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The Nature and Constitutionality of Stalking Laws

I. INTRODUCTION

In 1989, an obsessed fan shot and killed actress Rebecca Schaeffer at the front gate of her Los Angeles apartment.[1] Soon thereafter, in unrelated incidents, five Orange County women were slain at the hands of their intimate partners.[2] All of the killings shared two common at-

1. Fred Leeson, *Inside the Mind of a Star Stalker*, Crimebeat 20, 25-26 (Apr. 1992).

2. James Quinn, *Man Pleads No Contest in 'Stalking' Case*, L.A. Times B3, B5 (July 23, 1991); Rosalind Resnick, *States Enact 'Stalking' Laws; California Takes Lead*, Nat'l L. J. 3 (May 11, 1992).

tributes: the killers had stalked their victims incessantly, and the justice system had been unable to intervene.[3]

Suddenly conscious of the inadequacy of current law, the California legislature responded in 1990 by creating the nation's first stalking law.[4] The statute criminalizes the repeated harassment or following of another person in conjunction with a threat.[5] California is enforcing the law aggressively.[6]

Thirty states have followed California's move and enacted stalking laws.[7] The brutal killing of at least one woman in each state usually has prompted the passage of these laws.[8] Many of the statutes are identical to the California law,[9] but a few differ substantially in both scope and language.[10] Some target repeated harassment;[11] others target only literal

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3. Rebecca Schaeffer's killer, Robert John Bardo, had written numerous letters and had traveled from Tucson to Los Angeles three times in an attempt to communicate with the actress. Leeson, Crimebeat at 22-24 (cited in note 1). All five of the Orange County women were harassed and killed by boyfriends or ex-husbands, against whom they had obtained restraining orders. Quinn, L.A. Times at B5 (cited in note 2).

4. Cal. Pen. Code § 646.9 (West 1992).

5. Id. See notes 85-99 and accompanying text.

6. The Los Angeles Police Department has created a special group, the Threat Management Unit, to handle stalking cases. The unit has investigated 178 cases and prosecuted 29, with a 100% conviction rate. Telephone Interview with Officer Joseph Montes, Threat Management Unit, Los Angeles Police Dept. (Jan. 7, 1993). See John C. Lane, *Threat Management Fills Void in Police Services*, Police Chief 27 (Aug. 1992).

7. The total number of states with stalking laws, including California, is 31. See 1992 Ala. Acts 675; Cal. Pen. Code § 646.9 (West 1992); 1992 Colo. Rev. Stat. § 18-9-111; 1992 Conn. Pub. Acts 237; 68 Del. Laws 250 (1992); 1992 Fla. Laws 208; 1992 Hawaii Sess. Laws 292; Idaho Code § 18-7905 (1992); 1992 Ill. Laws 871; 1992 Iowa Legis. Serv. 2025 (West); 1992 Kan. SB 358; 1992 Ky. Rev. Stat. & Rules Serv. 443 (Baldwin); 1992 La. Acts 80; Mass. Ann. Laws ch. 265, § 43 (Michie/Law Co-op 1992); Mich. H.R. 5472 (1992); 1992 Miss. Laws 532; 1992 Neb. Laws 1098; 1992 N.J. Laws 209; N.Y. Pen. Law § 240.25 (McKinney 1989 & Supp. 1993); 1992 N.C. Adv. Legis. Serv. 804; Ohio HR 536 (1992); Okla. SB 667 (1992); 1992 R.I. Pub. Laws 201; 1992 S.C. Acts & Resol. 417; S.D. Cod. Laws § 22-19(A)-1 (1992); 1992 Tenn. Pub. Acts 795; Utah Code Ann. § 76-5-106.5 (1992); Va. Code Ann. § 18.2-60.3 (1992); 1992 Wash. Laws 186; W. Va. Code § 61-2-9(a) (1992); Wis. Stat. § 947.013 (1989-90) (amended by 1991 Wis. Act 194).

8. Melinda Beck, *Murderous Obsession*, Newsweek 60 (July 13, 1992). See, for example, M.E. Malone, *Assaults on Women, Problems, Prevention*, Boston Globe 17 (Feb. 21, 1992); Elizabeth Ross, *Problem of Men Stalking Women Spurs New Laws*, Christian Sci. Mon. 6 (June 11, 1992); *Man Charged with Murder Soon After New Law Bans It*, Hartford Courant C11, (Oct. 2, 1992); John W. Fountain and Joseph Kirby, *Stalking Victims Find Laws Are Little Help*, Chi. Trib. 1D (Aug. 5, 1992).

9. See, for example, Del. Laws 250 (1992); 1992 R.I. Pub. Laws 201; Utah Code Ann. § 76-5-106.5 (1992).

10. See, for example, Mich. H.R. 5472 (1992); W. Va. Code § 61-2-9(a) (1992).

11. See, for example, 1992 Fla. Laws 208.

stalking, such as following and surveillance.[12] Some require a threat,[13] others only conduct.[14] Further differences abound.

No stalking statute has faced a constitutional challenge at the appellate level.[15] Yet, since their inception, the statutes have been the source of much controversy. Civil libertarians claim that stalking laws contravene the Constitution by making criminal and innocent behavior indistinguishable and by infringing on First Amendment rights.[16] Others criticize the statutes as a politically safe shortcut that legislators have adopted to address a pervasive crisis too complex for a single law.[17]

In October 1992, Congress recognized the need for comprehensive stalking legislation that will pass constitutional muster, and it enacted a law charging the National Institute of Justice with the duty of drafting a model stalking law.[18] The Institute has one year from the law's enactment to research and develop the model law, which will serve as a guide for states wishing to enact stalking legislation or to solidify their current stalking laws.[19] Meanwhile, states continue to enact and enforce their own stalking laws.[20]

This Note will analyze the language and scope of stalking laws and various aspects of their constitutionality. Part II discusses the nature of

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12. See, for example, 1992 Conn. Pub. Acts 237.

13. See, for example, Cal. Pen. Code § 646.9; 1992 Ill. Laws 871.

14. See, for example, 1992 Fla. Laws 208; Conn. Pub. Acts 237; Idaho Code § 18-7905 (1992); 1992 Hawaii Sess. Laws 292.

15. *Nightline: Anti-Stalker Laws* (ABC television broadcast, Sept. 3, 1992) (available in LEXIS, Nexis Library, News File) (hereinafter *Nightline*).

16. See, for example, Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J. 35 (Nov. 1992) (declaring tbat stalking laws are void for vagueness); Resnick, Nat'l L. J. at 3 (cited in note 2) (quoting Jeffrey Weiner of Miami's Weiner, Robbins, Tunkey & Ross, stating that stalking laws "will not pass constitutional muster"); *Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) (available in LEXIS, Nexis Library, News File) (concluding that stalking laws could possibly be used against political dissidents); *Sonya Live: Stalking* (CNN television broadcast, October 2, 1992) (available in LEXIS, Nexis Library, News File) (declaring that stalking laws have the propensity to be abused).

17. See Maria Puente, *Legislators Tackling the Terror of Stalking*, USA Today 9A (July 21, 1992) (quoting Phil Gutis of the ACLU, stating "[i]t allows the governors and legislatures to say, 'We did something,' and it doesn't cost them anything"); *Nightline* (cited in note 15) (airing the statement of Professor Jonathan Turley, George Washington University: "[L]egislators want a silver bullet, and to be able to say, 'I got rid of stalking overnight.' That's not going to happen.").

18. Pub. L. No. 102-395 (1992). The law directs the Attorney General to develop a model stalking law through the National Institute of Justice, the criminal law research arm of the Justice Department. Id.

19. Id. The law is to be sufficiently broad to proscribe stalking behavior effectively, yet narrow enough to survive a constitutional challenge. *Anti-Stalking Legislation, 1992: Hearings on S.2922 Before the Senate Judiciary Committee*, 102d Cong., 2d Sess. (1992) (hereinafter *Hearings*) (unpublished statement of Maine Senator William S. Cohen, available from Senator Cohen's office). Senator Cohen sponsored the stalking bill.

20. See, for example, Mich. H.R. 5472 (1992).

stalking behavior and the past failures of the legal system to address it adequately. Part III analyzes stalking laws that various states have enacted, focusing on the California, Florida, and Connecticut statutes as representative examples. In Part IV, this Note addresses potential constitutional challenges to stalking statutes.[21] First, it analyzes whether the statutes violate substantive due process by creating criminal liability before the stalker has demonstrated culpability. It concludes that the statutes are constitutional under this aspect of substantive due process. Second, it addresses the constitutionality of stalking laws under the void for vagueness doctrine, concluding that some stalking statutes are unconstitutionally vague while others survive vagueness scrutiny. Part V proposes a model stalking statute that circumvents many of the vagueness problems present in current stalking laws. This Note concludes in Part VI with a call for states to enact comprehensive, effective stalking laws that meet constitutional requirements.

II. THE NATURE OF STALKING BEHAVIOR AND THE INADEQUACY OF TRADITIONAL LAW

Stalking[22] behavior varies widely in both its intensity and form. Some cases involve threatening and unceasing harassment;[23] other cases involve voluminous mailings of unsolicited love letters coupled with constant following;[24] still other instances consist of merely incessant following and surveillance.[25] Most of the victims are women, although sometimes men are targets.[26]

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21. This Note will not address First Amendment issues attached to stalking laws. It also will not address the overbreadth doctrine in depth, though potential overbreadth problems will be discussed when they are extremely obvious or important to the constitutionality of the model statute proposed in this Note. In addition, this Note will not address the constitutionality of warrantless arrest provisions or bail provisions sometimes contained in stalking statutes.

22. This article defines stalking as obsessive, repeated harassment—a series of minor intrusions that together show a pattern of malicious behavior directed at a specific individual. See generally Note, *A Remedial Approach to Harassment*, 70 Va. L. Rev. 507 (1984). Stalking statutes, however, vary in how they define stalking. See notes 85-93, 105-12, 135-41 and accompanying text.

23. See, for example, Michael Connelly, *Ex-Boyfriend Jailed Under 'Stalking' Law*, L.A. Times B1 (June 10, 1991).

24. See, for example, Park Elliot Dietz, *Threatening and Otherwise Inappropriate Letters to Hollywood Celebrities*, J. Forensic Sciences 185 (Jan. 1991). This condition is known as "erotomania." Note, 70 Va. L. Rev. at 512 n.14 (cited in note 22). See note 35 and accompanying text.

25. See, for example, Constance L. Hays, *If That Man Is Following Her, Connecticut Plans to Follow Him*, N.Y. Times B1 (June 5, 1992).

26. See *Women Ask Congress to Protect Victims of Stalkers*, Reuters (Sept. 29, 1992) (quoting testimony of Senator Joseph Biden, stating that most victims are women). John Lennon, Michael Jackson, and David Letterman are examples of men who have been stalked. Leeson, Crimebeat at 23-24 (cited in note 1).

Comprehensive data on stalking does not exist, since stalking has been classified as a crime category only recently.[27] Studies predict that about five percent of women in the general population will be victims of stalking sometime in their lives.[28] Even though much of the attention accorded to stalking focuses on the harassment of celebrities by obsessed fans,[29] statistics from Los Angeles show celebrity stalking there to comprise only seventeen percent of stalking as a whole.[30] Most victims of stalking are ordinary people,[31] and a great deal of stalking is related to domestic violence and former intimate relationships gone awry.[32]

Stalkers themselves seem to fit no general profile,[33] but many appear to have a mental disorder.[34] Some suffer from erotomania, a love obsession with a stranger who is usually of a higher class or is more successful than the stalker.[35] Many others harbor abandonment rage, a condition arising when the stalker is unable to process the hurt of a broken relationship.[36] Researchers estimate that approximately 200,000 people in the country stalk someone each year,[37] and this figure seems to be rising.[38]

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27. Beck, Newsweek at 60 (cited in note 8).

