalties for a stalking violation than the House Bill.¹⁰⁴ The Senate Bill states that a first offender, who is not the subject of a protection order issued to the victim, is subject to

commerce, harasses or makes a credible threat against another person shall be imprisoned not less than 2 years nor more than 4 years, fined not less than \$5,000 nor more than \$100,000, or both.

(3) A person with a prior stalking conviction who, in the special maritime and territorial jurisdiction of the United States, in the course of interstate travel, or by the use of an instrument of interstate or foreign commerce, harasses or makes a credible threat against another person shall be imprisoned not less than 5 years nor more than 10 years, fined not less than \$25,000 nor more than \$200,000, or both.

(c) RULE OF CONSTRUCTION.— For the purposes of subsection (b), a person shall be considered to engage in conduct in the course of interstate or foreign travel if—

(1) the person travels from 1 State to another or from a foreign country to a State with the intention of engaging in that conduct; and

(2) the person engages in the conduct within 30 days after entering the State in which the conduct occurs.

Id.

99. *Id.* § 880(a). The Senate Bill defines "harass" as "to engage in a knowing and willful course of conduct that (A) is directed at a particular person; (B) seriously alarms, disturbs, harasses, or terrorizes the person; (C) serves no legitimate purpose; (D) would cause a reasonable person to suffer substantial emotional distress; and (E) in fact causes substantial emotional distress to the person." *Id.* The Bill defines "credible threat" as "a threat to cause great bodily injury or death to a person made with the intent to place the person in reasonable fear of great bodily injury or death to himself or herself or a member of his or her family and with the apparent ability to carry out the threat." *Id.*

100. *Id.* The Senate Bill defines "course of conduct" as "a pattern of conduct composed of a series of acts over a period of time (regardless of length of time) evidencing a continuity of purpose." *Id.*; accord H.R. 740, 103d Cong., 1st Sess. (1993) (defining "course of conduct").

101. Compare H.R. 740, 103d Cong., 1st Sess. (1993) with S. 470, 103d Cong., 1st Sess. (1993) (defining circumstances that will trigger stalking as a federal offense). For a discussion of the trigger mechanisms of the House Bill, see *supra* notes 94-96 and accompanying text.

102. S. 470, 103d Cong., 1st Sess. § 880(c) (1993).

103. *Id.*

104. Compare H.R. 740, 103d Cong., 1st Sess. (1993) with S. 470, 103d Cong., 1st Sess. (1993) (providing for stiffer penalties in Senate Bill).

imprisonment of up to two years or a fine of up to \$5,000, or both.¹⁰⁵ If the stalker violates a protective order by stalking a victim, he or she must be imprisoned for at least two years, but no more than four years, or fined at least \$5,000, but no more than \$100,000, or receive both the incarceration and fine.¹⁰⁶ If the stalker has one or more prior stalking convictions and subsequently stalks another victim, the stalker shall be imprisoned for a minimum of five years, but no more than ten years, or fined a minimum of \$25,000, but no more than \$200,000, or receive both the incarceration and fine.¹⁰⁷

The Senate Bill provides that courts shall consider issuing an injunction preventing the stalker from further contact with the victim for a period of up to ten years.¹⁰⁸ In order to issue an injunction for longer than five years, however, a court must make specific findings that a longer time

105. S. 470, 103d Cong., 1st Sess. § 880 (b)(1) (1993).

106. *Id.* § 880(b)(2). The Senate Bill provides:

(2) A person who is under a protection order who, in the special maritime and territorial jurisdiction of the United States, in the course of interstate travel, or by the use of an instrument of interstate or foreign commerce, harasses or makes a credible threat against another person shall be imprisoned not less than 2 years nor more than 4 years, fined not less than \$5,000 nor more than \$100,000, or both.

