THE KANSAS STALKING LAW: A "CREDIBLE THREAT" TO VICTIMS. A CRITIQUE OF THE KANSAS STALKING LAW AND PROPOSED LEGISLATION

I. INTRODUCTION

The behavior known as stalking was thrust into public consciousness in the late 1980's when two actresses were violently attacked by men who had been stalking them.[1] Theresa Saldana was stabbed by her stalker in 1982 and Rebecca Schaeffer was mortally wounded when her stalker attacked in 1989.[2] Although the celebrity stalking incidents gain more public attention, most stalking victims are ordinary people.[3] In 1990, four women were killed in unrelated incidents over the course of five weeks in Orange County, California.[4] They were all killed by former intimates who had been stalking them.[5] These events served as the impetus for the enactment of the nation's first stalking law.[6] California's

1. Nannette Diacovo, Note and Comment, *California's Anti-Stalking Statute: Deterrent or False Sense of Security?*, 24 SW. U. L. REV. 389, 390 (1995) (examining California's stalking statutes and determining that while some changes in the statutes have made them more effective, the statutes remain problematic).

Stalking statutes throughout the nation have been in a seemingly constant state of change since their enactments. For this reason, law journal articles cited in this note may not have been written with regard to the current statutes of the state from which they come.

2. *Id.* at 390.
3. Miles Corwin, *When the Law Can't Protect*, L.A. TIMES, May 8, 1993, at A1.
4. *See id.*; Diacovo, *supra* note 1, at 390.
5. Corwin, *supra* note 3.
6. Diacovo, *supra* note 1, at 390.

stalking legislation was passed in 1990.[7] Since then, every state has enacted a stalking law.[8]

Data relating to stalking is scarce; however, studies have indicated that there may be as many as 200,000 stalkers nationwide.[9] According to these sources, one in twenty women will be victims of stalking at some point in their lives.[10] Although both men and women are stalked, women are stalked more frequently.[11] Studies have suggested that thirty percent of the 4,300 women who are murdered annually die at the hands of a stalker.[12] Moreover, one estimate

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7. Corwin, *supra* note 3. The original California stalking statute read as follows:

(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 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 the 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.

CAL. PENAL CODE § 646.9 (West Supp. 1991). See *infra* note 19 for text of current California stalking statute.

8. U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT, DOMESTIC VIOLENCE, STALKING, AND ANTISTALKING LEGISLATION, 4 (1996) [hereinafter ANTISTALKING LEGISLATION]. The aforementioned publication stated that all states plus the District of Columbia had adopted stalking statutes except Maine which had an antiterrorizing statute. *Id.* at 4, 15 n.8. Since that publication, Maine has adopted a stalking law. ME. REV. STAT. ANN. tit. 17-A, § 210-A (West Supp. 1996).

9. National Victim Center, *Stalking*, (visited Jan. 2, 1997) <http://www.nvc.org/ddir/info43.htm>. Stalking statistics have not been gathered by law enforcement officials in the past. *Id.* However, the Federal 1994 Crime Bill mandated the collection of stalking statistics. *Id.*

10. *Id.*

11. Brenda K. Harmon, Comment, *Illinois' Newly Amended Stalking Law: Are All the Problems Solved?*, 19 S. ILL. U. L.J. 165, 168 (1994) (examining the Illinois stalking statute and discussing the constitutional problems with its denial of bail provision). Estimates indicate that men stalk women in seventy-five to eighty percent of all stalking cases. National Victim Center, *supra* note 9. For this reason and for convenience, this note frequently employs the pronoun "he" when referring to stalkers and "she" when referring to victims.

12. Art Barnum, *Lawmakers Back Stalker Bill*, CHI. TRIB., April 13, 1992, at 1.

indicates that of the women killed by former intimates, ninety percent were stalked prior to their death.[13]

Kansas is not immune to the instances of stalking occurring throughout the nation. There have been three stalking reports filed with the University of Kansas campus police department since 1993.[14] Kansas State University has had two complaints filed since 1994 and Washburn University has had three since 1995.[15] All of these complaints involved female victims and male suspects.[16]

These statistics illustrate the need for and importance of stalking statutes. Stalking victims need a law that will protect them before their stalker takes violent action. As the statistics above indicate, a victim may be injured or killed if she has no legal course of action until a stalker becomes physically violent. This is the problem states sought to eliminate when they began enacting stalking laws.[17]

Kansas enacted its first stalking law in 1992 and has amended it every subsequent year.[18] The 1995 amendment changed the Kansas statute to its current version, one that mirrors the California statute.[19] Unfortunately, these

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13. J. William David, Comment, *Is Pennsylvania's Stalking Law Constitutional?*, 56 U. PITT. L. REV. 205, 208 (1994) (arguing that Pennsylvania's stalking statute is unconstitutionally vague).

14. Telephone Interview with Chris Keary, Sergeant, KU Campus Police Department (Oct. 9, 1996) [hereinafter Keary Interview].

15. Telephone Interview with Annette Boddy, Records Clerk, KSU Campus Police Department (Oct. 4, 1996) [hereinafter Boddy Interview]. Telephone Interview with Gary Pettijohn, Director of Security, Washburn University Campus Security (Oct. 18, 1996) [hereinafter Pettijohn Interview].

16. Keary Interview, *supra* note 14; Boddy Interview, *supra* note 15; Pettijohn Interview, *supra* note 15.

17. ANTISTALKING LEGISLATION, *supra* note 8, at 1. For text of the original Kansas stalking statute, see *infra* note 77.

18. *See generally*, Act of May 22, 1992, ch. 298, § 95, 1992 Kan. Sess. Laws 1980; Act of May 17, 1993, ch. 291, § 253, 1993 Kan. Sess. Laws 1802; Act of May 11, 1994, ch. 348, § 13, 1994 Kan. Sess. Laws 2096; Act of May 13, 1995, ch. 251, § 10, 1995 Kan. Sess. Laws 1203.

19. *See* KAN. STAT. ANN. § 21-3438 (1995); CAL. PENAL CODE § 646.9 (West Supp. 1997). The current Kansas stalking statute reads as follows:

> (a) Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety.
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> Stalking is a severity level 10, person felony.
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> (b) Any person who violates subsection (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subsection (a) against the same person, is guilty of a severity level 9, person felony.
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> (c) Any person who has a second or subsequent conviction occurring against such person, within seven years of a prior conviction under subsection (a) involving the same victim, is guilty of a severity level 8, person felony.
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> (d) For purposes of this section: (1) "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 and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of "course of conduct."
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> (2) "Harassment" means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.
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> (3) "Credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety. The present incarceration of a person making the threat shall not be a bar to prosecution under this section.

KAN. STAT. ANN. § 21-3438 (1995).

The California stalking statute, at the time of the enactment of the above Kansas statute, read as follows:

(a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family, is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

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

(c) Every person who, having been convicted of a felony under this section, commits a second or subsequent violation of this section shall be punished by imprisonment in the state prison for two, three, or four years.

(d) For the purposes of this section, "harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, torments, or terrorizes the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

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

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

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

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

(i) For purposes of this section, "immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(j) The court shall consider whether the defendant would benefit from treatment pursuant to Section 2684. If it is determined to be appropriate, the court shall recommend that the Department of Corrections make a certification as provided in Section 2684. Upon the certification, the defendant shall be evaluated and transferred to the appropriate hospital for treatment pursuant to Section 2684.

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

The current California statute differs slightly. *See* CAL. PENAL CODE § 646.9 (West Supp. 1997). The California Legislature modified the definition of "credible threat" which now reads as follows:

For the purposes of this section, "credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent to place the person [who] is the target of the threat in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section.

CAL. PENAL CODE § 646.9(g).

The California Legislature also revised the section dealing with restraining orders which now states as follows:

The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court.

amendments have not yet produced an effective stalking statute. The current version of the Kansas stalking law is troublesome for two reasons. First, the statute has too narrow an application to be effective. Second, the statute may not be constitutionally sound. After the 1995 amendment took effect, the Kansas Supreme Court ruled the 1994 version unconstitutional.[20] Although the amendments made to create the 1995 version may have rectified the specific problems outlined by the Kansas Supreme Court, it may remain vulnerable to constitutional attack.[21] It appears that the Kansas Legislature is grappling with the challenge of drafting a flexible statute that is broad enough to protect victims of stalking while defining the law in such a way that it is not vulnerable to constitutional attack.

This note proposes legislation that is both constitutional and more protective of stalking victims. First, this note will introduce the main types of stalkers in an effort to illustrate why a more effective statute is necessary. Second, it will detail the experience of one stalking victim who was not protected by the current Kansas stalking law. Third, it will discuss how a stalking statute should complement the other criminal provisions and why an effective stalking statute is a necessary part of the Kansas criminal code. Fourth, it will trace the development of the Kansas

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> It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.

CAL. PENAL CODE § 646.9(j). The California Legislature also added a provision relating to sex offender registration. *See* CAL. PENAL CODE § 646.9(d) (West Supp. 1997).

20. State v. Bryan, 910 P.2d 212, 214 (Kan. 1996). In *Bryan*, the Kansas Supreme Court struck down the 1994 Kansas stalking statute on the grounds that it was unconstitutionally vague. *Id.* In that case, the defendant, David C. Bryan, had been romantically involved with a woman affiliated with the University of Kansas. *Id.* When the relationship was terminated, Bryan began repeatedly confronting the alleged victim on the University campus. *Id.* Those actions subsequently formed the basis for a stalking charge against Bryan. *Id.* The defendant filed a motion to dismiss contending that the stalking statute was unconstitutionally vague. *Id.* That motion was granted by the district court and this appeal by the State followed. *Id.*

The 1994 Kansas stalking statute stated in pertinent part as follows:

> (a) Stalking is an intentional and malicious following or course of conduct directed at a specific person when such following or course of conduct seriously alarms, annoys or harasses the person, and which serves no legitimate purpose.
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> . . . .
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> (d) For the purposes of this section, "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 and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of "course of conduct."

Act of May 11, 1994, ch. 348, § 13, 1994 Kan. Sess. Laws 2096-97.