28. Puente, USA Today at 9A (cited in note 17).

29. For example, celebrity stalking is the only type of stalking that commentators have studied in deptb. Id.

30. Statistics from Los Angeles show that stalking victims consist of 17% highly recognizable celebrities, 32% lesser known entertainment fignres, 13% former employers or other professionals, and 38% other people. Id.

31. *Hearings* (cited in note 19) (statement of Senator William Cohen).

32. Ninety percent of women killed by husbands or boyfriends have been stalked. See Beck, Newsweek at 60 (cited in note 8). Fignres from Los Angeles show that at least 47% of stalkers know their victims. See Puente, USA Today at 9A (cited in note 17). See also *Hearings* (cited in note 19) (statement of Charles B. DeWitt, Director of the National Institute of Justice) (stating that family members and neighbors are most at risk from stalking behavior); *Nightline* (cited in note 15) (citing 1991 Justice Department statistics that 76% of violence against women is carried out by husbands/ex-husbands or boyfriends/ex-boyfriends).

33. Stalkers appear to come from all backgrounds, ethnic groups, and social classes. Cheryl Laird, *Stalking; Laws Confront Obsession That Turns Fear into Terror and Brings Nightmares to Life*, Houston Chron. 1 (May 17, 1992).

34. More than 90% of those engaged in celebrity stalking, the only type studied in depth, suffer from mental disorders. Puente, USA Today at 9A (cited in note 17).

35. The stalker usually has the deluded belief that the victim is in love with the stalker. See Kiley Armstrong, *Hate Abounds in the Name of Love*, Chi. Trib. 8 (Nov. 23, 1992); Note, 70 Va. L. Rev. at 512 n.14 (cited in note 22).

36. Armstrong, Chi. Trib. at 8 (cited in note 35) (quoting Dr. Reid Meloy, forensic psychologist).

37. See Puente, USA Today at 9A (cited in note 17).

38. In the past 20 years, as many attacks on public figures by mentally disordered people have been made as occurred in the preceding 175 years. Lane, Police Chief at 27 (cited in note 6) (quoting National Institute of Justice statistic). Domestic violence seems to be increasing, indicating that stalking, which is closely related, also is increasing. In Massachusetts, for example, the number of women killed by current or former husbands and boyfriends has tripled in two years.

Victims suffer substantial and lasting emotional injuries from their ordeal.[39] The greater danger, however, is that the obsession which stalking exposes is often a precursor to more violent crime.[40] The stories are numerous[41] and the figures staggering. Thirteen hundred women per year—nearly one-third of all women murdered each year—are slain at the hands of their intimate partners,[42] and ninety percent have been stalked by their slayer.[43] Further, rape and assault victims usually see their attackers repeatedly before the crime occurs.[44]

The inability of the justice system to intervene in this type of obsessive harassment is unsettling. Ninety percent of women slain by their intimate partners have called the police at least once; fifty percent have called five times or more.[45] One-fifth of all women murdered have been attacked previously by their killer.[46] State authorities inform those victims of stalking who seek legal protection that the legal system will not intervene until the perpetrator has "done something" or harmed them physically.[47] Victims question how far stalkers must go before the law will intervene: "What must he do? Kill me? Rape me?"[48] Many

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Colman McCarthy, *Better Protection for Women in Danger*, Wash. Post A3 (June 13, 1992). See also *News Release*, Mass. Off. Att'y Gen. 3 (March 30, 1992) (Massachusetts Attorney General Scott Harshbarger testifying before the Massachusetts Joint Committee on Criminal Justice, stating that "domestic violence . . . seems to be escalating in frequency and severity").

39. Note, 70 Va. L. Rev. at 513 n.24 (cited in note 22) (citing Linda M. Gunderson, Comment, *Criminal Penalties for Harassment*, 9 Pac. L. J. 217, 219 (1978), stating that "[t]be results of one study showed that women who received anonymous, obscene, or threatening telephone calls exhibited more anxiety than those who had been victims of serious physical assaults and thefts"). See also Laird, Housten Chron. at 1 (cited in note 33).

40. See Beck, Newsweek at 60 (cited in note 8).

41. *Hearings* (cited in note 19) (testimony of Jane McAllister and Sandra Poland); Fountain and Kirby, Chi. Trib. at 1D (cited in note 8).

42. Federal Bureau of Investigation, Uniform Crime Rep. 11 (1986). See Ann Jones, *Her Say: Time to Get Tough on Violence*, Chi. Trib. W11 (Apr. 5, 1992).

43. See Beck, Newsweek at 60 (cited in note 8); *Hearings* (cited in note 19) (statement of Sen. William Cohen); Joseph Kirby, *Law Enforcement Takes a New Approach to Domestic Violence*, Houston Chron. 3 (Aug. 23, 1992).

44. See Laird, Houston Chron. at L1 (cited in note 33).

45. *Hearings* (cited in note 19) (statement of Sen. William Cohen).

46. See *Anti-Stalking Laws Considered by Virginia* (Nat'l Pub. Radio broadcast, Mar. 10, 1992) (available on LEXIS, Nexis Library, News File).

47. *Hearings* (cited in note 19) (statement of Sandra Poland). See Louise Palmer, *Maine Woman Stalked for Eight Years*, States News Serv. (Sept. 29, 1992).

48. See Beck, Newsweek at 60 (cited in note 8) (quoting stalking victim as asking, "What does he have to do—shoot me?); Palmer, States News Serv. (cited in note 47) (quoting Sandra Poland testifying before the Senate Judiciary Committee, saying "What is the 'something' [police] must wait for him to do? Kidnap [her]? Rape her? Kill her?").

victims are forced to change their lifestyles drastically, or even to relocate and change their names in order to escape their pursuers.[49]

The law provides both civil and criminal means for addressing behavior such as stalking, but the traditional legal tools available often have proven inadequate.[50] Civil remedies available to the victim include common law actions for damages, such as trespass, assault, invasion of privacy, or intentional infliction of emotional distress.[51] The victim may opt instead for civil injunctive relief, such as a restraining order.[52] But all of these civil remedies are problematic. First, civil action requires that the victim, rather than the justice system, actively pursue the cause for relief.[53] This individual action is often expensive and can take months.[54] The cost alone may render civil aid inaccessible to those who need help the most.[55] Second, damage remedies are useless if the stalker has little wealth or is insolvent. Injunctive remedies can be equally useless depending on state requirements for issuance. Florida, for example, requires a showing of two acts of violence before a court may issue a restraining order.[56] Third, violations of injunctive orders may require the victim to return to court to have the order enforced, and the resulting sanctions generally are light.[57] Punishment is often civil contempt, which courts can sometimes dismiss if the violator agrees to right the wrong.[58] Additionally, criminal contempt yields only minor penalties.[59] Fourth, enforcement is lax, and violations are ram-

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49. See, for example, Puente, USA Today at 9A (cited in note 17) (noting that one woman has lived in hiding for six years to escape a stalker); Ross, Christian Sci. Mon. at 6 (cited in note 8) (relating story that a woman was forced to move to escape her stalker).

50. For a detailed discussion of conventional legal remedies for harassment, see Note, 70 Va. L. Rev. 507 (cited in note 22).

51. Id. at 516-22.

52. Id. For purposes of this Note, civil injunctions include protective orders, restraining orders, and other similar court orders.

53. Id. at 514 (stating that victims must bear the initial cost of litigation, potentially increasing their suffering); Kenneth R. Thomas, *Anti-Stalking Statutes: State Legislation*, Cong. Research Serv. Rep. 5 (Aug. 25, 1992) (stating that victims are responsible for initiating civil protection proceedings, proving case, obtaining a protection order, and then seeking sanctions for violations).

54. Thomas, Cong. Research Serv. Rep. at 4-5 (cited in note 53) (observing that the victim usually must hire a lawyer, pay court costs, and develop a case and that a protection order may take months to obtain).

55. Id.

56. See Resnick, Nat'l L. J. at 3 (cited in note 2).

57. Thomas, Cong. Research Serv. Rep. at 5 (cited in note 53). See generally Finn, *State-By-State Guide to Enforcement of Civil Protection Orders*, 14 Response 1 (1991).

58. Thomas, Cong. Research Serv. Rep. at 4-5 n.17 (cited in note 53) (noting that a violator is released from jail if he agrees to comply with a court order or if judge allows him to 'undo' behavior).

59. Sanctions rarely exceed six months incarceration. Id. at 5.

pant.[60] Often police do not know restraining orders are in effect, or they fail to arrest those who violate such orders.[61] Finally, the civil system lacks adequate deterrence.[62] Violence against the victim often occurs while the court orders are in effect,[63] and police sometimes even find written restraining orders with the bodies of murder victims who had been stalked.[64]

Criminal sanctions are equally problematic. Harassment laws are the most appropriate means for combatting stalking, but traditional harassment law is not sufficiently comprehensive. In most states, harassment laws apply solely to telephone and verbal harassment.[65] Only a few states have provisions that criminalize the following of a person with the intent to alarm or intimidate,[66] or that prohibit engaging in intentional conduct which alarms or harasses another.[67] The courts of some of the states with these provisions have found their statutes unconstitutional.[68] In addition, harassment laws fail to address repetitive, obsessive behavior.[69] Some statutes require that each act in a series of acts against the same victim be proven as separate and distinct misdemeanors.[70] Subsequent offenses rarely are felonies,[71] and the result is an

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60. During a five month period in Illinois in 1992, citizens reported 35,346 violations of protection orders. Linda Mae Caristone, *The Stalkers: 'Every Day Might Be My Last,'* Chi. Trib. 3 (Sept. 13, 1992). In Massachusetts, 2000 restraining orders were issued between September and December 1991, and over one-third were violated within the first few days. David Holmstrom, *Efforts to Protect Women from 'Stalkers' Gain Momentum at State, Federal Levels*, Christian Sci. Mon. 1 (Dec. 22, 1992).

61. Thomas, Cong. Research Serv. Rep. at 5 (cited in note 53). Police may not even have the authority to arrest for violations of protection orders in states where the penalty is only civil contempt. Id.

62. Note, 70 Va. L. Rev. at 521 (cited in note 22).

63. For example, in Massachusetts hetween January and June 1992, 19 women and children were slain in domestic violence, and at least half had protective orders against their killers. Ross, Christian Sci. Mon. at 6 (cited in note 8).

64. See, for example, Beck, Newsweek at 60 (cited in note 8) (relaying the story of police finding a restraining order in the purse of a murdered stalking victim).

65. Note, 70 Va. L. Rev. at 523-25 (cited in note 22). See, for example, Ill. Ann. Stat. ch. 134, § 16.4-1 (Smith-Hurd 1986); La. Rev. Stat. Ann. § 14-285 (West 1986).

66. See, for example, Ark. Stat. Ann. §§ 41-2909, 2910 (1977); Colo. Rev. Stat. § 18-9-111 (1978); N.Y. Pen. Law §§ 240.25-.30,.31 (McKinney 1989 & Supp. 1993). See generally Note, 70 Va. L. Rev. at 525, 537-44 (cited in note 22).

67. See, for example, Ark. Stat. Ann. §§ 41-2909, 2910 (1977); Colo. Rev. Stat. § 18-9-111 (1978) (held unconstitutional in *People v. Norman*, 703 P.2d 1261 (Colo. 1985)); N.Y. Pen. Law §§ 240.25-.31 (McKinney 1989 & Supp. 1993).

68. See, for example, *Norman*, 703 P.2d at 1261 (holding unconstitutional as void for vagueness the catch-all provision of a harassment statute).

69. Massachusetts Attorney General L. Scott Harshbarger has noted that current law leaves a void in cases of "continuous, escalating and dangerous conduct." Beverly Ford, *Officials Urge OK for Anti-Stalker Bill*, Boston Herald 10, 10 (Mar. 31, 1992).

