

# Minnesota's Anti-Stalking Statute: A Durable Tool to Protect Victims from Terroristic Behavior

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## Introduction

Justice Louis Brandeis identified the "right to be left alone as the most comprehensive of rights and the right most valued by civilized men."<sup>1</sup> The author agrees and sees well drafted anti-stalking legislation as the most effective tool to protect citizens from the terrorism of stalkers' conduct.

This article highlights the need for anti-stalking laws and determines that they can be drafted to withstand constitutional challenges. Section I discusses the reasons why effective anti-stalking legislation is urgently needed. Section II explores the history and development of anti-stalking laws, including proposed recommendations for effective legislation and pioneer legislation. It also discusses the ineffectiveness of other criminal statutes in addressing the crime of stalking. Section III compares Minnesota's anti-stalking law to pioneer legislation, addresses the impact of the Minnesota law, and analyzes the Minnesota anti-stalking statute from a constitutional standpoint. This article concludes that Minnesota's anti-stalking statute is much needed and that the law is constitutional.<sup>2</sup>

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1. 138 CONG. REC. S13,469-02 (daily ed. Sept. 15, 1992) (statement of Sen. Cohen).

2. Stalking and legislation dealing with such behavior influences debate in numerous arenas. Both sides of the heated abortion debate have utilized the stalking legislation to thwart the oppositions' efforts to uncover secret plans. Also, since stalking is perpetrated mostly by men, this has become a hot topic with womens' rights groups. These areas and other tangential areas are beyond the scope of this article. This article sets forth a means for drafting constitutional and effective anti-stalking legislation.

## I. Recognizing the Need for Effective Anti-Stalking Legislation

Stalking victims suffer from repeated and insidious harassment, that harassment laws are not equipped to address. By enacting separate anti-stalking statutes, state legislatures acknowledge the fact that stalking is not the same as harassment and that penalties for stalking should be more severe.<sup>3</sup> Actresses, novelists, and talk show hosts are not the only people being menaced by stalkers.<sup>4</sup> The majority of stalking cases involve females as the targets with former spouses or lovers as the perpetrators.<sup>5</sup> According to the FBI, about 200,000 people, most of them women, are harassed by stalkers each year in the United States.<sup>6</sup> In fact, about five percent of women will be victimized by stalkers during their lifetime.<sup>7</sup>

The National Women's Abuse Center estimates that four million men violently attack, abuse, or kill women they live with or date.<sup>8</sup> Nearly one third of all women killed in America are murdered by their husbands or boyfriends.<sup>9</sup> As many as ninety percent of those women were stalked.<sup>10</sup> Also, based on studies of large metropolitan cities, the *Seattle Times* reported that ninety percent of all women murdered by their partners notified police at least once of threats against them, and over half of these victims had called five times or more.<sup>11</sup>

Lack of effective or applicable laws, ineffectiveness of restraining orders, and increased public awareness of criminal acts by stalkers have given rise to the need for anti-stalking legislation.<sup>12</sup> Citizens are subjected to harassment and threat of physical harm as anti-abortion protestors blockade medical services clinics and fol-

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3. Kathleen G. McAnaney et al., Note, *From Imprudence to Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 883 (1993). Harassment, intimidation, threats, trespass, and loitering laws only partially, and inadequately address stalking behaviors, whereas anti-stalking statutes impose heavier penalties for repeat offenses against the same victim. *Id.*

4. Christina Perez, Note, *Stalking: When Does Obsession Become a Crime?*, 20 AM. J. CRIM. L. 263, 268-70 (1993); see also 138 Cong. Rec. S13469-02 (daily ed. September 15, 1992) (Statement of Sen. Cohen).

5. Melinda Beck et al., *Murderous Obsession*, NEWSWEEK, July 13, 1992, at 61.

6. Nina Schuyler, *No Place to Hide*, CAL. LAW., June 1993, at 18.

7. Maria Puente, *Legislators Tackling the Terror of Stalking*, USA TODAY, July 21 1992, at 9A.

8. 138 CONG. REC. S10,314-01 (daily ed., July 27, 1992) (statement of Sen. Thurmond).

9. Beck et al., *supra* note 5, at 61.

10. *Id.*

11. 138 CONG. REC., *supra* note 8.

12. *Id.*

low and threaten health care workers as they try to enter.<sup>13</sup> Clinics are also bombed, vandalized and set on fire.<sup>14</sup> The facilities are sprayed with butyric acid, a substance so foul smelling that those inside are forced to evacuate.<sup>15</sup> In addition, physicians' homes are picketed by anti-abortion demonstrators, and their names and addresses publicized on wanted posters. The lives of physicians' and their families are threatened.<sup>16</sup> Recently, a physician was even shot and killed outside the clinic he was about to enter.<sup>17</sup>

Other tragic examples of stalkers killing their victims highlight the need for effective anti-stalking legislation. In one incident in 1982, eleven-year-old Caty Thayer was repeatedly raped and then murdered in Vermont after being stalked by a stranger for nineteen months, during which time the police did nothing.<sup>18</sup> In another incident in 1992, Kristen Lardner, a twenty-one-year-old budding artist was shot to death in a Boston street by her ex-boyfriend against whom she had obtained a restraining order.<sup>19</sup>

## II. History of Legislating the Crime of Stalking

### A. *Development of Anti-Stalking Legislation Guidelines at the National Level*

Since 1990, in response to growing attention to the crime of stalking, state legislatures have raced to develop criminal sanctions specifically addressing that crime.<sup>20</sup> In July 1992, Senator William S. Cohen introduced a bill to assist the states in the enactment of legislation to address the criminal act of stalking other persons.<sup>21</sup> Senator Cohen felt that the responsibility for enacting and enforcing anti-stalking legislation should remain in the hands of the states.<sup>22</sup> However, he was concerned that states might write their anti-stalking statutes either too narrowly, rendering them essentially meaningless, or too broadly, making them unconstitutional.<sup>23</sup> Senator Cohen's bill, as passed, instructed the National Institute of Justice (NIJ), the Federal Government's principal criminal justice

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13. 138 CONG. REC. S2,776-06 (daily ed. March 11, 1993) (statement of Mrs. Boxer).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 138 CONG. REC., *supra* note 4.

19. Colman McCarthy, *Better Protection for Women in Danger*, WASH. POST, June 13, 1992, at A21.

20. *Id.*

21. 138 CONG. REC. S9,520-02 (daily ed. July 1, 1992).

22. *Id.*

23. *Id.*

research and development agency, to evaluate anti-stalking legislation and proposed anti-stalking legislation in the states; develop model anti-stalking legislation that is constitutional and enforceable; prepare and disseminate its findings to state authorities; and report to Congress its findings and the need or appropriateness of further action by the Federal government by September 30, 1993.<sup>24</sup>

On October 4, 1993, Senator Cohen announced the completion of the NIJ study which recommended that the states do the following: (1) establish a continuum of charges that could be used by law enforcement officials to intervene at various stages of a stalking situation, while less egregious cases could be handled under existing harassment or intimidation statutes; (2) enact aggravated harassment or intimidation statutes to be used when a defendant persistently engages in annoying behavior; and (3) create a stalking felony to allow enforcement officials to intervene and address serious, persistent, and obsessive behavior that causes a victim to fear bodily injury or death.<sup>25</sup> The NIJ did not list specific types of actions that could be construed as stalking because some courts have ruled that if a statute includes a specific list of prohibited acts, the list is exclusive.<sup>26</sup> Rather, the report's statutory recommendations seek to prevent stalkers from engaging in a course of conduct that would cause a reasonable person to fear bodily harm or death.<sup>27</sup> Although enacted before the completion of the NIJ report, California's groundbreaking anti-stalking law may also be considered a useful reference by states in the process of drafting or amending their anti-stalking statutes.

### *B. California's Anti-Stalking Statute*

Since 1990, 48 states have enacted anti-stalking laws.<sup>28</sup> California enacted the first anti-stalking law and amended it in 1992 and 1993.<sup>29</sup> Even with the 1992 amendment to the pioneer legisla-

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24. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1993, Pub. L. No. 102-395, § 109(b), 106 Stat. 1828, 1842 (1992).

25. 139 CONG. REC. S12,901-01 (daily ed. Oct. 4, 1993) (statement of Sen. Cohen).

26. *Id.*

27. *Id.*

28. 139 CONG. REC., *supra* note 25.

29. CAL. PENAL CODE § 646.9 (West Supp. 1993).

(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.

tion,<sup>30</sup> California's district attorneys and stalking victims com-

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(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.

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

(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 or to place that person in reasonable fear of death or great bodily injury 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

plained that under the law's 1992 terms a first time offender who did not violate an injunction or temporary restraining order could only be charged with a misdemeanor and that it was difficult to get a conviction.<sup>31</sup> Further, under the statute's 1992 definition of

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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, injunction, or any other court order 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 (f), 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) Every person who, having been convicted of a felony under this section, commits a second or subsequent violation of this section against the same victim and involving an act of violence or "a credible threat" of violence, as defined in subdivision (f), is punishable in the state prison, for 16 months, two or three years and a fine up to ten thousand dollars (\$10,000).

(e) For the purposes of this section, "harasses means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, 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."

(f) 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 or the safety of his or her immediate family. 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.

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

(h) 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.

(i) 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.