Id. The Bill defines a "protection order" as "an order of any court that (A) restrains a person from engaging in conduct prohibited by this section; or (B) restrains a person from intentionally coming into unsolicited contact, directly or indirectly, with a person protected under this section." *Id.*

107. *Id.* § 880(b)(3). The Senate Bill provides:

(3) A person with a prior stalking conviction who, in the special maritime and territorial jurisdiction of the United States, in the course of interstate travel, or by the use of an instrument of interstate or foreign commerce, harasses or makes a credible threat against another person shall be imprisoned not less than 5 years nor more than 10 years, fined not less than \$25,000 nor more than \$200,000, or both.

Id. The Senate Bill defines "prior convictions" as "(A) a conviction under this section; and (B) a conviction under state law prohibiting conduct that is prohibited by this section." *Id.*

108. *Id.* § 880(f). The Senate Bill provides:

(f) INJUNCTION.—

(1) IN GENERAL.—A court shall consider issuing an order enjoining an offender under this section from any contact with the victim for a period of up to 10 years.

(2) DURATION.—

(A) the duration of an injunction under this subsection shall be determined in light of—

(i) the seriousness of the facts before the court;

(ii) the likelihood that the offender will violate this section again; and

(iii) the safety of the victim and the victim's immediate family.

(B) The duration of an injunction under this subsection may be longer than 5 years only in an extreme case in which a longer duration is necessary to protect the safety of the victim or the victim's immediate family.

Id.

period is necessary.¹⁰⁹ The Senate Bill also provides that if probation is granted to the stalker, the stalker must undergo counseling, unless the court, upon a showing of good cause, deems the counseling unnecessary.¹¹⁰ The Senate Bill also provides that when a state anti-stalking law and the proposed federal anti-stalking law are both violated by the same offense, the offender shall be prosecuted under the state law, unless the Attorney General determines that "the offender will not be expeditiously or effectively prosecuted under the state law."¹¹¹

III. ANALYSIS

A. *A Comparison of the Statutes and Bills*

When traditional civil and criminal remedies failed to protect stalking victims, several states developed anti-stalking statutes to criminalize stalking behavior.¹¹² Of the statutes and bills discussed in this Comment, the Florida statute provides the broadest protection because, although it requires willful, malicious and repeated following or harassment to establish a stalking offense, it requires neither an intent to harm nor actual emotional distress.¹¹³ The Pennsylvania statute is slightly narrower than the Florida statute because it requires acts indicating an intent by the stalker to place the victim in reasonable fear of bodily injury or an intent by the stalker to cause the victim to suffer substantial emotional distress.¹¹⁴ The Senate Bill is also slightly less broad than the Florida statute, because it prohibits conduct which harasses the victim, but only when the victim suffers actual and substantial emotional distress.¹¹⁵ The California statute

109. *Id.*

110. *Id.* § 880(e). The Bill provides that "if probation is granted to an offender under this section, it shall be a condition of probation that the offender participate in counseling, unless the court, upon a showing of good cause, finds that counseling is not necessary." *Id.*

111. *Id.* § 880(d). The Bill provides:

(d) PROSECUTORIAL DISCRETION.— An offense under subsection (b) that is also an offense within the jurisdiction of a State shall not be prosecuted by the United States under this section unless the Attorney General (or the highest ranking subordinate of the Attorney General with responsibility for criminal prosecutions) makes a written determination that, in the judgement of the official who makes the determination, the offender will not be expeditiously or effectively prosecuted under State law.

Id.

112. For a complete list of the states that have passed anti-stalking laws, see *supra* note 2. For a discussion of the inadequacies of traditional civil remedies, see *supra* notes 21-30 and accompanying text. For a discussion of the inadequacies of traditional criminal remedies, see *supra* notes 31-40 and accompanying text.

113. FLA. STAT. ch. 784.048(2) (1994). For a discussion of the Florida statute, see *supra* notes 65-77 and accompanying text.

114. 18 PA. CONS. STAT. ANN. § 2709(b) (Supp. 1994). For a discussion of the Pennsylvania statute, see *supra* notes 78-89 and accompanying text.