70. Id. (quoting Massachusetts Attorney General L. Scott Harshbarger).

endless cycle of misdemeanor charges insufficient to deter the stalker.[72] Rather than delegitimizing the conduct,[73] the statutes actually downplay the significance of serious harassment and stalking.[74] The stalker must therefore "do something," such as physically attack the victim, before the law will strongly intervene.[75]

Lack of understanding in the legal community about the nature of obsessive behavior has contributed further to the inadequacy of legal intervention.[76] Some police departments do not view harassment and stalking as serious, and the result is inadequate enforcement.[77] Prosecutors sometimes are hesitant to press for harassment convictions because the punishment is too light to effect deterrence.[78] Judges may give little time on busy dockets to requests for restraining orders,[79] perceiving harassment as no more than a minor inconvenience for the victim.[80]

The justice system as a whole, therefore, has failed to respond to the problem of obsessive behavior. This phenomenon has combined with the law's longstanding resistance to recognizing the seriousness

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71. See Thomas, Cong. Research Serv. at 3 (cited in note 53); Note, 70 Va. L. Rev. at 526 (cited in note 22). See also Model Pen. Code § 250.4 (1980) (classifying harassment as a petty misdemeanor).

72. Note, 70 Va. L. Rev. at 526 (cited in note 22).

73. Id. at 515, 526 n.103 (concluding that criminal sanctions tend to delegitimize behavior).

74. Id. at 526 n.103 (citing Johs Andenaes, *General Prevention—Illusion or Reality?*, 43 J. Crim. L. & Criminology 176, 192 (1952), stating that the severity of the sanction reflects society's distaste for the behavior). The minor penalties that prior law imposed reflect a perception that harassment is insignificant. Id. at 526.

75. See notes 47-49 and accompanying text.

76. Holmstrom, Christian Sci. Mon. at 1 (cited in note 60) (stating that the "judiciary [is] inclined to see domestic violence not as a crime, but rather as a domestic issue").

77. See, for example, the tragedies of *Riss v. New York*, 240 N.E.2d 860 (N.Y. 1968) (victim Riss repeatedly begged police for help but police denied her assistance; her ex-boyfriend hired a thug who threw lye in her face, permanently disfiguring her and partially blinding her); *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) (victim Thurman's estranged husband repeatedly threatened and attacked her; police refused to take action and her husband eventually attacked her with a knife and stabbed her repeatedly).

78. Note, 70 Va. L. Rev. at 521 (cited in note 22).

79. See Patricia Nealon and Sean P. Murphy, *Thwarting the Killers is Complex, Elusive Goal*, Boston Globe 1 (June 2, 1992) (quoting Jean Haertl, intervention worker in domestic violence cases, as stating that "[w]ith dwindling resources and overcrowded courtrooms, judges have no time to spend on [protective order] cases").

80. One judge, pressed for time, recently ordered mediation when the victim of an obscene caller sued for an injunction. Mike Royko, *Mediation Order Is an Obscene Call*, Chi. Trib. 3 (Sept. 18, 1992). Observers accuse some judges of telling domestic violence victims to "work it out" with their spouse. See Bella English, *A Lifer's Story, a Mother's Plea*, Boston Globe 27 (Aug. 19, 1992). Ironically, Sol Wachtler, Chief Judge of the New York Court of Appeals, recently was indicted for harassing and threatening his former girlfriend. Since their break-up a year ago, he allegedly has made threatening phone calls and mailed sexually explicit letters. Associated Press, *Judge Accused of Threatening Ex-Girlfriend*, L.A. Times A24 (Nov. 8, 1992).

and tangibility of emotional harm.[81] The general sentiment has been that obsessive behavior that causes only mental anguish is not serious conduct, and therefore it does not warrant a serious remedy.

All of these factors have created a gap in the law,[82] leaving victims of stalking without an adequate legal recourse against their pursuers. Stalking laws represent a new attempt to fill this void and deal seriously with the problems of obsessive harassment.[83]

III. The Nature of Stalking Laws

As the first law of its kind, the California stalking law has become a model for other states enacting stalking legislation.[84] The more recent Florida and Connecticut stalking laws, although different, contain attributes common in other stalking laws. The combined attributes of these three laws are fairly representative of stalking laws as a whole.

A. The California Stalking Law: The Credible Threat Model

The California stalking law[85] criminalizes intentional obsessive har-

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81. Physical harm is perceived as much more tangible and real. The stringent requirements once imposed for proving emotional harm in tort are illustrative. See, for example, *Mitchell v. Rochester Ry.*, 45 N.E. 354 (N.Y. 1896) (requiring that wrongful act cause physical injury before emotional damages can be recovered); *Daley v. LaCroix*, 179 N.W.2d 390 (Mich. 1970) (requiring physical manifestations of emotional injury before allowing recovery).

82. See Ford, Boston Herald at 10 (cited in note 69) (quoting testimony of Massachusetts Attorney General L. Scott Harshbarger that a stalking bill will fill a void in cases of continuous, escalating conduct).

83. Id.

84. See note 9 and accompanying text.

85. Cal. Pen. Code § 646.9. The statute reads in full:

(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 of death or great bodily injury 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.

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

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

(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, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of conduct" means a pattern of conduct composed

assment by someone who makes a credible threat.[86] The statute has two actus reus[87] elements, each with separate intent requirements. First, the statute requires willful, malicious, and repeated following or harassment.[88] "Harassment" is used as a catch-all term, in order to reach any repeated intentional activity that a stalker may direct toward a victim. The statute defines "harasses" as requiring a course of conduct, which is a series of acts over a period of time that shows a continuity of purpose.[89] No minimum time period is specified.[90] The statute also does not define "following," but rather assumes that its meaning is clear. Second, the statute requires a "credible threat" that was intended to cause the victim to reasonably fear death or great bodily injury.[91] The perpetrator must have the intent and apparent ability to carry out the threat, and the victim must experience both subjective and objective fear.[92] The threat need not precede the other behavior.[93]

The statute excludes some constitutionally protected activity. For example, labor picketing is specifically excluded from the statute's reach.[94] The statute also creates a general exclusion of constitutionally

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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."

(e) For purposes of this section, "a credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

This section shall not apply to conduct which occurs during labor picketing.

86. Id.

87. "Actus reus" is the act requirement contained in criminal statutes. "Mens rea," used later in this article, is the intent requirement.

88. Cal. Pen. Code § 646.9.

89. Id.

90. Id.

91. Id. The statute requires that the stalker make, rather than merely pose, a credible threat. Therefore, the statute seems to require a verbal or written threat, rather than mere threatening conduct.

92. This seems to be required by the definition of "credible threat," but this definition is subject to two different constructions. The provision can be construed to mean that the victim must feel reasonable and actual harm, or that the stalker must intend that the victim experience reasonable and actual harm. California has moved to amend the definition of credible threat to include "any threat made in any manner or in any context which causes the person hearing or receiving the threat to reasonably fear for his or her safety or the safety of his or her immediate family." Cal. S.R. 1342 (1992). This proposed amendment will clarify the requirement that the victim experience both reasonable and actual fear. The current definition probably was intended to require this, because otherwise harassment, as defined in the statute, would require actual harm, but following, which is undefined, would not. This seems unlikely, but compare the Florida statute discussed in text accompanying notes 109-13.

93. Cal. Pen. Code § 646.9. Compare 1992 Ill. Laws 871. See notes 158-59 and accompanying text.

94. Cal. Pen. Code § 646.9(e).

protected activity through its definition of "harassment,"[95] but it fails to define "following" in a similar manner. Therefore, some constitutionally protected activity may fall within the statute's scope.[96]

The statute makes a first offense punishable by incarceration for up to one year in a county jail, or by a fine of not more than one thousand dollars, or both.[97] When the stalker violates a restraining order or injunction, or is convicted of a subsequent offense against the same victim within seven years, he may be incarcerated in a state prison.[98] The provisions regarding restraining orders and subsequent convictions reflect official recognition of the obsessive and continuing nature of the conduct.[99]

The California statute criminalizes much of the obsessive harassment that prior legislation failed to address. The statute reaches repeated intentional following where the stalker makes a threat with the intent to cause the victim serious emotional harm. But the statute's reach extends even further: if the stalker makes a threat, it proscribes any repeated action that the stalker intends to, and that actually does, cause the victim reasonably to fear bodily harm. The threat requirement places an outer limit on the reach of the statute and acts as a threshold to ensure that serious intent is present.

Bodybuilder Mark Bleakley's recent stalking of Leslie Wein is an example of the conduct that the California statute reaches. Bleakley began harassing Wein, his former girlfriend, after she ended their two-

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95. The definition of "harassment" includes "course of conduct," which is defined to explicitly exclude constitutionally protected activity. A requirement that harassment have "no legitimate purpose" also is an attempt to exclude constitutionally protected activity. Id. at § 646.9(d).

96. Critics fear that similar statutes may reach journalists or parents attempting to monitor children of whom they have been denied custody. See *Hearings* (cited in note 19) (statement of Sen. William Cohen). See also Seth Schiesel, *Federal Measure Would Bar Stalking*, Boston Globe 5 (July 2, 1992). It is doubtful, however, that these parties, especially journalists, would fit the other statutory requirements (such as making a threat with the intent to cause fear of serious bodily injury or death).

97. Cal. Pen. Code § 646.9.

98. Id. California has moved to increase the penalties for subsequent stalking offenses. Cal. S.B. 1342 (1992). Currently, the statute's language seems to increase punishment for subsequent offenses only by providing for incarceration in a state prison. Yet other sources indicate that punishment can be increased up to a maximum of three years. See id. See also James Quinn, *'Stalking' Law Violator Jailed a 2nd Time; Court: First Man Sentenced Under New Harassment Statute Was on Probation When He Went Looking for His Ex-Girlfriend*, L.A. Times B3 (Mar. 18, 1992) (stating that stalker Mark Bleakley was given a three-year sentence for subsequent offense). The maximum punishment for subsequent offenses is therefore unclear.

99. This provision ensures that injunctions are taken seriously and that subsequent barassment of the same victim is recoguized as recidivism (habitual criminal bebavior). Compare notes 60-64, 69-74 and accompanying text, and Robert J. Bender, *Stalking Bill*, Law Enforcement Newsl. 15, 17 (Off. of the Att'y Gen. of Mass. and the Dist. Att'y for Essex Co., July 1992) (stating that stalking laws recoguize that harassment is repeated even if the offender does not repeat the first type of conduct but changes to a different type of harassing conduct).

year relationship.[100] Bleakley called Wein's home tirelessly, hanging up when the phone was answered. He also slashed tires and poured acid on cars that Wein used, and eventually stole her collie, leaving photographs of the dog on cars outside of Wein's home.[101] Yet no witnesses could attest to Bleakley's acts until police were investigating damage to Wein's car and spotted Bleakley nearby in violation of a restraining order.[102] The next day, Bleakley phoned Wein at her office, saying, "I'm not just coming after your possessions, you'll be the next thing damaged."[103] A few days later, police observed Bleakley drive by Wein's house four times, and they arrested him on stalking charges. Bleakley was convicted of felony stalking.[104] He had intentionally threatened and repeatedly harassed Wein, causing serious and reasonable emotional distress, and the California stalking law provided strong criminal sanctions before Bleakley could carry out a physical assault.

B. The Florida Stalking Law: The Two-Tiered, Non-Credible Threat Model

The Florida stalking statute[105] is significantly broader than the California law. Although most of the language is virtually identical, the

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100. Quinn, L.A. Times at B3 (cited in note 98).

101. Id. The collie later was recovered unharmed. Id.

102. Id.

103. Id.

104. He was sentenced to seven months in a locked drug clinic, plus the five months he had served while awaiting trial. He also was given five years probation and ordered to leave Wein alone. Bleakley was allowed to leave the clinic for an afternoon, and immediately he went to the health clinic where Wein was a member and began looking for her car in the parking lot. Id. He was arrested again, and sentenced to the maximum three years in prison. Beck, Newsweek at 61 (cited in note 8).

