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COMMENT

Criminal Law: Criminal "Anti-Stalking" Laws: Oklahoma Hops on the Legislative Bandwagon

So, on this windy sea of land, the Fiend Walk'd up and down alone, bent on his prey...

— John Milton*

In its 1992 session, the Oklahoma legislature added a new penal statute prohibiting the crime of "stalking." Oklahoma has fallen in line with the other states and the federal government in responding to what appears to be a steadily increasing social problem. Stalking generally refers to a specific pattern of behavior directed toward another person which is calculated to harass or otherwise threaten that person.

* JOHN MILTON, PARADISE LOST 66 (Phillips & Sampson 1847) (1667).
2. See infra note 77.
3. See infra note 78.
4. The bellwether state of California passed the first anti-stalking law in the United States in 1990. Melinda Beck et al., Murderous Obsession, NEWSWEEK, July 13, 1992, at 60, 60; see Act of Sept. 11, 1992, ch. 627, 1992 Cal. Legis. Serv. 2419 (West) (codified at CAL. PENAL CODE § 646.9 (1992)). The 1990 law was amended in 1992 in order to include threats to a person's immediate family, provide increased punishment for subsequent offenses, and to require counseling for violators out on parole. Because stalking per se had not been categorized as a crime before then, there was no ready definition available upon which to model statutory language. However, the new laws are generally aimed at "halting a pattern of threats and harassment that often precedes violent acts, from assault to rape, child molestation and murder." Beck, supra, at 60.
Most of the new laws recently enacted define stalking as "repeated[ly] following or harassing . . . another person." Elizabeth Ross, Problem Of Men Stalking Women Spurs New Laws, CHRISTIAN SCIENCE MONITOR, June 11, 1992, at 6. In addition, most laws require that a "credible threat" of violence must be made against the person being stalked. Id. The anti-stalking law enacted by the state of Illinois is typical. Gera-Lind Kolarik, Stalking Laws Proliferate, 78 A.B.A. J. 35, 35 (1992). Under the Illinois statute,

(a) A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions:
   (1) Follows the person, other than within the residence of the defendant;
   (2) Places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.
(b) Sentence. Stalking is a class 4 felony. A second or subsequent conviction for stalking is a class 3 felony.
(c) Exemption. This section does not apply to picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute.

109

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The ordinary meaning of the word "stalk," used as a verb, is an apt description of the typical stalking case. The jarring reality of specific cases has served as a catalyst for both the societal awareness of the problem and the new legislation designed to deal with stalking. In many of these cases, one person literally follows another with the intent of menacing or hunting that person. The poignant stories of victims who have been "stalked," often with tragic endings, have resulted in an explosion of new legislation aimed at criminalizing the offensive conduct. This comment will examine the stalking problem and the constitutional issues associated with the new legislation.

Part I explores the nature of the stalking problem. The focus is upon the specific instances in which a person has been stalked; the ordeal endured by the victim; and the effect these cases have upon the communities in which they happen. Anti-stalking laws are designed to vindicate an individual's "right to be let alone." This privacy interest will be explored and analyzed in the context of both constitutional doctrine and social policy. Finally, other legal remedies, in addition to anti-stalking laws, will be analyzed. These include both criminal and civil approaches to dealing with the broader problem of harassment.

Part II analyzes the specific law enacted by the Oklahoma legislature which criminalizes stalking behavior. The elements of the crime as set forth in the statute will be scrutinized, as will the designated statutory punishments. Although, in the abstract, the concept of stalking seems straightforward, attempting to isolate stalking behavior is a challenging legislative task. However, it appears that the Oklahoma legislature has captured the essence of the crime of stalking in the language of the new statute. The Oklahoma anti-stalking statute is reproduced in the appendix to this comment.

Finally, part III focuses upon some of the constitutional hurdles the statute must overcome in order to be enforced by the courts. Two major constitutional issues applicable to Oklahoma's new anti-stalking law are vagueness and overbreadth. If statutory language is so unclear that a reasonable person would not be placed on notice as to what specific conduct is prohibited, it is in danger of being unconstitutionally vague. In contrast, reasonably precise statutory language may facially prohibit conduct that is constitutionally protected. Such a statute may be unconstitutionally overbroad.

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5. The word itself means "to pursue or approach (game, etc.) stealthily." WEBSTER'S NEW WORLD DICTIONARY 1305 (3d ed. 1988). This definition of "stalk" is quite apt when used to describe the behavior that anti-stalking laws are designed to deter.