115. S. 470, 103d Cong., 1st Sess. (1993). For a discussion of the Senate Bill, see *supra* notes 98-111 and accompanying text.

and the House Bill are the most narrow; both require "following" or "harassing" of a victim by the stalker and the making of a "credible threat."¹¹⁶

Both the California statute and the House Bill require that a "credible threat" be present before an action may be deemed a stalking offense.¹¹⁷ However, the Florida statute only requires a "credible threat" for the separate and enhanced crime of aggravated stalking.¹¹⁸ In addition, the Senate Bill provides that stalking may be present without a "credible threat."¹¹⁹ Furthermore, the term "credible threat" is not mentioned in the Pennsylvania statute's definition of stalking, but analogous behavior is actionable, though not required.¹²⁰ These statutes demonstrate that the "credible threat" requirement can considerably narrow the scope and protections offered by anti-stalking statutes.¹²¹

The California, Pennsylvania and Florida statutes and the House Bill expressly state that their provisions do not prohibit constitutionally protected activity.¹²² Recognizing the constitutional importance of labor picketing, the California and Pennsylvania statutes also expressly prohibit application of the anti-stalking statute to labor picketing.¹²³ However, the Senate Bill does not explicitly provide an exception for conduct related to constitutional activities.¹²⁴ The Florida statute, unlike the Senate and House Bills and the California and Pennsylvania statutes, provides an exception to the arrest warrant requirement for the arrest of a suspected

116. Compare H.R. 740, 103d Cong., 1st Sess. (1993) with CAL. PENAL CODE § 646.9(a) (West Supp. 1994) (both using very similar language to define stalking behavior). For a discussion of the California statute, see *supra* notes 45-64 and accompanying text. For a discussion of the House Bill, see *supra* notes 90-97 and accompanying text.

117. CAL. PENAL CODE § 646.9(a) (West Supp. 1994); H.R. 740, 103d Cong., 1st Sess. (1993). For a discussion of the House Bill, see *supra* notes 90-97 and accompanying text. For a discussion of the California statute, see *supra* notes 45-64 and accompanying text.

118. FLA. STAT. ch. 784.048(3) (1994). For a discussion of the Florida statute, see *supra* notes 65-77 and accompanying text.

119. S. 470, 103d Cong., 1st Sess. (1993). For a discussion of the Senate Bill, see *supra* notes 98-111 and accompanying text.

120. See 18 PA. CONS. STAT. ANN. § 2709(b) (Supp. 1994) (punishing stalker with intent to place victim in reasonable fear of bodily injury or with intent to cause substantial emotional distress to victim). For a discussion of the Pennsylvania statute, see *supra* notes 78-89 and accompanying text.

121. CAL. PENAL CODE § 646.9(d) (West Supp. 1994); FLA. STAT. ch. 784.048(1)(b) (1994); 18 PA. CONS. STAT. ANN. § 2709(e) (Supp. 1994); H.R. 740, 103d Cong., 1st Sess. (1993).

122. CAL. PENAL CODE § 646.9(f); 18 PA. CONS. STAT. ANN. § 2709(e).

123. See S. 470, 103d Cong., 1st Sess. (1993) (lacking exception for conduct related to constitutionally protected activities).

124. FLA. STAT. ch. 784.048(5) (1994).

stalker.¹²⁵ Even statutory language protecting or limiting constitutional rights may not save an anti-stalking statute from constitutional attack.

B. *The Constitutionality of the Statutes*

Anti-stalking statutes may be subject to constitutional attack based on both the overbreadth and void for vagueness doctrines.¹²⁶ “The overbreadth doctrine postulates that the government may not achieve its concededly valid purpose by means that sweep unnecessarily broadly, reaching constitutionally protected as well as unprotected activity.”¹²⁷ Two prongs comprise the void for vagueness doctrine.¹²⁸ The first prong addresses whether the statute is sufficiently clear in expressing exactly what conduct the statute prohibits.¹²⁹ The second prong addresses whether the statute sufficiently proscribes standards to prevent arbitrary and discriminatory enforcement.¹³⁰ Attacks against statutes similar to the California, Pennsylvania and Florida statutes and the House Bill based on the overbreadth doctrine should be defeated because of the statutes’ and pending legislation’s explicit language prohibiting their applicability to constitutionally protected activity.¹³¹

1. *Void For Vagueness*

For a statute to be upheld against a vagueness attack, the statute’s language must provide a “reasonable degree of certainty” in its meaning.¹³² However, the United States Supreme Court has held that a stat-

125. See Robert P. Faulkner and Douglas H. Hsiao, *And Where You Go I’ll Follow: The Constitutionality of Anti-stalking Laws and Proposed Model Legislation*, 31 HARV. J. ON LEGIS. 1 (1994) (discussing constitutionality of anti-stalking statutes).

126. JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 919 (4th ed. 1992) (discussing overbreadth doctrine and void for vagueness doctrine).

127. See BARRON, *supra* note 126, at 119 (quoting MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 216-17 (1984)).

128. See WAYNE R. LAFAVE & AUSTIN W. SCOTT JR., CRIMINAL LAW § 11 (2d ed. 1986) (discussing requirements and rationale of void for vagueness doctrine).

129. *Id.* For a discussion of the two prongs of the void for vagueness doctrine, see Guy, *supra* note 15, at 1013.

130. See CAL. PENAL CODE § 646.9(d) (West Supp. 1994); FLA. STAT. ch. 784.048(1)(b) (1994); 18 PA. CONS. STAT. ANN. § 2709(e) (Supp. 1994). The Senate Bill does not expressly exclude constitutionally protected activity, and therefore, it may be susceptible to a constitutional attack based on the overbreadth doctrine. See H.R. 740, 103d Cong., 1st Sess. (1993) (containing exception for constitutionally protected activity).

131. See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952) (holding federal statute, which included terms “so far as practicable” and “where feasible,” was not unconstitutional under void for vagueness doctrine because reasonable degree of certainty doctrine satisfied); see also Gilligan, *supra* note 27, at 315 (discussing void for vagueness doctrine as applied to stalking statutes).

132. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (holding city anti-noise ordinance was not unconstitutional on vagueness grounds because reasonable degree of certainty standard satisfied).

ute's words need not conform to mathematical certainty for the statute to avoid being held unconstitutional on vagueness grounds.¹³³ However, the Supreme Court has also held that when a statute's language is ambiguous and greater precision is not impossible or impractical, the statute may be found void for vagueness.¹³⁴

a. The California Statute

The California anti-stalking statute narrows the prohibited conduct by requiring both action and a credible threat with the intent to place the victim in reasonable fear.¹³⁵ The act requirement entails "willfully, maliciously, and repeatedly follow[ing] or harass[ing]."¹³⁶ Although the statute does not provide a meaning for "following," the word is easily defined and certain through its common usage.¹³⁷ However, the statute defines "harasses" broadly to include "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose."¹³⁸ The words "alarms," "annoys," "torments" and "terrorizes" may appear vague, but the statute limits the words' vagueness by requiring that the victim suffer reasonable and actual substantial emotional distress from the stalker's conduct.¹³⁹

The statute defines "course of conduct" clearly, but the definition fails to provide a time period over which the conduct must occur.¹⁴⁰ The statute merely requires "a period of time, however short, evidencing a continuity of purpose."¹⁴¹ However, the time-frame must be left open, because if it were not, the statute would have a built-in limitation, excluding certain short term stalking from its reach. For example, if the statute set the time-frame at one week, a stalker who stalked a victim for only one day would not violate the statute.

The California statute defines the term "credible threat" as "a verbal or written threat . . . made with the intent and apparent ability to carry out the threat so as to cause . . . reasonabl[e] fear."¹⁴² A question arises as to

133. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (holding California vagrancy statute as unconstitutionally vague for failing to clarify what was contemplated by "credible and reliable").

134. CAL. PENAL CODE § 646.9(a) (West Supp. 1994).

135. *Id.*

136. The definition of "follow," is "[t]o come or go after," or "[t]o move behind with the intention of overtaking; pursue . . ." AMERICAN HERITAGE DICTIONARY 320 (2d ed. 1982).

137. CAL. PENAL CODE § 646.9(d) (West Supp. 1994).

138. *Id.*

139. See CAL. PENAL CODE § 646.9(d). For the California statute's definition of the phrase "course of conduct," see *supra* note 49.