105. 1992 Fla. Laws 208. The pertinent part of the statute reads:

(1) As used in this section:

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

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

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

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

(4) Any person who, after an injunction for protection against repeat violence . . . or an injunction for protection against domestic violence . . . or after any other court imposed prohibition of conduct toward the subject person or that person's property, knowingly, willfully,

Florida statute does not require a credible threat for a stalking conviction.[106] Instead, it defines stalking as willful, malicious, and repeated following or harassment.[107] It then creates a second offense for aggravated stalking, which requires a credible threat or a violation of a court order.[108]

Florida's stalking offense[109] requires that the stalker intend to inflict emotional harm on the victim.[110] But the stalking provision does not require that the victim's fear be objectively reasonable.[111] In addition, it requires subjective harm only in the definition of "harasses," so following that constitutes stalking is criminal even if the victim is unharmed.[112] These differences from the California statute greatly broaden the scope of the Florida law. Thus, the Florida statute's reach extends so far as to include intentional following that is intended to cause harm but does not cause objectively reasonable harm, and does not even cause subjective harm.[113]

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maliciously, and repeatedly follows or harasses another person commits the offense of aggravated stalking, a felony of the third degree . . . .

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

106. Id. A number of other states have created offenses that do not require credible threats. See, for example, Idaho Code § 18-7905 (1992); 1992 Hawaii ALS 292.

107. 1992 Fla. Laws 208 (cited in note 105).

108. Id.

109. In this Note "Florida's stalking offense" or "Florida's stalking provision" refers to the lesser stalking offense, as distinguished from Florida's aggravated stalking provision.

110. 1992 Fla. Laws 208 (cited in note 105). The statute includes "malicious" in its mens rea requirement. This probably requires that the stalker intend the injury which foreseeably results from the behavior. See Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* 856-61 (Foundation, 3d ed. 1982); *Black's Law Dictionary* at 958 (West, 6th ed. 1990) (defining "malicious"). When the stalker harasses the victim, the statute requires that the victim suffer substantial emotional harm. Therefore, "malicious" requires that the stalker intend that the victim suffer substantial emotional harm, the foreseeable result of harassment. This Note will assume that "malicious" does require that a stalker harassing a victim must intend to cause substantial emotional harm to the victim. If "malicious" does not require an intent to harm the victim, however, the statute imposes strict liability and may be unconstitutional. See note 163. When the stalker follows the victim, the statute does not require that the victim suffer subjective harm. Therefore, "malicious" requires for following only that the stalker have the intent to cause some degree of emotional harm to the victim. (Emotional harm, rather than any other kind of harm, is required because this is the only type of harm that following—unaccompanied by an assault or other menacing behavior—can be intended to cause). Thus, intent to cause annoyance or some other type of minor emotional harm is sufficient.

Note the extreme scope of the statute if it does not require an intent to cause harm for harassing or following: the statute would reach any intentional acts directed at a specific person that are not intended to cause harm and that do not cause objectively reasonable harm; the statute also would reach intentional following that is not intended to cause harm, does not cause objectively reasonable harm, and does not even cause subjective harm.

111. 1992 Fla. Laws 208 (cited in note 105).

112. Id.

113. Objectively reasonable harm refers to harm that a reasonable person would suffer, whereas subjective harm is the actual harm that a victim suffers.

The aggravated stalking provision of the Florida statute differs from the California stalking law in three notable ways. First, the aggravated stalking provision defines "credible threat" as a threat made with the intent to cause the victim reasonably to fear for her safety.[114] It does not require intent and apparent ability to carry out the threat, as does the California statute.[115] Second, aggravated stalking does not require subjective fear where the stalker follows, rather than harasses, the victim.[116] Third, and most significantly, the Florida statute allows an exception to the credible threat requirement of aggravated stalking where the accused has committed the lesser stalking offense in knowing violation of a court order.[117] In this situation, the statute creates criminal liability for aggravated stalking while reaching just as broadly as the stalking provision. The statute is almost as narrow as the California law, however, where a credible threat rather than a violation of a court order yields aggravated stalking. The credible threat imposes requirements of objectively reasonable fear and an intent to cause fear.[118]

Both the stalking and aggravated stalking provisions of the Florida statute exclude some constitutionally protected activity. Yet like the California law, the general exclusions are contained in the definition of "harasses,"[119] so constitutionally protected activity is not excluded where the stalker follows the victim.[120] The Florida statute has a specific exclusion for labor picketing and organized protests, but this exception also is contained in the definition of "harasses."[121]

The Florida law makes stalking a misdemeanor.[122] It makes aggravated stalking a felony.[123] By creating felony liability, the Florida statute breaks the endless cycle of misdemeanors that has rendered traditional legal remedies ineffective against stalking behavior.[124] In or-

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114. 1992 Fla. Laws 208 (cited in note 105).

115. Id. See note 92 and accompanying text.

116. Id.

117. Id. "Court order" here refers to any injunctions or similar orders requiring the stalker to stay away from the victim. See note 99.

118. 1992 Fla. Laws 208 (cited in note 105).

119. Id. See note 85 and accompanying text.

120. See Thomas, Cong. Research Serv. Rep. at 6 (cited in note 53). This may make the legislation unconstitutionally overbroad. For a concise discussion of overbreadth, see M. Sean Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. Cbi. L. Rev. 1403, 1405-06 (1989).

121. 1992 Fla. Laws 208. The harassment definition also contains the phrase "no legitimate purpose" in an attempt to exclude constitutionally protected activity. Id. See Model Pen. Code § 250.4 cmt.6 (1980).

122. 1992 Fla. Laws 208.

123. Id.

124. See note 72 and accompanying text.

der to improve enforcement, the Florida law also authorizes warrantless arrests of suspected stalkers if probable cause is present.[125]

Like the California statute, the Florida law reaches blatant stalking conduct such as that in which stalker Mark Bleakley engaged.[126] But the Florida law sweeps further than does the California law in critical stalking cases that lie near the margins of criminal behavior. It reaches cases where stalking consists only of conduct without a threat, such as where an erotomaniac follows a victim incessantly but fails to communicate at all, or makes only obscene rather than overtly threatening statements.[127] Erin Tavegia's ordeal is an example of such conduct.[128] A man began stalking Tavegia, now seventeen years old, when she was only fifteen.[129] He would park outside her home, appearing at all hours of the day and night.[130] He would slowly drive behind her as she walked to and from school each day, sometimes offering her money to get in his car, and often saying he would see her after school.[131] Yet he never made a threat or became sexually explicit when attempting to talk to her.[132] The Florida stalking law reaches this behavior because Tavegia's stalker followed her repeatedly with an apparent intent to cause emotional harm. The Florida law also would reach the stalker if he had harassed Tavegia repeatedly, rather than followed her, and had done so with the intent to cause emotional harm. The Florida law creates immediate criminal liability without requiring that the stalker physically attack, or even overtly threaten, the victim. The California statute, on the other hand, will not reach any of this conduct because the stalker has not made a threat.[133] The Florida statute therefore addresses important stalking cases that the California statute does not encompass. However, both the Florida and California statutes require intent, so stalkers who act out of deluded love rather than an intent to harm are excluded.[134]

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125. The constitutionality of this provision is beyond the scope of this Note. For a reasoned opinion concerning warrantless arrest provisions, see Opinion of the Attorney General of Kentucky, OAG 92-96, 1992 Op. Att'y Gen. Ky. LEXIS 91 (June 12, 1992).

126. See text accompanying notes 100-04. Bleakley threatened, repeatedly harassed, and caused reasonable and substantial emotional distress to his victim. These actions constitute aggravated stalking under the Florida law.

127. See, for example, notes 23-24 and accompanying text.

128. See Hays, N.Y. Times at B1 (cited in note 25).

129. Id.

130. Id.

131. Id.

132. *Sonya Live: Stalker Laws* (cited in note 16). Police were unable to do anything more than arrest him for disturbing the peace. Id.

133. See *Hearings* (cited in note 19) (statement of Sen. William Cohen).

134. Arguably, when a threat or conduct as frightening and persistent as that of Tavegia's stalker is involved, intent seems obvious, so a defendant may have to argue insanity (or possibly diminished capacity) to prove lack of intent.

C. *The Connecticut Stalking Law: The Literal Stalking, Non-Credible Threat Model*

The Connecticut stalking statute[135] differs dramatically from both the California and Florida laws, for it addresses only literal stalking behavior rather than obsessive harassment in general. The Connecticut statute criminalizes willful and repeated following or lying in wait.[136] Unlike the California and Florida statutes, it does not reach miscellaneous, repeated, and intentional behavior that harms a victim.[137]

The Connecticut statute does not require a credible threat, but requires instead that the stalker harbor the intent to cause the victim to fear for her physical safety.[138] In this respect, it is a hybrid between the California and Florida statutes. Like California, it requires an intent to cause fear, yet like Florida it does not demand as a threshold requirement that the stalker make a credible threat. In this aspect the statute is broader than the California law, but narrower than the Florida law.[139]

The Connecticut statute requires in all cases that the victim experience both subjective and objective fear,[140] which narrows its scope in a similar manner to the California law. Unlike both the California and Florida statutes, however, the Connecticut law does not exclude First Amendment activity from its proscriptions.[141]

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135. 1992 Conn. Pub. Acts 237. The statute reads in pertinent part:

Section 1. (a) A person is guilty of stalking in the first degree when he commits stalking in the second degree as provided in section 2 of this act and (1) he has previously been convicted of this section or section 2 of this act, or (2) such conduct violates a court order in effect at the time of the offense, or (3) the other person is under sixteen years of age.

(b) Stalking in the first degree is a class D felony.

Section 2. (a) A person is guilty of stalking in the second degree when, with intent to cause another person to fear for his physical safety, he willfully and repeatedly follows or lies in wait for such other person and causes such other person to reasonably fear for his physical safety.

(b) Stalking in the second degree is a class A misdemeanor.

136. Id.

137. Id. A few states have enacted stalking laws of this type. See, for example, 1992 Ill. Laws 871 (criminalizing only surveillance or following, which must be preceded by a threat); 1992 Hawaii Sess. Laws 292 (criminalizing pursuing or conducting surveillance of another person only).

138. 1992 Conn. Pub. Acts 237.

139. Where the Florida law requires an intent to cause substantial emotional distress, the Connecticut and Florida laws are equivalent. This is because substantial emotional distress is the intended result of causing someone to fear. Therefore, an intent to cause someone to fear is virtually equivalent to an intent to cause someone to suffer substantial emotional distress. See note 110. However, the Florida law only requires an intent to cause some degree of emotional distress (for example, annoyance), rather than substantial emotional distress, when the stalker follows the victim. This is a lesser quantum of intent than the intent to cause fear that the Connecticut statute requires, and, therefore, the Connecticut statute is narrower. 1992 Conn. Pub. Acts 237.

140. Id.

141. Id. The Connecticut statute addresses only following or lying in wait accompanied by an intent to create fear of physical injury. Arguably, no First Amendment activity would fit this description.

The Connecticut statute creates an elevated stalking offense when the accused has violated a court order, or previously has been convicted of stalking, or when the victim is less than sixteen years old.[142] Stalking is a misdemeanor, while conduct falling within the elevated provision is a felony.[143] Connecticut's elevated offense primarily is an attempt to circumvent the problems that prior laws faced in addressing stalking.[144] This elevated offense is similar to Florida's aggravated stalking provision, but the Florida provision goes further to permit increased criminal liability based on the egregiousness of the stalking conduct itself.[145]

The Connecticut statute is narrower than both the California and Florida laws because it addresses only literal stalking behavior, which is a subcategory of obsessive harassment.[146] For example, the Connecticut statute would not criminalize most of stalker Mark Bleakley's harassment of Leslie Wein.[147] It would reach only Bleakley's shadowing of Wein, and his surveillance of her house and health club. It would not address the repeated ringing of her phone and the vandalizing of her cars. Yet in cases of literal stalking, such as that directed at victim Erin Tavegia,[148] the Connecticut statute reaches more activity than does the California law. As long as a stalker intends to cause fear to the victim, the Connecticut statute, without requiring an overt threat, provides criminal liability for following another person.[149] The Florida statute reaches this same activity, but the Connecticut statute is more limited because it requires objective and subjective fear on the part of the victim.[150]

Like the Florida and California statutes, the Connecticut statute only reaches stalking behavior that is intended to cause emotional harm to the victim.[151] Therefore, erotomaniacs who pursue a person out of

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142. Id.