6. See infra note 77.

7. See infra notes 39-50 and accompanying text.

8. See infra notes 129-46 and accompanying text.

9. See infra notes 207-17 and accompanying text.
I. Nature of the Problem

The crime of stalking can be thought of as a particular kind of behavior under the generic heading of harassment. The concept of harassment encompasses an extremely diverse area of the law both in terms of the behavior covered and the persons involved. In contrast, stalking typically involves a former lover or spouse who engages in repeated episodes of following another person with the intent to

10. See generally Linda M. Gunderson, Note, Criminal Penalties for Harassment, 9 PAC. L.J. 217, 218-20 (1978). Gunderson characterized harassment as follows:

In essence, harassment is an invasion of privacy causing the victim to suffer emotional distress. No physical contact or assault is involved in harassment alone; if there were, the conduct would be punishable under existing criminal statutes. In contrast with conduct disturbing the public peace, harassment directly affects an individual rather than the community at large.

A typical case of harassment occurs when the perpetrator continually follows the victim, constantly sends letters and packages, makes incessant telephone calls, and otherwise deluges the victim with unwarranted attention. If this behavior continues for any length of time, the victim is likely to become more than mildly irritated; he or she may become frightened, feel threatened, and find it necessary to alter his or her lifestyle in an effort to elude the perpetrator of the harassment.

Id. at 218-19. Harassment has also been characterized as "the persistent and unwelcome communication of demands or feelings." Andrea J. Robinson, Note, A Remedial Approach to Harassment, 70 Va. L. Rev. 507, 507 (1984). Examples of conduct falling under this broad heading include "[p]hone calls in the night proclaiming nonexistent intimacy, letters describing encounters that never took place, and stalking by strangers or ex-lovers." Id. (emphasis added).

11. Robinson states:

Some harassers have financial, sexual, or other apparent motives. Other perpetrators have no obvious motives or reasons for their behavior because their conduct reflects a mental disorder. Some tormenters know their victims well. Others know them only casually or not at all.

Telephone calls, letters, and face-to-face contact all have the potential to disrupt the lives of harassment victims. Victims' reactions range from mere annoyance to severe trauma and paranoia. At times they can deter harassment without invoking legal sanctions; in other cases they must endure harassment because available legal sanctions are weak or otherwise inappropriate. The variety of factual contexts is so great that no one legal remedy suffices.

threaten or intimidate. Most state anti-stalking laws also require that a "credible threat" of violence be made against the victim or the victim's immediate family.

Famous entertainers and other celebrities are obvious potential stalking victims.  

12. Beck noted that, while "[a] few stalkers fixate on co-workers or complete strangers, . . . the majority of cases involve former lovers or spouses." Beck, supra note 4, at 60-61; see, e.g., Kolarik, supra note 4, at 35-36 (relating that a woman's ex-husband repeatedly threatened and followed her after divorce, despite the fact that he had been arrested nine times for battery, violation of protective orders, and forcible entry); Andy Court, She Knew the System Would Fail Her, AM. LAWYER, June 1992, at 110 (relating poignant narrative of a woman killed by ex-boyfriend, and noting that more than 1200 women were murdered in 1990 by husbands or boyfriends); Women Winning Legal Help Against Stalkers, Florida, Others Pass Harassment Laws, CHI. TRIB., Apr. 16, 1992, at 30C (North Sports Final Edition) (relating the story of a 37-year-old woman who refused to allow abusive ex-husband back in house after he served prison term; he stalked her and eventually stabbed her in the chest, but she survived because of the leather jacket she was wearing).

Even society's elite are not insulated from the dark consequences of romantic relationships gone bad. An extraordinary series of events rapidly unfolded in New York resulting in the implication of one of that state's most esteemed jurists in a bizarre web of extortion and blackmail. Sol Wachtler, the Chief Judge of the New York Court of Appeals, the state's highest judicial body, is to become part of the caseload for the U.S. District Court in Manhattan when he answers to federal charges of conspiracy to commit extortion and blackmail. According to the F.B.I., Wachtler, 62 and married for 41 years, obsessively stalked and harassed Joy Silverman, 45, a Park Avenue socialite with whom he had been having an affair. In 1972 Wachtler became the youngest member of the Court of Appeals at age 42. Appointed Chief Judge by New York governor Mario Cuomo in 1985, Wachtler had earned an impeccable reputation as a learned jurist and a "straight-arrow Republican." Laurie Goodstein, An Unlikely Suspect for Scandal; Top N.Y. Judge Accused of Breaking Law in Secret Life, WASH. POST, Nov. 10, 1992, at 1A; see also David Gelman et al., The Strange Case of Judge Wachtler, NEWSWEEK, Nov. 23, 1992, at 34; John J. Goldman, N.Y. Judge Charged in Sex Scandal Keeps His Job, L.A. TIMES, Nov. 10, 1992, at 12A; Andrea Sachs, Sol Wachtler's Bizarre Demise, 79 A.B.A. J. 34 (1993); Craig Wolf, How F.B.I. Closed in on Top New York Judge, N.Y. TIMES, Nov. 10, 1992, at 1A.

