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First Amendment Implications of Anti-Stalking Statutes, The;Note

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THE FIRST AMENDMENT IMPLICATIONS OF ANTI-STALKING STATUTES

I. INTRODUCTION

Many legislatures across the country have enacted anti-stalking laws.[1] What may surprise state legislators is the courts' application of these statutes to proscribe expressive activity. In light of First Amendment protection of expression, such an application of the anti-stalking laws raises constitutional concerns.

State courts have been quick to apply anti-stalking laws to expressive activity. For example, in June 1993 a Texas judge issued a temporary restraining order against eight abortion protesters for stalking, as defined in the state's newly enacted statute.[2] The judge applied the anti-stalking law to prevent abortion opposition activity 500 feet from doctors' residences. In October 1993, Randy Jack Hinesley, believed to be the first person prosecuted under a state's anti-stalking statute, pleaded no contest to criminal charges of stalking an administrator of a Florida abortion clinic.[3] The judge used the state's stalking statute to convict Hinesley for following the administrator, obstructing her view as she drove her car and taking her picture, all done to show his opposition to abortion.[4] Another anti-abortion activist was charged with stalking the director of a woman's clinic in Charleston, South Carolina.[5] The scope of stalking laws has reached beyond anti-abortion protesters. In Minnesota, four abortion rights activists were charged under the state's anti-stalking law for following an Operation Rescue group en route to the doctors' homes.[6] These examples could signal the beginning of a line of cases where courts apply anti-stalking statutes to proscribe expressive conduct.

In each of these cases, courts applied the state anti-stalking statute to criminalize conduct that could be construed as expression protected by the First Amendment. Although none of the defendants argued that the statutes were unconstitutional,[7] critics have nevertheless questioned their constitutional validity. Scholars and defense attorneys have argued that these statutes are unconstitutional for various reasons.[8] The two

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1. *3 More Sue Hooters on Harassment*, PLAIN DEALER (Cleveland), May 11, 1993, at 1E (stating that Congress created a model stalking statute because the states have begun to do so in large numbers and are facing constitutional challenges).

2. Debbie Housel, *Judge Bars Abortion Protesters From Doctors' Homes*, HOUSTON POST, June 25, 1993, at A1.

3. *Abortion Protester Pleads No Contest in Stalking Case*, SUN SENTINEL (Ft. Lauderdale), Oct. 9, 1993, at 18A.

4. *Id.*

5. Bruce Smith, *Abortion Clinic Head Threatened*, CHARLOTTE OBSERVER, Apr. 2, 1993, at 1C.

6. Kurt Chandler, *Four Abortion Rights Activists Charged Under Anti-Stalking Law*, STAR TRIBUNE (Minneapolis), Aug. 26, 1993, at 1B.

7. Of the cited examples where criminal action has been taken, the Florida individual pleaded no contest to the charges. He made no constitutional challenges to the statute under which he was being convicted. *Abortion Protester Pleads No Contest in Stalking Case*, *supra* note 3, at 18A. None of the cases have been argued before a court.

8. Scholars arguing that stalking statutes are unconstitutional assert the laws as written are unconstitutionally vague and have various unconstitutional bail and warrantless arrest provisions. *See, e.g.*, Gera-Lind Kolarik, *Stalking Laws Proliferate but Critics Say Constitutional Flaws Also Abound*, 78

major arguments are that the statutes are overbroad and that they criminalize what is otherwise constitutionally protected expressive activity.

The enactment of anti-stalking statutes are a reaction to well-publicized cases where women were repeatedly followed, harassed and threatened by an individual who eventually killed them.[9] In each of these cases, police could not charge the offenders with violating any criminal statute because none existed proscribing the activity.[10] Now, at least forty states have enacted anti-stalking statutes.[11]

This Note will analyze certain First Amendment implications of anti-stalking statutes.[12] Section II will provide the background necessary to understand why stalking statutes were enacted, the actus reus and mens rea requirements of the statutes, the

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A.B.A. J. 35 (1992); Joseph V. Collina, *Stalking Law is Bad Legislation, Unneeded and Unconstitutional*, CHICAGO DAILY LAW BULL., July 31, 1992, at 5. *See generally* Robert A. Guy, Jr., Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991 (1993) (discussing void for vagueness challenges to stalking statutes).

9. In 1989, actress Rebecca Shaeffer was shot and killed by an obsessed fan. Her killer had written numerous letters and had traveled on several occasions to communicate with her. Fred Leeson, *Inside the Mind of a Star Stalker*, CRIMEBEAT, Apr. 20, 1992, at 22-24. For over a year, he had sent Shaeffer gifts, called her repeatedly and obtained personal information on her through databases. Eric Malnic, *Man Who Killed T.V. Actress Gets Life Without Parole*, LOS ANGELES TIMES, Dec. 21, 1991, at B3.

Practically every week, new cases of people being "stalked"—usually by someone they know—appear in the media. Newspapers are filled with celebrity cases: ice skater Katarina Witt was followed by a man who tossed obscene letters onto the ice and a David Letterman fan, pretending to be his wife, repeatedly trespassed near his home. Michael Matza, *When Attraction Turns Obsessive it May Seem Harmless. But to Victims, Stalking Means a Life of Fear*, PHILADELPHIA INQUIRER, May 23, 1993, at A1.

Ordinary people are victims of stalking as well. Karen Erjavec received unsigned letters and threatening telephone calls from a man who became obsessed with her after they were in a wedding party together. Bryan Miller, *Thou Shalt Not Stalk*, CHICAGO TRIBUNE, Apr. 18, 1993, at 14. The stalker fatally shot and killed both Karen and her boyfriend while they were walking home. *Id.* Steve Jackson repeatedly threatened to kill his ex-girlfriend after their relationship ended. Kevin McKinney, *Teen Held Under Law Against Stalking*, PHILADELPHIA INQUIRER, July 23, 1993, at B4. He continued to attempt to break into her home, made threatening phone calls and would appear at her place of employment. *Id.*

10. In five unrelated cases where boyfriends or ex-husbands harassed and killed their respective partners, each of the women had obtained restraining orders that proved to be ineffective. James Quinn, *Man Pleads No Contest in 'Stalking' Case*, LOS ANGELES TIMES, July 23, 1991, at B3.