The *Bryan* court observed that one could make a stalking case based on "following" or based on a defined "course of conduct." *Bryan*, 910 P.2d at 217, 218. The court explained that the 1994 statute prohibited "intentional and malicious following or course of conduct when such following or course of conduct seriously alarm[ed], annoy[ed], or harass[ed] the person." *Id.* at 217. The court further noted that while "course of conduct" was defined to include an objective (reasonable person) standard, "following" was not. *Id.* The statute thus provided "no definition of the terms alarming, annoying, or harassing in relation to an objective standard when a charge of stalking [was] based on 'following.'" *Id.* The *Bryan* court concluded that the statute specified no standard of conduct and on this basis ruled the 1994 statute unconstitutionally vague. *Id.* at 214, 218. For further discussion of the *Bryan* case, see *infra* Part VII.B.

21. The 1995 amendment to the stalking law transformed the stalking law into its current form which is codified at KAN. STAT. ANN. § 21-3438 (1995). For the full text of the current stalking statute, see *supra* note 19.

stalking statute. Finally, it will detail the problems with the current stalking statute, discuss possible solutions and offer proposed legislation.

II. THE STALKER

Stalking can occur in a variety of contexts. Many times, a former intimate will begin to stalk his victim after she has ended the relationship.[22] Other times the victims are celebrities and are stalked by obsessed fans.[23] However, stalkers can be anyone including strangers, acquaintances and coworkers.[24] Frequently, stalking behavior initially presents itself as an annoyance. For example, a rejected suitor or former intimate sends a gift or telephones in an attempt to make amends. However, this behavior can escalate into relentless and unwanted contact that can be dangerous or even fatal.[25]

Stalkers generally employ a method which uses the victim's fear in an attempt to gain control.[26] "Stalkers typically are crafty and 'have mastered the art of psychological terrorism.'"[27] It is likely, therefore, that stalking behavior will not initially show itself in the form of violence or physical contact.

Various commentators have classified stalkers into typical categories.[28] The three categories this note employs are Erotomania, Love Obsessional and Simple Obsessional.[29] Stalkers come in all forms—strangers, prominent citizens, former intimates—and can be massively or mildly mentally afflicted.[30] However, "none of the people [who stalk] are normal individuals. . . . [S]omething [is] wrong with each and every one of them."[31]

The first category, Erotomania, is characterized by a delusional belief that the victim is in love with the stalker.[32] Despite the fact that the stalker does not know the victim, an Erotomaniac commonly believes that the victim is hindered from expressing her feelings of love for the stalker because of some external obstacle.[33]

The Love Obsessional differs from the Erotomaniac as the Love Obsessional does not necessarily hold the belief that the victim returns his feelings of affection or love.[34] This type of stalker frequently thinks the victim would reciprocate his

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22. ANTISTALKING LEGISLATION, *supra* note 8, at 3.
23. *Id.*
24. *Id.* at 5. Even judges can be stalkers. The former chief judge of the State of New York, Sol Watchtler stalked his former girlfriend, Joy Silverman, after she ended their relationship. Jim Mulvaney & Rita Ciolli, *Jail for Wachtler? A Plea Bargain Expected Today*, NEWSDAY, Mar. 31, 1993, at 3. Wachtler's activities included making harassing phone calls to Silverman, ordering his staff to gather background information regarding Silverman's new boyfriend, sending obscene mail to Silverman's daughter and threatening to kidnap Silverman's daughter. *Id.*
25. ANTISTALKING LEGISLATION, *supra* note 8, at 1, 5.
26. Harmon, *supra* note 11, at 168.
27. Diacovo, *supra* note 1, at 392.
28. *See* Diacovo, *supra* note 1, at 392-98; Harvey Wallace, *A Prosecutor's Guide to Stalking*, 29-FEB PROSECUTOR 26, 26-27 (1995); ANTISTALKING LEGISLATION, *supra* note 8, at 5.
29. Diacovo, *supra* note 1, at 392-98.
30. *Id.* at 392.
31. *Id.* (quoting Dr. Park Eliot Dietz, stalking expert) (internal quotations omitted).
32. Wallace, *supra* note 28, at 27.
33. *Id.* at 27. This commentator states that the Erotomaniac usually engages in the stalking behavior for 124 months. *Id.* He bases this observation on a 74-subject study. *Id.*
34. Diacovo, *supra* note 1, at 395.

feelings if she only had the opportunity to become acquainted with him.[35] This state of mind generally inspires the Love Obsessional to endeavor to become known to the victim by incessantly trying to contact the victim in some way.[36] Although the Love Obsessional is not as likely as the Erotomaniac to threaten his victim, he does tend to shift between emotions of love and hate with respect to his victim.[37]

The Simple Obsessional, unlike the Erotomaniac and Love Obsessional, has had a previous relationship with the victim.[38] The relationship may have been casual; for example, a customer-server relationship, or it may have been romantic.[39] The Simple Obsessional begins stalking the victim when the relationship has either ended or the stalker in some way feels wronged by the victim.[40] The stalking behavior is generally an attempt to either win back love or seek revenge.[41] The Simple Obsessional is the most likely to make threats. Of those Simple Obsessionals who make threats, thirty percent actually do what they threaten.[42]

III. CASE STUDY

Jennifer[43] is a single mother of two children.[44] She had been dating a man

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35. Wallace, *supra* note 28, at 27.
36. Diacovo, *supra* note 1, at 395.
37. *Id.* Wallace, in his article, states that the Love Obsessional can engage in stalking behavior for approximately 146 months. Wallace, *supra* note 28, at 27.
38. Wallace, *supra* note 28, at 27.
39. Diacovo, *supra* note 1, at 396.
40. *Id.*
41. Wallace, *supra* note 28, at 27. Wallace states that this type of stalking behavior generally lasts about five months. *Id.*
42. Diacovo, *supra* note 1, at 396.
43. The victim's real name has not been used.
44. Interview with a victim of stalking, name of victim and place of interview confidential (Oct. 12, 1996) [hereinafter, Victim Interview]. Jennifer's experience is not unique; however, it is not representative of all stalking scenarios. Jennifer, although traumatized and terrorized, is in some senses lucky. Although she lives with the knowledge that her stalker could return, she escaped with her life and those close to her suffered no serious physical harm.

Other victim's stories have a more brutally tragic ending. In Topeka, Kansas, Roselyn Crouch's former boyfriend shot and killed her new boyfriend, wounded a passenger in her new boyfriend's car and then shot and killed himself. Sarah Morrison, *Shootings Kill 2, Wound 1*, TOPEKA CAP. J., Dec. 6, 1996, at 1-A. Crouch's neighbor stated that the former boyfriend had been "harassing Crouch for about a year and that police had been called to the house several times." *Id.* at 2-A. Further, the neighbor stated "she got restraining orders against him, but it didn't do any good. . . . [S]he was beleaguered with constantly trying to evade him and keep him away from them. I know she was afraid he was going to do something." *Id.*

Aside from this tragedy, several other episodes of stalking have occurred since the inception of this note. In Kansas City, a woman was forced at gunpoint into a cab by her ex-boyfriend. Cindy Eberting, *An Angel was Behind the Wheel*, KAN. CITY STAR, Nov. 14, 1996, at A1. The driver of the cab was forced to drive twelve hours, almost to Chicago. *Id.* The woman, Darlene Butler, had a protection from abuse order against her ex-boyfriend. *Id.* Fortunately, she and the cab driver escaped without serious physical injury. *Id.* In Atlanta, the five-year-old son of Deborah Copeland was killed by Copeland's ex-boyfriend as Copeland was forced to watch. Maria Elena Fernandez, *Stabbed 5-Year-Old Died with a Smile*, ATLANTA J. & CONST., Dec. 11, 1996, at C2. The ex-boyfriend, Quinton Hunnicutt, was charged with murder, kidnapping and sexual assault. *Id.* He had held Copeland, three of Copeland's siblings and Copeland's son captive for two days. *Id.* Court records showed that Copeland had left Hunnicutt after years of abuse. *Id.* At Kansas State University, a female student was physically attacked in a parking lot by a man who remained unidentified at the time of the article. Jeremy Kelley, *Student Attacked in B-2*, KAN. ST. COLLEGIAN, Oct. 3, 1996, at 1. "'There were four offenses charged in the incident.'" *Id.* (quoting Robert Mellgren, Assistant Director

named Robert for five months when she decided in August 1995 she no longer wanted to see him. Robert then began stalking her. In September, Robert slept in his car in front of Jennifer's house. Throughout September, Robert sought contact with Jennifer. He would show up to volleyball games where she was coaching, telephone her house and come to her house and bang on the door. These events happened at least daily.

Early in October, Jennifer filed a complaint with the local police department. One particular Sunday in October Jennifer went to meet a friend for coffee. Robert showed up there and was very angry. The following Sunday, Robert, who had apparently been following Jennifer, pulled up behind her car as she parked at a local restaurant, blocked her in the parking space, approached her, grabbed her wrist and yelled at her. He followed Jennifer and her two children throughout that day, appearing everywhere they went. Robert's behavior continued throughout October.

In November, Robert began calling Jennifer incessantly. On November 4, 1995, Jennifer received fourteen calls from Robert, as noted by her "Caller I.D." Robert came to her house that day as well but Jennifer did not let him in. By November 12, 1995, Robert had placed eighty-five calls to Jennifer. Because Jennifer had "Caller I.D.", Robert began placing person to person calls and collect calls under false names. Formal charges were filed against Robert on December 4, 1995.[45] However, the phone calls continued into December. On February 14, 1996, Robert entered a plea of guilty and was found guilty of criminal trespass and battery.[46] No stalking charges were prosecuted; Jennifer's situation did not fit the criminal definition of stalking which requires a "credible threat."[47] Robert was granted probation for eighteen months and is currently in violation of the conditions of his probation.[48] A warrant has been issued but his whereabouts are currently unknown.[49]

Robert harassed Jennifer for approximately four months, keeping her in constant fear.[50] Although Robert never made an explicit threat, he demonstrated that he was capable of being physically abusive when he blocked Jennifer into a

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of the KSU Police). Stalking was included because the attacker had assaulted the victim several months earlier as well. *Id.* The attacker was also charged with battery, intimidation of the victim and threatening the victim. *Id.* In November, an actor, John Heard, was charged with stalking the mother of his child, actress Melissa Leo, and assaulting her boyfriend. *Actor Charged*, MANHATTAN MERCURY, Nov. 22, 1996, at A7.

45. Interview with Brenda M. Jordan, Assistant Riley County Attorney, Riley County Attorney's Office, in Manhattan, Kansas (Jan. 14, 1997) [hereinafter Jordan Interview].