13. Ross, supra note 4, at 6; see, e.g., Act of May 20, 1992, ch. 250 (codified at DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992)) ("[A]ny person who willfully, maliciously and repeatedly follows or harasses another person or who repeatedly makes a credible threat with the intent to place that person in reasonable fear of death or serious physical injury is guilty of the crime of stalking.")); Act of Apr. 29, 1992, West No. 190, 1992 Iowa Legis. Serv. 408 (West) (codified at IOWA CODE § 708.11 (Supp. 1993)) (stating that a person commits stalking when the person, on more than one occasion, willfully follows, pursues, or harasses another person and, while doing so and without legitimate purpose, makes a credible threat against the other person); Act of June 5, 1992, Pub. Act 80, 1992 La. Sess. Law Serv. 97 (West) (codified at LA. REV. STAT. ANN. § 14:40.2 (1992)) (defining "stalk as the willful, malicious, and repeated following or harassing of another person, accompanied by the making of a credible threat, with the intent to place that person in reasonable fear of death or serious bodily injury"). But cf. IDAHO CODE § 18-7905 (Supp. 1993) (containing no specific provision for a "credible threat," but simply providing that any person who willfully, maliciously, and repeatedly follows or harasses another person or a member of that person's immediate family is guilty of the crime of stalking).

characters out of one of his books:

When a large brown envelope was delivered . . . to the home of Stephen King, the horror writer, his imagination went into overdrive. He recalled how an author had broken into his house in Maine last year, claiming King had plagiarized one of his characters for the book *Misery*.

King was also aware that down the road was a van owned by Steven Lightfoot, who is convinced that the author killed John Lennon. A court order keeps Lightfoot, 28, away from the house, but the van is parked nearby with a sign that reads: "Photos prove it's Stephen King, not Mark David Chapman, getting John Lennon's autograph. . . ."

. . .

Aware that the post is not delivered on Sundays, King called the police. But instead of detonating a bomb, a controlled explosion sent scores of pages from one of King's novels fluttering across the lawn. Why someone should deliver an author's book to his home remains a mystery.

*James Adams, U.S. Clamps Down on the Psychos Who Stalk Stars, The Times* (London), July 5, 1992, available in LEXIS, Nexis Library, Papers File. Other celebrities have dealt with "fans" who have crossed the line from admiration to obsession. Television actress Sharon Gless has been harassed by a gun-wielding fan who broke into her home. Actor Michael J. Fox received over 6000 threatening letters from 26-year-old fan Tina Marie Ledbetter. Ledbetter became furious with Fox when it was announced that he plans to marry Tracy Pollen. Perhaps more chilling is Michael Owen Perry, who became fixated upon pop singer Olivia Newton-John. Perry became convinced that "the singer was responsible for dead bodies rising through the floor of his home and that she was sending him messages through her eyes." Although Perry was kept away from Newton-John, he did murder five people, including his own parents. At the time of his arrest in a hotel outside Washington, D.C., he was "watching seven televisions showing nothing but static; on each he had painted a pair of eyes." *Id.* Adams, *supra,* refers to Perry as "William," but his real name is Michael Owen Perry. Perry recently avoided execution in Louisiana because of his mental condition. See Mark Hansen, *Insane Inmate Avoids Death Penalty,* 79 A.B.A. J. 32 (1993).