143. Id.

144. The provision punishes recidivism (habitual criminal behavior) and puts teeth back into restraining orders. It also provides felony penalties, breaking the cycle of misdemeanors that rendered prior laws inadequate. See notes 65-74 and accompanying text. The recognition of the victim's age is curious and unique—no evidence available to this author suggests that minors are more often the victims of stalking than are women in general.

145. For instance, aggravated stalking is constituted under the Florida law if the stalker makes a threat in addition to following the victim. See text accompanying note 108.

146. See note 22 (defining "obsessive harassment").

147. See notes 100-04 and accompanying text.

148. See text accompanying notes 128-32. Tavegia was only 15 when the stalking conduct began; so the Connecticut statute would elevate the conduct to first degree stalking and provide a felony penalty.

149. See note 135.

150. Id.

151. See note 134 and accompanying text.

deluded love and yet harbor no intent to cause emotional harm are excluded from the statute.[152]

D. Significant Variations in Other Stalking Laws

The language of stalking laws from other states, although similar to the California, Florida, and Connecticut statutes, often contains omissions and variations that significantly alter the scope of these laws. A number of examples will illustrate this point. The West Virginia stalking statute[153] is extremely narrow. It only addresses stalking that is conducted by someone with whom the victim "formerly resided or cohabited or . . . engaged in a sexual or intimate relationship."[154] Stalking by a stranger or acquaintance therefore does not fall within the purview of the statute. The Virginia law,[155] in contrast, defines stalking broadly as "engag[ing] in conduct with the intent to cause emotional distress."[156] This statute does not define the conduct. Therefore, conduct may include virtually anything that causes distress. The only limits are that the conduct must occur on more than one occasion and the fear must be reasonable.[157] The Illinois statute[158] defines stalking so that a credible threat must *precede* the harassment and following.[159] Obsessive behavior that frightens the victim but occurs prior to a threat is outside the scope of the statute.

Stalking statutes also differ in specific mens rea requirements. Hawaii, for example, allows for stalking convictions when the perpetrator has a mens rea of only reckless disregard, rather than purpose or knowledge.[160] A new Michigan statute,[161] designed to reach all stalking behavior, including that of erotomaniacs, does not require that the stalker intend to harm the victim.[162] Thus, the Michigan statute may permit strict liability convictions.[163]

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152. Id.
153. W. Va. Code § 61-2-9(a) (1992).
154. Id.
155. Va. Code Ann. § 18.2-60.3 (1992).
156. Id.
157. Id.
158. 1992 Ill. Laws 871.
159. Id. See also Caristone, Chi. Trib. at 3 (cited in note 60) (stating that the stalker must threaten first).
160. 1992 Hawaii Sess. Laws 292.
161. Mich. H.R. 5472 (1992).
162. The statute requires that a stalker act willfully, but it does not require that the stalker intend to barm the victim. Id. The statute was drafted based on victims' needs, and it attempts to encompass all harassment and following that causes the victim to have reasonable fear. Id. See *Hearings* (cited in note 19) (statement of Michigan State Representative Perry Bullard).
163. See Mich. H.R. 5472 (1992). Most stalking laws only punish when either subjective or objective harm is present. Therefore, the wrongfulness of the conduct that they address is the

IV. The Constitutionality of Stalking Laws

A. Classifying Stalking Laws: Inchoate or Completed Offenses?

Many legislators claim that the purpose of stalking laws is to prevent violence before it happens.[164] This suggests that stalking laws punish based on the potential of future harm, much like inchoate crime laws.[165] If stalking laws do address future harm, substantive due process requires that they create criminal liability only once the defendant has demonstrated culpability adequately.[166] This raises two issues. First, do stalking laws punish for future harm? Second, if the laws do punish for future harm, are they consistent with culpability requirements of substantive due process? Because this Note finds that stalking laws do not address future harm, it does not reach the second inquiry.

The law provides inchoate offenses that authorize intervention based on future harm.[167] If stalking laws also punish based on future harm, they should share many of the attributes of inchoate crimes. But they do not. Inchoate crimes, such as attempt and conspiracy, require an intent to commit a secondary, or "target," crime and they require an act that is part of the commission of that secondary offense.[168] Inchoate crimes also create criminal liability without the necessity of manifest

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harm caused to the victim. See notes 164-78 and accompanying text. If a stalking law requires only an intent to follow or harass another, it creates a strict liability offense, because the statute punishes for substantial emotional harm done to the victim but does not require that the stalker intend this harm. Strict liability offenses rarely are constitutional. See *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. Balint*, 258 U.S. 250 (1922); *People v. Hutchison*, 361 N.E.2d 328 (Ill. App. 1977).

164. See, for example, Rick Pluta, *Anti-Stalking Bill Clears House Panel*, UPI (Sept. 15, 1992) (quoting Michigan State Senator Perry Bullard, saying the aim "is stopping activity before a physical and emotional harm occurs"). See also Quinn, L.A. Times at B3 (cited in note 2) (quoting Los Angeles Deputy District Attorney Andrew W. Diamond, as stating that statute is a "helpful tool because it allows us to intercede before actual harm comes to a victim").

165. Inchoate crimes include attempt, solicitation, and conspiracy. They allow intervention before the completion of a crime based on a demonstrated intent to commit the crime and to cause future harm. See Jordan Berns, Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 Ohio St. L. J. 717, 720-22 (1989).

166. Substantive due process stems from the Fifth and Fourteenth Amendments of the Constitution. See Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* § 2.12 at 148 n.1 (West, 2d ed. 1986). It operates as a limit on the police power of the states and determines that some conduct, because of its nature, cannot be proscribed or regulated. Id. Substantive due process also requires that criminal statutes contain necessary elements such as mens rea and an act or omission. Id. at 149. See *Proctor v. State*, 176 P. 771 (Okla. Crim. App. 1918) (setting forth the act requirement). This last requirement ensures that statutes do not punish before the defendant has exhibited criminal culpability.

167. See noto 165 and accompanying text.

168. For example, attempted murder requires an intent to kill and an act that is a step toward the killing. See Perkins and Boyce, *Criminal Law* at 611 (cited in note 110).

injury.[169] Stalking laws, in contrast, do not point to a specific secondary offense. They intervene before a stalker's intent to commit a target crime, such as murder or rape, can be identified. They require an intent to stalk[170] and an act of stalking,[171] rather than an intent to commit a secondary offense. In addition, stalking laws generally require manifest harm.[172] Stalking, therefore, is not an inchoate offense.

Instead, stalking laws achieve prevention by criminalizing acts prior to the beginning of the commission of a secondary offense.[173] Loitering laws are conventional tools for achieving prevention in much the same way. They criminalize presence when it is indicative of future dangerous activity.[174] But unlike stalking laws, loitering laws generally require intent to commit a secondary offense.[175] Loitering laws, therefore, only intervene when a target crime is identifiable but has not yet been committed.[176] In addition, loitering laws create criminal liability before a victim is identifiable and before harm has occurred.[177] Stalking laws, on the other hand, create criminal liability only when a victim is clearly identifiable and when harm has occurred.[178] Since loitering laws address future harm, while stalking laws address only consummated harm, stalking is not an intervention crime. Stalking offenses merely appear to share the qualities of intervention crimes for three reasons.

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169. For example, conspiracy and solicitation create criminal liability when illegal activity is only imminent. Harm, therefore, has not necessarily occurred. See Berns, 50 Ohio St. L. J. at 721 (cited in note 165).

170. Stalking laws generally require an intent to injure the victim by following or harassing her. See notes 85, 110, 136-38 and accompanying text. This is the equivalent of an intent to stalk.

171. See text accompanying notes 88, 107, 136.

172. When the stalker follows the victim, the Florida law's lesser offense does not require actual harm. This is probably the result of careless drafting because the statute requires harm when the stalker harasses. Regardless, the statute merely provides the equivalent of attempted stalking; the law proscribes stalking when the stalker follows and attempts to cause harm to the victim but is unsuccessful. See text accompanying note 112.

173. The statutes criminalize intentional following and harassment, which often precede the more violent activity. See notes 40-44 and accompanying text.

174. See generally Berns, 50 Ohio St. L. J. 717 (cited in note 165).

175. Most loitering laws that are found constitutional require intent to commit a secondary offense. See id. at 722-33. For example, a statute might punish for "loiter[ing] in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act." Id. at 730 (quoting from Cal. Pen. Code § 647(d)).

176. For example, the target crime from the loitering law cited in note 175 is "engaging in or soliciting any lewd or lascivious or any unlawful act." Cal. Pen. Code § 647(d). The statute creates liability when a person loiters for this purpose, although the person has not yet begun to engage or solicit.

177. As in the previous two notes, the perpetrator is merely present in the bathroom for the purpose of committing an unlawful act. The police do not need to identify a victim, because the statute creates liability before tbe commission is begun.

178. See text accompanying notes 92, 140. The Florida stalking provision is an aberration because it does not require harm if the stalker follows the victim. See text accompanying note 112.

First, stalking laws attach serious penalties to actions that occur early in an escalating series of events.[179] Stalkers cannot commit more serious offenses because they may be in prison as a result of their past actions. This gives the illusion that stalking laws have intervened for the purpose of preventing future harm; however, the laws merely have punished for the past harm that a stalker caused. Just as incarceration for a murder conviction prevents an offender from continuing to harm others, so does incarceration for a stalking conviction prevent a stalker from further harming his victim. Yet both convictions are based only upon past demonstrations of culpability accompanied by consummated injury.

Second, the law traditionally has perceived harassment as worthy of only minor penalties.[180] Stalking laws, in contrast, prescribe major penalties for harassment. This gives the appearance that they punish for something more, such as the potential of future harm. In reality, however, stalking laws simply reflect a new awareness of the seriousness of harassment.[181] The laws prescribe punishment befitting the crime, a task prior laws have failed to accomplish.[182]

Third, the current harm that stalking laws address is solely a product of potential future harm. Stalking is wrongful because the threat of future violence causes emotional injury to the victim.[183] If the likelihood of future harm is great, then the present emotional harm is substantial. Therefore, the injury stalking laws address is a function of future harm. This gives the false impression that stalking laws address future injury.

For these reasons, stalking laws do not create intervention offenses. They punish only for manifest harm that stems from completed acts. Thus, they yield criminal liability only when culpability has been demonstrated adequately, satisfying this substantive due process requirement.

B. Void for Vagueness Challenges

The void for vagueness doctrine stems from the due process requirements of the Fifth and Fourteenth Amendments.[184] It is a two-pronged procedural concern imposed upon legislation. The first prong focuses on notice and requires that "a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand

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179. See notes 40-44 and accompanying text

180. See notes 70-74 and accompanying text.

181. For a discussion of the seriousness of harassment, see note 39 and accompanying text.

182. See notes 72-74 and accompanying text.

183. See note 39 (stating that victims of telephone harassment exhibit more anxiety than do victims of physical assault).