46. *Id.* The battery charge stemmed from the incident in the parking lot during which Robert grabbed Jennifer's wrist. Victim Interview, *supra* note 44. The harassment by telephone charge had been dropped as the result of a plea bargain. Jordan Interview, *supra* note 45. Because harassment by telephone is a nonperson misdemeanor while battery and trespass are both person misdemeanors, it was better to drop the harassment by telephone. *Id.*

47. Jordan Interview, *supra* note 45. See text at *supra* Part VI. for the definition of "credible threat."

48. *Id.* Robert is in violation of the conditions of his parole as a result of his disappearance. *Id.*

49. *Id.*

50. A former Los Angeles County District Attorney has described stalking in the following way: "This is terrorism, pure and simple. . . . Somebody's life is destroyed by it, somebody's life becomes enveloped by it. Everything that they do—when they are asleep, when they are awake—is somehow connected to it. . . . There is somebody constantly focused on them with an obsession." MELITA SCHAUM & KAREN PARRISH, STALKED 9 (1995) (quoting Ira Reiner).

parking stall, approached her and grabbed her by the wrist. Accordingly, his actions, although void of an explicit threat, made Jennifer fearful of her and her family's safety. Moreover, statistics indicate that many times stalking perpetrated by a former intimate is a warning sign of future violence.[51] Therefore, stalking behavior, even in the absence of a "credible threat," should be taken seriously.[52]

IV. WHY OTHER CRIMINAL PROVISIONS ARE INADEQUATE WITHOUT A STALKING LAW

An effective stalking statute is essential to the protection of victims of stalking. In a scenario such as Jennifer's, where the current stalking law is inapplicable, the probable criminal action that can be taken against a stalker is limited to the criminal provisions regarding criminal threats, harassment by telephone, assault and battery.[53] However, these laws provide inadequate protection for many victims of stalking.

The criminal threat and harassment by telephone provisions are not broad enough to cover the wide range of stalking behavior. In order to be charged with making a criminal threat, one must make a threat to commit violence.[54] The criminal threat provision would not be useful in a stalking situation such as Jennifer's where there has been no communicated threat. Additionally, this provision would not cover situations where a stalker follows his victim, places her under surveillance or sends incessant and frightening "love" letters or gifts. Obviously, the same problem exists with regard to the harassment by telephone statute as the harassment in the above situations is not achieved by use of a telephone.[55] Even

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51. The statistic referenced states that of the women killed by former intimates, ninety percent were stalked prior to their death. David, *supra* note 13, at 208.

52. One stalking expert, Gavin de Becker, has stated:

> A viable law will take into account that the perception of the victim is a key element of threats and unwanted pursuit. The CONTEXT is an important part of the victim's perception. If I say to you in this testimony, "I will shoot you tomorrow as you walk to your car," not one of you is alarmed, because in this context, it is not a threat. On the other hand, if a person your daughter dated once three years ago shows up in the parking lot near her car and stares at her ominously, if he follows her on campus, if he sends her dead flowers, leaves bizarre messages on her answering machine, shows up at a family event and points his finger at her with a trigger-pulling gesture, well, that is threatening conduct-even though he may never have spoken a threatening word.

SCHAUM & PARRISH, *supra* note 50, at 173-74 (quoting Gavin de Becker).

53. The Kansas criminal threat statute may be found at KAN. STAT. ANN. § 21-3419 (1995). The harassment by telephone statute is codified at KAN. STAT. ANN. § 21-4113 (1995). The assault statute is at KAN. STAT. ANN. § 21-3408 (1995), and battery may be found at KAN. STAT. ANN. § 21-3412 (1995). The text of these statutes may be found *infra* at notes 54 (criminal threats), 55 (harassment by telephone), 57 (assault) and 58 (battery).

54. KAN. STAT. ANN. § 21-3419. The criminal threat statute reads in pertinent part as follows: "A criminal threat is any threat to . . . commit violence communicated with intent to terrorize another . . . or in reckless disregard of the risk of causing such terror." *Id.*

55. KAN. STAT. ANN. § 21-4113. The harassment by telephone statute reads as follows:

> (a) Harassment by telephone is use of telephone communication for any of the following purposes:
> (1) Making or transmitting any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent;
> (2) making a telephone call, whether or not conversation ensues, or transmitting a telefacsmile communication with intent to abuse, threaten or harass any person at the called number;
> (3) making or causing the telephone of another repeatedly to ring, with intent to harass any person at the called number;

in situations where stalkers use the telephone to harass a victim, this statute is not adequate without a companion stalking statute. Harassment by telephone is a class A nonperson misdemeanor and does not carry with it the more profound penalties as does the felony stalking statute.[56] Nor is the harassment by telephone provision capable of addressing the other dangerous stalking activities that may also be occurring.

Similar problems exist with the assault and battery statutes. Because assault requires the victim to be apprehensive of imminent bodily harm, situations as above described would, again, generally not be covered.[57] Battery requires actual physical contact and therefore provides the victim no protection from stalking behaviors and no protection from the eventual physical violence because the statute does not operate until the stalker has had physical contact with the victim.[58]

Like harassment by telephone, assault and battery are misdemeanors and do not provide strict enough penalties for a stalking situation.[59] An effective stalking law is needed so the whole range of stalking behaviors over a period of time can be taken into account and as a result justify increased punishment. If this is done, it should provide increased protection for victims of stalking.

Jennifer's situation exemplifies the necessity of having an effective stalking provision in addition to the above criminal provisions. Robert terrorized Jennifer for nearly four months. However, because the current stalking statute is too

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(4) making repeated telephone calls, during which conversation ensues, or repeatedly transmitting a telefacsimile communication solely to harass any person at the called number;
(5) playing any recording on a telephone, except recordings such as weather information or sports information when the number thereof is dialed, unless the person or group playing the recording shall be identified and state that it is a recording; or
(6) knowingly permitting any telephone or telefacsimile communication machine under one's control to be used for any of the purposes mentioned herein.
(b) Every telephone directory published for distribution to members of the general public shall contain a notice setting forth a summary of the provisions of this section. Such notice shall be printed in type which is no smaller than any other type on the same page and shall be preceded by the word "WARNING."
(c) Harassment by telephone is a class A nonperson misdemeanor.
(d) As used in this section, "telephone communication" shall include telefacsimile communication which is the use of electronic equipment to send or transmit a copy of a document via telephone lines.

Id.

56. The maximum penalties for a class A nonperson misdemeanor are one year in the county jail and a fine of $2,500. *See* KAN. STAT. ANN. § 21-4502 (1995); KAN. STAT. ANN. § 21-4503a (1995). Judges will generally be reluctant to sentence an individual to the maximum degree on misdemeanor charges and thus it is likely that a person convicted of this crime would serve little or no jail time. Telephone Interview with Barry Wilkerson, Assistant Riley County Attorney (Oct. 11, 1996) [hereinafter Wilkerson Interview].

57. KAN. STAT. ANN. § 21-3408. The assault statute reads as follows: "Assault is intentionally placing another person in reasonable apprehension of immediate bodily harm. Assault is a class C person misdemeanor." *Id.*

58. KAN. STAT. ANN. § 21-3412. The battery statute reads as follows: "Battery is: (a) Intentionally or recklessly causing bodily harm to another person; or (b) intentionally causing physical contact with another person when done in a rude, insulting or angry manner. Battery is a class B person misdemeanor." *Id.*

59. *See* KAN. STAT. ANN. § 21-3412; KAN. STAT. ANN. § 21-3408. Assault is a class C person misdemeanor and carries with it a maximum jail sentence of one month in the county jail. *See* KAN. STAT. ANN. § 21-3408; KAN. STAT. ANN. § 21-4502. Battery is a class B person misdemeanor and carries with it a maximum jail term of six months in the county jail. *See* KAN. STAT. ANN. § 21-3412; KAN. STAT. ANN. § 21-4502.

narrow, Robert was charged with two misdemeanors, battery and trespassing.[60] The infliction of such fear and the utter disruption of one's life accomplished over four months deserves more than misdemeanor charges.

V. WHY RESTRAINING ORDERS ALONE ARE INADEQUATE

The civil remedy of a restraining order also needs to be complemented by an effective stalking law. Restraining orders are not by themselves largely effective. First, there are practical problems associated with obtaining restraining orders, such as legal costs and availability.[61] Second, restraining orders are frequently violated.[62] As such, although restraining orders may provide protection in some cases, an effective stalking statute is needed to complement restraining orders by providing independent criminal penalties for stalking behavior.

To pursue a restraining order, a petition for relief must be filed with the court.[63] A hearing date is then set.[64] A restraining order will not be granted unless one shows the following:

> (1) there is a reasonable probability of irreparable future injury to the [person seeking the order]; (2) an action at law will not provide an adequate remedy; (3) the threatened injury to the [person seeking the order] outweighs whatever damage the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest.[65]

The hearing provides the opportunity for the victim to make these four showings. This requires legal argument and examination of witnesses; therefore, in the vast majority of cases, it also requires an attorney. The attorney's fees for obtaining a restraining order can be several hundreds of dollars or more; however, the financial ability of a victim to hire an attorney varies.[66] As such, the cost may serve as a hinderance to many victims.

In addition to the potential economic barriers, the requirement that the victim show "reasonable probability of irreparable harm" may also provide a barrier. With respect to that requirement, the Kansas Court of Appeals in *Sampel v. Balbernie* stated that "[m]ere apprehension or possibility of wrong or injury ordinarily does not establish a reasonable probability of future injury that will justify" this type of relief.[67] Further, the court stated "it must clearly appear that

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60. Jordan Interview, *supra* note 45.

61. SCHAUM & PARRISH, *supra* note 50, at 158.

62. *See* Harmon, *supra* note 11, at 172; Diacovo, *supra* note 1, at 397. See *supra* note 44 for specific instances where restraining or protection from abuse orders were violated and violent acts were committed.

63. Telephone Interview with Charles Ball, Attorney, Myers, Pottroff & Ball (Feb. 6, 1997) [hereinafter Ball Interview].

64. *Id.*

65. Sampel v. Balbernie, 889 P.2d 804 (Kan. Ct. App. 1995) (reversing the district court's dismissal of a petition for injunctive relief for failure to state a claim).

66. Ball Interview, *supra* note 63; Telephone Interview with Anne Miller, Attorney, Seaton, Miller & Bell (Feb. 5, 1997).