Janet Jackson, the famous pop singer, has also had a run-in with an obsessed fan. *Man Charged in Jackson Stalking Will Not be Tried,* Reuter News Reports, Oct. 13, 1992, available in LEXIS, Nexis Library, Wires File. Frank Paul Jones was arrested in the gate-equipped driveway of the Jackson family compound in a Los Angeles suburb. Jones steadfastly maintains that he is Jackson's husband. He has been accused of sending threatening letters to Jackson, as well as her brother, pop star Michael Jackson, and former president George Bush. Jones was indicted in federal court and charged with sending almost forty threatening letters to Jackson. However, U.S. District Judge Andrew Hauk, after considering a psychological evaluation, found that Jones was mentally incompetent to stand trial. Jones had been previously arrested for attempting to enter the grounds of the White House. *Id.; see also* David Landis & Darren Summers, *Jackson Stalker,* USA TODAY, Oct. 15, 1992, at 11A. David Letterman, the famous host of his own late-night television talk show, has been the target of an obsessive fan for several years. *People,* NEWSDAY (Nassau & Suffolk ed.), June 7, 1992, at 8.

An obsessed fan who has haunted talk show host David Letterman for four years was sentenced in Norwalk, Conn., to 6 months in prison for trespassing at his home.

Margaret Ray, 40, of Crawford, Colo., pleaded guilty to first-degree criminal trespass for wandering on the grounds of Letterman's New Canaan home on May 11.

She has been arrested seven times on similar charges and has served time in prison and in a state hospital for bothering him . . .

. . .

Ray was first arrested in May, 1988, while driving Letterman's Porsche in New York City. She identified herself as Letterman's wife and her son as David Jr. Police said she had broken into his house and taken the car keys.

Letterman once found Ray standing in a darkened hallway outside his bedroom and another time found her sleeping in a guest bedroom. He was not harmed.
On July 18, 1989, the star of the television situation comedy "My Sister Sam," Rebecca Schaeffer, was shot to death in California by an obsessed fan. Although

Letterman, who has occasionally joked about Ray on his NBC-TV talk show, "Late Night With David Letterman," declined comment on Friday.

He said recently that he did not know what to do about her. "The thing is, she's insane," he said. "And you don't want to do anything to make it worse than it is. It's been five years now, and I've tried a lot of things, and none of them have worked."

Id. Although Lettermen was unharmed during his ordeal, other celebrities have not fared as well. In 1982, actress Theresa Saldana was stalked by obsessed fan Arthur Richard Jackson. Cheryl Laird, Stalking: Laws Confront Obsession that Turns Fear into Terror and Brings Nightmares to Life, HOUSTON CHRON., May 17, 1992 (2 Star Edition), lifestyle sec., at 1. Jackson became fixated on Saldana after seeing her in the movie "Raging Bull." Jackson eventually attacked the actress and inflicted ten stab wounds. The attack prompted Saldana to form a national victim's organization, Victims for Victims. Jackson, in prison, has vowed to carry out his "divine mission" to kill Saldana in order to secure their "escape" in the afterlife. Id.; Bruce Rubenstein, Stalker a Danger to Himself and Others; But He May Go Free, ILL. LEGAL TIMES, June 1992, at 18 (relating the life of Ralph Nau, a "classic stalker" who has harassed celebrities such as Cher, Olivia Newton-John, and Sheena Easton). See infra note 15 and accompanying text, describing the tragic story of television actress Rebecca Schaeffer.

Schaeffer was killed by Robert Bardo, then just 19 years old, who has been described as an "archetypal stalker" and, in the words of one of his high school teachers, "a time bomb waiting to explode." Mike Tharp, In the Mind of a Stalker, U.S. NEWS & WORLD REPORT, Feb. 17, 1992, at 28, 29. The events leading up to Schaeffer's murder are particularly chilling:

After watching the actress on "My Sister Sam," Bardo began writing her. She sent him one handwritten postcard, saying his first letter was "the nicest, most real" she had received, drawing a peace symbol and heart on the card and signing it "Love, Rebecca."

Not long after receiving the card, Bardo wrote in his diary, "When I think about her I feel that I want to become famous and impress her." Below, on the same page, he wrote: "How do you I [sic] know if the table and paper before me is just a field of electronic pulses. How can I be sure if this is reality?"

He traveled in June 1987 to the Burbank studios where the series was filmed, carrying a large teddy bear and a letter for Schaeffer. Security guards rebuffed him. He returned a month later, this time carrying a knife ("because I thought she was turning arrogant"). But he again failed to meet Schaeffer and went back to Arizona.

For much of 1988, Bardo forgot about the actress, shifting his fixation to singers Debbie Gibson and Tiffany. In mid-1989, though, Schaeffer acted in "Scenes From the Class Struggle in Beverly Hills," a film described in promotions as "just another weekend of shameless sexual adventure, ill-fated romance and accidental death." The actress appeared in one scene in bed with an actor, incensing Bardo, who believed she had become just "another Hollywood whore."