31. Schuyler, *supra* note 6, at 18.

"credible threat,"<sup>32</sup> which is required before law enforcement officers can go after a stalker, prosecutors often had to wait for an actual attack before prosecuting.<sup>33</sup>

With the 1992 amendment of the statute, a first offense generally was punishable as a misdemeanor, and the offender could be imprisoned in county jail for not more than one year, punished by a fine of not more than one thousand dollars (\$1,000), or be fined and imprisoned.<sup>34</sup> Under the 1993 revision, stalking in California is punishable as a misdemeanor or a felony, and allows a convicted stalker to be sentenced to the state prison, even if the person has not also violated a temporary restraining order, injunction, or other court order.<sup>35</sup>

The 1993 language subjects a person found guilty of violating a temporary restraining order, an injunction, or any other court order, to a felony conviction punishable by imprisonment in state prison for two, three, or four years.<sup>36</sup> The 1992 language, in contrast, made it possible to charge the crime as a misdemeanor or a felony if the stalker violated a temporary restraining order, an injunction, or both.<sup>37</sup> However, the imposed sentence still could not exceed one year.<sup>38</sup>

The 1993 statute also redefined "credible threat" and "harasses."<sup>39</sup> Previously, "credible threat" meant a threat made with the intent and the apparent ability to carry out the threat so as to cause the targeted person to reasonably fear for his or her safety or that of his or her immediate family.<sup>40</sup> "Credible threat" now 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 targeted person to reasonably fear for his or her safety or that of his or her family."<sup>41</sup> Also, for purposes of the statute, "harasses" previously meant "a knowing and willful course of conduct directed at a specific person which seriously harms, annoys, harasses, or terrorizes the person and which serves no legiti-

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32. CAL. PENAL CODE § 646.9 (f) (West 1992).

33. Schuyler, *supra* note 6, at 18.

34. CAL. PENAL CODE § 646.9(a) (West 1992).

35. CAL. PENAL CODE § 646.9(a) (West Supp. 1993).

36. CAL. PENAL CODE § 646.9(b) (West Supp. 1993).

37. CAL. PENAL CODE § 646.9(b) (West 1992).

38. *Id.*

39. CAL. PENAL CODE § 646.9(e) (West Supp. 1993).

40. CAL. PENAL CODE § 646.9(f) (West 1992).

41. CAL. PENAL CODE § 646.9(e) (West Supp. 1993).

mate purpose."<sup>42</sup> The 1993 amendment defines "harass" as "torment."<sup>43</sup>

Under the 1993 statutory definition, "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 or his or her immediate family in reasonable fear . . . is guilty of the crime of stalking, punishable by imprisonment . . ."<sup>44</sup> The statute, as amended, requires that an accused stalker "act with the intent to place a person or his or her immediate family in reasonable fear for their safety."<sup>45</sup> Previously, the law required an intent to place a victim or his or her immediate family in a reasonable fear of death or great bodily harm.<sup>46</sup>

The 1993 amendments also changed the requirement that a person previously convicted under the statute must commit a second or subsequent violation involving an act of violence or credible threat of violence against the same person in order to subject the stalker to a possible sentence to the state prison.<sup>47</sup> Now, every person who has been convicted of a felony under the statute, shall be punished for second or subsequent offenses, against either the same or a different person, by imprisonment in the state prison for two, three, or four years.<sup>48</sup> Along with stiffer sentences, however, the statute provides for mental health evaluation and treatment for persons convicted under its terms.

Before the 1993 amendment of the anti-stalking statute, California's criminal code authorized the Director of Corrections to certify to the Director of the State Department of Mental Health, that a mentally deficient or insane person convicted under the anti-stalking statute and confined in a state prison should receive treatment at a state hospital.<sup>49</sup> The legislature added this provision to the state's amended anti-stalking statute, requiring that the court determine whether a defendant convicted under the anti-stalking law would benefit from treatment and placement in a state hospital.<sup>50</sup> Upon such a determination, the court must recommend that the Department of Corrections certify the stalker's mental defi-

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42. CAL. PENAL CODE § 646.9(f) (West 1992).

43. CAL. PENAL CODE § 646.9(a) (West Supp. 1993).

44. *Id.*

45. *Id.*

46. CAL. PENAL CODE § 646.9(a) (West 1992).

47. *Id.*

48. CAL. PENAL CODE § 646.9(c) (West Supp. 1993).

49. CAL. PENAL CODE § 2684 (West 1992).

50. CAL. PENAL CODE § 646.9(j) (West Supp. 1993).

ciency and or insanity to the Department of Mental Health, and initiate placement in a state hospital for treatment.<sup>51</sup>

The 1992 and 1993 amendments appear to make California's anti-stalking law a more effective tool against stalkers. California's public defenders and the American Civil Liberties Union, however, opposed these amendments.<sup>52</sup> They felt that the 1993 statute, as amended, would be unconstitutionally broad.<sup>53</sup> For instance, they feared that the changes would allow the arrest of harmless, mentally incompetent defendants.<sup>54</sup>

Although an individual's rights and freedoms of expression, travel, and movement must be protected, we ought not tolerate situations in which a person is allowed to place another individual or that person's family in fear of physical or emotional harm.<sup>55</sup> States must not go so far with anti-stalking legislation as to improperly restrict the rights of law abiding citizens to engage in generally legal activities.<sup>56</sup> It is imperative that anti-stalking legislation prohibit the use of ordinary behavior to terrorize.<sup>57</sup> These are some of the dilemmas legislators face in drafting anti-stalking statutes.

### C. *Criminal Provisions That Could Be Used to Address Stalking in Minnesota*

Prior to the passage of Minnesota's anti-stalking legislation, victims of actions that could be considered part of stalking activities could seek protection and remedies using other criminal statutes. These statutes do not directly address the specific crime of stalking. However, they do sanction some actions that stalkers could use to cause another person to feel oppressed, persecuted, or intimidated.

#### 1. Domestic Abuse Act

Under Minnesota's Domestic Abuse Act, any family or household member may seek protection from the court personally or on behalf of a minor family or household member.<sup>58</sup> The petitioner

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51. *Id.*

52. Schuyler, *supra* note 6, at 20.

53. *Id.*

54. *Id.*

55. 139 CONG. REC., *supra* note 25.

56. *Id.*

57. *Id.*

58. MINN. STAT. § 518B.01 (West Supp. 1993). Pertinent subdivisions are herein outlined:

Subd. 2. Definitions. As used in this section, the following terms shall have the meanings given them:

(a) "Domestic abuse" means (i) physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily

injury or assault, between family or household members; or (ii) criminal sexual conduct . . . committed against a minor family or household member by an adult family or household member.

(b) "Family or household members" means spouses, former spouses, parents, and children, persons related by blood, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or have lived together at any time. "Family or household member" also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time. Issuance of an order for protection on this ground does not affect a determination of paternity . . . .

Subd. 4. Order for protection. There shall exist an action known as a petition for an order for protection in cases of domestic abuse.

(a) A petition for relief under this section may be made by any family or household member personally or on behalf of minor family or household members.

(b) A petition for relief shall allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.

Subd. 6. Relief by the court.

(a) Upon notice and hearing, the court may provide relief as follows:

(1) restrain the abusing party from committing acts of domestic abuse;

(2) exclude the abusing party from the dwelling which the parties share or from the residence of the petitioner . . . .

(8) exclude the abusing party from the place of employment of the petitioner or otherwise limit access to the petitioner by the abusing party at the petitioner's place of employment . . . .

(9) Any relief granted by the order for protection shall be for a fixed period not to exceed one year, except when the court determines a longer fixed period is appropriate . . . .

Subd. 7. Temporary order.

(a) Where an application under this section alleges an immediate and present danger of domestic abuse, the court may grant an ex parte temporary order for protection, pending a full hearing, and granting relief as the court deems proper, including an order:

(1) restraining the abusing party from committing acts of domestic abuse;

(2) excluding any party from the dwelling they share or from the residence of the other except by further order of the court; and

(3) excluding the abusing party from the place of employment of the petitioner or otherwise limiting access to the petitioner by the abusing party at the petitioner's place of employment . . . .

(c) An ex parte temporary order for protection shall be effective for a fixed period not to exceed 14 days, except for good cause as provided under paragraph (d). A full hearing, as provided by this section, shall be set for not later than seven days from the issuance of the temporary order. The respondent shall be served

must allege, under oath, that the offending party has engaged in domestic abuse. The Act defines domestic abuse as physical harm, bodily injury, assault or the infliction of fear of imminent physical harm, bodily injury or assault.<sup>59</sup> The court may provide relief in the form of a temporary restraining order (TRO) which excludes the abusing party from the parties' shared dwelling, or from petitioner's residence or place of employment, until a hearing is held to determine if a longer-term order will be issued.<sup>60</sup>

The ability to use this statute to combat stalking is somewhat limited. First, the Act can only be enlisted to restrain a person related by blood or marriage, a person who has shared a dwelling with the victim, or a person who has a child in common with the petitioner.<sup>61</sup> Therefore, a stalker who is a stranger to or merely an

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forthwith a copy of the ex parte order along with a copy of the petition and notice of the date set for the hearing.

(d) When service is made by published notice, . . . the petitioner may apply for an extension of the period of the ex parte order . . . . The court may extend the ex parte temporary order for an additional period not to exceed 14 days. The respondent shall be served forthwith a copy of the modified ex parte order along with a copy of the notice of the new date set for the hearing.

Subd. 13. Copy to law enforcement agency.

(a) An order for protection granted pursuant to this section shall be forwarded by the court administrator within 24 hours to the local law enforcement agency with jurisdiction over the residence of the applicant

Subd. 14. Violation of an order for protection.