67. *Sampel*, 889 P.2d at 807. In *Sampel*, the Kansas Court of Appeals reviewed the trial court's dismissal of Sampel's petition for a restraining order. *Id.* at 806. The trial court dismissed the petition on the grounds that the injunctive relief sought was unavailable in domestic dispute situations. *Id.* The court of appeals reversed stating that "[g]eneral injunctive relief is available to protect persons from

some act has been done, or is threatened, which will produce irreparable injury."[68] These requirements serve to limit the availability of restraining orders. For example, a victim whose stalker is sending obsessive letters and following her will likely have difficulty showing the requisite probability of irreparable harm. Furthermore, the *Sampel* court suggested that a single act of violence may be sufficient but only where there is also a threat of future harm or where future harm is reasonably probable.[69] Thus, even if the stalker commits an act of violence against his victim, the ability to get a restraining order is not guaranteed.

The Kansas Protection from Abuse Act makes the process of getting a restraining order easier, but only in some circumstances.[70] The Protection from Abuse Act provides relief only for those victims who live with or formerly lived with their stalkers.[71] Furthermore, to be eligible under this act, the victim must allege that abuse has already occurred.[72] Provided one is eligible, the act simplifies the process and enables individuals to seek a restraining order without the help of an attorney.[73] Therefore, this act provides assistance for some stalking victims; however, those ineligible will continue to face the problems associated with obtaining traditional restraining orders.

Even if a restraining order is obtained, it may not provide much protection.[74] In fact, at least one expert believes that obtaining a restraining order may provoke violence.[75] Of this occurrence, the expert has stated:

> Cases which escalated to violence have one factor in common alarmingly often: INTERVENTION (usually in the form of police warnings and restraining orders).
>
> It is common that [restraining orders] precede violence in stalking cases; this fact alone calls for the greatest caution when making the intervention decision. Study the cases, work back from the murder, and you'll find police interventions or [restraining orders], or both.[76]

This frightening observation illustrates the precarious position into which victims may be placed. Under the current stalking law, a victim may not be protected until the stalker has become violent. In the meantime, the victim will likely want to legally protect herself with a restraining order. However, the restraining order may be out of reach. On the other hand, if the victim succeeds in obtaining the order, it may provoke, instead of restrain, her stalker.

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continuing abuse, harassment, and threats." *Id.* at 807.

68. *Id.* at 807.

69. *Id.*

70. *See* KAN. STAT. ANN. §§ 60-3101 to -3111 (1994 & Supp. 1996).

71. KAN. STAT. ANN. § 60-3104(a) (Supp. 1996).

72. *Id.* This provision reads as follows: "A person may seek relief under the protection from abuse act by filing a verified petition with any district judge or with the clerk of the court alleging abuse by another with whom the person resides or formerly resided." *Id.* Abuse is defined as including the following: (1) "Willfully attempting to cause bodily injury, or willfully or wantonly causing bodily injury"; (2) "Willfully placing, by physical threat, another in fear of imminent bodily injury"; (3) Certain sexual conduct with a minor under 16 years of age. KAN. STAT. ANN. § 60-3102 (1994).

73. *See* KAN. STAT. ANN. §§ 60-3101 to -3111.

74. SCHAUM & PARRISH, *supra* note 50, at 159.

75. *Id.*

76. *Id.* (quoting Gavin de Becker, stalking expert).

VI. HISTORY OF THE KANSAS STALKING LAW

The first Kansas stalking statute was passed in 1992.[77] It was thereafter amended slightly in 1993[78] and substantially in 1994.[79] Subsequently, the 1994

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77. Act of May 22, 1992, ch. 298, § 95, 1992 Kan. Sess. Laws 1980. The original Kansas stalking statute read as follows:

> (a) Stalking is the willful, malicious and repeated following and harassment of another person.
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> Stalking is a class B misdemeanor.
>
> (b) Any person who violates subsection (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subsection (a) against the same person, is guilty of a class A misdemeanor.
>
> (c) Any person who has a second or subsequent conviction occurring against such person, within seven years of a prior conviction under subsection (a) involving the same victim, is guilty of a class A misdemeanor.
>
> (d) For purposes of this section:
>
> (1) "Harassment" 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; and
>
> (2) "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".
>
> (e) This section shall not apply to conduct which occurs during labor picketing.

Id.

78. Act of May 17, 1993, ch. 291, § 253, 1993 Kan. Sess. Laws 1802. The 1993 amendment changed the statute to read as follows:

> (a) Stalking is the intentional, malicious and repeated following and harassment of another person.
>
> Stalking is a class B person misdemeanor.
>
> (b) Any person who violates subsection (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subsection (a) against the same person, is guilty of a class A person misdemeanor.
>
> (c) Any person who has a second or subsequent conviction occurring against such person, within seven years of a prior conviction under subsection (a) involving the same victim, is guilty of a class A person misdemeanor.
>
> (d) For purposes of this section:
>
> (1) "Harassment" means a knowing and intentional 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; and
>
> (2) "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."
>
> (e) This section shall not apply to conduct which occurs during labor picketing.

Id. This amendment did not create a substantive change in the law. It merely changed the word willful to intentional.

79. Act of May 11, 1994, ch. 348, § 13, 1994 Kan. Sess. Laws 2096-97. The 1994 version read "[s]talking is an intentional and malicious following or course of conduct directed at a specific person when such following or course of conduct seriously alarms, annoys or harasses the person, and which serves no legitimate purpose." *Id.* Course of conduct was then defined as follows:

> [A] pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of "course of conduct."

Id.

stalking statute was ruled unconstitutional by the Kansas Supreme Court.[80] In the meantime, in 1995, the Kansas Legislature again amended the stalking statute.[81] This amendment brought the stalking statute to its current form which reads as follows:

> (a) Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety. Stalking is a severity level 10, person felony.
> (b) Any person who violates subsection (a) when there is a temporary restraining order or an injunction, or both, in effect prohibiting the behavior described in subsection (a) against the same person, is guilty of a severity level 9, person felony.
> (c) Any person who has a second or subsequent conviction occurring against such person, within seven years of a prior conviction under subsection (a) involving the same victim, is guilty of a severity level 8, person felony.
> (d) For purposes of this section: (1) "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 and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of "course of conduct."
> (2) "Harassment" means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.
> (3) "Credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety. The present incarceration of a person making the threat shall not be a bar to prosecution under this section.[82]

VII. PROBLEMS WITH THE CURRENT STALKING LAW

A. *The Ineffectiveness of the Stalking Law*

The current stalking statute imposes an unduly heavy burden on prosecutors and victims. According to the statute, stalking can occur in one of two ways: by following the victim or by harassing the victim. In order to successfully prosecute an individual for stalking by harassment, eleven elements must be proved.[83] They are (1) intentional, malicious and repeated harassment; (2) knowing and intentional course of conduct; (3) subjective serious alarm, annoyance, torment or terror; (4) no legitimate purpose; (5) objective substantial emotional distress; (6)

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80. State v. Bryan, 910 P.2d 212 (Kan. 1996). See *supra* note 20 and *infra* Part VII.B. for case description.
81. Act of May 13, 1995, ch. 251, § 10, 1995 Kan. Sess. Laws 1203.
82. KAN. STAT. ANN. § 21-3438 (1995).
83. *Id.*

subjective substantial emotional distress; (7) credible threat; (8) intent to carry out the threat; (9) apparent ability to carry out the threat; (10) objective fear of safety caused by the threat; and (11) specific intent to create objective fear for safety.[84]

In order to prove stalking by following, the following elements must be satisfied: (1) intentional, malicious and repeated following; (2) credible threat; (3) intent to carry out the threat; (4) apparent ability to carry out the threat; (5) objective fear for safety caused by the threat; and (6) specific intent to create objective fear of safety.[85]

Because stalking manifests itself in many different behaviors and because this statute requires proof of a great number of them, it does not protect many victims. Perhaps the greatest hinderance to prosecution under this statute is the requirement that the stalker make a credible threat. Many prosecutors are reluctant or unable to utilize the current law due to this requirement.[86]

Not all stalkers make a credible threat as it is defined by the statute. Although all stalkers are capable of violence, the Love Obsessional is less likely to make a threat to his victim than the Erotomaniac.[87] Thus, the victim of this type of stalker may remain legally unprotected until the stalker becomes physically violent. The credible threat requirement also would not bring within its ambit a situation where a stalker threatens his victim but has no provable intent or apparent ability to carry it out. Jennifer's situation, as detailed above, is another example of the problems created by this element.[88] There, the stalker engaged in actions that may have implied a threat. However, the prosecutor did not pursue a stalking charge because the credible threat language of the statute did not encompass Jennifer's situation to the degree needed to justify pursuing a conviction.[89]

Furthermore, one purpose of the stalking law is to protect people before they are victims of actual violence; however, the credible threat element requires an intent and apparent ability to carry out the threat before legal action may be taken.[90] Thus, the credible threat requirement interferes with the purpose of the law because before a victim is protected, the stalker must be ready, willing and able to commit an act of violence. By the time this happens, the stalker may be moments away from harming his victim.[91]

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84. *Id.*

85. *Id.* The Kansas Court of Appeals defined "following" as "to go, proceed, or come after or pursue in an effort to overtake." State v. Zhu, 909 P.2d 679, 681 (1996) (internal quotations omitted) (upholding defendant's conviction of stalking) (citing State v. Culmo, 642 A.2d 90, 98 (Conn. Super. Ct. 1993) (upholding the constitutionality of the Connecticut second-degree stalking statute) (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 479 (1991))).

86. Wilkerson Interview, *supra* note 56; Telephone Interview with Nicky Sipes Brumbeloe, Shawnee County Assistant District Attorney, Shawnee County District Attorney's Office (Oct. 3, 1996); Telephone Interview with Jerry Little, Douglas County Assistant District Attorney, Douglas County District Attorney's Office (Oct. 10, 1996).

87. Diacovo, *supra* note 1, at 392, 395.

88. *See Legally, Stalking is Only a Nuisance Now*, MANHATTAN MERCURY, May 5, 1996, at C4.

89. Victim Interview, *supra* note 44; Jordan Interview, *supra* note 45.

90. KAN. STAT. ANN. § 21-3438 (1995).

91. Some critics have stated that "by the time a threat *does* occur, it may be too late to avert a physical attack or murder." SCHAUM & PARRISH, *supra* note 50, at 172. Indeed, a Chief Deputy State's Attorney stated "[i]n real life . . . the threat is the *last thing* that happens before the person is harmed." *Id.* (quoting Steven P. McCollum).