The denouement came quickly. After reading in People magazine how Arthur Jackson, a stalker who stabbed actresses Theresa Saldana numerous times, had obtained her address, Bardo paid $250 to a private detective, who learned Schaeffer's address from California's motor vehicle department. He got his older brother to buy him a gun (Arizona requires firearms purchasers to be 21), put it in a plastic bag with a letter to Schaeffer. The bag also contained a U2 tape (whose song "Exit" contains the lyrics, "Deeper into the black/Deeper into the white/pistol weighing heavy") and a copy of "The Catcher in the Rye," the book carried by John Hinckley Jr. when he shot President Reagan. In his shirt pocket, Bardo carried hollow-point cartridges, which explode on impact.

The murder. He took an overnight bus to Los Angeles Union Station and a local bus to the Fairfax district where Schaeffer lived. After walking aimlessly for 90 minutes, he went to her apartment and pushed her buzzer; she came down and he handed her the
this incident focused national attention on the problem of obsessive celebrity fans, the impetus behind the nation's first anti-stalking law was the successive slayings of five women by ex-husbands or boyfriends within a six-month period in Orange County, California, in early 1990. The ensuing statewide uproar prompted lawmakers into action and on September 29, 1990, the governor approved the country's first anti-stalking law. California is not unique. Similar cases with the same tragic results are happening with alarming frequency across the nation. Incidents in other states sparked a surge in anti-stalking legislation nationally.

letter. Then, he went to the diner, called his sister in Tennessee (who told him to leave immediately and come there) and returned to Schaeffer's door.

Id. at 30. On this second visit, as Schaeffer opened the door, Bardo killed her with one shot to the chest. 16.


As a result of the proliferation of fanatics such as Robert Bardo, the industry of celebrity security has flourished. Gavin de Becker has emerged as somewhat of an authority in this area. Operating out of Los Angeles, de Becker runs "the equivalent of a private Secret Service." What To Do If You Can't Afford To Hire Protection, USA TODAY, July 21, 1992, at 9A. At a cost of over $200,000 per year, de Becker's clients get computer analysis, monitoring of potential stalkers, and, if necessary, physical protection. Id.; see also Rubenstein, supra note 14 (stating that Cher, Olivia Newton-John, and Sheena Eason retained de Becker for protection against the stalker Ralph Nau, and describing how de Becker's agents followed Nau night and day and essentially neutralized him); Adams, supra note 14 (relating that Michael J. Fox hired de Becker, a security consultant who specializes in stalking cases, and that the person harassing him was eventually arrested and ordered to receive psychiatric treatment); Tharp, supra (describing Gavin de Becker as an authority on protecting celebrities and politicians).


17. Beck, supra note 4, at 61. Tragically, all but one of the murdered women had sought help from the authorities shortly before their deaths. "What does he have to do — shoot me?" 19-year-old Tammy Marie Davis asked police just days before an ex-boyfriend did just that, fatally, in Huntington Beach. When Patricia Kastle . . . was shot by her former husband, police found a restraining order in her purse." Id.; see also Resnick, supra note 16 (stating that California enacted the nation's first stalking bill two years ago after five Orange County women were murdered in succession by former husbands or boyfriends).

18. See CAL. PENAL CODE § 646.9 (West Supp. 1993). This section of the penal code was amended in 1992 to include, among other things, an expansion of the definition of stalking to encompass threats against a person's immediate family in addition to threats against the person being stalked. See Act of Sept. 11, 1992, ch. 627, 1992 Cal. Legis. Serv. 2419 (West). See supra note 4.

19. Beck states:

Behind almost every state bill has been at least one local tragedy. Wisconsin lawmakers acted after Shirley Lowery was fatally stabbed 19 times, allegedly by her ex-boyfriend in a Milwaukee courthouse where she had gone to obtain a protective order. Virginia lawmakers were moved after Regina Butkowski's mother testified that her daughter had been stalked for six months by a weight lifter who finally shot her, set her body on fire and dumped it into a creek, where it was found eight months later. Georgia's proposed law may pick up more support after the sad case of Joyce Durden, whose estranged husband carried out his repeated death threats last month. He gunned her down at a school where she taught mentally disabled preschoolers, then shot himself in the head.
The most telling statistic, and very likely the most compelling reason that the problem of stalking has gained so much attention in state legislatures, is that almost one-third of all women killed in America are murdered by their husbands or boyfriends.\(^{20}\) Of these, as many as 90% have been stalked.\(^{21}\)