(a) Whenever an order for protection is granted pursuant to this section, and the respondent or person to be restrained knows of the order, violation of the order for protection is a misdemeanor. Upon conviction, the defendant must be sentenced to a minimum of three days imprisonment and must be ordered to participate in counseling or other appropriate programs selected by the court. If the court stays imposition or execution of the jail sentence and the defendant refuses or fails to comply with the court's treatment order, the court must impose and execute the stayed jail sentence. A person who violates this paragraph within two years after a previous conviction . . . or within two years after a previous conviction under a similar law of another state, is guilty of a gross misdemeanor. Upon conviction, the defendant must be sentenced to a minimum of ten days imprisonment and must be ordered to participate in counseling or other appropriate program selected by the court . . . .

(b) A peace officer shall arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order granted pursuant to this section restraining the person or excluding the person from the residence or the petitioner's place of employment, even if the violation of the order did not take place in the presence of the peace officer, if the existence of the order can be verified by the officer . . . .

(c) A violation of an order for protection shall also constitute contempt of court and be subject to the penalties therefor.

59. MINN. STAT. § 518B.01 Subds. 2(a) & 4(b)(West Supp. 1993).

60. MINN. STAT. § 518B.01 Subd. 7 (West Supp. 1993).

61. MINN. STAT. § 518B.01 Subd. 2(b) (West Supp. 1993).

acquaintance of the victim is not subject to the penalties of the Act. Second, if the court decides that there is a basis for issuing a TRO, it is only effective for fourteen days, with the possibility of a fourteen day extension.<sup>62</sup> If, after a required hearing within seven days of issuing a TRO, the court decides not to issue a permanent order, the victim will be left unprotected after the TRO expires or will have to continue to seek restraining orders against the offender.<sup>63</sup>

Third, the penalties for violating a restraining order under the Act are minimal in comparison to the physical, mental, or emotional harm that a stalker could inflict on a victim in the course of that violation.<sup>64</sup> A first-time violator is subject to a misdemeanor charge and if convicted, faces a minimum of three days imprisonment and mandatory counseling.<sup>65</sup> However, the court has the discretion to stay imposition or execution of the jail sentence.<sup>66</sup> Furthermore, even with the imposition and execution of the maximum possible sentence of ninety days, a stalker would be free to terrorize his victim after this relatively short period of time. Also, there is no guarantee that mandatory counseling would deter a stalker.

A repeat violator is not likely to be much more deterred by sanctions under the Act. A person convicted of violating a restraining order under the Act within two years after a conviction under the Act or under a similar law of another state must be sentenced to a minimum of ten days imprisonment and must be ordered to participate in counseling or other appropriate program selected by the court.<sup>67</sup> However, the maximum jail time the offender receives still does not exceed one year. Therefore, a stalker who is a family or household member is not likely to be deterred by the penalties that may be imposed under this Act. Other laws, such as assault statutes may provide a more effective means to prosecute stalkers.

## 2. Assault Statutes

Under Minnesota law, assault is an act done with the intent to cause fear in another of immediate bodily harm or death or the intentional infliction of or attempt to inflict bodily harm upon an-

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62. *Id.*

63. MINN. STAT. § 518B.01 Subd. 7(c) (West Supp. 1993).

64. MINN. STAT. § 518B.01 Subd. 14(a) (West Supp. 1993).

65. *Id.*

66. *Id.*

67. *Id.*

other.<sup>68</sup> Whoever assaults another and inflicts great bodily harm commits first degree assault under Minnesota Statute section 609.221, and may be sentenced to imprisonment for not more than twenty years or to payment of a fine of not more than \$30,000, or both.<sup>69</sup> A person commits second degree assault under Minnesota Statute section 609.222 if he assaults another with a dangerous weapon, and may be sentenced for up to seven years or fined up to \$14,000, or both.<sup>70</sup> If the offender inflicts substantial bodily harm, he may be sentenced to a maximum of ten years or fine of \$20,000, or both.<sup>71</sup>

According to section 609.224, whoever commits an act with the intent to cause fear in another of immediate bodily harm or death or who intentionally inflicts or attempts to inflict bodily harm upon another is guilty of fifth degree assault, a misdemeanor.<sup>72</sup> Further, a person who is convicted under the statute for committing the above acts against the same victim within five years of a previous conviction under the statute may be sentenced to imprisonment for up to one year or a fine of up to \$3,000 or both.<sup>73</sup> It appears that it would be difficult, if not impossible, to sanction a stalker under any of these statutes if he merely makes himself present where the victim lives or works, without saying anything to or taking or attempting to take any action against the victim. Therefore, until a stalker violently attacks or attempts to violently attack the victim, assault statutes provide ineffective protection against stalkers. Trespass statutes, however, might provide a means for police to take action against stalkers before they inflict bodily harm upon their victims.

### 3. Trespass Statutes

Under Minnesota Statute section 609.605, a person commits a misdemeanor trespass violation who returns to the property of another to harass, abuse, or threaten another, after being told to leave the property and not to return.<sup>74</sup> This statute is violated if the ac-

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68. MINN. STAT. § 609.02 (West 1992) (defining terms related to assault statutes).

69. MINN. STAT. § 609.221 (West Supp. 1993) ("Great bodily harm" in context of first-degree assault is that which creates a high probability of death, causes 'serious permanent disfigurement,' or causes a permanent or protracted loss of impairment of function of any bodily member or organ or "other serious bodily harm").

70. MINN. STAT. § 609.215 (West Supp. 1993).

71. *Id.*

72. MINN. STAT. § 609.224 (West 1992).

73. *Id.*

74. MINN. STAT. § 609.605 (West 1992). Pertinent provisions are herein outlined:  
Subdivision 1. Misdemeanor.

(a) The following terms have the meanings given them for purposes of this section.

tor is, "without claim of right to the property or consent of one with authority to consent; trespasses on the premises of another, and without claim of right, refuses to leave upon the demand of the lawful possessor; or occupies or enters another's dwelling without claim of right or consent of the owner or who has the right to give consent, except in an emergency . . . ."75 This statute might be effective against a person stalking his victim at her home, unless the stalker is a spouse who has an unrestricted interest in the property entered upon. Furthermore, this statute probably would not be effective against a person stalking his victim at her workplace, unless the employer pressed charges, or unless the stalking activities took place in public. The statute appears to be mainly concerned with protecting property interests, although it alludes to the possible harm that the actor, by his intrusion could cause to the victim. A more effective means to combat stalking may be the use of terroris-

(i) "Premises" means real property and any appurtenant building or structure.

(ii) "Dwelling" means the building or part of a building used by an individual as a place of residence on either a full-time or a part-time basis. A dwelling may be part of a multidwelling or multipurpose building, or a manufactured home . . . .

(b) A person is guilty of a misdemeanor if the person intentionally:

. . . .

(3) trespasses on the premises of another and, without claim of right, refuses to depart from the premises on demand of the lawful possessor;

(4) occupies or enters the dwelling of another, without claim of right or consent of the owner or the consent of one who has the right to give consent, except in an emergency situation;

. . . .

(7) returns to the property of another with the intent to harass, abuse, or threaten another, after being told to leave the property and not to return, if the actor is without claim of right to the property or consent of one with authority to consent.

Subd. 2. Gross misdemeanor. Whoever trespasses upon the grounds of a facility providing emergency shelter services for battered women, . . . or of a facility providing transitional housing for battered women and their children, without claim of right or consent of one who has right to give consent, and refuses to depart from the grounds of the facility on demand of one who has right to give consent, is guilty of a gross misdemeanor.

Subd. 3. Trespasses motivated by bias. Whoever commits an act described in subdivision 1, clause (7), because of the property owner's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, . . . age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

75. MINN. STAT. § 609.605, Subd. 1(b) (West 1992).

tic threat statutes, which deal directly with explicit and implicit threats stalkers make toward their victims.

#### 4. Terroristic Threats Statutes

Under Minnesota Statute section 609.713, "whoever threatens, directly or indirectly, to commit any crime of violence with the purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror or inconvenience, may be sentenced to imprisonment for not more than five years."<sup>76</sup> This provision could be potentially effective in prosecuting a stalker who makes threatening statements or commits threatening acts against a victim. However, this statute is difficult to use because it requires proof that the offender meant to express a purpose or intent to injure the person, property, or rights of the victim by commission of an unlawful act.<sup>77</sup> It would be difficult to prove the crime against a stalker who commits a lawful act such as walking or standing near where the victim walks or is located or who only says to his victim, "I love you," or "You belong to me." However, public nuisance laws could be a useful means to address such insidious stalking activities.

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76. MINN. STAT. § 609.713 (West 1987 & Supp. 1992).

Terroristic Threats

Subdivision 1. Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another or to cause evacuation of a building, place of assembly or facility of public transportation or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience may be sentenced to imprisonment for not more than five year§

Subd. 2. Whoever communicates to another with purpose to terrorize another or in reckless disregard of the risk of causing such terror, that explosives or an explosive device or any incendiary devise is present at a named place or location, whether or not the same is in fact present, may be sentenced to imprisonment for not more than three year§

Subd. 3. (a) Whoever displays, exhibits, brandishes, or otherwise employs a replica firearm in a threatening manner, may be sentenced to imprisonment for not more than one year and one day or to payment of a fine of not more than \$3,000, or both, if, in doing so, the person either:

- (1) causes or attempts to cause terror in another person; or
- (2) acts in reckless disregard of the risk of causing terror in another person.

(b) For purposes of this subdivision, "replica firearm" means a device or object that is not defined as a dangerous weapon, and that is a facsimile or toy version of, and reasonably appears to be a pistol, revolver, shotgun, sawed-off shotgun, rifle, machine gun, rocket launcher, or any other firearm.