140. CAL. PENAL CODE § 646.9(d) (West Supp. 1994).

141. *Id.* § 646.9(e).

142. For a discussion of the two possible constructions of the term "intent," see Guy, *supra* note 15, at 1014.

whether “intent” means intent to do the act threatened or intent to cause the victim to suffer reasonable fear.¹⁴³ However, construing the statute to require the stalker to have the intent to do the act threatened would nullify the “apparent ability” language of the statute and make the statute extremely narrow.¹⁴⁴ The broader and more plausible interpretation would require the stalker to have the intent to cause reasonable fear in the victim and have the apparent ability to carry out the threat.¹⁴⁵ Therefore, California courts should broadly interpret the intent requirement of the anti-stalking statute to protect victims. Thus, the California statute should survive a void for vagueness challenge because its terms are clearly defined and readily ascertainable.

b. The Florida Statute

The Florida statute prohibits “willfully, maliciously, and repeatedly follow[ing] . . . another person.”¹⁴⁶ As in the California statute, the term “following” is not defined because its meaning is presumed to be clear. However, the terms “willful” and “malicious” may not be clear and may, therefore, subject the statute to a void for vagueness attack. Furthermore, this prong of the crime on its face, does not require that an intent to harm be present.¹⁴⁷ The use of the words “willful” and “malicious” may have been intended to incorporate an element of the offender’s intent. However, after reading this part of the statute, a reasonable person may not know exactly what conduct is prohibited and what standards will be used to enforce the statute. Therefore, this part of the statute may be void for vagueness.

The Florida statute also prohibits “willfully, maliciously, and repeatedly harass[ing] . . . another person”¹⁴⁸ The statute defines the term “harasses” as “engaging in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.”¹⁴⁹ This prong of the crime requires that the victim suffer only subjective emotional distress.¹⁵⁰ Consequently, the statute may be susceptible to constitutional attack based on the term “emotional distress”, because the term is not clearly defined.¹⁵¹

143. See CAL. PENAL CODE § 646.9(d) (West Supp. 1994).

144. *Id.*

145. FLA. STAT. ch. 784.048(2) (1994). For a discussion of Florida’s aggravated stalking provision, see *supra* note 68-69 and accompanying text.

146. See FLA. STAT. ch. 784.048(2). However, Florida’s aggravated stalking provision does require an intent to place the victim in reasonable fear. See *id.* ch. 784.048(3).

147. *Id.* ch. 784.048(2).

148. *Id.* ch. 784.048(1)(a).

149. *Id.* ch. 784.048(1)(c).

150. See *id.*

151. See Boychuck, *supra* note 5, at 789 (discussing how “reasonable person” approach to emotional distress in stalking statutes makes statute less subjective and less likely to be unconstitutionally vague).

The subjective nature of the term "emotional distress" may not provide sufficient notice as to what conduct the statute prohibits.¹⁵² For example, one person may suffer emotional distress at a point when another person would not. On the other hand, a reasonable person reading the statute would probably understand the parameters of what constitutes "emotional distress." Yet, the statute does add clarity to its definition of "emotional distress" by requiring that the emotional distress caused by the offenders' actions be "substantial."¹⁵³ As a result, this provision of the statute is not sufficiently unclear to render it void for vagueness.

Florida's aggravated stalking provision, like the California statute, also requires a credible threat.¹⁵⁴ This provision in the Florida statute should survive a void for vagueness challenge for the same reasons discussed in connection with the California statute.¹⁵⁵ According to one commentator, the aggravated stalking provision of Florida's law that punishes violations of a court-imposed order¹⁵⁶ should survive a constitutional attack, "because it is virtually identical to harassment under the Florida stalking provision. Furthermore, the violation of the court order provides an even stronger limit that differentiates innocent from criminal conduct."¹⁵⁷

c. The Pennsylvania Statute

Pennsylvania's stalking statute requires a course of conduct or repeated acts toward another "under circumstances which demonstrate either . . . an intent to place the person in reasonable fear of bodily injury . . . or an intent to cause substantial emotional distress to the person."¹⁵⁸ The definition of "course of conduct" is substantially similar to the definition in the California statute.¹⁵⁹ As a result, it should survive a vagueness challenge for the same reasons.¹⁶⁰