In addition to requiring a credible threat, the stalking law requires the stalker to have the specific intent to place the victim in reasonable fear for her safety.[92] Again, stalkers may not intend to inspire fear in their victims, or if they do, it may be difficult to prove.[93] For example, a stalker in the Erotomania category, who believes his victim shares his romantic feelings and would respond but for some barrier, may not initially intend to put the victim in fear.[94] He may simply be trying to accomplish his goal of removing the barrier which he believes hinders the establishment of a relationship with his victim.[95] Furthermore, the methods employed by those stalkers who do specifically intend to place their victims in fear may be too subtle or dependent on context to qualify as credible proof of intent to place in fear.[96]

Further detracting from the effectiveness of this law are the penalties for violating it; they are not stringent enough. Because women who are stalked by former intimates are so often killed by them, stalking penalties should reach the level necessary to allow a judge to order incarceration or in-patient therapy.[97] Presently, a first stalking offense is a level 10 person felony which is the least

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92. KAN. STAT. ANN. § 21-3438 (1995).

93. SCHAUM & PARRISH, *supra* note 50, at 174.

94. *Id.*

95. ANTISTALKING LEGISLATION, *supra* note 8, at B-2 to B-3.

96. For example, the stalker who sends intimate gifts to his victim and notes regarding their imminent happiness together.

97. See David, *supra* note 13, at 208, for an estimate that of the women murdered annually by former intimates, ninety percent were stalked prior to their deaths. The National Institute of Justice research report recommends that states "consider establishing a sentencing scheme for stalking that permits incarceration as an option for all stalking convictions." ANTISTALKING LEGISLATION, *supra* note 8, at C-1.

Some stalking statutes now allow courts to determine if the defendant would potentially benefit from psychiatric treatment and to issue orders of that nature. For example, California's stalking statute states the following at subsection *l*:

> The court shall consider whether the defendant would benefit from treatment pursuant to Section 2684. If it is determined to be appropriate, the court shall recommend that the Department of Corrections make a certification as provided in Section 2684. Upon the certification, the defendant shall be evaluated and transferred to the appropriate hospital for treatment pursuant to Section 2684.

CAL. PENAL CODE § 646.9(*l*) (West Supp. 1997).

Section 2684 of the *California Code* states the following:

> (a) If, in the opinion of the Director of Corrections, the rehabilitation of any mentally ill, mentally deficient, or insane person confined in a state prison may be expedited by treatment at any one of the state hospitals under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the Director of Corrections, with the approval of the Board of Prison Terms for persons sentenced pursuant to subdivision (b) of Section 1168, shall certify that fact to the director of the appropriate department who shall evaluate the prisoner to determine if he or she would benefit from care and treatment in a state hospital. If the director of the appropriate department so determines, the superintendent of the hospital shall receive the prisoner and keep him or her until in the opinion of the superintendent the person has been treated to the extent that he or she will not benefit from further care and treatment in the state hospital.
>
> (b) Whenever the Director of Corrections receives a recommendation from the court that a defendant convicted of a violation of [the stalking law] and sentenced to confinement in the state prison would benefit from treatment in a state hospital pursuant to subdivision (a), the director shall consider the recommendation. If appropriate, the director shall certify that the rehabilitation of the defendant may be expedited by treatment in a state hospital and subdivision (a) shall apply.

CAL. PENAL CODE § 2684 (West Supp. 1997).

serious ranking possible for a felony non-drug offense.[98] The severity increases to a level 9 for a stalking offense committed in violation of a temporary restraining order and increases to a level 8 for a second stalking offense within seven years regarding the same victim.[99] A level 8, 9, or 10 felony will result in presumptive probation even if the stalker has a criminal record including two prior felonies, providing that only one is a person felony.[100] Thus, even in situations where the stalker was previously convicted of stalking the same victim or violated a restraining order to accomplish the stalking, the stalker will be presumptively entitled to probation during sentencing. Especially in situations such as these, judges need to be able to incarcerate stalkers because the stalker, by continuing to stalk his victim subsequent to a first conviction, demonstrates that the criminal prosecution alone, without incarceration, is not a sufficient deterrent.

B. *The Constitutionality of the Current Statute*

Aside from its ineffectiveness, the current statute may also be unconstitutional. It could be argued that the current statute is impermissibly vague. This argument proved to be fatal to the 1994 stalking statute. While the current statute addresses problems inherent in the 1994 statute, new problems abound which continue to keep the current statute vulnerable to constitutional attack.

It was *State v. Bryan* in which the Kansas Supreme Court ruled the 1994 version of the stalking law unconstitutionally vague.[101] The court stated the test for vagueness as whether the language of a statute

> "conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process"

and hence void for vagueness.[102]

The 1994 version stated "[s]talking is an intentional and malicious following or course of conduct directed at a specific person when such following or course of conduct seriously alarms, annoys or harasses the person."[103] This version also included a definition of course of conduct which imported an objective

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98. *See* KAN. STAT. ANN. § 21-3438 (1995); KAN. STAT. ANN. § 21-4704 (Supp. 1996).

99. KAN. STAT. ANN. § 21-3438.

100. KAN. STAT. ANN. § 21-4704 (Supp. 1996). A judge may only deviate from the presumptive sentences for "substantial and compelling reasons." KAN. STAT. ANN. § 21-4704(d).

The Kansas sentencing guidelines require that a person's criminal history be used in conjunction with the severity level of the committed crime in order to determine the presumptive sentence that person should receive. *See* KAN. STAT. ANN. § 21-4704. The classification of an individual's criminal history involves distinguishing between prior person felonies or misdemeanors and prior nonperson felonies or misdemeanors. *See* KAN. STAT. ANN. § 21-4711 (Supp. 1996). Examples of person crimes are murder, battery, assault and robbery. *See* KAN. STAT. ANN. § 21-3401 (1995); KAN. STAT. ANN. § 21-3412 (1995); KAN. STAT. ANN. § 21-3408 (1995); KAN. STAT. ANN. § 21-3426 (1995). Examples of nonperson crimes are theft and forgery. *See* KAN. STAT. ANN. § 21-3701 (1995); KAN. STAT. ANN. § 21-3710 (1995).

101. State v. Bryan, 910 P.2d 212 (Kan. 1996). See *supra* note 20 for further case description.

102. *Bryan*, 910 P.2d at 215 (quoting State v. Dunn, 662 P.2d 1286 (Kan. 1983) (upholding the Drug Paraphernalia Act in the face of a constitutional challenge based on a theory of vagueness)).

103. Act of May 11, 1994, ch. 348, § 13, 1994 Kan. Sess. Laws 2096. See *supra* note 20 for the text of the 1994 Kansas stalking statute.

standard by requiring that the course of conduct "cause a reasonable person to suffer substantial emotional distress."[104] However, a person could be guilty of stalking by following without engaging in the course of conduct defined and, thus, would be guilty of stalking by intentionally and maliciously following a specific person when the following alarmed, annoyed or harassed the person.[105] The stalking by following provision did not include an objective (reasonable person) standard and, thus, the presence of a criminal act was dependent on whether the victim subjectively felt alarmed, annoyed or harassed.[106] The Kansas Supreme Court invalidated the statute on that basis stating that the problem was that the statute used the words "alarms, annoys and harasses without any sort of a definition or an objective standard to measure the prohibited conduct" and, thus, "persons of common intelligence must necessarily guess at its meaning."[107]

The current statute solves that particular problem by making stalking "an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety."[108] Thus, the following need only be intentional and malicious and need not alarm, annoy or harass the victim.[109] Furthermore, the following must be coupled with a credible threat which is defined in terms of an objective standard.[110]

Although the specific concerns expressed by the *Bryan* court have been rectified, the current statute is more complex, more confusing and contains more definitions to synthesize. As a result, questions arise that may weaken the ability of the current statute to withstand an attack on vagueness grounds.

The operation of the definitions found in the current statute raises such questions. The statute defines three terms, "course of conduct," "harassment" and "credible threat." These three definitions and the basic definition of stalking are as follows:

> Stalking is an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety.
>
> . . . .
>
> . . . "Course of conduct" [This phrase is defined because it is used in the definition of harassment below] means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of course of conduct.
> "Harassment" means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose.

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104. *Id.*
105. *Id.*
106. *Bryan*, 910 P.2d at 217.
107. *Id.* at 219, 221 (internal quotation marks omitted). For further explanation of this case, see *supra* note 20.
108. KAN. STAT. ANN. § 21-3438(a) (1995).
109. *Id.*
110. *Id.*

> "Credible threat" means a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements and conduct made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for such person's safety. The present incarceration of a person making the threat shall not be a bar to prosecution under this section.[111]

1. *The "Repeated Pattern" Argument*

The first potential vagueness problem relates to stalking by harassment. In a stalking by harassment case, an argument could be made that the definitions of "harassment" and "course of conduct" read in conjunction with the basic definition of stalking render the statute impermissibly vague. These definitions, taken together, suggest that the statute requires a "repeated . . . pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."[112] Therefore, stalking by harassment oddly seems to require a repeated pattern.[113] Furthermore, the pattern itself must be composed of a series of acts. Therefore, to establish stalking by harassment, one must show a series of acts which constitutes a pattern of conduct which then must be shown to have been repeated.[114] In *Commonwealth v. Kwiatkowski*, the Massachusetts stalking law was deemed void for vagueness for exactly this reason.[115] The *Kwiatkowski* court explained:

> To be guilty under the "harassment" aspect, as opposed to the "following" aspect, . . . it can be fairly argued . . . that one must engage repeatedly (certainly at least twice) in a pattern of conduct or series of acts over a period of time. Under this interpretation, there must be repetition of either a pattern of conduct or a series of acts. One pattern or one series would not be enough.
>
> We doubt that the Legislature intended to provide that proof of either repeated patterns of conduct or repeated series of acts was an essential element of the harassment aspect of the crime of stalking. A single pattern of conduct or a single series of acts, combined with the other elements of the crime, was presumably intended to constitute the crime. That is not, however, stated in [the statute] with sufficient clarity to avoid the force of defendant's claim of unconstitutional vagueness.[116]

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111. KAN. STAT. ANN. § 21-3438.