11. The states that currently have stalking statutes include: ALA. CODE § 13A-6-90 (1975), ALASKA STAT. § 11.41.260 (1993), ARK. CODE ANN. § 5-71-229 (Michie 1993), CAL. PENAL CODE § 646.9 (West 1992), COLO. REV. STAT. ANN. § 18-9-111 (West 1993), CONN. GEN. STAT. ANN. § 53a-181 (West 1993), DEL. CODE ANN. tit. 11, § 1312A (1992), D.C. CODE ANN. § 22-504 (1981), FLA. STAT. ANN. § 748.048 (West 1993), GA. CODE ANN. § 16-5-90 (Michie 1993), HAW. REV. STAT. § 711-1106.5 (1992), IDAHO CODE § 18-7905 (1993), ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993), IND. CODE ANN. § 35-45-10-1 (West 1993), IOWA CODE ANN. § 708.11 (West 1993), KY. REV. STAT. ANN. § 508.140 (Michie/Bobbs-Merrill 1993), LA. REV. STAT. ANN. § 14:40.2 (West 1993), MD. CRIM. LAW CODE ANN. § 121B (1993), MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1993), MICH. COMP. LAWS ANN. § 600.2950a (West 1993), MINN. STAT. ANN. § 609.749 (West 1994), MISS. CODE ANN. § 97-1-7 (1972), MO. ANN. STAT. § 565.004 (Vernon 1993), MONT. CODE ANN. § 45-5-220 (1993), NEB. REV. STAT. § 28-311.02 (1992), NEV. REV. STAT. § 200.575 (1993), N.J. STAT. ANN. § 2C:12-10 (West 1993), N.M. STAT. ANN. § 30-3A-3 (Michie 1993), N.C. GEN. STAT. § 14-277.3 (1994), N.D. CENT. CODE § 12.1-17-07.1 (1993), OKLA. STAT. ANN. tit. 21, § 1173 (West 1993), R.I. GEN. LAWS § 11-59-1 (1992), S.D. CODIFIED LAWS ANN. § 22-19A-1 (1993), TENN. CODE ANN. § 39-17-315 (1993), 1993 TEX. PENAL CODE ANN. § 42.07(a)(7) (West 1994), UTAH CODE ANN. § 76-5-106.5 (1993), VA. CODE ANN. § 18.2-60.3 (Michie 1993), WASH. REV. CODE ANN. § 9A.46.110 (West 1993), W. VA. CODE § 61-2-9a (1993), WYO. STAT. § 6-2-506 (1993).

12. This Note will not address First Amendment vagueness concerns, statutes that specifically exclude labor picketing from prosecution, or the constitutionality of the warrantless arrest and bail provisions prevalent in many stalking statutes.

basis for using them to outlaw what is allegedly protected First Amendment conduct, and discuss the potential overbreadth and First Amendment challenges to the statutes. Section III will discuss the overbreadth doctrine and standard of review for First Amendment challenges, including a detailed presentation of the tests and legal principles involved in determining whether a statute is overbroad or violates the First Amendment. Section IV will argue that stalking statutes are valid under the First Amendment. Section V, the conclusion, will propose cautionary measures legislatures should take in enacting stalking statutes to diminish the possibility of overbreadth and First Amendment challenges.

II. HISTORY OF STALKING STATUTES AND THE POTENTIAL FIRST AMENDMENT CHALLENGES

Stalking was not a crime until California enacted the first statute prohibiting it.[13] The need for stalking legislation arose due to the inability of existing legal remedies to protect the victims from their stalkers.[14] The most common type of protection for people being stalked, prior to the enactment of stalking statutes, was the use of an injunction.[15] This method, however, proved to be ineffective in providing any meaningful protection.[16] Restraining orders and injunctions are often difficult to obtain and can easily be broken with minor, and often, delayed consequences.[17]

It is often difficult for a person being stalked to obtain a restraining order.[18] For a judge to issue a protective order, many states require that there be actual physical abuse.[19] Yet, many stalking victims are never physically abused. Thus, the victim is unable to obtain a restraining order.

Restraining orders also fail to protect people from being stalked because minor punishment is assessed if the order is broken. In thirty-one states, a violation of a protective order only results in civil contempt.[20] Unless the statute specifies otherwise, police officers have no arrest power for civil contempt, even if they have witnessed the offense.[21] If the restraining order is violated, the victim either has to obtain an arrest warrant or petition the court to summon the violator to a contempt hearing.[22] The

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

14. Florida's stalking statute includes legislative findings that, "the traditional protections currently available under criminal statutes are not always applicable to stalking" and that the legislature wanted to "provide protection to victims, their families, and friends from the needless torment caused by stalking." FL. STAT. ANN. § 784.048 (West 1993). *See* Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271 (1992) (discussing the inadequacies of the present injunctive system).

15. Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L. Q. 43 (1989).

16. Restraining orders vary in the amount of relief they grant. Typically, they include provisions prohibiting contact or visiting a certain individual. *Id.* at 50.

17. Finn, *supra* note 15, at 43 (discussing the common statutory weaknesses of existing protective measures).

18. Bradburn, *supra* note 14, at 271.

19. Florida's stalking statute, for example, requires physical abuse on two separate occasions. FLA. STAT. ANN. § 784.046(2) (West 1993).

20. Finn, *supra* note 15, at 55. Civil contempt is defined as "[a] species of contempt of court which generally arises from a wilful failure to comply with an order of court . . . ." BLACK'S LAW DICTIONARY 245 (6th ed. 1990).

21. Finn, *supra* note 15, at 55.

22. Finn, *supra* note 15, at 55.

time delays involved in obtaining the hearing or warrant render injunctive relief ineffective to protect a victim from immediate physical harm. Since injunctive relief proved inadequate to protect stalking victims, legislators responded by enacting stalking statutes.[23]

The elements of stalking vary among the states. Every statute requires an activity, actus reus, to be done with a specified level of intent, mens rea. A typical actus reus element requires that the person commit the act of stalking intentionally, willfully or knowingly with the intent to put the victim in reasonable fear of bodily harm or death.[24] Most states require the act of harassing or following.[25] Alabama, for example, has a simple classification of the stalking actus reus as following or harassing.[26] Some states, like Illinois, delineate the actus reus element even further and define stalking as following the person on at least two separate occasions, or placing the person under surveillance by remaining present outside his school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the person allegedly doing the stalking.[27]

The intent required to be convicted under a stalking statute varies considerably among the states.[28] The California stalking law, for example, requires a "credible threat" intended to cause the victim to reasonably fear harm.[29] Florida's stalking law

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23. The senators who introduced stalking legislation in North Carolina commented on the inadequacies of existing law to protect the victims of stalking. Helen Marvin, *Stalker Law Would Help Protect North Carolinians*, CHARLOTTE OBSERVER, June 18, 1992, at 15A.