Perhaps even more frightening are cases where the stalker is a stranger who, for unknown reasons, simply becomes fixated on another person. Karen Erjavecz became the object of such a fixation. During the summer of 1991, she and Kenneth Kopecky were both members of the same wedding party. For some inexplicable reason, Kopecky became intensely infatuated with her and, as a result, Karen and her boyfriend, Glenn Beach, lived in terror for the next six months.\(^{22}\)

During this period, the couple received anonymous letters and bizarre, threatening telephone calls. Glenn’s car was vandalized and tire tracks were left on the lawn of the house where he lived with his parents. Karen’s father, a policeman, was well aware that there was little legal recourse against such persistent harassment. On February 16, 1992, the Beaches returned home from a movie and, amid the surveillance lights they had installed around their house, stepped into a bustling crime scene in their driveway.\(^{23}\)

Glenn had been stabbed twice and shot six times in the back. Karen had been shot in the head at close range. Two days later, Kopecky was tracked down to a motel in Michigan where he shot himself as police were about to apprehend him.\(^{24}\)

Although it is impossible to know how many people like Kenneth Kopecky exist in society,\(^{25}\) the problem of stalking has apparently become prevalent enough to

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Beck, supra note 4, at 60. In Illinois, Gov. James Edgar signed that state’s anti-stalking law after legislative hearings in which family members and police told how stalkers had killed five victims in the same year. Kolarik, supra note 4, at 35.

20. Beck, supra note 4, at 61. In 1990, 30% of the women who were murdered were killed by their husbands or boyfriends. Court, supra note 12. In the same year, only 4% of the men who were murdered were killed by wives or girlfriends. Id. This statistical pattern seems to be holding. Among all female murder victims in 1991, 28% were killed by their husbands or boyfriends; while still only 4% of the male victims were killed by their wives or girlfriends. Federal Bureau of Investigation, U.S. Dep’t of Justice, Crime in the United States in 1991, UNIFORM CRIME REPORTS, Aug. 30, 1992, at 18.

21. Beck, supra note 4, at 61. Harassment, of course, does not always involve male victimization of women. See Gunderson, supra note 10, at 220. However, it is clear that stalking is a crime in which men are disproportionately likely to be the perpetrators. See Rubenstein, supra note 14, at 18 (stating that ex-wives and ex-girlfriends constitute more than 90% of stalking victims).

22. Beck, supra note 4, at 60.

23. Id.

24. Id.

25. One major psychiatric study estimated that there are 200,000 people in the United States who are stalking someone. Cable News Network Transcript #170-2, Sept. 29, 1992 (Domestic News; byline by Skip Loescher), available in LEXIS, Nexis Library, Script File. Psychiatrists estimate that 5% of the women in the U.S. will be victims of unwanted pursuit at some time in their lives. Many of these stalkers will be mentally ill and violent. Id.

"Stalkers range from coldblooded killers to lovesick teens, huddled beneath an umbrella of psychological syndromes: paranoia, erotomania, manic depression and schizophrenia." Thurf, supra note 15, at 28. Gavin de Becker, the authority on stalkers who prey on celebrities, has compiled a database of 9000 potential and actual stalkers, this up from a mere 1500 names in 1985. From analyzing the data
attract the attention of state lawmakers.

In Oklahoma, state representative Mary Fallin authored the bill that eventually became the state's anti-stalking law, effective June 4, 1992. The new law was put to use for the first time in Oklahoma on July 28, 1992, when prosecutors charged an Oklahoma City man with stalking a female acquaintance. The circumstances surrounding the stalker's activities and the victim's ordeal seem to typify those that the statute was designed to address.

Police had received numerous complaints that the victim had been stalked over a two-year period by the man ultimately charged with the crime. The man charged under the anti-stalking law was accused of following the victim fourteen times from her home to work, to her parents' home, and, on some occasions, to the municipal police department. In addition, the man was also accused of verbally harassing the victim by the use of threats, foul language, and obscene gestures.

Whether the new law will have any noticeable impact in reducing the incidents of stalking remains to be seen. However, in the first case to which it has been applied, the results thus far have been less than auspicious. The person charged under the new law seems to be undeterred since he has recently been jailed on stalking charges for a second and third time.