184. LaFave and Scott, *Criminal Law* § 2.3 at 90-91 (cited in note 166).

what conduct is prohibited."[185] The second prong focuses on consistency and requires that the law provide explicit standards to prevent arbitrary and discriminatory enforcement.[186] This second prong is the most important determinant of vagueness.[187]

The Supreme Court has mitigated these weighty requirements by recognizing that the law does not require impossible standards.[188] Words need not reach mathematical or scientific precision,[189] and courts will uphold uncertain language when it is necessary for legislating in a certain area of the law.[190] Sloppy draftsmanship, however, will fall prey to the vagueness doctrine.[191] Additionally, the Supreme Court has found that a mens rea element to an offense will mitigate against vagueness, especially with regard to the notice prong.[192] Yet when proscribed conduct is not indicative of the requisite mens rea, a statute is unconstitutionally vague because it allows law enforcement officials to have too much discretion in distinguishing innocent from criminal behavior.[193]

One of the major criticisms of stalking laws is that the conduct which these laws proscribe is innocuous, such that criminal and innocent behavior are indistinguishable.[194] In addition, critics charge that the statutes' language is unclear, creating the possibility of uneven enforcement.[195]

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185. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). See LaFave and Scott, *Criminal Law* § 2.3 at 91-92.

186. LaFave and Scott, *Criminal Law* § 2.3 at 94-95.

187. *Kolender*, 461 U.S. at 357-58. See also Berns, 50 Ohio St. L. J. at 718 (cited in note 165). An additional consideration is any "chilling effect" which a law may have on First Amendment rights. LaFave and Scott, *Criminal Law* § 2.3 at 96-97.

188. *Roth v. United States*, 354 U.S. 476, 491 (1957).

189. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972); *Bachowski v. Salamone*, 407 N.W.2d 533, 537 (Wis. 1987).

190. LaFave and Scott, *Criminal Law* § 2.3 at 95 (citing Note, 109 U. Pa. L. Rev. 67, 95 (1960)).

191. Id.

192. *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 35 (1963); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952); *Screws v. United States*, 325 U.S. 91, 101 (1945). See generally LaFave and Scott, *Criminal Law* § 2.3 at 93-94.

193. This allows law enforcement officials to discriminate and results in unequal application of the law. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-64, 168 (1972). See also Berns, 50 Ohio St. L. J. at 719 (cited in note 165).

194. See *Nightline* (cited in note 15) (broadcasting Professor Jonathan Turley's statement that the standard the laws created will make some legal behavior indistinguishable from some criminal behavior).

195. See note 16 and accompanying text.

1. The California Stalking Law: Void for Vagueness Issues When a Credible Threat is Required

One major limitation of the California statute is the requirement of a credible threat. The threat requirement demands that the stalker demonstrate a serious intent to harm the victim.[196] However, the definition of "credible threat" is somewhat unclear. It requires "the intent and the apparent ability to carry out the threat so as to cause the person who is the target . . . to reasonably fear."[197] "Intent" is subject to two different constructions. The question is whether the stalker must have the intent to carry out the threat, or merely the intent to cause the person who is the target to harbor reasonable fear. The first response does not seem plausible, because authorities cannot ascertain an intent to carry out the threat until the stalker undertakes the commission of the threat. If the threat is to kill the victim, the stalker does not have culpable intent to carry it out until he at least attempts murder.[198] Under this construction, then, the stalking statute does not provide criminal liability until the stalker has acted to physically harm the victim; this is the same problem traditional statutes have faced in attempting to address stalking behavior.[199] Under the second and more likely construction, the stalker need only have the apparent ability to carry out the threat and the intent to cause the victim to fear. The statute then creates criminal liability before the stalker initiates a physical attack, as stalking statutes are intended to do.[200]

"Threat" itself is not vague.[201] And by requiring that a threat be "credible," the statute further defines the meaning of "threat," rather than making it ambiguous.[202] The threat provision strongly mitigates against vagueness in the statute because it requires that the stalker demonstrate a tangible intent to cause emotional harm. Therefore, the threat requirement explicitly distinguishes innocent conduct from crim-

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196. The stalker must intend the threat to cause the victim to fear great bodily injury or death. See note 85.

197. Cal. Pen. Code § 646.9(f). See also notes 85-93 and accompanying text.

198. Substantive due process requires at least an act before someone is considered culpable and therefore criminally liable. See note 166 and accompanying text.

199. See text accompanying notes 47-49.

200. See note 164 and accompanying text (stating that the purpose is to intervene rather than wait for stalker to "do something.")

201. See *Armstrong v. Ellington*, 312 F. Supp. 1119, 1124-26 (W.D. Tenn. 1970) (holding that the word "threat" is not vague); *Commonwealth v. Green*, 429 A.2d 1180, 1182 (Pa. Super. Ct. 1981). But see *State v. Hamilton*, 340 N.W.2d 397 (Neb. 1983).

202. Some argue that the credible threat provision makes the California statute too narrow to address stalking effectively. See *Hearings* (cited in note 19) (statement of Sen. William Cohen).

inal behavior. Terroristic threat statutes already proscribe such activity, and they have survived vagueness challenges.[203]

In addition to a threat, the California stalking statute is limited by an act requirement of either following or harassment.[204] The conduct must be willful, intended to cause serious emotional harm, and repeated.[205] The meaning of "following" seems obvious. But "harassment" is much broader, requiring a course of conduct directed at the victim that "seriously alarms, annoys, or harasses . . . and which serves no legitimate purpose."[206] Courts have upheld "harass" in the face of vagueness challenges.[207] But at least one court has found that the words "annoy" and "alarm" are so broad that they provide no standard for enforcement.[208] However, the stalking statute limits these terms by requiring that a victim suffer substantial and reasonable emotional distress.[209] In addition, the stalker must repeat the conduct, and the conduct must serve no legitimate purpose.[210] Furthermore, the credible threat requirement restricts what conduct the statute reaches.[211] All of these limits mitigate any ambiguity in the terms "annoy" and "alarm."

The statute clearly defines course of conduct and at least one court has upheld the "course of conduct" phraseology, even when undefined.[212] The fact that the stalking statute defines "course of conduct" further mitigates any vagueness concerns, but the definition does present a problem. "Course of conduct" requires a series of acts occurring over a period of time, but the statute sets no minimum time period.[213] Two separate acts only minutes apart thus may constitute a course of conduct.[214] This injects some degree of uncertainty into the statute, but it may be a necessary evil to prohibit stalking behavior adequately.[215]

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203. *Masson v. Slaton*, 320 F. Supp. 669 (N.D. Ga. 1970); *Armstrong*, 312 F. Supp. at 1119; *State v. Gunzelman*, 502 P.2d 705 (Kan. 1972); *Green*, 429 A.2d at 1180. But see *Hamilton*, 340 N.W.2d at 397.

204. See notes 85-93 and accompanying text.

205. See note 88 and accompanying text.

206. Cal. Pen. Code § 646.9(e). See also note 89 and accompanying text.

207. *Bachowski*, 407 N.W.2d at 538-39; *State v. Hagen*, 558 P.2d 750, 752-53 (Ariz. Ct. App. 1976); *Commonwealth v. Duncan*, 363 A.2d 803, 806 (Pa. Super. Ct. 1976).

208. *Norman*, 703 P.2d at 1267. For a discussion of *Norman*, see text accompanying notes 237-42.

209. See notes 85-93 and accompanying text.

210. Id.

211. Id.

212. See, for example, *Bachowski*, 407 N.W.2d at 533. For a discussion of this case, see text accompanying notes 231-36.

213. See notes 85-93 and accompanying text.

214. See, for example, *Duncan*, 363 A.2d at 803. This case found that a single encounter constituted repeated harassment when the harasser was tenacious. Id. at 805.

215. See Model Pen. Code § 250.4 cmt. 6 (1980) (stating that it is impossible to define harassment more precisely). But see note 280 and accompanying text.

Courts have upheld other statutes that do not specify a minimum time frame.[216]

In all instances, a requirement that the victim's fear be reasonable limits the statute.[217] In its definition of "harassment," the statute also requires actual harm, and it probably demands the same in its definition of "credible threat."[218]

Utilizing all of these requirements, the California stalking statute sets explicit standards for identifying stalking behavior and distinguishing innocent from criminal conduct. The statute has some imperfect language, but all of the pieces in sum create a well-defined perimeter.[219] A stalker must threaten, follow, or harass repeatedly, and harbor an intent to cause serious emotional harm. Harm must be actual and reasonable. The California statute is narrow and specific, and therefore it is not vague.

Furthermore, a statute substantially similar to the California stalking statute has survived a vagueness challenge. In *Armstrong v. Ellington*,[220] a federal district court upheld a Tennessee law's provision that made it a crime to prowl, ride, or walk for the purpose of terrorizing any citizen.[221] The district court found that a threat or an act of violence is necessary to constitute "terrorizing."[222] It then found that the term "terrorizing" is not vague, and the court therefore concluded that this provision of the statute is constitutional.[223]

The Tennessee statute at issue in *Armstrong* proscribes threatening conduct when accompanied by a verbal threat and an intent to cause fear.[224] This provision is substantially similar to the California stalking statute; thus, the California statute is not void for vagueness.

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216. See, for example, *Bachowski*, 407 N.W.2d at 533; *Duncan*, 363 A.2d at 803.

217. See notes 85-93 and accompanying text.

218. See note 85, 92.

219. State court interpretations of the statute could extinguish any of these minor ambiguities. Under the vagueness doctrine, statutes are not tested on their face, but as state courts have construed them. LaFave and Scott, *Criminal Law* § 2.3 at 91 (cited in note 166).

220. 312 F. Supp. 1119 (W.D. Tenn. 1970).

221. Id. at 1123 (citing Tenn. Code Ann. § 39-2805 (1907)). The statute was enacted in 1907 and was aimed at preventing "Night Rider troubles." Id.

222. Id. at 1126.

223. Id.

224. Id. at 1125-26.

2. The Florida and Connecticut Stalking Laws: Void for Vagueness Issues When No Credible Threat is Required

a. The Florida Stalking Law

Florida's stalking provision shares few of the limits that the California stalking statute contains.[225] The Florida stalking provision punishes repeated, intentional, and malicious *following* when no subjective or objective harm is present.[226] But it provides no guidelines for distinguishing malicious following from innocent following. For example, assume that A repeatedly follows B for no legitimate reason. The conduct does not harm B, and the conduct would not harm the objectively reasonable person. If A is following B with the intent to cause her emotional harm, then A is criminally liable. But nothing indicates that A has such intent. A has not caused emotional harm. A also has not threatened B, indicating an intent to harm. Therefore, police officers, prosecutors, and juries have no standards by which to determine that A has violated the stalking statute. Whether certain conduct constitutes stalking becomes a matter of discretion. Thus, this part of the Florida stalking provision violates the second prong of the vagueness test.

The stalking of Erin Tavegia[227] is an example of conduct that the Florida following provision reaches. But the Tavegia example does not show the inherent vagueness present in the statute, because the stalker's conduct falls well above the threshold that the statute creates. Tavegia's stalker caused both reasonable and actual emotional distress, and this coupled with the extreme persistance of the conduct gave a clear indication of intent.[228] The Florida statute is vague because it captures activity that is much less obvious than this, and provides no standards for distinguishing innocent from criminal behavior. That is, when no reasonable or actual harm is present, it is difficult to determine the existence of intent to harm and to define what constitutes stalking conduct.

The Florida stalking provision also punishes for repeated, intentional, and malicious *harassment* when subjective harm is present but objective harm is not.[229] Harassment is a "course of conduct" directed at a victim that causes "substantial emotional distress . . . and serves no legitimate purpose."[230] Two courts have addressed vagueness challenges

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225. This section addresses Florida's stalking provision, rather than the aggravated stalking provision.