24. Those state statutes that require the intent to put the victim in reasonable fear of harm are: ALA. CODE § 13A-6-90 (1975), ALASKA STAT. § 11.41.260 (1993), ARK. CODE ANN. § 5-71-229 (Michie 1993), CAL. PENAL CODE § 646.9 (West 1992), COLO. REV. STAT. ANN. § 18-9-111 (West 1993), CONN. GEN. STAT. ANN. § 53a-181 (West 1993), DEL. CODE ANN. tit. 11, § 1312A (1992), D.C. CODE ANN. § 22-504 (1981), GA. CODE ANN. § 16-5-90 (Michie 1993), HAW. REV. STAT. § 711-1106.5 (1992), ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993), IND. CODE ANN. § 35-45-10-1 (West 1993), IOWA CODE ANN. § 708.11 (West 1993), KY. REV. STAT. ANN. § 508.140 (Michie/Bobbs-Merrill 1993), LA. REV. STAT. ANN. § 14:40.2 (West 1993), MD. CRIM. LAW CODE ANN. § 121B (1993), MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1993), MICH. COMP. LAWS ANN. § 600.2950a (West 1993), MINN. STAT. ANN. § 609.749 (West 1994), MISS. CODE ANN. § 97-1-7 (1972), MONT. CODE ANN. § 45-5-220 (1993), NEV. REV. STAT. § 200.575 (1993), N.J. STAT. ANN. § 2C:12-10 (West 1993), N.M. STAT. ANN. § 30-3A-3 (Michie 1993), N.C. GEN. STAT. § 14-277.3 (1994), N.D. CENT. CODE § 12.1-17-07.1 (1993), OKLA. STAT. ANN. tit. 21, § 1173 (West 1993), R.I. GEN. LAWS § 11-59-1 (1992), S.D. CODIFIED LAWS ANN. § 22-19A-1 (1993), TENN. CODE ANN. § 39-17-315 (1993), 1993 TEX. PENAL CODE ANN. § 42.07(a)(7) (West 1994), UTAH CODE ANN. § 76-5-106.5 (1993), VA. CODE ANN. § 18.2-60.3 (Michie 1993), WASH. REV. CODE ANN. § 9A.46.110 (West 1993), W. VA. CODE § 61-2-9a (1993), WYO. STAT. § 6-2-506 (1993).

25. The state statutes which specifically include the acts of harassing or following in their definition of stalking include: ALASKA STAT. § 11.41.260 (1993), CAL. PENAL CODE § 646.9 (West 1992), COLO. REV. STAT. ANN. § 18-9-111 (West 1993), CONN. GEN. STAT. ANN. § 53a-181 (West 1993), DEL. CODE ANN. tit. 11, § 1312A (1992), FLA. STAT. ANN. § 748.048 (West 1993), GA. CODE ANN. § 16-5-90 (Michie 1993), HAW. REV. STAT. § 711-1106.5 (1992), IDAHO CODE § 18-7905 (1993), ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993), IND. CODE ANN. § 35-45-10-1 (West 1993), IOWA CODE ANN. § 708.11 (West 1993), LA. REV. STAT. ANN. § 14:40.2 (West 1993), MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1993), MICH. COMP. LAWS ANN. § 600.2950a (West 1993), MINN. STAT. ANN. § 609.749 (West 1994), MONT. CODE ANN. § 45-5-220 (1993), NEB. REV. STAT. § 28-311.02 (1992), N.J. STAT. ANN. § 2C:12-10 (West 1993), N.M. STAT. ANN. § 30-3A-3 (Michie 1993), N.C. GEN. STAT. § 14-277.3 (1994), N.D. CENT. CODE § 12.1-17-07.1 (1993), OKLA. STAT. ANN. tit. 21, § 1173 (West 1993), S.D. CODIFIED LAWS ANN. § 22-19A-1 (1993), TENN. CODE ANN. § 39-17-315 (1993), UTAH CODE ANN. § 76-5-106.5 (1993), WASH. REV. CODE ANN. § 9A.46.110 (West 1993), W. VA. CODE § 61-2-9a (1993), WYO. STAT. § 6-2-506 (1993).

26. ALA. CODE § 13A-6-90 (1993).

27. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993).

28. *See* Guy, *supra* note 8, at 991.

29. CAL. PENAL CODE § 646.9 (West 1992). A credible threat is defined as a "threat made with

requires that the stalker intend to inflict emotional harm on the victim.[30] The law, however, does not require that the fear be objectively reasonable.[31] Virginia's stalking statute only requires engaging in "conduct with the intent to cause emotional distress."[32] This Note will examine stalking statutes noting the different elements in each state statute. The varying degrees of conduct required to convict under the statutes will affect the overbreadth and as-applied First Amendment challenges.

III. THE OVERBREADTH DOCTRINE AND AS-APPLIED FIRST AMENDMENT CHALLENGES

A defendant may challenge a statute by claiming it is facially overbroad or that, as applied, the law violates the person's protected First Amendment rights. Overbreadth is a facial challenge to the statute as written. The as-applied First Amendment challenge examines the implications of the law as applied to the specific facts of a case.

A. The Overbreadth Doctrine

Traditional overbreadth doctrine allows a person charged with a crime to challenge the controlling statute as being facially overbroad because it may criminalize constitutionally protected activity.[33] Under this doctrine, individuals may challenge the law even though their conduct may be proscribed by a different, properly drawn statute.[34] This type of challenge allows a defendant to challenge the statute for the possible threat to another person's right to engage in protected activity.[35]

The ability of a defendant to challenge a statute because of the mere possibility of the statute proscribing protected activity is an exception to the constitutional doctrine requiring standing for a person to sue.[36] Traditionally, the Supreme Court has placed a restraint on those individuals who challenge a statute on constitutional grounds. The rule, grounded in Article III of the Constitution, limits the jurisdiction of federal courts to actual cases and controversies.[37] The Court stated that, as it pertains to all federal courts, the Supreme Court

> [H]as no jurisdiction to pronounce any statute, either of a State or of the United

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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.*

30. FLA. STAT. ANN. § 748.048 (West 1993).

31. *Id.* Although the Florida statute requires the stalker to intend to inflict harm on the victim, the law does not require actual harm.

32. VA. CODE ANN. § 18.2-60.3 (Michie 1993).

33. Coates v. Cincinnati, 402 U.S. 611, 614 (1971).

34. Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987).

35. *Id.*

36. Thornhill v. Alabama, 310 U.S. 88 (1940).

37. New York v. Ferber, 458 U.S. 747, 768 (1982). Article III provides in relevant part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III § 2.

> States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.[38]

When faced with an overbreadth challenge, however, the Court does not require that the person presently before the court be the actual litigant who could raise such a constitutional question. The overbreadth doctrine, therefore, is one of the few exceptions to the case or controversy principle.[39]

An overbroad statute is void in its entirety if it reaches a substantial amount of protected speech and there is no way of severing the statute's unconstitutional applications.[40] As the overbreadth doctrine may void an entire statute, the Court has held that the doctrine is "strong medicine" and should be applied "only as a last resort."[41] Consequently, the degree of overbreadth must be substantial before the statute may be facially invalidated.[42]

In *Broadrick v. Oklahoma*,[43] the Court discussed the overbreadth doctrine and the need for substantial overbreadth to invalidate a statute. In *Broadrick*, Oklahoma state employees brought a class action, seeking a declaration that a state statute regulating political activity by state employees was invalid.[44] The statute in question, Section 818 of the Oklahoma's Merit System of Personnel Administration Act, restricted the political activities of the state's classified civil servants.[45] The civil servants argued that although the statute served valid goals,[46] its language was unconstitutionally vague and its prohibitions too broad in proscribing protected activity.[47]

Writing for the majority, Justice White maintained that Section 818 was neither unconstitutionally vague nor substantially overbroad.[48] The Court opened the overbreadth analysis by stating that "[a]pplication of the . . . doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last re-

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38. Liverpool, New York & Philadelphia S.S. Co. v. Comm'rs of Emigration, 113 U.S. 33, 39 (1885); United States v. Raines, 362 U.S. 17, 21 (1960).