77. *Id.*

## 5. Public Nuisance Statutes

Minnesota Statute section 609.746 addresses many of the activities that could be characterized as attributable to stalkers.<sup>78</sup> It provides that, a person is guilty of a misdemeanor, who, "with the intent to harass, abuse, or threaten another, repeatedly follows or pursues another after being told not to do so by the person being followed or pursued."<sup>79</sup> Also, a person who, "enters upon another's property or surreptitiously gazes, stares, or peeps in the window of a house or dwelling of another with the intent to intrude upon or interfere with the privacy of a member of the household" is guilty of a misdemeanor under the statute.<sup>80</sup> Because this statute seems mainly geared toward privacy concerns rather than the potential harm that stalkers inflict upon their victims, it probably would not be very effective in addressing the crime of stalking, although it does prohibit acts stalkers might engage in. A harassment statute would likely provide a more effective tool to address repeated, unwanted behaviors displayed by stalkers because the prohibition addresses the psychological or emotional impact of the activities on the victim rather than the effect of the actions on a victim's right to privacy.

## 6. Harassment Statutes

It is a gross misdemeanor under Minnesota Statute section 609.747 for a person to commit more than one act of harassment

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78. MINN. STAT. § 609.746 (West Supp. 1992).

Interference with privacy

Subdivision 1. Surreptitious intrusion. A person who enters upon another's property and surreptitiously gazes, stares, or peeps in the window of a house or place of dwelling of another with intent to intrude upon or interfere with the privacy of a member of the household is guilty of a misdemeanor.

Subd. 2. Intrusion on privacy. A person who, with the intent to harass, abuse, or threaten another, repeatedly follows or pursues another after being told not to do so by the person being followed or pursued, is guilty of a misdemeanor. A person is guilty of a gross misdemeanor if he:

(1) violates this subdivision within two years after a previous conviction under this subdivision or section 609.224; or

(2) violates this subdivision against the same victim within five years after a previous conviction under this subdivision or section 609.224.

Subd. 3. Intrusion on privacy; aggravated violation. Whoever commits an act described in subdivision 2 because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, . . . age, or national origin, may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

79. MINN. STAT. § 609.746 Subd. 2 (West Supp. 1992).

80. MINN. STAT. § 609.746 Subd. 1 (West Supp. 1992).

against the same individual within six consecutive months.<sup>81</sup> An individual violates the statute by returning to the property of another with the intent to harass, abuse, or threaten another, after being told to leave the property and not to return.<sup>82</sup> It is also a gross misdemeanor for a person who has been convicted of assault or terroristic threat to commit harassment against the same victim within five consecutive years after the conviction or against any victim within two consecutive years after conviction.<sup>83</sup> These provisions appear to do no more than provide increased penalties for actions prohibited by the above trespass, assault, and terroristic threat statutes. However, the possibility of greater sentences and fines may at least assist in efforts to deter stalkers.

A person who is the victim of harassment may seek a restraining order from the court under section 609.748 against a person who makes "repeated, intrusive or unwanted acts, words, or gestures that are intended to adversely affect her safety, security, or privacy, regardless of the relationship between the actor and the intended target."<sup>84</sup> Violation of a TRO or a restraining order of

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81. MINN. STAT. § 609.747 (West Supp. 1992).

Subdivision 1. Multiple acts of harassment. It is a gross misdemeanor for a person to commit more than one act of harassment in violation of section 609.605, subdivision 1, paragraph (b), clause (7), against the same individual within six consecutive months. As used in this subdivision, "individual" means a natural person.

Subd. 2. Harassment following assault or terroristic threat.

(a) It is a gross misdemeanor for a person who has been convicted of assault or terroristic threat to commit harassment:

(1) against the same victim, within five consecutive years after the conviction; or

(2) against any victim, within two consecutive years after the conviction.

(b) In this subdivision:

(1) "assault" means a violation of section 609.221, 609.222, 609.223, 609.2231, or 609.224;

(2) "harassment" means a violation of section 609.605, subdivision 1, paragraph (b), clause (7); 609.746, subdivision 2; 609.79, subdivision 1, clause (1)(b); or 609.795, subdivision 1, clause (3); and

(3) "terroristic threat" means a violation of 609.713, subdivision 1 or 3.

82. MINN. STAT. § 609.747 Subd. 2(b)(2) (West Supp. 1992).

83. MINN. STAT. § 609.747 Subd. 2(1) & (2) (West 1992).

84. MINN. STAT. § 609.748 (West Supp. 1992). Pertinent provisions are herein outlined:

Subdivision 1. Definition. As used in this section, "harassment" means repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

Subd. 2. Restraining order; jurisdiction. A person who is a victim of harassment may seek a restraining order from the district court in the manner provided in this section. The parent or guardian of a minor

which respondent has knowledge is a misdemeanor, punishable by up to ninety days in prison, a fine of up to \$700, or both.<sup>85</sup> This statute provides broader restraining order protection than the Domestic Abuse Act because a petitioner may restrain persons beyond those with whom they have or have had some type of familial relationship. Therefore, it is potentially more useful in deterring stalkers than the Domestic Abuse Act.

"A person who, by means of a telephone, makes any comment, request, suggestion or proposal which is obscene, lewd, or lascivious" is guilty of a misdemeanor under Minnesota Statute section 609.79.<sup>86</sup> It is also a misdemeanor for a person to "repeatedly make telephone calls, whether or not conversation ensues, with the intent

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who is a victim of harassment may seek a restraining order from the juvenile court on behalf of the minor.

Subd. 4. Temporary restraining order.

(a) The court may issue a temporary restraining order ordering the respondent to cease or avoid the harassment of another person or to have no contact with that person if the petitioner files a petition . . . and if the court finds reasonable grounds to believe that the respondent has engaged in harassment.

(c) The temporary restraining order is in effect until a hearing is held on the issuance of a restraining order . . . . The court shall hold the hearing on the issuance of a restraining order within 14 days after the temporary restraining order is issued unless (1) the time period is extended upon written consent of the parties; or (2) the time period is extended by the court for one additional 14-day period . . . .

Subd. 5. Restraining order.

(a) The court may grant a restraining order ordering the respondent to cease or avoid the harassment of another person or to have no contact with that person . . . . Relief granted by the restraining order must be for a fixed period of not more than two years.

Subd. 6. Violation of restraining order.

(a) When a temporary restraining order or a restraining order is granted under this section and the respondent knows of the order, violation of the order is a misdemeanor.

Subd. 8. Notice. An order granted under this section must contain a conspicuous notice to the respondent:

- (1) of the specific conduct that will constitute a violation of the order;
- (2) that violation of an order is a misdemeanor punishable by imprisonment for up to 90 days or a fine of up to \$700 or both; and
- (3) that a peace officer must arrest without warrant and take into custody a person if the peace officer has probable cause to believe the person has violated a restraining order.

85. MINN. STAT. § 609.748 Subd. 8(2) (West Supp 1992).

86. MINN. STAT. § 609.79 (West 1992 & Supp. 1993).

Subdivision 1. Whoever,

- (1) By means of a telephone,

to abuse, threaten or harass.<sup>87</sup> Furthermore, a person having control of a telephone who knowingly permits it to be used for purposes prohibited by this statute, is also guilty of a misdemeanor.<sup>88</sup> Aggravated violations, meaning those motivated by the victim's actual or perceived race, color, religion, sex, sexual orientation, or disability; or those committed while falsely impersonating another, may be punished with up to one year in prison or a fine of up to \$3,000, or both.<sup>89</sup> Also, section 609.795 makes it a misdemeanor to use the mails or to deliver letters, telegrams, or packages with the intent to abuse, disturb, or cause distress.<sup>90</sup> These statutes may be useful in deterring persons who engage in activities that may upset victims. They may also provide a method of dealing with stalkers before their activities escalate to physical violence against a victim. However, where harassment is organized by particular groups against specific targets and often involves violence, a statute specifically addressing such activities may be more effective against such behavior.

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(a) Makes any comment, request, suggestion or proposal which is obscene, lewd, or lascivious,

(b) Repeatedly makes telephone calls, whether or not conversation ensues, with intent to abuse, threaten, or harass,

(c) Makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number, or

(2) Having control of a telephone, knowingly permits it to be used for any purpose prohibited by this section, shall be guilty of a misdemeanor.

Subd. 1a. Obscene or harassing telephone calls; aggravated violations.

(a) Whoever commits an act described in subdivision 1 because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, . . . age, or national origin may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

Subd. 2. The offenses may be prosecuted either at the place where the call was made or where it is received.

87. MINN. STAT. § 609.79 Subd. 1(1)(b) (West 1992 & Supp. 1993).

88. MINN. STAT. § 609.79 Subd. 1(2) (West 1992 & Supp. 1993).

89. MINN. STAT. § 609.79 Subd. 1a(a) & (b) (West 1992 & Supp. 1993).

90. MINN. STAT. § 609.795 (West 1992 & Supp. 1993).

Subdivision 1. Misdemeanors. Whoever does any of the following is guilty of a misdemeanor:

(1) knowing that the actor does not have the consent of either the sender or the addressee, intentionally opens any sealed letter, telegram, or package addressed to another; or

(2) knowing that a sealed letter, telegram, or package has been opened without the consent of either the sender or addressee, intentionally publishes any of the contents thereof; or

(3) with the intent to abuse, disturb, or cause distress, repeatedly uses the mails or delivers letters, telegrams, or packages.

## 7. Prohibition on Obstructing Access

Some citizens and lawmakers have suggested that anti-stalking legislation be used to address the violence associated with anti-abortion protests.<sup>91</sup> In fact, an anti-stalking bill was introduced in Congress in 1993 to make stalking a federal crime.<sup>92</sup> The bill was proposed in order to offer protection to health care workers when anti-abortion protesters follow and threaten them.<sup>93</sup>

Minnesota followed suit, passing a bill in 1993 that prohibits physical interference with safe access to health care facilities.<sup>94</sup>

91. 138 CONG. REC., *supra* note 13.