226. See notes 110-12 and accompanying text.

227. See text accompanying notes 128-32.

228. Id.

229. See notes 105-12 and accompanying text.

230. Id.

to harassment statutes similar to this part of the Florida law. In *Bachowski v. Salamone*,[231] the Wisconsin Supreme Court found constitutional a harassment statute that criminalizes "engag[ing] in a course of conduct or repeatedly commit[ting] acts which harass or intimidate [another] person and which serve no legitimate purpose."[232] The required mens rea of the statute is an "intent to harass or intimidate."[233] The Wisconsin Supreme Court found that the words "harass" and "intimidate" have a clear meaning, and require more than mere annoying behavior.[234] It also found that the requirements of repetition, intent, and no legitimate purpose provide clear standards for enforcement.[235] Noting that the conduct that the statute targeted defies a more specific description, the Wisconsin Supreme Court upheld the statute.[236]

In *People v. Norman*,[237] however, the Colorado Supreme Court struck down a harassment statute that criminalized "engag[ing] in conduct or repeatedly commit[ting] acts that alarm or seriously annoy another person and that serve no legitimate purpose."[238] The mens rea was an "intent to harass, annoy, or alarm."[239] The Colorado Supreme Court noted that the statute could encompass any conduct.[240] It also observed that the words "alarm" and "annoy" are so broad that only personal discretion determines their meaning.[241] The Colorado Supreme Court therefore found that the statute provided no limiting standards and was unconstitutionally vague.[242]

The harassment provision of the Florida stalking statute is similar to the provision upheld in *Bachowski*. Both statutes require repeated conduct that has no legitimate purpose. They also require an intent to harass the victim. In addition, the statute in *Bachowski* requires that the victim suffer harassment or intimidation. The Florida statute requires that the victim suffer substantial emotional distress. These requirements are equivalent, because stalking laws merely recognize that when victims experience harassment they suffer emotional distress.[243]

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231. 407 N.W.2d at 533.
232. Id. at 534 n.1.
233. Id.
234. Id. at 537.
235. Id. at 537-38.
236. Id. at 539.
237. 703 P.2d at 1261.
238. Id. at 1266.
239. Id.
240. Id. at 1267.
241. Id. at 1266.
242. Id. at 1267. The holding of *Norman* is explained clearly in *People v. McBurney*, 750 P.2d 916, 918-19 (Colo. 1988).
243. See notes 110, 139.

On the other hand, the Florida law can be distinguished from the statute struck down in *Norman*. The *Norman* statute does not require repeated conduct. It also does not require that the conduct cause substantial emotional harm; it merely requires that conduct annoy or alarm. This threshold for harassment is much lower than the minimum requirement for harassment in the Florida statute. Furthermore, the *Norman* statute does not require an intent to harass, but merely an intent to annoy or alarm. The Florida statute is therefore much more specific than the statute struck down for vagueness in *Norman*.

Like the statute upheld in *Bachowski*, the harassment segment of the Florida stalking provision provides explicit guidelines for distinguishing innocent from criminal behavior. It punishes only when the stalker engages in repeated, intentional, and malicious conduct that causes substantial harm to the victim and that has no other legitimate purpose. Therefore, this part of the Florida statute is not vague. For example, it reaches the conduct of Mark Bleakley even before he verbally threatened Leslie Wein.[244] Once authorities could trace the ringing of the phone and the car vandalism to Bleakley,[245] the Florida harassment provision would provide criminal liability. Bleakley's actions showed a continuity of purpose, and they caused actual fear. In addition, Bleakley had no possible legitimate justification for his actions. The conduct indicated an intent to harm. The harassment provision of the Florida stalking offense, which punishes only once these requirements have been met, is not vague.

Florida's aggravated stalking provision's requirement of a credible threat is substantially similar to the California law's requirement.[246] Therefore, it should survive a vagueness challenge for the same reasons that the California statute would survive a challenge.[247] But when following or harassing that violates a court order constitutes aggravated stalking, the statute does not share the limits of the California statute[248] because a credible threat or reasonable harm need not accompany the conduct. Repeatedly harassing the victim in conjunction with a violation of a court order still survives vagueness challenges, however, because it is virtually identical to harassment under the Florida stalking provision,[249] and the violation of the court order provides an even stronger limit that differentiates innocent from criminal conduct. When the stalker repeatedly follows the victim in conjunction with a violation

244. See text accompanying notes 100-04.
245. Id.
246. See text accompanying notes 114-18.
247. See text accompanying notes 196-224.
248. See note 117 and accompanying text.
249. See notes 229-45 and accompanying text.

of a court order, Florida's aggravated stalking provision also survives vagueness, because the willful violation of the court order gives some concrete indication of an intent to emotionally harm the victim.[250] Therefore, Florida's aggravated stalking provision is not vague.

In conclusion, the Florida stalking provision is unconstitutionally vague where it proscribes malicious following. However, it survives vagueness scrutiny where it proscribes harassment. The aggravated stalking provision also survives vagueness scrutiny.

b. The Connecticut Stalking Law

The Connecticut stalking statute proscribes repeated following or lying in wait,[251] similar to the unconstitutionally vague provision of the Florida statute.[252] But the Connecticut law requires an intent to cause the victim to fear for physical safety, which is a higher threshold than the intent to cause emotional harm that the Florida statute requires. In addition, the Connecticut statute places well-defined limits on the conduct it addresses by requiring both reasonable and actual harm.[253] The Florida provision does not impose these requirements. Thus, the two statutes produce markedly different results when they are applied to the example utilized to analyze the Florida following provision.[254] Again, assume A repeatedly follows B. Under the Connecticut statute, B must actually fear for physical safety, and the reasonable person must recognize that A's conduct is sufficient to cause that fear. If A has the intent to cause B to fear physical injury, then A is criminally liable. The reasonable and actual consequences of A's conduct, coupled with the persistence of A's conduct, which shows it has a continuity of purpose, indicate that A probably harbors an intent to cause B fear. Therefore, the limits that the Connecticut statute imposes make innocent conduct distinguishable from criminal behavior. Thus, the Connecticut law sets standards that clearly define stalking.

The stalking of Erin Tavegia[255] is a good example of the conduct that the Connecticut statute reaches. The man who stalked Tavegia incessantly followed her, and he caused both objective and subjective harm. This indicates that the stalker had intent to cause Tavegia to fear for her safety and suffer emotional harm.[256] The Florida following

250. Compare text accompanying notes 225-28, 251-57.
251. See notes 135-40 and accompanying text.
252. See text accompanying notes 225-28.
253. See notes 135-40 and accompanying text.
254. See text accompanying note 226.
255. See notes 128-32 and accompanying text.
256. The stalker may not have had intent to cause emotional harm, but instead may have been suffering from erotomania. If so, the statute would not reach his conduct. In cases when the

provision is vague because it does not require at least this much.[257] The Connecticut statute requires this much indication of intent as a minimum, and, therefore, it clearly distinguishes between innocent and criminal behavior.

The Connecticut stalking law recognizes that certain conduct is threatening and indicative of an intent to cause emotionally damaging fear. The *Bachowski* court acknowledges precisely this concept.[258] The statute in *Bachowski* criminalized repeated conduct that the perpetrator intended to harass or intimidate the victim and that the victim found harassing or intimidating.[259] The Wisconsin court upheld the statute against the vagueness challenge,[260] thereby recognizing that conduct which is intimidating can be sufficiently indicative of an intent to cause emotional harm. The Connecticut stalking statute is even more specific than was the harassment statute upheld in *Bachowski.* In addition to requiring actual injury and repeated conduct like that in *Bachowski,*[261] the Connecticut stalking statute also requires objectively reasonable harm.[262] Furthermore, the Connecticut law reaches only following or lying in wait,[263] a much narrower set of activities than that which the *Bachowski* statute reached.[264] Therefore, the Connecticut stalking statute provides explicit standards, and thus is not unconstitutionally vague.

The Connecticut statute demonstrates that a stalking law which punishes for following yet requires no credible threat can survive a vagueness challenge. Such a result is contrary to that which Florida's stalking provision suggests.[265]

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conduct is intended to harm or when the stalker suffers from erotomania, the conduct is highly indicative of an intent to harm, and thus the statute is not vague in either case. Innocent conduct is clearly distinguishable because it may not cause objective or subjective harm, or be tirelessly repeated. In the event that some innocent conduct does meet these requirements, the defendant should still be able to distinguish his conduct from criminal conduct by providing an explanation which suggests that he is not mentally defective or that he is attempting to cause emotional harm. The intent requirement then would exclude the innocent actor from the purview of the statute. Mentally defective behavior that indicates intent and that appears to fall within the proscription of the statute does not make the statute vague.

257. See notes 225-28 and accompanying text.

258. See notes 231-36 and accompanying text.

259. Id.

260. Id.

261. Id.

262. See notes 135-40 and accompanying text.

263. Id.

264. See notes 231-36 and accompanying text. The statute in *Bachowski* reached *any* repeated conduct.

265. See text accompanying notes 225-28.

V. A Model Stalking Statute

The California, Florida, and Connecticut stalking statutes represent novel attempts to address stalking behavior, but all suffer from significant shortcomings. The California stalking statute, although constitutional, is too narrow to comprehensively address obsessive conduct because it requires a threat. The statute excludes dangerous cases of stalking, such as that directed at Erin Tavegia.[266] The Florida statute, on the other hand, reaches these important cases.[267] Yet it is unconstitutionally vague when it addresses stalking by following because it places no limits on the conduct in order to distinguish innocent and criminal behavior.[268] The Connecticut statute, although it constitutionally reaches dangerous cases of following, is too narrow because it excludes important cases of harassment.[269]

Each of these laws, however, does have specific strengths. The California statute constitutionally reaches both harassment and following, and it supplies important language that virtually all stalking laws have imitated in full or in part.[270] The Florida statute is significant because it achieves a constitutional proscription of harassment without requiring a credible threat.[271] The Connecticut statute achieves a constitutional proscription of dangerous following without requiring a threat.[272]

The model statute that follows is primarily a composite of these three stalking laws. It draws on the strengths of all while avoiding the narrow scope or constitutional infirmities of each individual law. The model law reaches all stalking conduct intended to cause emotional harm; it proscribes both harassment and following, and does so without requiring a threat.[273] Yet the statute contains sufficient limitations to ensure that it is neither vague nor overbroad.

Model Stalking Law

Section 1. Stalking:

(1) A person is guilty of stalking who willfully, maliciously, and repeatedly follows or harasses another person with the intent to cause that person to suffer substantial emotional distress.

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266. See note 133 and accompanying text. See Appendix, Figure 1.
267. See notes 127-32 and accompanying text.
268. See notes 225-28 and accompanying text. See Appendix, Figure 2.
269. See notes 146, 147 and accompanying text. See Appendix, Figure 3.
270. See notes 196-224 and accompanying text.
271. See notes 229-45 and accompanying text.
272. See notes 251-65 and accompanying text.
273. See Appendix, Figure 4.

(2) Stalking is a misdemeanor punishable by incarceration for a maximum of one year or a fine of not more than $2000, or both.
(3) The sentencing court may order any person convicted under this statute to be examined by one or more mental health professionals.

Section 2. Aggravated Stalking:

(1) A person is guilty of aggravated stalking who willfully, maliciously, and repeatedly follows or harasses another person with the intent to cause that person to suffer substantial emotional distress and in addition meets any one of the following conditions:

(a) communicates a credible threat to that person with the intent to cause him or her to fear great bodily injury or death, or

(b) knowingly violates a court order prohibiting behavior described in Section 2(1) against the same victim, or

(c) has been previously convicted under Section 1(1) or under this section within seven years against the same victim.
(2) Aggravated stalking is a felony.
(3) The sentencing court may order any person convicted under this statute to be examined by one or more mental health professionals.

Section 3. Definitions:

(1) "Harasses" means to engage in a course of conduct directed at a specific person which causes reasonable and substantial emotional distress in such person and serves no legitimate purpose.
(2) "Course of conduct" means a pattern of conduct composed of a series of acts occurring in separate encounters, evidencing a continuity of purpose. Constitutionally protected activity is not included within the definition of course of conduct.
(3) "Follows" means lying in wait for or following a specific person which causes reasonable and substantial emotional distress in such person and serves no legitimate purpose. Constitutionally protected activity is not included within the definition of following.
(4) "Credible Threat" means a threat made with the apparent ability to carry it out which would cause a reasonable person to fear great bodily injury or death. The victim must actually fear great bodily injury or death.