39. *Raines*, 362 U.S. at 22-23.

40. Houston v. Hill, 482 U.S. 451, 458 (1987) (citing *Ferber*, 458 U.S. at 747).

41. Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973).

42. *Ferber*, 458 U.S. at 769.

43. *Broadrick*, 413 U.S. at 601.

44. *Broadrick*, 413 U.S. at 602.

45. Section 818 reached a broad range of political activities and conduct. Two of the contested portions of the statute provide that "[n]o employee in the classified service . . . shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose" and no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office." *Broadrick*, 413 U.S. at 605-7.

46. *Broadrick*, 413 U.S. at 607. The civil servants did not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees and conceded that such restrictions serve valid and important state interests. Such interests included attracting greater numbers of qualified people by insuring their job security, free from the "vicissitudes of the elective process, and by protecting them from 'political extortion.'" *Id.* at 606.

47. *Id.* at 607.

48. *Id.*

sort."[49] The Court wrote that although the statute may be broadly worded and potentially reach protected activity, "there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe."[50] For this reason, the Court held that "particularly where conduct and not merely speech is involved . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[51] Indeed, when discussing the previous instances when the Court has struck down a law on overbreadth grounds, the Court noted that overbreadth claims have "been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct."[52] In addition, the Court noted that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner."[53]

When a federal court examines a statute challenged on overbreadth grounds, the court will construe the statute to avoid constitutional problems, provided the statute is subject to a limiting construction.[54] In *United States v. Thirty-Seven Photographs*,[55] the court examined the constitutionality of a statute that allowed the government to seize allegedly obscene photos.[56] The Court wrote that "'[w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[57] In *R.A.V. v. City of St. Paul*,[58] the Minnesota Supreme Court construed the state hate crime statute to save it from being unconstitutionally overbroad. The Supreme Court was bound by the construction the lower court gave the statute in question.[59] Although the statute was eventually deemed an unconstitutional infringement of First Amendment rights, the court was still bound by the limiting construction of the Minnesota court. If the savings construction would avoid a constitutional problem, the Court will abide by this construction and sustain the statute's validity.

A statute that is not subject to such a narrowing construction, and is impermissibly overbroad, may be partially sustained if the unconstitutional section can

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49. *Id.* at 613.

50. *Broadrick*, 413 U.S. at 615; New York v. Ferber, 458 U.S. 747, 770 (1982). *Cf.* Alderman v. United States, 394 U.S. 165, 174-75 (1969).

51. *Broadrick*, 413 U.S. at 615; *Ferber*, 458 U.S. at 770.

52. *Broadrick*, 413 U.S. at 615. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940).

53. *Broadrick*, 413 U.S. at 614. Although not specifically in the court's opinion, the reluctance to apply the overbreadth doctrine to cases where the statute is neutral may correlate to the Court's reluctance to apply the strict scrutiny standard of review to other content-neutral statutes when faced with an as-applied challenge. *See infra* notes 99-117 and accompanying text.

54. *Ferber*, 458 U.S. at 769 n.24.

55. United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).

56. *Id.*

57. *Id.* at 369 (quoting Crowell v. Benson, 285 U.S. 22 (1932)).

58. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

59. *Id.* In *R.A.V.* the Minnesota court gave a savings construction to the statute in question and sustained its validity. 464 N.W.2d 507 (Minn. 1991). Although the Supreme Court decided the law was nevertheless an impermissible encroachment on First Amendment rights, the Court was bound by the narrow savings construction of the lower court. *R.A.V.*, 112 S. Ct. at 2541. *Accord, e.g.*, Haynes v. United States, 390 U.S. 85, 92 (1968).

be severed.[60] In *New York v. Ferber*, a bookstore proprietor was convicted under a New York statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16.[61] The Court held that the statute should not, in its entirety, be deemed unconstitutionally overbroad if the unconstitutional portion could be severed from the legitimate proscription of activity.[62] The Court wrote that if the federal statute is impermissibly overbroad "it nevertheless should not be stricken down on its face if it is severable, only the unconstitutional portion is to be invalidated."[63] The Court also noted that the overbreadth doctrine should only be applied in circumstances in which "facial invalidation of a statute is truly warranted."[64]

Federal courts will not strike down a law as overbroad if there is a core of easily identifiable protected conduct, conceivably proscribed by a statute, but is known to be constitutionally protected.[65] In *United States Civil Service Commission v. National Ass'n of Letter Carriers*,[66] a declaratory judgment action was brought to contest the validity of the Hatch Act prohibition against federal employees taking an active part in political management or in political campaigns.[67] Federal employees argued the Hatch Act prohibitions were unconstitutionally vague and overbroad.[68] The Supreme Court disagreed. In holding the statute constitutional, Justice White wrote

> Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute . . . . The remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees, and the extent to which pure expression is impermissibly threatened, if at all, by the [statute], does not in our view make the statute substantially overbroad and so invalid on its face.[69]

The fact that there existed a core of easily identifiable and constitutionally proscribable conduct that could be reached by the statute did not invalidate the entire statute on overbreadth grounds.[70]

Although the overbreadth doctrine could be applied to strike down many laws as facially unconstitutional, the Supreme Court has refused to adopt such a sweeping doctrine. By requiring substantial overbreadth and by allowing the courts to construe the statute narrowly to save it from being deemed unconstitutional, the doctrine has had a more limited application. Only in cases of complete bans of expressive activity has the Court deemed a statute unconstitutional.[71] The Court in *Ferber*[72] noted Jus-

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60. *Ferber*, 458 U.S. at 769; United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971).
61. *New York v. Ferber*, 458 U.S. 747 (1982).
62. *Id.* at 769.
63. *Id.* at 769 n.24.
64. *Id.*
65. Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984).
66. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973).
67. *Id.*
68. *Id.*
69. 413 U.S. at 580.
70. In Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1947), the Supreme Court invalidated a Maryland statute that limited charitable fundraising expenses to twenty-five percent. The dissenters criticized the majority for failing to recognize that a core of constitutionally protected activity existed here which should save the statute from being invalidated on overbreadth grounds.
71. For example, in Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569 (1987) the Court, per Justice O'Connor, struck down an airport resolution banning all "First Amendment activi-

tice Brennan's dissenting observation in *Broadrick* that the Court has "never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application."[73] A tenuous application of a statute to protected expression would not render the statute unconstitutionally overbroad. Even if the facial challenge does not survive, a defendant challenging a statute may argue that the statute, as applied to facts of his case, violates the First Amendment.