92. *Id.*

93. *Id.*

94. MINN. STAT. § 609.7495 (West 1993).

Subdivision 1. Definitions. For the purposes of this section, the following terms have the meanings given them.

(a) "Facility" means any of the following:

- (1) a hospital or other health institution licensed under sections 144.50 to 144.56;
- (2) a medical facility as defined in section 144.561;
- (3) an agency, clinic, or office operated under the direction of or under contract with the commissioner of health or a community health board, as defined in section 145A.02;
- (4) a facility providing counseling regarding options for medical services or recovery from an addiction;
- (5) a facility providing emergency shelter services for battered women, as defined in section 611A.31, subdivision 3, or a facility providing transitional housing for battered women and their children;
- (6) a residential care home or home as defined in section 144B.01, subdivision 5;
- (7) a facility as defined in section 626.556, subdivision 2, paragraph (f);
- (8) a facility as defined in section 626.557, subdivision 2, paragraph (a), where the services described in that paragraph are provided;
- (9) a place to or from which ambulance service, as defined in section 144.801, is provided or sought to be provided; and
- (10) a hospice program licensed under section 144A.48.

(b) "Aggrieved party" means a person whose access to or egress from a facility is obstructed in violation of subdivision 2, or the facility.

Subd. 2. Obstructing access prohibited. A person is guilty of a gross misdemeanor who intentionally and physically obstructs any individual's access to or egress from a facility.

Subd. 3. Not Applicable. Nothing in this section shall be construed to impair the right of any individual or group to engage in speech protected by the United States Constitution, the Minnesota Constitution, or federal or state law, including but not limited to peaceful and lawful handbilling and picketing.

Subd. 4. Civil Remedies.

(a) A party who is aggrieved by an act prohibited by this section, or by an attempt or conspiracy to commit an act prohibited by this section, may bring an action for damages, injunctive or declaratory relief, as appropriate, in district court against any per-

Minnesota Statute section 609.7495 makes it a gross misdemeanor for a person to "intentionally and physically obstruct an individual's access to or egress from a health care facility."<sup>95</sup> The law also provides for civil penalties, noting that an aggrieved party may bring an action for damages, or for injunctive or declaratory relief against any person or entity who has violated or conspired to violate the statute.<sup>96</sup> In apparent response to possible criticism that the law infringes on the rights of protesters on either side of the abortion issue, the Minnesota legislature prudently added a disclaimer to the statute stating, "[n]othing in this section shall be construed to impair the right of any individual or group to engage in speech protected by the United States Constitution, the Minnesota Constitution, or federal or state law, including but not limited to peaceful and lawful handbilling and picketing."<sup>97</sup> Although this statute could be used to protect previously abused women from further harm while seeking refuge at shelters for battered women, its main purpose appears to be deterring violence committed by picketers and protestors who threaten or harass health care workers or patients at women's clinics. Despite the statute's importance in deterring violent acts by specific groups, its scope is too narrow to fully address the crime of stalking, which needs to be more broadly addressed, as evidenced below.

### III. Analysis of Minnesota's Anti-Stalking Statute

#### A. Minnesota's Anti-Stalking Legislation

Minnesota has felt the impact of stalking crimes, reporting numerous tragic incidents. Pamela Sweeney had told friends that she was being harassed by a co-worker, Joe Walsh, who had come to her

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son or entity who has violated or has conspired to violate this section.

(b) A party who prevails in a civil action under this subdivision is entitled to recover from the violator damages, costs, attorney fees, and other relief as determined by the court. In addition to all other damages, the court may award to the aggrieved party a civil penalty of up to \$1,000 for each violation. If the aggrieved party is a facility and the political subdivision where the violation occurred incurred law enforcement or prosecution expenses in connection with the same violation, the court shall award any civil penalty it imposes to the political subdivision instead of to the facility.

(c) The remedies provided by this subdivision are in addition to any other legal or equitable remedies the aggrieved party may have and are not intended to diminish or substitute for those remedies or to be exclusive.

95. MINN. STAT. § 609.7495 Subd. 2 (West 1993).

96. MINN. STAT. § 609.7495 Subd. 4 (West 1993).

97. *Id.*

home uninvited, repeatedly drove by her home, and made harassing phone calls to her.<sup>98</sup> On May 31, 1991, Walsh entered Pamela's home, using keys he had stolen from her desk, and killed her.<sup>99</sup> In another incident, while Marcia Palmer and her husband Jeffrey were going through a nasty divorce, she made threats and repeated calls to his new home.<sup>100</sup> He installed an elaborate security system in his house in response to his wife's harassment.<sup>101</sup> However, that was not enough to stop Marcia, who knocked on her estranged husband's door on Halloween night in 1992 wearing a black cape and a monster mask, and shot and killed Jeffrey and his girlfriend when he answered the door.<sup>102</sup>

Ramsey County Judge, Joanne Smith, has also been victimized since 1984 by a man she sentenced to ninety days in jail for assaulting a woman.<sup>103</sup> Since then, she has encountered mutilated animals on her porch and sidewalk, a fake bomb in her mailbox, slashed automobile tires, spray-painted obscenities on her house, and numerous obscene and hang-up phone calls.<sup>104</sup> Proponents of Minnesota's anti-stalking law cited these cases as evidence of the state's need for such legislation.<sup>105</sup>

In May 1993, Governor Arne Carlson signed a bill making stalking a crime in the state of Minnesota.<sup>106</sup> Its terms encompass

98. Donna Halvorsen, *Senate Panel Will Debate Stalking Bill But Crime is Difficult to Define, Backers Say*, STAR TRIB. (MINNEAPOLIS), January 28, 1993, at 1B.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Joanne Smith, *The Judge as Victim: She Tells her Own Story to Push Anti-Stalking Bill*, STAR TRIB. (MINNEAPOLIS), February 20, 1993, at 1A.

104. *Id.*; see also Donna Halvorsen, *Victim's Campaign Pays Off in New Anti-stalking Law*, STAR TRIB. (MINNEAPOLIS), May 21, 1993, at 2B.

105. Halvorsen, *supra* note 104; see also Halvorsen, *supra* note 98.

106. MINN. STAT. § 609.749 (West 1993).

Subd. 1. DEFINITION. As used in this section, "harass" 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.

Subd. 2. HARASSMENT AND STALKING CRIMES. A person who harasses another by committing any of the following acts is guilty of a gross misdemeanor:

(1) directly or indirectly manifests a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act;

(2) stalks, follows, or pursues another;

(3) returns to the property of another if the actor is without claim of right to the property or consent of one with authority to consent;

(4) repeatedly makes telephone calls, or induces a victim to make telephone calls to the actor, whether or not conversation ensues;

(5) makes or causes the telephone of another repeatedly or continuously to ring;

(6) repeatedly uses the mail or delivers or causes the delivery of letters, telegrams, packages, or other objects; or

(7) engages in any other harassing conduct that interferes with another person or intrudes on the person's privacy or liberty.

**Subd. 3. AGGRAVATED VIOLATION.** A person who commits any of the following acts is guilty of a felony:

(1) commits any offense described in subdivision 2 because of the victim's or another's actual or perceived race, color, religion, sex, sexual orientation, disability, . . . age, or national origin;

(2) commits any offense described in subdivision 2 by falsely impersonating another;

(3) commits any offense described in subdivision 2 and possesses a dangerous weapon at the time of the offense;

(4) commits a violation of subdivision 1 with intent to influence or otherwise tamper with a juror or a judicial proceeding or with intent to retaliate against a judicial officer, . . . or a prosecutor, defense attorney, or officer of the court, because of that person's performance of official duties in connection with a judicial proceeding; or

(5) commits any offense described in subdivision 2 against a victim under the age of 18, if the actor is more than 36 months older than the victim.

**Subd. 4. SECOND OR SUBSEQUENT VIOLATIONS; FELONY.** A person is guilty of a felony who violates any provision of subdivision 2 within ten years after being discharged from sentence for a previous conviction under this section; sections 609.221 to 609.224; 518B.01, subdivision 14; 609.748, subdivision 6; or 609.713, subdivision 1, 3, or 4.

**Subd. 5. PATTERN OF HARASSING CONDUCT.**

(a) A person who engages in a pattern of harassing conduct with respect to a single victim or one or more members of a single household in a manner that would cause a reasonable person under the circumstances to feel terrorized or to fear bodily harm and that does cause this reaction on the part of the victim, is guilty of a felony and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than \$20,000, or both.

(b) For purposes of this subdivision, a "pattern of harassing conduct" means two or more acts within a five-year period that violate the provisions of any of the following: (1) this section; (2) § 609.713; (3) § 609.224; (4) § 518B.01, subd. 14; (5) § 609.748, subd. 6; (6) § 609.605, subd. 1, para. (a), clause (7); (7) § 609.79; or (8) § 609.795

**Subd. 6. MENTAL HEALTH ASSESSMENT AND TREATMENT.**

(a) When a person is convicted of a felony offense under this section, or another felony offense arising out of a charge based on this section, the court shall order an independent professional mental health assessment of the offender's need for mental health treatment. The court may waive the assessment if an adequate assessment was conducted prior to the conviction.