It should be observed that, under a typical anti-stalking statute, the behavior which is criminalized generally consists of repeatedly following the victim in a threatening way and verbally threatening the victim so that she has a reasonable fear

gathered from this group, de Becker has discovered several common characteristics which he calls "pre-incident indicators." These include such things as "references to obsessive love, weapons, death, suicide, religious themes and a common destiny with the stalked figure." Although there is no single profile which fits all stalkers, many of them share certain behavioral traits such as "an intense interest in the media, an inability to develop meaningful relationships, a history of unsuccessful efforts to establish an identity, and a desire for recognition and attention." Id. at 28-29.


27. Robert Medley & Charolette Aiken, Man Faces New Stalking Law, DAILY OKLAHOMAN, Aug. 1, 1992, at 8. Other states have also recently begun to implement their respective anti-stalking statutes. See, e.g., Man Charged With Stalking Soon After New Law Bans It, HARTFORD COURANT, Oct. 2, 1992, at 11C (stating that less than 24 hours after the law went into effect, a man was charged with second degree stalking for harassing a 17-year-old girl); Robert Enstad, Man Charged With Stalking, CHI. TRIB., Oct. 1, 1992, at 3L (relating that a Chicago man was the first person to be charged under the state's anti-stalking law for allegedly stalking his former wife).

28. Man Faces New Stalking Law, supra note 27.

29. Id.

30. Id.

31. See Judy Kuhlman & Lisa Beckloff, Second Stalking Charge Filed Against City Man, DAILY OKLAHOMAN, Aug. 8, 1992, at 14; Judy Kuhlman, City Man Jailed For Third Time In Stalking Case, DAILY OKLAHOMAN, Sept. 2, 1992, at 28. On December 14, 1992, the man plead no contest to two misdemeanor counts of stalking in Oklahoma County District Court. Charolette Aiken, State's First Convicted Stalker Gets Deferred Term, DAILY OKLAHOMAN, Dec. 15, 1992, at 9. He was given a one-year deferred sentence on each count to be served concurrently. Id.
for her safety. The person doing the stalking is not required to physically harm the victim in order to be charged and convicted under a typical anti-stalking law. The interests underlying laws which prohibit actual physical violence against one person by another are very easily grasped. In contrast, the interests underlying state anti-stalking laws include the amorphous concept of "privacy."

A. Interests Protected

The two main beneficiaries of anti-stalking legislation are (1) the individuals being harassed and (2) society in general. While each group may benefit from civil and criminal laws which seek to redress the problem of harassment, the underlying interests protected are fundamentally different.

1. Societal Interests

Vindication of individual dignity and personal autonomy are important societal considerations in seeking to prevent harassment. A democracy simply cannot function adequately unless there exists some mechanism which preserves and reinforces an individual's right to be free from unwanted, unwarranted, and harmful invasions of his or her privacy. Society receives its strength from its members. Therefore, there is an overriding societal interest in protecting a right which is considered to be invaluable by civilized persons.

There are numerous theories which seek to explain how punishment through criminal laws serves the interests of society in general. However, an important


33. The psychological effects of stalking may actually be more damaging than an actual physical assault. Gunderson, supra note 10, at 219. One study has shown that "women who received anonymous, obscene, or threatening telephone calls exhibited more anxiety than those who had been victims of serious physical assaults and thefts." Id. The sociologist who conducted the study observed: "The ambiguous threat can be the most devastating of them all. You think someone is after you but you don't know who it is or what they want. Fear of the unknown can freeze people's lives into a state of terror." Id. at 219 n.13 (quoting Perry Garfinkel, Psychological Rape: New Terror for Women, NEW WEST, Feb. 28, 1977, at 20, 22).

34. Id. at 229-30.

35. Id.

36. Id. at 230.

37. Id.

38. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5, at 22-29 (2d ed. 1986). LaFave and Scott have identified several societal interests which are incorporated into the criminal law:

The protections afforded by the criminal law to the various interests of society against harm generally form the basis for a classification of crimes in any criminal code: protection from physical harm to the person; protection of property from loss, destruction or damage; protection of reputation from injury; safeguards against sexual immorality; protection of the government from injury or destruction; protection against interference with the administration of justice; protection of the public health; protection of the public peace and order; and the protection of other interests.
consideration which must be kept in mind is that societal interests are essentially derivative of the rights and interests of its individual members. In analyzing harassment laws, and anti-stalking laws in particular, it is necessary to have an understanding of the nature and extent to which an individual has an enforceable right to "privacy."