B. The As-Applied First Amendment Challenge

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech."[74] In interpreting this language, the Court has stated that "above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[75] Despite this assertion, protection given to speech is not absolute.[76]

Certain categories of speech do not merit full First Amendment protection. Obscenity may be wholly prohibited.[77] In cases of libel, the reputation interests of individuals grant libelous speech less constitutional protection.[78] The Supreme Court has held that commercial speech is afforded lesser protection than other constitutionally guaranteed expression.[79] Certain cases have suggested that threats constitute a category of speech not worthy of First Amendment protection.[80] Indeed, the Court has specifically denied First Amendment protection to a category of speech known as "fighting words."[81]

"Fighting words" are a category of expression "not within the area of constitutionally protected speech."[82] As such, they can be consistent with the First Amendment, regulated because of their constitutionally proscribable content.[83] "Fighting words" are defined as "those which by their very utterance inflict injury or tend to

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ties" within the airport to be unconstitutionally overbroad. The Court concluded that any narrow savings construction would not save the resolution because it impermissibly and substantially interfered with obviously protected First Amendment free speech activities such as wearing a campaign button or T-shirt. *Id.* at 575.

72. New York v. Ferber, 458 U.S. 747 (1982).

73. *Ferber*, 458 U.S. at 772 (quoting *Broadrick*, 413 U.S. at 630 (1973) (Brennan, J., dissenting)).

74. U.S. CONST. amend. I.

75. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

76. Whitney v. California, 274 U.S. 357, 373 (1927).

77. Miller v. California, 413 U.S. 15 (1973).

78. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

79. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 456 (1978).

80. *See* Watts v. United States, 394 U.S. 705, 707 (1969) (stating that what is a threat must be distinguished from what is constitutionally protected speech). *See also* Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U.S. 287, 292-95 (1941) (holding the presence of violence justified an injunction against both violent and nonviolent activity); Shackelford v. Shirley, 948 F.2d 935, 938-39 (5th Cir. 1991) (holding conviction under telephone harassment statute not entitled to relief because "threats made with the specific intent to injure and focused on a particular individual easily fall into that category of speech deserving of no First Amendment protection"); United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 (9th Cir. 1990) (noting that "[a] 'true' threat, where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, is unprotected by the first amendment.") United States v. Mitchell, 463 F.2d 187, 191 (8th Cir. 1972) (stating violent threats are "devoid of constitutional protection"). *See generally* United States v. McDermott, 822 F. Supp. 582 (N.D. Iowa 1993).

81. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

82. Roth v. United States, 354 U.S. 476, 483 (1957).

83. R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2543 (1992).

incite an immediate breach of the peace."[84] "Similarly, words that create an immediate panic are not entitled to protection."[85] "This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."[86] Hence "[t]he principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[87]

Expressive conduct may not always merit full protection either.[88] Although the Court could have restricted First Amendment protection to the written or spoken word, it extended protection to types of expressive activity because conduct can be communicative.[89] The Court refused, however, to accept the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[90] To determine if conduct is sufficiently expressive to merit First Amendment protection, the Court inquires whether "[a]n intent to convey a particularized message was present, and [whether] in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[91] Both the nature of the activity and the factual context are relevant.[92] The conduct must be intended to convey a message. Those who viewed the act should likely be able to understand that a message is being conveyed as well.

In *Tinker v. Des Moines Independent Community School District*,[93] the Court held that wearing armbands to oppose the Vietnam War was constitutionally protected expression.[94] In *Spence v. Washington*,[95] the Court assumed for First Amendment purposes that affixing a peace symbol to a flag was expression through conduct.[96] Begging and panhandling in a subway system are also deemed expressive conduct under the First Amendment.[97]

Determining whether or not the First Amendment applies to the conduct in question is the first step in an expressive-conduct First Amendment challenge.[98] Once the

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84. Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (quoting *Chaplinsky*, 315 U.S. at 571-72).

85. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) (quoting Schenck v. United States, 249 U.S. 47 (1919)).

86. *NAACP*, 458 U.S. at 927.

87. *Id.* at 928 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969)).

88. *See* Dallas v. Stanglin, 490 U.S. 19, 25 (1989) (refusing to grant First Amendment protection to social dancing). *Cf.* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460 (1991) (granting First Amendment protection to nude dancing).

89. United States v. O'Brien, 391 U.S. 367, 376 (1968). In *O'Brien*, the court discussed the First Amendment implications of the statute because the "alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment." *Id.*

90. *Id.*

91. Spence v. Washington, 418 U.S. 405, 410-11 (1974) (per curiam).

92. *Id.* at 409-10.

93. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969).

94. *Id.*

95. *Spence*, 418 U.S. at 405.

96. The Court's opinion stated that this conduct was "a case of prosecution for the expression of an idea through activity." *Id.* at 411.

97. Young v. New York City Transit Auth., 903 F.2d 146, 152 (2d Cir. 1990). In *Young*, the Second Circuit deemed panhandling as activity primarily designed to collect money, not to express any ideas. *Cf.* Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (holding begging constitutes communicative activity of some sort).

98. Texas v. Johnson, 491 U.S. 397, 403 (1989). In this case, Justice Brennan stated that the

conduct has been shown to bring First Amendment protection into play, the Supreme Court has allowed certain incidental limitations on the nonspeech element (the actual conduct versus the speech element, the message) provided the government can prove a sufficiently important governmental interest in regulating the nonspeech element.[99] The level of review and deference with which the Court will scrutinize the statute depends on whether or not the statute in question is deemed content-based or content-neutral.