112. *See id.* The general definition of stalking requires "an intentional, malicious and repeated following or harassment of another person." *Id.* Thus, stalking requires, among other things, a "repeated . . . harassment." *Id.* If one inserts the definition of "harassment" in place of the word "harassment," the stalking law requires a "repeated . . . course of conduct." *Id.* Now if one inserts the definition of "course of conduct" in place of the phrase "course of conduct," the statute requires a "repeated . . . pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose." *Id.*

113. In other words, the statute requires more than one pattern.

114. One can argue that this makes the statute vague because of the difficulty involved in determining when a sufficient series of acts has occurred in order to constitute a pattern of conduct. Furthermore, the pattern of conduct must be repeated and thus, one must also determine when the initial pattern ends so that one can determine if it has been repeated.

115. *Kwiatkowski*, 637 N.E.2d 854, 857 (Mass. 1994).

116. *Id.* (footnote omitted).

Thus, a vagueness argument based on the *Kwiatkowski* case could be made in Kansas because the Kansas statute as drafted creates the same ambiguity as did the Massachusetts statute. Furthermore, the assumption could be made in Kansas as it was made in Massachusetts that the Legislature did not intend for the statute to require proof of a repeated pattern of conduct.[117]

2. *The "Apparent Ability" Argument*

The second potential vagueness concern arises in connection with the credible threat requirement. In all stalking cases, whether by following or harassment, the existence of a credible threat must be proved.[118] In order for a threat to be credible, the definition requires that it be written, verbal or implied and that it be "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 such person's safety."[119] The statute includes no definition of apparent ability and without such, one may argue that it is impermissibly vague. It is unclear what a person needs to possess in order to have an apparent ability to carry out a threat. One would think that every stalker, even every living person, would have an apparent ability to carry out a communicated threat, especially when the statute states that "[t]he present incarceration of a person making the threat shall not be a bar to prosecution" under the credible threat section.[120] However, by requiring an apparent ability to carry out a threat, the statute limits the applicability of the stalking statute; to whom and what behavior the limit applies is an unanswered question in this jurisdiction.[121] Therefore, this question may form

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117. The argument that the Kansas Legislature presumably did not intend the statute to so operate is buttressed by the presence of a second presumably unintentional operation of the statute. The second questionable operation arises in connection with two exceptions to the stalking law. The first exception protects "constitutionally protected activity" and the second protects behavior serving a "legitimate purpose." *See* KAN. STAT. ANN. § 21-3438 (1995). Recall that stalking may be accomplished by "following" or "harassment" but in either case a "credible threat" must be shown. Recall also that the phrase "course of conduct" is found in the definition of "harassment" and is also separately defined. However, the "course of conduct" definition is not utilized in a stalking by following case. Thus, in a stalking by harassment case, the "harassment," "course of conduct" and "credible threat" definitions are utilized while in a stalking by following case, only the "credible threat" definition is utilized. The above mentioned exceptions protecting "constitutionally protected activity" and behavior serving a "legitimate purpose" are found in the "course of conduct" and "harassment" definitions only and thus would apply only in a stalking by harassment case. *See* KAN. STAT. ANN. § 21-3438. Therefore, it could be argued that "constitutionally protected activity" or conduct serving a "legitimate purpose" are protected only in the context of a stalking by harassment case. It seems unlikely that this result was intended by the Legislature. One wonders when the making of a credible threat would ever be legitimate or protected activity. Nonetheless, if the statute is trying to protect police, reporters, or protesters of some sort, it seems as though the protection would be necessary in both the harassment and the following context. This second and equally odd operation of the stalking law may add validity to the original claim that the stalking law operates in a way the Legislature did not intend.

118. KAN. STAT. ANN. § 21-3438.

119. *Id.*

120. *Id.*

121. In *People v. McClelland*, a California court briefly discussed the California statute's apparent ability requirement. *McClelland*, 49 Cal. Rptr. 2d 587, 593 (Ct. App. 1996). In that case, the defendant challenged the sufficiency of evidence with regard to the apparent ability requirement. *Id.* In response, the court stated that "[t]he circumstances leading to defendant's attempted murder conviction, his threatening display of matches to [the victim], his throwing of a bottle at the house . . . constituted substantial evidence of his apparent ability to carry out the threat, 'Fire bomb at 6:00 o'clock.'" *Id.* The defendant apparently did not challenge the constitutionality of the apparent ability

the basis of a constitutional argument based on vagueness because "persons of common intelligence must necessarily guess at its meaning and differ as to its application."[122]

3. *"Constitutionally Protected Activity" and "Legitimate Purpose"*

The third area of constitutional concern involves the terms "constitutionally protected activity" and "legitimate purpose." Both of these terms are used in the current stalking statute. They are not defined by the statute and have both been found by courts in other states to render stalking statutes impermissibly vague.[123]

The ambiguities that exist in the stalking statute may each leave it subject to constitutional attack. Moreover, when taken in conjunction with one another the unclear portions of the statute create a confusing and frustrating stalking law which is, at best, thoroughly difficult to understand and utilize and, at worst, unconstitutional.

VIII. PROPOSED LEGISLATION

Pursuant to the Violence Against Women Act, the U.S. Attorney General must submit reports to Congress regarding stalking and stalking laws on a yearly

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clause. *See generally id.*

122. *Bryan*, 910 P.2d at 215. The requirement that a stalker have the apparent ability to carry out a credible threat raises questions that are unique to a stalking situation. Because the purpose of a stalking law is to protect victims before physical harm occurs, the intended operation of the apparent ability requirement becomes difficult to ascertain. For example, a stalker threatens to shoot the victim but the stalker does not have a gun. Does the apparent ability clause require that the stalker actually obtain a gun before the victim is protected by the stalking law or is it sufficient that the stalker could obtain a gun? If the apparent ability clause requires the stalker to actually obtain a gun, then the clause seems to interfere with the purpose of the law. This is so because the stalker would have to threaten to shoot the victim and obtain a gun before the law would protect the victim. By the time this occurs, the gun may be pointed at the victim. On the other hand, suppose the apparent ability clause would only require that the stalker be able to obtain a gun. If this is the intended operation of the clause, one struggles to conceive of a situation where a stalker would not have the apparent ability to carry out a threat. Perhaps the function of the apparent ability clause is limited to obviously "ludicrous" or "insincere" threats such as a stalker who threatens to assassinate the President of the United States if the victim does not go out with the stalker. John Hinckley, Jr. shot former President Ronald Reagan in an attempt to gain the affection of Hinckley's stalking victim, actress Jodie Foster. Christina Perez, Note, *Stalking: When Does Obsession Become A Crime?*, 20 AM. J. CRIM. L. 263, 270 (1993) (detailing several well-known stalking cases).

123. Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Legislation*, 31 HARV. J. ON LEGIS. 1, 24-25 (1994) (surveying several states' stalking statutes, discussing the constitutional pitfalls and offering proposed legislation). The above article cites *State v. Tremmel* and *State v. Kahles* for support with regard to the constitutional vulnerability produced by the phrases "substantial emotional distress," "legitimate purpose" and "constitutionally protected activity." *Id.* (citing *Tremmel*, No. 93-02769 (Fla. Cir. Ct. June 9, 1993); *Kahles*, No. 92-022819 MM10A (Fla. Cir. Ct. Mar. 10, 1992)). *Tremmel* and *Kahles* originated in the Florida Circuit Court and it is the circuit court opinions upon which Faulkner and Hsiao relied when determining that the above phrases were problematic. *Id.* Both cases were subsequently appealed and in both cases, the court upheld the constitutionality of the stalking statute. *See* State v. Tremmel, 644 So. 2d 102 (Fla. Dist. Ct. App. 1994), *approved by* Higgins v. State, 656 So. 2d 483 (Fla. 1995); State v. Kahles, 657 So. 2d 897 (Fla. 1995).

In Oregon, however, the court of appeals held that the term "without legitimate purpose" found in a statute authorizing stalking protective orders was unconstitutionally vague. State v. Orton, 904 P.2d 179, 182 (Or. Ct. App. 1995). The court cited *State v. Norris-Romine/Finley*, 894 P.2d 1221 (Or. Ct. App. 1995), as controlling precedent wherein the court ruled the phrase "without legitimate purpose," as used in the state's anti-stalking statute, unconstitutionally vague. *Id.* at 181, 182.

basis.[124] The 1996 report included a model stalking law which forms verbatim much of the proposed legislation offered in this note.[125]

The legislation offered here is as follows:

> [(1) The following definitions are applicable to this statute only.]
> (a) "Course of conduct" means repeatedly maintaining a visual[, audio] or physical proximity to a person [OR] repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person[.]
> (b) "Repeatedly" means on two or more occasions[.]
> (c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.
> (2) Any person who:
> (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily [harm or death to herself or himself or to fear bodily harm or death to a member of her or his immediate family];
> (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily [harm or death to herself or himself or to a member of her or his immediate family]; and
> (c) whose [words or] acts induce fear in the specific person of bodily [harm or death to herself or himself or to a member of her or his immediate family]; is guilty of stalking.[126]

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124. ANTISTALKING LEGISLATION, *supra* note 8, at iii.

125. *Id.* at B-1 to B-3. The Model Antistalking Code for the States reads as follows:

> Section 1. For purposes of this code:
> (a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;
> (b) "Repeatedly" means on two or more occasions; and
> (c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.
> Section 2. Any person who:
> (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family;
> (b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of death of himself or herself or a member of his or her immediate family; and
> (c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family; is guilty of stalking.

Id. at B-1.

The changes to the above legislation reflected in the proposed legislation are fairly minor. The term "bodily injury" has been changed to "bodily harm" simply because bodily harm seems somewhat more inclusive. The definition of "course of conduct" has been expanded to include the stalker who repeatedly maintains an audio proximity to the victim. The purpose is to include those stalkers who primarily use the telephone to stalk their victims. Aside from the two aforementioned textual changes, the wording of the above statute has been condensed slightly in an effort to make the statute easier to read and readily understandable.

126. Additions and changes made to the model stalking law by the writer are contained in brackets ([]). See *supra* note 125 for a brief explanation of the additions and changes.

This proposal attempts to simplify the stalking statute and cover a wider variety of stalking behaviors by eliminating some of the necessary elements, especially the elements of credible threat and specific intent. The proposed legislation includes the option of proving stalking with evidence of a communicated threat but does not make the threat an essential element. The proposed legislation in lieu of specific intent requires purposeful actions on the part of the stalker which would cause a reasonable person to fear for her or his safety or that of her or his family.[127]

IX. CONSTITUTIONALITY OF THE PROPOSED LEGISLATION

The proposed legislation is valid despite the absence of credible threat and specific intent requirements. Furthermore, it should withstand constitutional scrutiny based on vagueness and overbreadth theories.