However, the phrase "repeated acts," as used in the Pennsylvania statute, may pose a vagueness problem.¹⁶¹ The statute provides some gui-

152. FLA. STAT. ch. 784.048(2) (1994).

153. *Id.* ch. 784.048(3); see CAL. PENAL CODE § 646.9 (West Supp. 1994). For a discussion of the California statute, see *supra* notes 45-64 and accompanying text.

154. For a discussion of why the California statute should survive a void for vagueness challenge, see *supra* notes 135-45 and accompanying text.

155. FLA. STAT. ch. 784.048(4).

156. Guy, *supra* note 15, at 1019 (discussing why Florida's stalking statute is not unconstitutionally vague under vagueness doctrine). For a discussion of the Florida statute's harassment provision, see *supra* notes 66-69 and accompanying text.

157. Guy, *supra* note 15, at 1019.

158. 18 PA. CONS. STAT. ANN. § 2709(b) (Supp. 1994).

159. *Id.* For a discussion of the Pennsylvania statute's definition of "course of conduct," see *supra* note 81.

160. For a discussion of why the California statute's definition of "course of conduct" should survive a void for vagueness challenge, see *supra* notes 140-41 and accompanying text.

161. 18 PA. CONS. STAT. ANN. § 2709(b). The Pennsylvania statute prohibits a course of conduct or repeated acts toward another person which indicate an intent

dance as to the definition of the term "acts" by giving the example of following another person without the proper authority to do so.¹⁶² This, alone, is probably insufficient to overcome a vagueness challenge, but the statute also requires that the action demonstrate either of two intents on the part of the offender.¹⁶³ The first intent, to place the person in reasonable fear of injury, imposes an objective standard that should not be held to be vague. The second intent, to cause substantial emotional distress to the person, could be challenged for vagueness for the same reasons as the Florida statute's emotional distress requirement.¹⁶⁴ However, the Pennsylvania statute defines "emotional distress" as "[a] temporary or permanent state of great physical or mental strain."¹⁶⁵ While this definition is broad, it may be enough to thwart a vagueness challenge.

C. *The Effectiveness of the Statutes*

Aside from constitutional issues, these statutes raise questions concerning their effectiveness in accomplishing their purposes: to prevent and criminalize stalking. California's requirement of a credible threat may not provide sufficient protection for stalking victims. For example, if a deranged man merely follows or harasses a woman but makes no threats toward her, the stalking statute does not criminalize the stalker's behavior. Therefore, the victim's only options to protect herself are the traditional remedies.¹⁶⁶ In contrast to the California statute, the Florida statute provides a remedy for the woman who is being followed, while also providing for an enhanced punishment if a credible threat accompanied the stalker's actions.¹⁶⁷ Therefore, a statute without a credible threat requirement provides more protection for victims of stalking. Future state statutes will hopefully follow Florida's lead and not require a credible threat.

Pennsylvania's statute requires a showing of actions indicative of "bad intent" on the part of the perpetrator before protection from the stalker is triggered.¹⁶⁸ However, the proof required to demonstrate such intent is unclear. A question arises as to whether the action itself could be sufficient to prove the offender's ill intentions. However, the language of the

to cause that person substantial emotional distress or place that person in fear of bodily harm. *Id.*

162. *Id.*

163. *Id.* For a discussion of the two intents, see *supra* note 79 and accompanying text.

164. For a discussion of the Florida statute's emotional distress requirement, see *supra* notes 149-50 and accompanying text.

165. 18 PA. CONS. STAT. ANN. § 2709(f).

166. CAL. PENAL CODE § 646.9(a) (West Supp. 1994). For a discussion of traditional civil and criminal remedies, see *supra* notes 21-40 and accompanying text.

167. FLA. STAT. ch. 784.048(2)-(3) (1994). For a discussion of the Florida statute, see *supra* notes 65-77 and accompanying text.