Content-based regulations, those which restrict speech based on the message, are subject to a higher level of scrutiny known as strict scrutiny.[100] Statutes which are content-neutral are those which place no emphasis on the message, but rather, focus on the conduct or manner in which the speech is directed. Content-neutral statutes regulating conduct are examined using the test outlined in *United States v. O'Brien*.[101]

Whether the challenged law is content-based is a crucial question. In every case where the *O'Brien* test has been applied to a content-neutral regulation, the regulation has been sustained. Compare this result with cases where strict scrutiny has been applied. Regulations are typically struck down under the stringent strict scrutiny approach. It is substantially more difficult to survive such a constitutional challenge.[102]

In *O'Brien*, the seminal case discussing the level of First Amendment protection granted to conduct, the defendant was convicted for burning his draftcard in violation of a recently amended provision of the United States Code.[103] Under the new provision, an offense was committed by any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any [registration] certificate."[104] O'Brien and three of his companions burned their draftcards on the steps of the South Boston Courthouse.[105] Upon questioning and at his trial, O'Brien stated that he had burned his draftcard publicly to influence others to adopt his antiwar beliefs and to reevaluate their positions regarding the Selective Service and armed forces.[106]

At the district court, O'Brien argued that the law prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech.[107] The district court found no violation. The appellate court, however, held the amendment to be an unconstitutional abridgement of the freedom of speech.[108] It considered the law to be in violation of the First Amendment because the law singled out persons engaged in protests for special treatment.[109] The court

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Court must "first determine whether Johnson's burning of the flag constituted expressive conduct permitting him to invoke the First Amendment in challenging his convictions." *Id.*

99. United States v. O'Brien, 391 U.S. 367, 376 (1968).

100. *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

101. *O'Brien*, 391 U.S. at 367; *See infra* notes 102-117 and accompanying text.

102. In *R.A.V.*, the court applied strict scrutiny to a statute that prohibited certain hate crimes, those done to an individual because of their race, color, creed, religion or gender. The court concluded strict scrutiny was the appropriate standard and struck down the law as unconstitutional. 112 S. Ct. at 2538. In *Johnson*, 491 U.S. at 397, the Court applied strict scrutiny to a Texas flag burning statute and held it to be unconstitutional.

103. *O'Brien*, 391 U.S. at 370.

104. *Id.*

105. *Id.* at 369.

106. *Id.* at 370.

107. *Id.*

108. O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), *cert granted*, 389 U.S. 814, *judgment denied*, 391 U.S. 367, *reh'g denied*, 393 U.S. 900.

109. *Id.*

nevertheless affirmed O'Brien's conviction as violating a statutory provision that made it a crime not to possess a draftcard.[110] The central issue in the case was whether the federal statute proscribing the knowing destruction of a draftcard was an unconstitutional infringement on First Amendment free speech protection. The court addressed the issues of what types of conduct should be protected and, if protected, what level of scrutiny applies. In *O'Brien*, the Supreme Court stated the test for determining whether a state's regulation of conduct is an unconstitutional burden and violates the First Amendment:[111]

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[112]

Each of these four elements must be met to sustain a First Amendment challenge.

This test has only been applied to instances where the state regulation in question is content-neutral.[113] This concern over whether a regulation is content-neutral is expressed in the third prong of the *O'Brien* test.[114] Since the answer to this element of the test is determinative of whether *O'Brien* applies, this issue is typically considered before moving on to the other elements of the test. *O'Brien* is not applied when examining content-based restrictions, i.e., those that limit conduct because of the message that is being conveyed through that activity. The Court will instead apply a much more stringent strict scrutiny standard of review.[115]

When the state regulation is unrelated to the suppression of free expression (content-neutral), it must meet the other elements of the *O'Brien* test. The first prong inquires whether the regulation is within the constitutional power of the government to regulate.[116] This element is typically met without much difficulty because a state is able to identify some source of regulatory power.[117]

The second element of the O'Brien test is whether the government regulation

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110. *Id.*

111. David S. Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491, 505 (1988).

112. *O'Brien*, 391 U.S. at 376.

113. Texas v. Johnson, 491 U.S. 397, 412 (1989) (applying *O'Brien* to the expressive conduct of burning a United States flag); Barnes v. Glen Theatre, 111 S. Ct. 2456 (1991) (applying *O'Brien* to the validity of a state statute prohibiting nude dancing). In United States v. Albertini, 472 U.S. 675, 687-88 (1985), the majority opinion, written by Justice O'Connor, noted that the "application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment" if is satisfies the *O'Brien* standard. *See supra* notes 103-112 and accompanying text. *See infra* notes 113-117 and accompanying text.

114. The third element in *O'Brien* asks whether the government regulation is "unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 376.

115. Boos v. Barry, 485 U.S. 312 (1988). Strict scrutiny review is the strictest scrutiny a court will apply to a state regulation. Under strict scrutiny, the court asks whether the state has a compelling state interest in regulating the speech. Almost all state regulations examined under this level of scrutiny are deemed unconstitutional.

116. *O'Brien*, 391 U.S. at 376.

117. One scholar has commented that the first element of the *O'Brien* test "is superfluous in light of what is normally designated criterion." *Recent Development, Free Speech and Public Utilities:* Consolidated Edison Co. v. Public Service Commission, 44 ALB. L. REV. 515, 523 n.50 (1980). *See* Day, *supra* note 111, at 491.

furthers an important or substantial governmental interest.[118] A state may not proscribe conduct without a legitimate interest. The interest, however, need not rise to the level of being a compelling state interest, as required with strict scrutiny review.[119] The government can satisfy this prong merely through proof of the existence of some governmental concern.

The final element of the test requires the incidental restriction on the alleged First Amendment freedom be "no greater than is essential to the furtherance" of the governmental interest.[120] Although this aspect of the test could have been used to examine the means used in the regulation with some level of scrutiny, the Court has, instead, reduced the means test to requiring only a rational basis.[121] Under rational basis review, the court will merely inquire into whether the means used are rationally related to meeting the desired end. If so, this prong is satisfied.

IV. STALKING STATUTES ARE CONSTITUTIONALLY VALID

State anti-stalking statutes survive both facial and as-applied First Amendment attacks.

A. Stalking Statutes Are Not Overbroad

A statute must be substantially overbroad to be facially unconstitutional.[122] It is doubtful that stalking statutes, which proscribe conduct, not pure speech, rise to this level. The conduct and intent requirements of the statutes limit the application of the statutes. These two requirements will limit the situations in which the statutes will apply.

To be convicted under a stalking statute, the defendant must engage in repeated conduct, such as following the victim. States traditionally have had the power to proscribe conduct,[123] regardless of the message involved, when such conduct rises to the level of harassment, murder, or other harm. In a recent challenge to a hate crime statute, the Washington Supreme Court stated that when the conduct involved "crosses the boundary into criminal harassment" the state could proscribe such conduct."[124]

A state stalking statute would also survive an overbreadth challenge because the intent requirement would eliminate from proscription any innocent protected conduct. Stalking statutes require defendants to intend to put their victims in fear for their life

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118. *O'Brien*, 391 U.S. at 376.

119. In applying strict scrutiny standard of review, the Court will ask whether the state has asserted some compelling interest in regulating the behavior. Under *O'Brien*, the interest need not be compelling or of substantial importance. The interest need only be legitimate. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 51 (1987).

120. *O'Brien*, 391 U.S. at 376.

121. In Wayte v. United States, 470 U.S. 598, 613 (1985), the Court did not consider the means used in a Selective Service System statute to be unconstitutional despite the random prosecutions under the statute to enforce the law. In United States v. Albertini, 472 U.S. 675, 689 (1985), the Court held that the means prong of *O'Brien* was satisfied "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *See* Day, *supra* note 111, at 491.