A. *Absence of Credible Threat Requirement*

The *Bryan* court, in its analysis of the 1994 stalking statute, cited an article which listed qualities found in stalking statutes most capable of surviving constitutional attack.[128] Included in the list is the presence of a credible threat requirement.[129] However, the *Bryan* opinion suggests that this requirement is not necessary and that without it a statute can survive constitutional attack.[130] First, the court noted that many states do not include a credible threat requirement because of the resulting problems of effectiveness.[131] Further, in its opinion, the *Bryan* court identified several stalking statutes from other states that are constitutionally acceptable.[132] Three of the statutes cited—Connecticut's, Michigan's and Georgia's—do not require a credible threat.[133] After citing

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127. The proposed legislation does not attempt to set out severity levels for violations of the stalking law. However, the penalties should be more strict, especially for repeat offenders and for those stalkers who violate restraining orders to accomplish the crime. The penalties provided should allow judges to incarcerate stalkers, at least in some instances. As has been stressed throughout this note, stalking behavior is often a precursor to violent attacks, and many times, murder. *See supra* Part I and Part II. Provisions, such as California's, allowing judges to order mental evaluations and mental inpatient treatment should also be seriously considered. See *supra* note 97 for the California provision.

128. *Bryan*, 910 P.2d 212, 217 (Kan. 1996) (citing M. Katherine Boychuck, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 NW. U. L. REV. 769 (1994) (examining virtually all state stalking statutes and concluding that only those laws requiring "specific criminal intent, communication of a threat, and an objective standard" will most likely survive constitutional attack)).

129. *Bryan*, 910 P.2d at 217 (citing Boychuck, *supra* note 128).

130. *Id.* at 219-20.

131. *Id.* at 219.

132. *Id.* at 219-20.

133. *Id.* The court discusses the Connecticut, Georgia and Michigan stalking statutes, none of which require a credible threat. *Id.* The Connecticut statutes read as follows:

> (a) A person is guilty of stalking in the first degree when he commits stalking in the second degree as provided in section 53a-181d and (1) he has previously been convicted of this section or section 53a-181d, 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.

CONN. GEN. STAT. § 53a-181c (1994).

> (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 wilfully 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.

CONN. GEN. STAT. § 53a-181d (1994).

The Michigan statute reads as follows:

(1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.

(b) "Emotional distress" means a significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at the workplace or residence of that individual.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(2) **[Stalking as misdemeanor; penalty.]** An individual who engages in stalking is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.

(3) **[Probation; conditions.]** The court may place an individual convicted of violating subsection (2) on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:

(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

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

(5) **[Additional penalties.]** A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

MICH. STAT. ANN. § 28.643(8) (Callaghan Supp. 1996) (alterations in the original).

The Georgia statute reads as follows:

(a) A person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. For the purpose of this article, the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. For the purposes of this article, the term "harassing and intimidating" means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in

Connecticut's stalking statute, the court commented that even though Connecticut's statute does not contain a credible threat element, it does require an objective standard in its fear requirement which the court stated was contrary to the 1994 Kansas statute which required only a subjective standard.[134] The court then cited Michigan's stalking law which also has no requirement of a credible threat and subsequently stated "[t]he difference between this statute and the more vague Kansas statute is obvious."[135] Finally the *Bryan* court noted that these statutes have withstood constitutional challenges.[136] Thus, although the *Bryan* court mentioned the credible threat element, it does not imply that such a requirement is an essential part of a constitutional statute.[137]

B. *Absence of Specific Intent Requirement*

The *Bryan* court also suggested that a specific intent element is not necessary.[138] The Michigan statute cited therein, in addition to not requiring a credible threat, does not require specific intent.[139] Although the *Bryan* court noted that a statute will more easily survive a constitutional attack for vagueness if it requires specific intent, it also noted that the Michigan statute cited has not been deemed void for vagueness.[140] Thus, the proposed legislation should not be subject to a strong constitutional attack based on the absence of a specific intent element.

In addition to the Michigan statute cited by the *Bryan* court, many other states have enacted stalking statutes that do not require specific intent to cause fear.[141] Among them, the Washington and Indiana statutes have withstood

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reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.

(b) Except as provided in subsection (c) of this Code section, a person who commits the offense of stalking is guilty of a misdemeanor.

(c) Upon the second conviction, and all subsequent convictions, for stalking, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less that one year nor more than five years.

GA. CODE ANN. § 26-3701 (Harrison Supp. 1996).

134. *Bryan*, 910 P.2d at 219.

135. *Id.* at 220. See *supra* note 133 for the text of the Michigan statute which imposes an objective standard, defines all terms and employs enumerated lists of examples.

136. *Id. See also* State v. Culmo, 642 A.2d 90 (Conn. Super. Ct. 1993) (upholding Connecticut stalking statute challenged on vagueness grounds); Johnson v. State, 648 N.E.2d 666 (Ind. Ct. App. 1995) (ruling that Indiana stalking statute was not unconstitutionally vague); People v. White, 536 N.W.2d 876 (Mich. Ct. App. 1995) (upholding Michigan stalking statute in the face of an attack on vagueness grounds).

137. *Bryan*, 910 P.2d at 219-20. According to the National Institute of Justice research report, ten states' stalking statutes do not require an explicit or implicit threat. ANTISTALKING LEGISLATION, *supra* note 8, at E-2 to E-5.

138. *Bryan*, 910 P.2d at 219-21.

139. *Id.* at 220. See also *supra* note 132 for the text of the Michigan statute.

140. *Id.*

141. D.C. CODE ANN. § 22-504 (1996); IND. CODE ANN. § 35-45-10-1, 35-45-10-2 (West Supp. 1996); IOWA CODE ANN. § 708.11 (West Supp. 1996); ME. REV. STAT. ANN. tit. 17-A, § 210-A (West Supp. 1996); NEV. REV. STAT. § 200.575 (1996); N.H. REV. STAT. ANN. § 633:3-a (1996); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1995); UTAH CODE ANN. § 76-5-106.5 (Supp. 1996); VT. STAT. ANN. tit. 13, § 1061 (Supp. 1995); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1997); WIS. STAT. ANN. § 940.32 (West 1996).

The District of Columbia statute reads in pertinent part as follows:

Any person who on more than [one] occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking. . . .

D.C. CODE ANN. § 22-504 (1996).

The Indiana statute reads in pertinent part as follows:

As used in this chapter, "stalk" means a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened.

IND. CODE ANN. § 35-45-10-1 (West Supp. 1996).

As used in this chapter, "harassment" means conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress.

IND. CODE ANN. § 35-45-10-2 (West Supp. 1996).

The Indiana statute then defines stalking as a class D felony. However, the statute goes on to state "The offense is a Class C felony if at least one (1) of the following applies: (1) A person: (A) stalks the victim; and (B) makes an explicit or an implicit threat with the intent to place the victim in reasonable fear of: (i) sexual battery . . .; (ii) serious bodily injury; or (iii) death." IND. CODE ANN. § 35-45-10-5 (West Supp. 1996).

The Iowa statute reads in pertinent part as follows:

2. A person commits stalking when all of the following occur:

a. The person purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to, or the death of, that specific person or a member of the specific person's immediate family.

b. The person has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to, or the death of, that specific person or a member of the specific person's immediate family by the course of conduct.

c. The person's course of conduct induces fear in the specific person or a member of the specific person's immediate family.

IOWA CODE ANN. § 708.11 (West Supp. 1996)

The Maine statute reads in pertinent part as follows:

1. A person is guilty of stalking if:

A. The person intentionally or knowingly engages in a course of conduct directed at another specific person that would in fact cause a reasonable person:

(1) To suffer intimidation or serious inconvenience, annoyance or alarm;

(2) To fear bodily injury or to fear bodily injury to a member of that person's immediate family; or

(3) To fear death or to fear death of a member of that person's immediate family; and

B. The person's course of conduct in fact causes the other specific person [to suffer or fear the same].

ME. REV. STAT. ANN. tit. 17-A, § 210-A (West Supp. 1996).

The Nevada statute reads in pertinent part as follows: "A person who, without lawful authority, willfully or maliciously engages in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that actually causes the victim to feel terrorized, frightened, intimidated or harassed, commits the crime of stalking." NEV. REV. STAT. § 200.575 (1996).

The New Hampshire statute reads in pertinent part as follows:

"Stalk" means any of the following:

(1) To follow another person from place to place on more than one occasion for no legitimate purpose with the intent to place such person in fear for his personal safety; or

(2) To appear on more than one occasion for no legitimate purpose in proximity to the residence, place of employment, or other place where another person is found with the intent to place such person in fear for his personal safety; or

(3) To follow another person from place to place on more than one occasion for no legitimate purpose under circumstances that would cause a reasonable person to fear for his personal safety; or

(4) To appear on more than one occasion for no legitimate purpose in proximity to the residence, place of employment, or other place where another person is found under circumstances that would cause a reasonable person to fear for his personal safety.

N.H. REV. STAT. ANN. § 633:3-a (1996).

The North Dakota statute reads in pertinent part as follows:

"Stalk" means to engage in an intentional course of conduct directed at a specific person which frightens, intimidates, or harasses that person, and that serves no legitimate purpose. The course of conduct may be directed toward that person or a member of that person's immediate family and must cause a reasonable person to experience fear, intimidation, or harassment.

N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1995).

The Utah statute reads in pertinent part as follows:

A person is guilty of stalking who:

(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:

(i) to fear bodily injury to himself or a member of his immediate family; or

(ii) to suffer emotional distress to himself or a member of his immediate family;

(b) has knowledge or should have knowledge that the specific person:

(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or

(ii) will suffer emotional distress or a member of his immediate family will suffer emotional distress; and

(c) whose conduct:

(i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or

(ii) causes emotional distress in the specific person or a member of his immediate family.

UTAH CODE ANN. § 76-5-106.5 (Supp. 1996).

Vermont's stalking statute reads in pertinent part as follows:

(1) 'Stalk' means to engage in a course of conduct which consists of following or lying in wait or harassing; and

(A) serves no legitimate purpose; and

(B) causes the person to fear for his or her physical safety or causes the person substantial emotional distress.

(2) 'Course of conduct' means a pattern of conduct composed of two or more 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.'

. . . .

(4) 'Harassing' means a course of conduct directed at a specific person which would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death, including but not limited to verbal threats, written threats, vandalism, or unconsented to physical contact.

VT. STAT. ANN. tit. 13, § 1061 (Supp. 1995).