Section 4. Severability:

The provisions of this statute are severable.

The model statute contains both stalking and aggravated stalking provisions. Stalking requires repeated harassment or following engaged in with an intent to cause substantial emotional harm. Because this

provision does not require a credible threat, it reaches important cases of stalking, such as that conducted against Erin Tavegia.[274] The aggravated stalking provision provides felony sanctions when a stalker makes a credible threat, violates a court order, or stalks the same victim after previously having been convicted of stalking. This provision addresses recidivism, much like the Connecticut and Florida elevated stalking provisions.[275] In addition, it punishes more egregious behavior, such as when the stalker makes a threat, with increased sanctions, similar to the Florida aggravated stalking provision.[276]

The model statute is not limited to literal stalking behavior.[277] By its definition of "harassment" it reaches any repeated conduct the stalker used to harm the victim emotionally.[278] This allows the statute to punish behavior such as that of stalker Mark Bleakley.[279] The statute's definition of "course of conduct," used to define "harassment," requires a series of acts that occur in separate encounters. This narrows the statute and eliminates the possibility that a single encounter with a tenacious harasser could constitute stalking, a problem present in other statutes.[280]

When the stalker makes a threat, the model statute requires that the stalker have the apparent ability to carry it out.[281] The definition of "credible threat" is similar to the California statute, but the word "intent" is dropped from the beginning of the definition in order to eliminate the confusion that the two possible constructions of the California definition created.[282] The stalker still must intend that the threat cause the victim to fear great bodily injury or death.

Both stalking and aggravated stalking in the model statute require willful and malicious intent.[283] In addition, the model statute requires that the stalker harbor an intent to cause the victim to suffer substantial emotional distress.[284] Similarly, the Florida stalking provision[285] re-

274. See notes 127-32, 255 and accompanying text.

275. See note 144 and accompanying text.

276. See text accompanying note 145.

277. Compare notes 135-37 and accompanying text.

278. Compare notes 88, 89 and accompanying text.

279. See notes 100-03 and accompanying text. Compare notes 126, 146, 147 and accompanying text.

280. See notes 212-16 and accompanying text.

281. See Model Statute Sec. 3(4).

282. See notes 197-200 and accompanying text.

283. See Model Statute Secs. 1(1) and 2(1).

284. One article has noted that intent to cause substantial emotional distress is the only intent requirement that is not subject to some degree of vagueness or overbreadth. Terms such as "annoy" and "harass" often are challenged. M. Sean Royall, *Constitutionally Regulating Telephone Harassment: An Exercise in Statutory Precision*, 56 U. Chi. L. Rev. 1403, 1422 (1989).

285. See notes 105-13 and accompanying text.

quires that a stalker who harasses a victim must act maliciously and cause substantial emotional distress.[286] "Maliciously" requires that the stalker intend the consequences of his action; therefore, the Florida statute requires that the stalker possess the intent to cause the substantial emotional distress.[287] The model statute requires this same intent, but does so explicitly rather than relying on the definition of "malicious," as does the Florida statute. The model statute thus demands the same severity of intent that the harassment segment of the Florida stalking provision requires. The California and Connecticut statutes differ because they both require an intent to cause fear,[288] while the model statute and Florida statute merely recognize that substantial emotional distress is the stalker's intended result of the fear, and therefore it is equivalent to the intent to cause fear. The model statute simply equates the mens rea with the ultimate effect of the conduct and requires the same level of intent as these other stalking statutes.

Because the model law, like the California, Florida, and Connecticut laws, requires that the stalker intend to cause the victim emotional harm, it does not reach cases when the stalker acts out of deluded love rather than an intention to harm.[289] In order to reach these marginal cases of erotomania, the model statute would have to impose strict liability, similar to the Michigan stalking statute.[290] A court probably would find such a result unconstitutional.[291] Thus, a constitutional stalking law cannot reach all obsessive behavior; injunctions or civil commitment necessarily must address some stalking.[292] The model stalking law minimizes the need for these other options by comprehensively proscribing as much stalking behavior as is constitutionally permissible.[293]

The model statute survives vagueness challenges because it places serious limits on the behavior it reaches. The stalker must act repeatedly, with no legitimate purpose, and with an intent to cause the victim substantial emotional harm. In all cases, the victim must suffer reasonable and actual substantial emotional harm. When the stalker follows

286. Id.

287. See note 110 and accompanying text.

288. See notes 91, 138 and accompanying text.

289. See notes 134, 151, 152 and accompanying text.

290. See notes 161-63.

291. See note 163.

292. Congress recognized this in its bill charging the National Institute of Justice with designing a model stalking law. The Institute is authorized to study and evaluate both mental health commitment statutes and protection orders as they relate to the need to prevent stalking behavior. See *Cooperative Agreement to Develop Model State Anti-Stalking Law*, U.S. Newswire (Dec. 23, 1992).

293. See Appendix, Figure 4.

the victim, the statute contains all of the requirements present in the Connecticut statute,[294] which is not vague.[295] The model statute contains a further limitation that the conduct have no legitimate purpose. When the stalker harasses the victim, the model law contains all of the requirements present in the harassment part of the Florida stalking provision,[296] which survives vagueness scrutiny.[297] The model statute is more limited than this segment of the Florida law, however, because it requires that harm be objectively reasonable. Therefore, both the following and harassment prongs of the model stalking provision survive vagueness analysis.

The aggravated stalking provision of the model statute is even more secure against vagueness challenges. It requires, in addition to all the other limits of the statute, that the actor make a credible threat, violate a restraining order or a similar court order, or demonstrate a history of harassing the same victim. All of these requirements act as additional standards to guide law enforcement in distinguishing innocent from criminal behavior.[298] Therefore, the aggravated stalking provision of the model law is not vague.

The model statute also survives overbreadth challenges. Constitutionally protected activity is excluded from the statute in all cases because the exclusion is contained explicitly in both the definition of "harasses" and the definition of "follows." Both definitions also contain requirements that the acts serve "no legitimate purpose."[299]

The stalking and aggravated stalking provisions are distinctly separate in the statute. Independence ensures that a constitutional problem invalidating one provision will not necessarily invalidate the other. The section requiring severability further strengthens this separation.

The model statute provides misdemeanor sanctions for stalking and sets a specific penalty. The statute makes aggravated stalking a felony, but does not set a specific punishment, leaving this to be determined flexibly by state felony penalties. The imposition of a felony penalty ensures that egregious and recidivist conduct is met with seri-

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294. See notes 135-40 and accompanying text.

295. See notes 251-64 and accompanying text.

296. See notes 105-12 and accompanying text.

297. See notes 229-45 and accompanying text.

298. Where the statute requires a credible threat, it is substantially the same as the California stalking law; therefore, it survives vagueness for the same reasons. See notes 196-224 and accompanying text.

299. These provisions ensure that the statute is not overbroad. Model Pen. Code § 250.4 cmt. 6 (1980). See Note, 70 Va. L. Rev. at 532 (cited in note 22); *Bachowski*, 407 N.W.2d at 539. In addition, the statute insists on substantial emotional harm in both intent and effect. This requirement creates a higher threshold than words such as "annoying" or "alarming," which courts have found overbroad. See *Bolles v. People*, 541 P.2d 80 (Colo. 1975).

ous sanctions, a task which prior harassment law has failed to accomplish.[300]

The model statute also provides the court with the option of conducting a mental health evaluation of an accused stalker. This reflects a recognition of the mental defect that is often an element of stalking behavior.[301]

VI. CONCLUSION

The proliferation of stalking statutes reflects a new awareness that obsessive harassment is serious behavior warranting a serious remedy. Stalking laws are an important addition to the legal arsenal, precisely because they account for the nature of obsessive behavior and punish it with adequate penalties. Yet current stalking laws are not comprehensive. Some, like the California and Connecticut statutes, are too narrow to address fully all dangerous stalking behavior. Others, like the Florida statute, are drafted imprecisely and are susceptible to vagueness challenges. With stalking behavior on the rise, the need for states to enact comprehensive and carefully drafted stalking laws that will pass constitutional muster is paramount.

*Robert A. Guy, Jr.**

300. See text accompanying notes 72-74.

301. This provision is extremely similar to a provision in a model statute proposed in Note, 70 Va. L. Rev. at 531-33 (cited in note 22). In addition, the Hawaii stalking statute allows a judge to order counseling. 1992 Hawaii Sess. Laws 292.

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APPENDIX

(Shaded areas indicate what types of stalking conduct the statutes proscribe.)

FIGURE 1. CALIFORNIA STALKING STATUTE

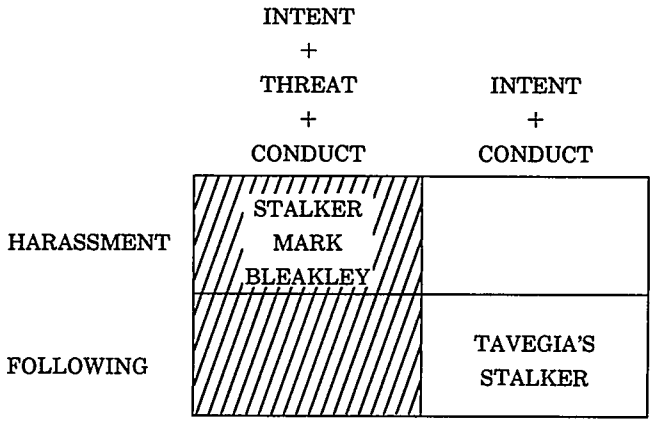


FIGURE 2. FLORIDA STALKING STATUTE

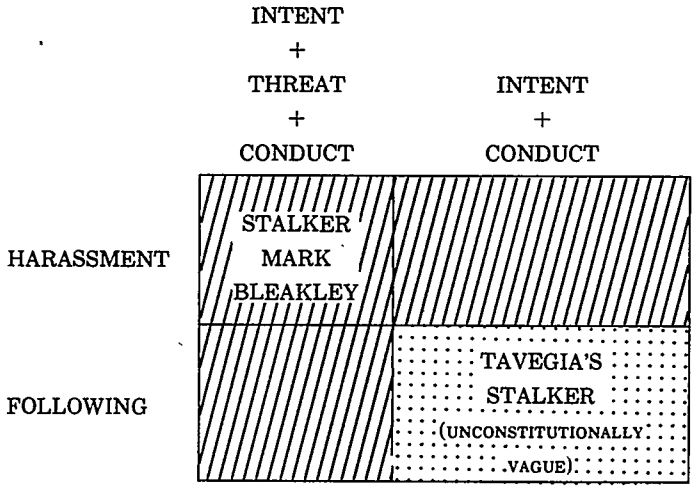
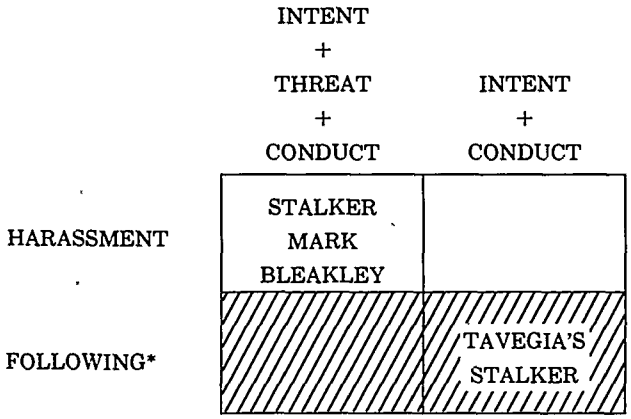


FIGURE 3. CONNECTICUT STALKING STATUTE



* The Connecticut Statute does not specifically address stalking that consists of intent + threat + conduct, but it will reach this behavior because it reaches the lower threshold of intent + conduct.

FIGURE 4. MODEL STALKING LAW