122. *See supra* notes 40-42 and accompanying text.

123. Minnesota *ex rel.* Whipple v. Martinson, 256 U.S. 41, 45 (1921) (stating "there can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.")

124. State v. Talley, 858 P.2d 217, 227 (Wash. 1993).

or bodily injury. Peaceful picketing would not be proscribable under such a statute because it lacks the requisite intent to constitute criminal activity. Wearing political attire and following a candidate would not constitute stalking absent the intent to harm. Once an individual acts with the intent to harm, his activity would most likely be deemed not protected under the First Amendment.

It is difficult to determine what types of protected activity could be proscribed by the stalking statutes that would make the statutes overbroad. In a case by case analysis, a court would require both conduct and intent to harm before convicting someone. As in *Broadrick*,[125] the Court noted that any hypothetically remote application of the statute to protected or innocent conduct would not fall under the sweep of the statute; a case by case analysis of the facts would show that the protected conduct does not meet the statute's requirements to convict.[126] Any possible impermissible applications of the statute would not exist because the facts before the court could not support a conviction.

B. Stalking Statutes Are a Permissible, Content-Neutral Regulation of Conduct

As a threshold matter, a court must determine whether the conduct proscribed by a challenged stalking statute is protected by the First Amendment.

Stalking may well be considered expressive. In *Spence v. Washington*,[127] the Court discussed when activity should be considered protected expression.[128] The Court considered the nature of the activity involved, the factual context, and the environment in which the activity was undertaken.[129] The Court looked to whether the activity is designed to communicate an idea and whether a reasonable person would understand this intent.[130] In a stalking situation, a person threatens another individual. That person conveys a message, albeit a negative one. When a person follows another or sends numerous letters, that may be an expression of affection and warm feelings. For example, a person may be obsessed with a movie star and may send him love letters expressing this obsession.[131] The fan is expressing a message to its star. The recipient, of course, understands that the fan reveres him.

Abortion protesting probably constitutes protected expressive conduct: the protesters are expressing their opposition to abortion. They have the intent to convey this opposition. The likelihood that a reasonable person would understand this message is high. In fact, picketing on issues of public concern, such as the abortion debate, has been held to be protected by the First Amendment.[132]

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125. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973).

126. *Id.*

127. Spence v. Washington, 418 U.S. 405 (1974). In *Spence*, the defendant was convicted, under a Washington statute, for improperly using the American flag for exhibition or display. The Court held that the statute was unconstitutional as applied to a college student in hanging a privately owned United States flag, upside down, with a peace symbol affixed, out of his window on private property, as a means of expressing his opinion that America stood for peace. *Id.* Before addressing whether the statute was a permissible infringement of First Amendment rights, the Court first examined whether the activity was protected. *Id.* at 409.

128. *Id.* at 410.

129. *Id.*

130. *Id.*

131. In the case of actress, Rebecca Shaeffer, her obsessed fan sent numerous letters expressing his feeling towards her.

132. Frisby v. Schultz, 487 U.S. 474 (1988) (concluding that abortion picketing about a residence or dwelling to be protected expressive conduct); Amalgamated Food Employees Union Local 590 v.

A protester's behavior that transcends mere picketing should technically be considered expressive conduct. In the Florida incident, the defendant protested at the abortion clinic where the victim worked. The defendant also followed his victim, took pictures of her, and attempted to obstruct her view as she drove her car.[133] The defendant made gestures toward his victim allegedly implying that he wanted to shoot her.[134] This activity, despite its nature, technically meets the criteria under *Spence* to warrant constitutional protection as expressive activity. The defendant maintains the intent to convey a message. He opposes the activities of the victim. In all likelihood, his victim and a reasonable person viewing the situation would understand that his repeated efforts indicate an opposition to abortion. This activity technically should be considered expressive conduct under the First Amendment.

A strong argument can be made, however, that stalking is not worthy of First Amendment protection because the activity falls within the category of unprotected speech, "fighting words", or constitutes unprotected threats.[135] In *R.A.V.*, the Court discussed the burning of crosses as protected first amendment activity.[136] The Court noted that the action itself may be proscribed as fighting words, but specifically singling-out the content of the words for regulation (making the regulation content-based) is not allowed.[137] Stalking is threatening activity. A conviction requires the intent to harm and repeated conduct. Regardless of the message meant to be conveyed by the activity, the actions are proscribable conduct meant to "inflict injury."[138]

If stalking, arguendo, is deemed worthy of First Amendment protection, anti-stalking statutes would nonetheless sustain constitutional muster. The statutes, after all, would not proscribe any speech protected by the First Amendment. Stalking activity, when shown to have an intent to threaten, would not be protected under this exemption. Assuming that stalking activity encompasses some expressive conduct protected by the constitution, the statutes are still constitutionally permissible. They only reach activity intended to cause harm.

Once the conduct is deemed expressive and protected by the First Amendment, the court will apply one of two standards of review to expressive conduct: strict scrutiny or the *O'Brien* test.[139] Which standard applies depends on whether the challenged statute is content-neutral (*O'Brien*) or content-based (strict scrutiny). The proper standard with which to examine stalking statutes is the *O'Brien* test because such statutes are content-neutral regulations of criminal conduct.[140] In Florida's stalking statute, for

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Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (holding picketing at a supermarket in a shopping center to be protected conduct).

133. *Abortion Protester Pleads No Contest in Stalking Case*, *supra* note 3, at 18A.

134. Earlier in the year, a physician was shot to death during an anti-abortion demonstration. The defendant in this case made gestures to the victim, pointed to them and said "bang, bang" on the day after the doctor was shot. *Id.*

135. *See supra* notes 81-87 and accompanying text.

136. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

137. *Id.* at 2544 (citing Texas v. Johnson, 491 U.S. 397 (1989) and noting that activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable whereas burning a flag in violation of an ordinance against dishonoring the flag is not).

138. *See supra* note 84 and accompanying text.

139. *See* Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563 (1993).

140. Stalking statutes, in general, do not make an exception for certain types of conduct. Illinois' stalking statute, for example, makes a specific exemption to that activity that arises out of a bona fide

example, a person is guilty of felony stalking if he "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."[141] To be convicted of stalking in Florida, the defendant needs to: 1) commit the act of following or harassing on more than one occasion, 2) with the intent to place that other individual in fear of death or injury and 3) makes this threat credible.[142] To be convicted of stalking in North Carolina, a person must willfully follow another "with the intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury."[143] Similar to the Florida statute, the crime in North Carolina requires an intent to put a person in fear through their actions.