168. 18 PA. CONS. STAT. ANN. § 2709(b) (Supp. 1994). For a discussion of the Pennsylvania statute, see *supra* notes 78-89 and accompanying text.

statute seems to indicate that more is needed.¹⁶⁹ If so, the Pennsylvania statute does not criminalize stalking-type behavior until the perpetrator's actions rise to a level indicative of ill intent. This restriction may also cause an unnecessary limitation on the effectiveness of the statute.

D. *The Proposed Model Statute*

In response to questions arising under the newly formulated anti-stalking laws, the United States Congress directed the National Institute of Justice to develop a Model stalking law that would be both constitutional and effective.¹⁷⁰ The task force charged with developing the model statute released its proposal in September 1993.¹⁷¹ The proposal is scheduled to be presented to the Attorney General for submission to Congress.¹⁷²

In the proposal, the task force defined stalking as:

“‘repeatedly maintaining a visual or physical proximity’ to someone, or repeatedly conveying threats by words or conduct, causing in either case ‘reasonable fear’ of bodily injury or death. The stalking would have to be ‘purposeful,’ but it would still be a crime if the targets were given cause to fear for their ‘immediate family’ or for themselves.”¹⁷³

The fear that the stalking behavior creates in the victim is the key element of the proposed statute.¹⁷⁴

The proposed statute addresses some of the concerns that previous state statutes failed to address. For example, to ensure that it would not be subject to a constitutional attack based on vagueness, the task force used explicit language in the proposal, such as “repeatedly maintaining a visual or physical proximity” to the victim, in defining stalking.¹⁷⁵ The proposal also requires that the prohibited actions are accompanied by “reasonable fear” of injury to the victim.¹⁷⁶ This added provision further guards against a void for vagueness attack. The proposed statute, however, may be subject to some of the same effectiveness concerns as the other statutes.¹⁷⁷ For example, if a stalker instills fear in a victim without maintain-

169. See 18 PA. CONS. STAT. ANN. § 2709(b), (c)-(f) (Supp. 1994). For the pertinent statutory language of this section see *supra* note 78.

170. S. 2922, 102d Cong., 2d Sess. (1992). For the text of Congress' directive, see *supra* note 7.

171. George Lardner, Jr., *Federal Task Force Suggests States Make Stalking a Felony Offense*, WASH. POST, Sept. 12, 1993, at A19.

172. *Id.* (quoting task force proposal).

173. *Id.*

174. *Id.*; see also *Stalking the Wild Stalker*, WASH. TIMES, Sept. 20, 1993, at A22.

175. See Lardner, *supra* note 170 (quoting proposal).

176. *Id.* (quoting proposal).

177. For a discussion of effectiveness concern, see *supra* notes 166-69 and accompanying text.

ing physical or visual contact, the proposed statute would fail to criminalize such behavior.

IV. CONCLUSION

Traditional remedies proved ill-suited to deal effectively with the offense of stalking.¹⁷⁸ Therefore, states drafted statutes that dealt specifically with stalking. However, in drafting such statutes, state legislatures encountered difficulty in balancing the need for an effective anti-stalking statute with the requirement that the statute not be unconstitutionally vague. Although no appellate court has yet ruled a state statute unconstitutional, it may only be a matter of time before one does.

The United States Senate and House of Representatives have recognized the need for a federal stalking statute and have introduced their respective Bills.¹⁷⁹ In addition, Congress has recognized the need for a more uniform state stalking statute by directing that a model stalking statute be drafted.¹⁸⁰ Stalking statutes will continue to evolve, and with the aid of a model statute, they will likely evolve into effective and constitutionally sound means of protecting stalking victims.

B. Benjamin Haas

178. For a discussion of why traditional remedies are ill suited to deal with staking type behavior, see *supra* notes 21-40 and accompanying text.

179. For a discussion of the House and Senate Bills, see *supra* notes 90-111 and accompanying text.

180. For a discussion of the proposed model statute, see *supra* notes 170-77 and accompanying text.