(b) Notwithstanding section 13.42, 13.85, 144.335, or 260.161, the assessor has access to the following private or confidential data on the person if access is relevant and necessary for the assessment:

(1) medical data under 13.42;

(2) welfare data under section 13.46;

(3) corrections and detention data under section 13.85;

(4) health records under section 144.355; and

(5) juvenile court records under section 260.161.

many of the prohibitions in the criminal statutes above.<sup>107</sup> The one new provision, however, specifically prohibits pursuing, following, or stalking another person.<sup>108</sup>

The sanctions outlined in this new law appear to be tougher than most of those in the criminal statutes above. For example, here, the prohibited acts are charged at the outset as gross misdemeanors instead of as misdemeanors.<sup>109</sup> Also, aggravated violations, or second or subsequent violations result in a felony conviction.<sup>110</sup> Further, a person engaging in a pattern of harassing conduct could be sentenced to up to ten years imprisonment or fined up to \$20,000, or both.<sup>111</sup> Most of the sentences or fines for the criminal statutes described above are not as stringent for first time offenses as those permissible under this statute. Also, a key provision of the anti-stalking statute is that it aims at a pattern of terrorizing behavior not covered by existing Minnesota criminal statutes which generally address single incidents.<sup>112</sup>

Although Minnesota's anti-stalking statute could be used as an effective weapon against stalkers, recommendations of the Minnesota Sentencing Guidelines Commission could undermine the impact of the new law.<sup>113</sup> Initially, the Commission ranked felony stalking at the second and third levels of the ten-level chart of

Data disclosed under this section may be used only for purposes of the assessment and may not be further disclosed to any other person, except as authorized by law.

(c) If the assessment indicates that the offender is in need of and amenable to mental health treatment, the court shall include in the sentence a requirement that the offender undergo treatment.

(d) The court shall order the offender to pay the costs of assessment under this subdivision unless the offender is indigent under section 563.01.

Subd. 7. EXCEPTION. Conduct is not a crime under this section if it is performed under terms of a valid license, to ensure compliance with a court order, or to carry out a specific lawful commercial purpose or employment duty, is authorized or required by a valid contract, or is authorized, required, or protected by state or federal law or the state or federal constitutions.

Subdivision 2, clause (2), does not impair the right of any individual or group to engage in speech protected by the federal constitution, the state constitution, or federal or state law, including peaceful and lawful handbilling and picketing.

107. MINN. STAT. § 609.749 Subd. 2 (West 1993).

108. MINN. STAT. § 609.749 Subd. 2(2) (West 1993).

109. MINN. STAT. § 609.749 Subd. 2 (West 1993).

110. MINN. STAT. § 609.749 Subds. 3 & 4 (West 1993).

111. MINN. STAT. § 609.749 Subd. 5 (West 1993).

112. Donna Halvorsen, *Legislature OKs Bill to Fight Crime, Curb Guns*, STAR TRIB. (MINNEAPOLIS), May 16, 1993, at 1B.

113. *Penalty Recommendations for Stalking Draw Fire*, STAR TRIB. (MINNEAPOLIS), July 22, 1993, at 2B.

guidelines.<sup>114</sup> This meant that only stalkers with long criminal records would actually be imprisoned for violating the statute, and even then, recommendations for imprisonment ranged from only nineteen to twenty-five months.<sup>115</sup> Convicted stalkers without records might have received a few months in county jail and probation.<sup>116</sup> Essentially, therefore, a felony violation of the anti-stalking law would have carried only the same penalties as theft of \$2,500 or less.<sup>117</sup>

Minnesota Court of Appeals Judge, R.A. Randall, was one of the Commission members voting for lower penalties and stated that "the crime [stalking] is virtually redundant."<sup>118</sup> "When you have the egregious case, there are plenty of laws to use."<sup>119</sup> However, in apparent response to concern expressed by the public, women's groups, Minnesota's Lieutenant Governor, Joanell Dyrstad, and the state's Attorney General, Hubert Humphrey III, the Commission decided to review its decision.<sup>120</sup>

Although the Commission subsequently decided to raise felony stalking to levels four and five on the sentencing guidelines chart, some observers, including Lieutenant Governor Dyrstad, and Minnesota Supreme Court Justice, Sandra Gardebring were still disappointed.<sup>121</sup> Now, for example, offenses such as repeated phone calls may be punished similarly to such crimes as third-degree assault and motor vehicle theft, and the penalty for harassing conduct that causes terror may be punished similarly to the crime of residential burglary or simple robbery.<sup>122</sup>

Justice Gardebring, a member of the Commission, thought that no sentencing guidelines should be set because of "the broad language of the statute and the varieties of behavior" which might be prohibited by it.<sup>123</sup> Lieutenant Governor Dyrstad also thought that sentencing under the law should be left to a judge's discretion for at least a year to get a clearer understanding of the statute's prohibitions.<sup>124</sup> Corrections Commissioner, Frank Wood, agreed

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Stalking Sentences Will Be Reconsidered*, STAR TRIB. (MINNEAPOLIS), August 25, 1993, at 6B.

118. *Penalty Recommendations*, *supra* note 113, at 2B.

119. *Id.*

120. *Stalking Sentences*, *supra* note 117, at 6B.

121. Kevin Duchscher, *Sentencing Commission Urges Stiffer Stalking Penalties: Under Changes Violators Would Be More Likely to Serve Time*, STAR TRIB. (MINNEAPOLIS), October 22, 1993, at 7B.

122. *Id.*

123. *Id.*

124. *Id.*

that stalking crimes should be unranked because simply raising the penalties slightly could cause more debate and mistrust of the system without actually responding to the public's demand for stiffer sanctions.<sup>125</sup> However, Commission members disagreed with those opinions, expressing concern that providing no guidelines would amount to the Commission shirking the responsibility to protect those convicted under the statute from widely varying sentences imposed by judges with unlimited sentencing discretion.<sup>126</sup> Unfortunately, the reality is that if judges believe that longer sentences are justified, they ultimately have the option of departing from the Commission's sentencing guidelines recommendations.<sup>127</sup>

### B. Constitutional and Procedural Issues Regarding Minnesota's Anti-Stalking Statute

#### 1. First Amendment Questions

The First Amendment guarantees an individual's freedom of speech and expression.<sup>128</sup> However, it is well understood that the right of speech is not absolute at all times and in all circumstances.<sup>129</sup> The crime of stalking typically involves repeatedly threatening another person by harassing phone calls or written messages.<sup>130</sup> The government has a compelling interest in preserving the peace, in protecting each person from crime, and from fear of crime.<sup>131</sup> Hence, threats of violence appropriately fall outside of First Amendment protection, because people must be protected from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.<sup>132</sup> Still, states must be careful to construct their anti-stalking laws so as to avoid having them declared invalid because they violate the First Amendment.

St. Paul Police Chief, William Finney, said he thinks that Minnesota's new anti-stalking law will give police a way to deal with people who "have been frustrating law enforcement efforts for many, many years."<sup>133</sup> But William Roath, Executive Director of the Minnesota Civil Liberties Union, noted that many stalking laws

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125. *Id.*

126. *Id.*

127. *Id.*

128. U.S. CONST. amend. I.

129. *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 570 (1942) (holding that lewd, obscene, profane, libelous and insulting language is no essential part of any exposition of ideas and, therefore, is not protected by the First Amendment).

130. Beck et al., *supra* note 5, at 60.

131. *Wisconsin v. Mitchell*, 458 N.W.2d 807, 809 (1992).

132. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538, 2546 (1992).

133. Halvorsen, *supra* note 104, at 2B.

in other states have been challenged as vague and too broad, saying that the problem is that most of the anti-stalking laws make crimes out of things that are generally legal.<sup>134</sup> Minnesota's anti-stalking statute, however, prohibits acts that are already sanctioned under other Minnesota criminal statutes.<sup>135</sup> Also, the statutory exceptions to the conduct prohibited by the statute may protect it from invalidation by the courts.<sup>136</sup> The terms of the statute note under what circumstances some acts prohibited by the law are permissible.<sup>137</sup> For example, under the statute, otherwise prohibited conduct is not a crime if it is performed under terms of a valid license, to ensure compliance with a court order, to carry out a specific lawful commercial purpose or employment duty, or if it is authorized or required by a valid contract.<sup>138</sup> The law also specifically states that its terms do not impair the right to engage in speech protected by the federal constitution, the state constitution, or federal or state law, including peaceful and lawful handbilling and picketing.<sup>139</sup>

## 2. Vagueness

In order to be constitutional, a criminal statute must be sufficiently definite to give notice of its prohibited conduct to a person who intends to avoid its penalties and to guide the judge and defense attorney in the law's application.<sup>140</sup> Essentially, the terms of a penal statute creating a new offense must be sufficiently explicit to give "fair notice" of what acts are punishable.<sup>141</sup> The point is to lessen the possibility that a citizen could possibly violate a statute without knowing that he is committing a crime and without intending to do so.

Stalking behavior can include repeatedly following an individual or showing up at the targeted person's home or work

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134. Halvorsen, *supra* note 98, at 1B.