The Washington statute reads in pertinent part as follows:

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

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

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

(c) The stalker either:

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

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

WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1997).

The Wisconsin statute states in pertinent part the following requirements:

(a) The actor intentionally engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family.

(b) The actor has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family.

(c) The actor's acts induce [the aforementioned].

WIS. STAT. ANN. § 940.32 (West 1996).

constitutional attack despite the lack of a specific intent element.[142] Thus, in Kansas and elsewhere, courts are rejecting the notion that the specific intent element is a prerequisite of a constitutional statute.

C. *Vagueness and Overbreadth*

Finally, the proposed legislation should not succumb to a constitutional attack based on vagueness or overbreadth. Vagueness and overbreadth are the most frequent grounds upon which attacks on stalking legislation are based.[143] However, these challenges are rarely successful.[144] In fact, these constitutional challenges have only succeeded in four states, and the elements declared unconstitutional in these states are not present in the proposed legislation.[145]

Alaska employs a recklessness standard and its statute states, in pertinent part, as follows: "A person commits the crime of stalking in the second degree if the person knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member." ALASKA STAT. § 11.41.270 (Michie Supp. 1995).

The Minnesota statute states, in pertinent part, as follows: "[H]arass means to engage in intentional conduct in a manner that: (1) would cause a reasonable person under the circumstances to feel oppressed, persecuted, or intimidated; and (2) causes this reaction on the part of the victim." MINN. STAT. ANN. § 609.749 (West Supp. 1997). The Minnesota Supreme Court has interpreted the statute to require specific intent. State v. Orsello, 554 N.W.2d 70, 76 (Minn. 1996). The dissenting opinion, however, stated "[t]he majority's conclusion that [the stalking law] requires proof that the defendant intended to cause the victim to feel oppressed, persecuted or intimidated, as opposed to proof that the defendant intended to engage in conduct that caused the victim's reaction, is an unwarranted rewrite of a clear and unambiguous statute." *Id.* at 77 (Stringer, J., dissenting).

142. State v. Lee, 917 P.2d 159 (Wash. Ct. App. 1996) (upholding stalking statute which did not require a specific intent to cause harm but did require that a stalker know or should have known that his or her behavior was frightening); Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995) (upholding stalking statute and stating that it was a specific intent statute, and thus, more readily upheld because it required a stalker to engage in a knowing or intentional course of conduct).

143. Boychuck, *supra* note 128.

144. ANTISTALKING LEGISLATION, *supra* note 8, at 6-7.

145. *Id.* at A-2 to A-11. The successful challenges include: State v. Bryan, 910 P.2d 212 (Kan. 1996); State v. Norris-Romine/Finley, 894 P.2d 1221 (Or. 1995) (striking the Oregon stalking statute due to vagueness); Commonwealth v. Kwiatkowski, 637 N.E.2d 854 (Mass. 1994) (statute deemed unconstitutional due to ambiguous use of word "repeatedly;" Long v. State, 931 S.W.2d 285 (Tex. Crim. App. 1996).

In *State v. Bryan*, 910 P.2d at 220-21, the 1994 Kansas stalking statute was struck down because it did not define the criminal behavior with respect to an objective standard. The court in *State v. Norris-Romine/Finley*, 894 P.2d at 1225, struck the Oregon statute because the phrase "without legitimate purpose" was deemed unconstitutionally vague. The court in *Kwiatkowski*, 637 N.E.2d at 857-58, struck the Massachusetts stalking statute because the word "repeatedly" was used in an ambiguous manner. The legislation proposed in this note defines "repeatedly" and furthermore does not use that term in conjunction with the phrases "pattern of conduct" or "series of acts" as did the Massachusetts statute. *Id.* at 857. Finally, the court in *Long*, 931 S.W.2d at 290, 297, ruled the stalking statute unconstitutionally vague due to the absence of a reasonable person standard.

As of January 1996, there had been fifty-three challenges regarding nineteen different states' stalking statutes. ANTISTALKING LEGISLATION, *supra* note 8, at 6. Since then, six additional constitutional challenges have been waged; none of them were successful. *See* Petersen v. State, 930 P.2d 414 (Alaska App. 1996) (upholding Alaska stalking statute challenged on vagueness and overbreadth grounds); United States v. Smith, 685 A.2d 380 (D.C. 1996) (ruling that the District of Columbia stalking statute was neither unconstitutionally vague nor overbroad); People v. Tran, 54 Cal. Rptr.2d 650 (Ct. App. 1996) (upholding California stalking statute challenged for unconstitutional vagueness); Snowden v. State, 677 A.2d 33 (Del. 1996) (upholding Delaware stalking statute challenged for being unconstitutionally vague and for violating constitutional right to travel); State v. Lee, 917 P.2d 159 (Wash. Ct. App. 1996) (ruling that Washington stalking statute was neither unconstitutionally overbroad nor vague); State v. Fonseca, 670 A.2d 1237 (R.I. 1996) (upholding Rhode Island stalking statute challenged on vagueness grounds).

An attack based on vagueness stems from a theory of due process.[146] The test for determining if a statute is vague is

> "whether its language conveys a sufficiently definite warning as to the conduct proscribed when measured by common understanding and practice. A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application is violative of due process."[147]

The proposed legislation clearly states an objective standard with which it defines the criminal stalking behavior. This remedies the specific vagueness concerns of the Kansas Supreme Court articulated in *State v. Bryan*.[148] Furthermore, the conduct prescribed by the proposed legislation is much more readily comprehensible than that of the current statute. It does encompass a wider variety of behavior, but that behavior is more readily identified in the proposed legislation.

In deciding whether a statute is unconstitutionally vague, a second appropriate question is "whether the [statute] adequately guards against arbitrary and discriminatory enforcement."[149] Several elements appearing in the proposed legislation serve to keep the statute from being used in an arbitrary manner. The proposed legislation mandates that the stalker repeatedly engage in stated activities.[150] The Indiana Court of Appeals has stated, with regard to the Indiana stalking law, that because "the State must prove engagement in a repeated or continuing course of conduct [the statute] militates against arbitrary enforcement."[151] Furthermore, the stalker must have knowledge or constructive knowledge that his actions will place the victim in fear and the stalker's activities must be such as would cause fear in a reasonable person. As such, the statute will not allow an individual to be punished for legitimate behavior that unexpectedly puts another in fear. Nor will the statute punish an individual for invoking fear in another where that fear is unreasonable. These elements similarly guard against the arbitrary enforcement of the proposed law because the statute, by requiring these elements, eliminates the possibility that it will be used to prosecute innocent activities. Furthermore, the proposed legislation is stated in a clear and concise manner and thus helps guarantee the prosecution of non-innocent activities.

Overbreadth, the second most frequent basis of constitutional challenge, concerns statutes that criminalize innocent behaviors which are constitutionally protected.[152] Although there have been many challenges to various state stalking laws on this basis, none, thus far, have been successful.[153] The proposed

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146. *Bryan*, 910 P.2d at 215.

147. *Id.* (quoting State v. Dunn, 662 P.2d 1286, 1295 (Kan. 1983) (explaining that the Drug Paraphernalia Act provides fair warning of what constitutes criminal behavior)).

148. *Id.* at 220-21.

149. *Id.* at 215 (quoting *Dunn*, 662 P.2d 1286).

150. The proposed legislation requires that the stalker repeatedly maintain visual, audio or physical proximity to a person or repeatedly convey verbal or written threats or threats implied by conduct. There is no requirement in the proposed legislation that the stalker engage in the previously criticized "repeated pattern." See *supra* Part VII.B.1. for a discussion of the current statute's requirement that one engage in a repeated pattern.

151. Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995).

152. Faulkner & Hsiao, *supra* note 123, at 17-18.

153. ANTISTALKING LEGISLATION, *supra* note 8, at 7.

legislation should likewise withstand an overbreadth attack. It does not threaten constitutionally-protected innocent actions. To that end, it requires that the stalker purposefully engage in repeatedly maintaining proximity to a specific person or repeatedly conveying express or implied threats to a specific person, that the stalker have knowledge or constructive knowledge that his actions will induce fear in the victim and that a reasonable person would be fearful. In Michigan, the court of appeals listed similar elements of the Michigan statute in support of its decision that the statute was not overbroad.[154] In that case, the court stated "the stalking statutes address a wilful pattern of conduct, including but not limited to, following or confronting the victim or calling the victim . . . that would cause a reasonable person to feel terrorized, threatened, or harassed, and would cause a reasonable person in the victim's position to suffer emotional distress."[155] The court later stated that the statutes in question "could not be applied to entirely innocent conduct."[156] Furthermore, an Alaska appellate court has stated that "the Constitution does not guarantee a right to threaten people. When a person's words or actions constitute an assault—when they cause other people to reasonably fear for their own safety or the safety of those close to them—the Constitution no longer provides a refuge."[157]

The proposed legislation would provide Kansas with a law that could be more readily defended in the face of a constitutional attack. It would provide more protection against an attack on vagueness grounds than the current statute and should survive an attack on an overbreadth theory as well.

X. CONCLUSION

The proposed legislation seeks to rectify the problems inherent in the current stalking law while protecting the law from constitutional attack. The current stalking law is not only extremely confusing and potentially unconstitutional but it is also very narrow and as such leaves many victims unprotected. A strong stalking law is needed to protect Kansans from stalkers who have the ability under the current laws to keep their victims in constant fear and disrupt their victim's lives without the threat of serious legal repercussions. Furthermore, the protection of stalking victims needs to begin from the commencement of the stalking behavior. A stalking law which requires a victim to wait until the stalker has made a threat, intends to carry out the threat and has the apparent ability to do so,

154. People v. White, 536 N.W.2d 876, 883 (Mich. Ct. App. 1995).

155. *Id.* at 883. The court also considered that the statute in question required that the contact be made without the consent of the victim and that the phrase "harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose" was defined. *Id.* The proposed legislation requires that the victim subjectively feel fear and thus it is implied that the victim did not consent to the contact. The proposed legislation does not employ the phrases mentioned above because some lower courts and one appellate court in other states have ruled that these phrases render statutes impermissibly vague. See *supra* note 123 for explanation of these cases.

156. *White*, 536 N.W.2d at 883.

157. Petersen v. State, 930 P.2d 414, 431 (Alaska Ct. App. 1996).

requires the victim to wait too long. As such, the victim may not have an adequate legal remedy under the law until she is moments away from physical harm or death.

Callie Anderson Marks