In examining these statutes, the proscribed conduct requires transmittal of fear to the victim and the intent to transmit such fear. A stalking statute, therefore, would not prohibit peaceful picketing outside of a business in opposition to its buying policies. In this situation, the picketers would lack the intent to put someone in fear of injury, as required by the statute. The stalking statutes would not encompass consistent phone calls to political constituents seeking their support for an upcoming election—the intent to put someone in fear of injury would be lacking. Regardless of what a person is trying to convey through his activity, he will be convicted only if he intends to place his victim in fear of injury.

In each stalking statute, the legislature does not distinguish among the messages conveyed by the prohibited activity. One stalker may choose to express his love of a star through his actions. Another stalker may choose to follow a former girlfriend in an attempt to gain her love once again. Another stalker may choose to follow a presidential hopeful to show his undying support of the candidate's views. Yet another may choose to follow a doctor who performs abortions around town day and night. If the stalker has the intent to put the victim in fear of bodily injury, only then may he be convicted under the statutes. The fact that each of these individuals expresses a different message is irrelevant to conviction under the statute. The statute is applied to all individuals who engage in fear-inducing activity. It is behavior that is targeted, not the beliefs.

To illustrate this point, it is helpful to examine certain cases where the court has held the state regulation to be content-based. In *R.A.V. v. City of St. Paul*,[144] the defendant challenged his conviction under a Minnesota statute that prohibited bias-motivated disorderly conduct.[145] In holding the statute unconstitutional, the Court applied a strict scrutiny standard of review because the statute was content-based.[146] Not all disorderly conduct under the statute was prohibited—only bias-motivated conduct

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labor dispute. This distinction would make the statute content-based and therefore subject to the higher strict scrutiny standard. Illinois' statute, however, is the only statute that makes such an explicit content distinction. Consequently, this Note examines the First Amendment implications based on the assumption that the statute does not, as do the majority of statutes, make an exemption for certain activity.

141. FLA. STAT. ANN. § 748.048(3) (West 1993).

142. Every state stalking statute thus far requires intent by the stalker to put the "stalkee" in fear of injury. *See, e.g.*, CAL. PENAL CODE § 646.9 (West 1992); ALA. CODE § 13A-6-90 (1993).

143. N.C. GEN. STAT. § 14-277.3 (1994).

144. R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992).

145. *Id.*

146. *Id.*

could be reached. In *Texas v. Johnson*,[147] the Court held a state statute that prohibited burning of a United States flag to be unconstitutional under the strict scrutiny standard.[148] Under the ordinance, only flag burning done to dishonor the flag was proscribable.[149] In both of these cases, one could only be convicted under the statute if the content of the message being conveyed was a specific message. The statute made a distinction based on the content of the conduct.

Although not dispositive in determining whether a statute is content-based, the motive behind enacting the statutes may be a factor in the content-based, content-neutral determination.[150] The first stalking statute was enacted in response to several well publicized cases of individuals being stalked.[151] Several of the enacted statutes include findings that the stalking statute was enacted to criminalize the harassing behavior.[152] The statutes were not enacted with the intent to distinguish among messages propounded by activities. The stalker's conduct, not message, was proscribed.

As content-neutral regulations, stalking statutes should be examined using the *O'Brien* test. The first prong inquires whether the regulation is within the government's regulatory power.[153] The Supreme Court has held that it is within the state's power to proscribe harmful conduct.[154] The state, therefore, can legitimately proscribe this harmful harassing activity.

The second prong of the *O'Brien* test requires that the regulation further an important or substantial government interest.[155] In enacting stalking statutes, the state maintains an interest in protecting the well-being and privacy of the home.[156] Residential privacy has been the hallmark of a "free and civilized society."[157] Stalkers often follow their victims home. In the Texas case, abortion protesters followed the doctor up and down the street in front of his home and placed crosses in the front lawns of other residents on the street.[158] Because the state maintains an important interest in protecting the privacy of the home, it may proscribe this conduct that impedes the enjoyment of the victims' privacy at home.

States also maintain the general regulatory power to provide for the well-being of their citizens. In protecting its citizens from harassing and threatening activity by criminalizing stalking, the state protects the well-being of its citizens.

Stalking statutes satisfy the means element of the *O'Brien* test as well. This

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147. Texas v. Johnson, 491 U.S. 397 (1989).

148. *Id.*

149. *Id.* at 406-07.

150. *See id.* at 397.

151. In 1989, actress Rebecca Shaeffer was shot and killed by an obsessed fan. Her killer had written numerous letters and had traveled on several occasions to communicate with her. Leeson, *supra* note 9, at 22-24. In five unrelated California cases, boyfriends or ex-husbands harassed and killed their respective partners. Their actions prior to the murders were not considered criminal conduct under the then-present state law. Quinn, *supra* note 10, at B3.

152. Sponsors of the stalking legislation in North Carolina, for example, commented that the laws would allow for a person being stalked to gain protection by arresting the stalker. Marvin, *supra* note 23, at 15A.

153. United States v. O'Brien, 391 U.S. 367, 376 (1968).

154. Minnesota *ex rel.* Whipple v. Martinson, 256 U.S. 41, 45 (1921).

155. *O'Brien*, 391 U.S. at 376.

156. Frisby v. Schultz, 487 U.S. 474, 484 (1988).

157. Carey v. Brown, 447 U.S. 455, 471 (1980).

158. Terri Williams, *No Arrests of Abortion Protesters Pickets at Doctors' Homes Unswayed by Court Action*, HOUS. POST, June 27, 1993, at A23.

prong requires the means used in proscribing expressive conduct to be rationally related to a legitimate end. In this case, stalking statutes are designed to proscribe threatening conduct. It is rational for a state to prohibit conduct that is threatening to its citizens. The legislature easily could have determined that this was the best way to stop the behavior. Whether alternatives exist to reach a specific end is not an issue in a rational basis means-end analysis. The means used need only be rational, and not be the least onerous alternative. Stalking statutes, therefore, meet this rational basis standard.

V. CONCLUSION

Anti-stalking statutes were enacted to protect men and women from harassing, threatening activity. The activity being proscribed by the statutes transcends mere expressive conduct. Stalkers place their victims in fear of harm. This type of activity is not worthy of constitutional protection. States have the right to protect their citizens from those who place them in fear.

Anti-stalking statutes, as content-neutral regulations, may permissibly limit collateral expressive activity. States maintain legitimate concerns in protecting their citizens from harm, especially near the confines of their own home.

Legislators must be forewarned, however, to carefully draft stalking statutes to avoid constitutional challenges. Of primary importance is to draft the legislation to be content-neutral. By doing so, the statutes will be scrutinized under the less onerous *O'Brien* standard and are more likely to withstand scrutiny. The statutes should also be precisely drafted to require specific actus reus and mens rea elements for conviction. These elements will lessen the chance of potential overbreadth challenges. By carefully constructing the statutes, legislators will be able to effectively protect their citizens from stalkers while maintaining permissible restrictions on our precious First Amendment rights.

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