135. MINN. STAT. § 609.749 Subd. 2 (West 1993).

136. MINN. STAT. § 609.749 Subd. 2 (West 1993).

137. *Id.*

138. MINN. STAT. § 609.749 Subd. 7 (West 1993).

139. *Id.*

140. Hawaii v. Marley, 509 P.2d 1095, 1103 (1973). In *Marley*, the Hawaii supreme court held constitutional a statute which prohibited entering or remaining "in or upon the dwelling house, buildings, or improved or cultivated lands of another or the land of another about or near any of its buildings used for dwelling purposes, after having been forbidden to do so by the person who has lawful control of such premises, either directly or by notice posted thereon." *Id.* The court said the statute was not unconstitutionally vague, indefinite or overbroad on its face, and that the law provided adequate notice of potential criminal liability. *Id.*

141. Connally v. General Construction Co., 269 U.S. 385, 391 (1926) (affirming the imposition of a decree to enjoin the Oklahoma Commissioner of Labor from enforcing a statute that did not inform those subject to it of what conduct would render them liable for its penalties).

place.<sup>142</sup> A major concern regarding anti-stalking laws is whether they may curtail some perfectly legitimate activities involving going to certain places repeatedly.<sup>143</sup> For example, an overbroad statute could make it a criminal offense for an investigative reporter to pursue the subject of a report.<sup>144</sup> It might also prevent a concerned father, unfairly denied visitation rights, from watching his children from a distance to make sure that they are safe.<sup>145</sup> The delicate balance for legislators drafting anti-stalking laws is to provide the most effective statutory tools against criminal behavior while imposing as little as possible upon the lives of law-abiding people. Even though citizens are concerned about crime and their own personal safety, people generally will not tolerate an infringement upon their guaranteed rights.

If a statute is so vague and indefinite in its form and as interpreted, that it would permit the punishment of protected activities, it is void on its face, as contrary to the 14th Amendment.<sup>146</sup> No matter how well intentioned a law may be, interpreting courts must not enforce its terms if they are contrary to the Constitution. Therefore, each state faces the challenge of ensuring that its statute's terms and plausible interpretations do not infringe upon the liberty interests of one person in order to protect the rights of another. To rush through a law that likely will not hold up in court does a disservice to those stalking victims whom the laws are intended to protect.<sup>147</sup>

Opponents of the Minnesota anti-stalking statute might argue that it is unconstitutionally vague, giving police officers too much discretion to decide which suspects are or are not in violation of the law based on a subjective evaluation of the acts committed. The danger of bias and prejudice affecting officers' judgment is a very legitimate concern. However, the chances of biased application of Minnesota's anti-stalking law are probably limited because of the terms and construction of the statute. Because the acts prohibited are not identified by broad, general descriptions, and are instead set out by list, the discretion of law enforcers is appropriately limited. Either a suspect's actions fit the law's prohibitions—con-

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142. Beck et al., *supra* note 5, at 60.

143. 138 CONG. REC., *supra* note 21.

144. *Id.*

145. *Id.*

146. *Winters v. New York*, 333 U.S. 506, 509 (1948) (reversing the conviction of a person charged with having in his possession, with the intent to sell, certain magazines because the statute under which he was charged failed to give fair notice of what acts were punishable and because it included prohibitions against constitutionally protected expressions).

147. 138 CONG. REC., *supra* note 21.

cretely defined acts—or they do not. This way, there is not much room for subjective interpretation by individual police officers. Listing is also a way to ensure that the average citizen understands what actions are sanctioned, so as to give him fair warning.<sup>148</sup> The definitions of the prohibited acts are also straightforward, with commonly used terms, so as to avoid misunderstandings about what activities constitute a crime under the statute.<sup>149</sup>

### 3. Warrant Requirements

A police officer may lawfully arrest a person without a warrant when the officer has reasonable grounds to believe that a felony has occurred and that the person apprehended committed it.<sup>150</sup> An officer may also make a warrantless arrest for a misdemeanor committed in the officer's presence, meaning that the officer is aware of the commission of the crime through any of his or her senses.<sup>151</sup> To avoid constitutional challenges based on the allowance of warrantless arrests for gross misdemeanors committed under the anti-stalking statute but not in the presence of law enforcement officers, the Minnesota legislature wisely did not include such a provision.<sup>152</sup> Because actions usually involved in stalking, such as tire slashings and phone harassment, are misdemeanors, police must witness them to make a warrantless arrest.<sup>153</sup> Since police will not likely gain independent knowledge of stalkers' activities, stalking victims must report incidents to assist police in establishing arrest probable cause, and also to establish that the suspect is engaging in a pattern of prohibited conduct. To make an arrest for a felony charge under the anti-stalking law, an officer also must still have probable cause, or knowledge based on reasonable and trustworthy facts and circumstances sufficient to warrant a reasonably prudent person to believe that the suspect committed or is committing a crime.<sup>154</sup> Leaving out a constitutionally questionable warrantless arrest provision is another way Minnesota legislators may have en-

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148. *Hawaii v. Marley*, 509 P.2d, at 1103; see also MINN. STAT. § 609.749 Subd. 2 (West 1993).

149. *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926).

150. *Wong Sun v. United States*, 371 U.S. 471, 479-81 (1963) (reversing defendant's conviction on narcotics charges because the information on which the officers acted in arresting him without a warrant did not constitute probable cause).

151. *Carroll v. United States*, 267 U.S. 132, 156-57 (1925) (establishing probable cause arrest where police, on information received, anticipated cars carrying prohibited liquor, and defendants came through on the highway, carrying liquor).

152. MINN. STAT. § 609.749 (West 1993).

153. Halvorsen, *supra* note 112, at 1B.

154. *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (reversing defendant's conviction for possession of illegal contraband because officers arrested him based on a picture of him and knowledge that he had a record of similar prior convictions, with-

sured that the law will survive judicial scrutiny. However, the effectiveness of the law will necessarily be measured by the willingness of stalking victims to report the crime.

#### 4. Intent

Minnesota state senator, Pat McGowan stated that under Minnesota's anti-stalking law, prosecutors will not have to prove that a stalker intended to harass a victim.<sup>155</sup> The statute only requires proof that the stalker's behavior would cause a reasonable person to feel oppressed, persecuted, or intimidated.<sup>156</sup> The statute says that purpose or intent to injure a person, property, or rights of another may be manifested directly or indirectly.<sup>157</sup> One might understand the senator's statement in conjunction with the terms of the statute to mean that the victim's demonstrated reasonable feeling of oppression, persecution, or intimidation is enough proof of the stalker's intent in committing the act. If this interpretation proves viable, the statute should survive a constitutional challenge to the statute's intent requirements.

#### C. *A Brief Comparison of the California and Minnesota Statutes*

The construction of the Minnesota statute may make it less susceptible to constitutional challenges and possible invalidation. Unlike California's pioneer legislation, Minnesota's statute lists specific acts that are prohibited by the statute<sup>158</sup> This conduct is sanctioned by other criminal statutes that do not face constitutional challenges. Listing is recommended against as "exclusive," by the NIJ report submitted to Congress.<sup>159</sup> However, while naming the acts that constitute prohibited stalking behavior may appear to narrow the law's scope too much, this approach may be what makes its invalidation less likely.

Critics of California's anti-stalking law have raised questions of whether it provides adequate notice of what the law prohibits.<sup>160</sup> A major concern is that illegal behavior will be indistinguishable from legal behavior, possibly subjecting innocent or incompetent

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out having heard or seen anything else to give them grounds for belief that defendant had acted or was then acting unlawfully).

155. Halvorsen, *supra* note 112, at 1B.

156. *Id.*

157. MINN. STAT. § 609.749 Subd. 2 (West 1993).

158. *Id.*

159. 139 CONG. REC., *supra* note 25.

160. Schuyler, *supra* note 6, at 20.

people to criminal penalties.<sup>161</sup> The California statute states that conduct during labor picketing is not covered by the statute.<sup>162</sup> It also points out that the harassing conduct prohibited by the law is that which serves no legitimate purpose.<sup>163</sup> However, it does not give explicit notice as to what is or is not a legitimate purpose.<sup>164</sup> In contrast, by outlining exceptions to the statute, Minnesota's anti-stalking law gives clear notice as to when the statute applies.<sup>165</sup> It also expressly states that the law does not infringe upon constitutionally guaranteed rights.<sup>166</sup>

The construction of the Minnesota statute may also better assist prosecutors in obtaining convictions for stalking. The Minnesota law does not require "credible threat," which is required by the California law.<sup>167</sup> Neither does the Minnesota statute require a reasonable fear for safety.<sup>168</sup> Under Minnesota's provisions, a prosecutor would not have to show that the suspect possessed the actual or apparent ability to carry out the threat.<sup>169</sup> The requirement, instead, is that a reasonable person under the circumstances would feel oppressed, persecuted or intimidated by the suspect's conduct.<sup>170</sup> Here, proof of what the victim suffered and how objectively reasonable that suffering is, in terms of the suspect's conduct, is more critical for a conviction than whether the suspect could have carried out his threat—whether that determination is objective or subjective. Although the California law may have provided the Minnesota legislature with a valuable reference while drafting the state's anti-stalking statute, in choosing alternative terms and construction, the Minnesota lawmakers may have better insured the availability of this tool to directly combat the crime of stalking.

#### *D. Impact of the Statute*

At least seven people have been charged under Minnesota's new anti-stalking law since its passage in 1993. These people include a man obsessed with a convenience store worker who was arrested after he allegedly returned repeatedly to the store to ask her out, parked near the store and stared at her, and told her that he was not afraid of the police and that they could do nothing to

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161. *Id.*

162. CAL. PENAL CODE § 646.9 (West Supp. 1993).

163. *Id.*

164. *Id.*

165. MINN. STAT. § 609.749 Subd. 7 (West 1993).

166. *Id.*

167. CAL. PENAL CODE § 646.9 (West Supp. 1993).

168. *Id.*

169. MINN. STAT. § 609.749 (West 1993).

170. *Id.*

him.<sup>171</sup> Four abortion rights activists were also charged under the law for allegedly trailing an "Operation Rescue" caravan en route to the homes of two doctors who perform abortions.<sup>172</sup> Further, a man who had been a resident of a mental health facility where he first met one of its employees was charged under the anti-stalking law for allegedly writing and telephoning her after she indicated to him that his attentions were unwanted.<sup>173</sup> Finally, an "Operation Rescue" trainee, was charged under the law for allegedly following an abortion clinic security guard several times from his home.<sup>174</sup>

In December 1993, Minnesota District Court Judge, E. Anne McKinsey denied a motion to declare Minnesota Statute section 609.749 and its subdivisions unconstitutional, holding that facial overbreadth and vagueness challenges to the anti-stalking law must fail.<sup>175</sup> Five cases, including the first and last incidents described above, were consolidated for argument and consideration of the common issue of defendants' constitutional challenge to the statute.<sup>176</sup>

In response to the overbreadth challenge, Judge McKinsey explained that a review of the pertinent provisions of the statute makes it clear that the focus of the law is upon conduct, not protected expression.<sup>177</sup> By its terms, she noted, the statute defines "harassment" as intentional "conduct" that oppresses, persecutes, or intimidates another.<sup>178</sup> Judge McKinsey ruled that the law's prohibition of persons from "targeting" individuals (or households) in a harassing manner, so as to cause the victims to feel oppressed, persecuted, or intimidated, is a permissible regulation of conduct,

171. Tatsha Robertson, *Minneapolis Man Charged Under Anti-Stalking Law, Police Say He Ignored Warnings to Leave Store Clerk Alone*, STAR TRIB. (MINNEAPOLIS), June 10, 1993, at 1B.

172. Kurt Chandler, *Four Abortion Rights Activists Charged Under Anti-Stalking Law*, STAR TRIB. (MINNEAPOLIS) Aug. 26, 1993, at 1B; see also Maureen M. Smith, *4 Abortion Rights Volunteers Arrested Under State's New Anti-Stalking Law*, STAR TRIB. (MINNEAPOLIS) July 12, 1993, at 5A.

173. Associated Press, *St. Paul Man Charged with Stalking Woman*, STAR TRIB. (MINNEAPOLIS), August 13, 1993, at 2B.

174. Maureen M. Smith, *Operation Rescue Trainee Arrested, Clinic Guard was Allegedly Stalked*, STAR TRIB., (MINNEAPOLIS) June 26, 1993, at 1B; see also Maureen M. Smith, *Operation Rescue Trainee in Court, May be Charged Under State's New Anti-Stalking Law*, STAR TRIB., (MINNEAPOLIS) June 29, 1993, at 2B.

175. *State v. Davis*, No. 93-042334, slip op. at 3 (Minn. Dist. Ct. 4th J. Dist. Dec. 7, 1993).

176. *Id.* at 2. Defendants adopted one another's written and oral arguments, and state prosecutors adopted one another's arguments. *Id.*

177. *Id.* at 9 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984), "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").

178. *Id.* at 12,

regardless of the intended message.<sup>179</sup> She further found that even though it is possible to imagine that the statute may prohibit some lawful conduct, such hypothetical situations, in and of themselves, will not render the entire statute void and unenforceable.<sup>180</sup> And since defendants in this case could not identify any conduct protected under the First Amendment which the statute purports to regulate, she concluded that their overbreadth challenge must fail.<sup>181</sup>

Judge McKinsey also noted that subdivision 7 removes any doubt regarding the law's permissible application.<sup>182</sup> The inclusion of the subdivision, she determined, is neither an admission of the statute's overbreadth, nor a violation of separation of powers, interfering with judicial function.<sup>183</sup> In her view, subdivision 7 is a legitimate legislative enactment setting forth the parameters of the statute.<sup>184</sup>

Addressing the vagueness challenge, Judge McKinsey concluded that, as required,<sup>185</sup> ordinary people can understand what conduct is prohibited by Minnesota's anti-stalking law and in a manner that does not encourage arbitrary and discriminatory enforcement.<sup>186</sup> Relating to the first requirement, she determined that the omission of specific intent or motive in the definition of "harassment" was deliberate and necessary to effectuate the purpose of the statute because although a stalker's actual "intent" may be amorous, for example, its effect on the victim, according to the "reasonable person" standard, may be terror.<sup>187</sup> Moreover, she said, the statute does require "scienter," insofar as it provides that "harassment" means to engage in "intentional conduct" causing the victim reasonably to feel "oppressed."<sup>188</sup> Thus, while the defendant may not intend the victim's actual reaction, the conduct causing the reaction is intended.<sup>189</sup>

Judge McKinsey also determined that the definition of "harass" is not vague in its description of the effect upon the victim because the statute provides that conduct must be measured against

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179. *Id.* at 13.

180. *Id.* at 13-14.

181. *Id.* at 14 (quoting *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 78 (1985); accord *State v. Andersen*, 370 N.W.2d 653, 662 (1985)).

182. *Id.* at 15.

183. *Id.* at 15 (quoting *Boos v. Barry*, 485 U.S. 312, 325-26 (1987), "such a 'saving clause' was at least tacitly approved by the Supreme Court").

184. *Id.* at 16.

185. *Id.* at 17-18 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

186. *Id.* at 26.

187. *Id.* at 21.

188. *Id.*

189. *Id.*

a "reasonable person" standard, while also requiring that the victim actually feel "oppressed, persecuted, or intimidated."<sup>190</sup> These terms, she said, have commonly understood meanings suggesting a degree of interference with another person's privacy, liberty, and security which is greater than mere annoyance or irritation.<sup>191</sup> Judge McKinsey further noted that "stalk," has common usage in everyday speech, "connot[ing] a particular kind of conduct readily understood by anyone exposed to contemporary media, while "follow" and "pursue," when read together in context with "stalk[ing]" provide an "'ascertainable standard of guilt' sufficient to enable persons of ordinary intelligence to avoid conduct which the law forbids."<sup>192</sup> Also, "pattern," she said, has a precise meaning set forth in subdivision 5.<sup>193</sup> Therefore, she concluded, the statute contains articulable and objective standards for fair notice and enforcement.<sup>194</sup>

In regard to the second requirement to overcome a vagueness challenge, Judge McKinsey determined that Minnesota's anti-stalking statute does not foster arbitrary or discriminatory enforcement.<sup>195</sup> With its list of content-neutral acts comprising impermissible harassment and the requirement that the harassment must be intimidating, oppressing, or persecuting to a reasonable person and must cause such reaction in the actual victim, she said, the statute contains adequate guidance to law enforcement personnel to ensure fair and nondiscriminatory enforcement.<sup>196</sup>

Unfortunately, even if the Minnesota anti-stalking law is not subsequently declared unconstitutional and invalid at the appellate or state supreme court level, and even considering the somewhat stiffer penalties proposed by the Minnesota Sentencing Commission, the statute still may not deter or do much for most stalkers, ninety percent of whom research suggests are mentally ill.<sup>197</sup> Stanton Samenow, a clinical psychologist and author of "Inside the Criminal Mind," says that many stalkers have disturbed self images in which they see themselves as irresistible or complete zeros.<sup>198</sup> When they are rejected, they resort to intimidation in a desperate attempt to try to regain self-esteem.<sup>199</sup> If researchers are

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190. *Id.* at 21-22.

191. *Id.* at 22.

192. *Id.* at 23 (quoting *State v Christensen*, 439 N.W.2d 391).

193. *Id.* at 24; see also MINN. STAT. § 609.749 Subd. 5(b) (West 1993).

194. *Id.* at 26.

195. *Id.* at 25.

196. *Id.* at 26.

197. Puente, *supra* note 7, at 9A.

198. Beck, et al., *supra* note 5, at 61.

199. *Id.*

correct in their analyses of typical stalkers, it might appear that to enact anti-stalking statutes and impose stiff penalties for the crime is useless or even unfair. However, legislators must ensure that police and prosecutors have a means to deal with criminals who knowingly and intentionally terrorize others. Furthermore, where anti-stalking laws such as Minnesota's provide for mental health assessments and treatment, the lawmakers not only protect stalking victims, but also provide psychiatric help for convicted stalkers who should be held responsible and punished for the crime.

There is also concern that some Minnesota citizens might get a false sense of security from a stalking law.<sup>200</sup> While the law's purpose is to stop obsessive behavior, it could trigger violent behavior, especially after the offender is arrested and released on bail.<sup>201</sup> The threat of prison may deter some stalkers, but for others, it is like putting fuel on a fire.<sup>202</sup> Suspects arrested under Minnesota's anti-stalking statute might retaliate against their victims, but the alternative is to permit them to continue their terroristic behavior unchecked. Although the law cannot be expected to be a cure-all, Minnesota's anti-stalking statute can at least give Minnesotans confidence that steps have been taken to protect them from the tyranny of others. Judge Smith acknowledged that stalking victims can never be given back their sense of security, but the state's new anti-stalking law makes it clear that stalking is a crime that will be taken seriously by police, prosecutors, and judges.<sup>203</sup> The message to victims, she said, is hope.<sup>204</sup>

## Conclusion

Although critics of the Minnesota anti-stalking statute may characterize it as simply a conglomeration of acts already prohibited by other criminal statutes, it can be useful to prosecutors, law enforcement officers, and stalking victims. A major benefit is that it consolidates a variety of conduct associated with stalking. This will relieve all parties of the onerous task of figuring out what criminal statute or series of statutes might be applicable in each case of alleged stalking. At the least, this new statute acknowledges that stalking is a distinctive crime that should be explicitly sanctioned. Ideally, it will deter or punish stalkers who have escaped prosecution because no other Minnesota statute directly addressed the crime.

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200. Halvorsen, *supra* note 98, at 1B.

201. *Id.*

202. Beck et al., *supra* note 5, at 61.

203. Halvorsen, *supra* note 104, at 2B.

204. *Id.*