2. Individual Interests

Anti-stalking laws are designed to protect an individual's interest in a right which is generically referred to as "privacy." In the context of harassment, this right has been characterized as an individual's "right to be let alone."39 The legal doctrine recognizing such a right originally applied to tort law and had its genesis in a famous and influential law review article written in 1890 by Samuel D. Warren and Louis D. Brandeis.40

In their article, the authors reviewed a number of court cases in which relief was granted on the basis of defamation, invasion of property rights, or breach of confidence or an implied contract, and concluded that the cases were in fact decided upon a much broader principle.41 According to the authors, this distinct principle was necessary in order to protect private individuals against mental pain and distress resulting from the "excesses of the press."42

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39. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117, at 849 (5th ed. 1984) [hereinafter PROSSER & KEETON] (quoting Judge Cooley in his treatise COOLEY, TORTS 29 (2d ed. 1888)). One court observed that the legislature, in enacting a harassment statute, intended to "extend to the individual the protections which have long been afforded the general public under disorderly conduct and breach of the peace statutes." Commonwealth v. Duncan, 363 A.2d 803, 807 (Pa. Super. Ct. 1976).


41. PROSSER & KEETON, supra note 39, at 849.

42. Id. at 849-50. It seems that this entire body of law can verily be traced to a single incident involving Samuel Warren's wife:

In the year 1890 Mrs. Samuel D. Warren, a young matron of Boston, which is a large city in Massachusetts, held at her home a series of social entertainments on an elaborate scale. She was the daughter of Senator Bayard of Delaware, and her husband was a wealthy young paper manufacturer, who only the year before had given up the practice of law to devote himself to an inherited business. Socially Mrs. Warren was among the elite; and the newspapers of Boston, and in particular the SATURDAY EVENING GAZETTE, which specialized in "blue blood" items, covered her parties in highly personal and
Although met with judicial resistance at first, the right of privacy has evolved over the years and is recognized in virtually all jurisdictions. Prosser has characterized the right to privacy as composed of four distinct interests. Of these, the one most applicable to stalking legislation is the right to be free from "unreasonable intrusion." Unreasonable intrusion generally encompasses "the intruding upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

William L. Prosser, Privacy, 48 Cal. L. Rev. 383, 383 (1960) [hereinafter Prosser, Privacy]. Addressing the problem of invasive and annoying press coverage, the Warren and Brandeis article excoriated the press in a passage which observed:

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Warren & Brandeis, supra note 40, at 196.


44. Prosser & Keeton, supra note 39, at 851. Prosser noted that "it has even been said that the only state not recognizing a right of privacy in some form or to some extent as of 1980 was Rhode Island." Id. Rhode Island has since fallen in line with other jurisdictions. See R.I. GEN. LAWS § 9-1-28.1 (1985); Doe v. Edward A. Sherman Publishing Co., 593 A.2d 457 (R.I. 1991) (holding that the statutory right of privacy not implicated when newspaper publishes divorce list obtained from official court records). The Supreme Court of Oklahoma has recognized the tort of invasion of privacy in McCormack v. Oklahoma Publishing Co., 613 P.2d 737, 740 (Okla. 1980). See also 21 Okla. STAT. ANN. § 839.1 (West Supp. 1993) (stating that right of privacy encompasses the use of a person's name or picture for commercial purposes without consent).

45. Prosser has stated that the right to privacy "is not one tort, but a complex of four." Prosser, Privacy, supra note 42, at 389. He has characterized the law in this area as comprising "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff, . . . to be let alone." Id. (quoting Cooley, Torts 29 (2d ed. 1888)). The four interests are: 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing private facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Id. See generally Prosser & Keeton, supra note 39, at 851-69; RESTATEMENT (SECOND) OF TORTS §§ 652A(-I) (1977).

46. See Robinson, supra note 10, at 517 (holding that courts recognizing the tort of invasion of privacy can ground relief for harassment victims on a theory of invasion upon solitude or seclusion);
tentional interference with another’s interest in solitude or seclusion, either as to his person or to his private affairs or concerns.”

However, this interest has been construed rather narrowly in that the right virtually disappears or is not applicable when a person is on a public street or in any other public place.46 Thus, an individual’s right to privacy is not violated when he or she is watched and followed along public thoroughfares.47 In contrast to tort doctrine, criminal anti-stalking laws recognize this privacy interest to a certain extent, even in instances where the stalking takes place in public.48

In addition to applications in tort law, the concept of privacy has been afforded constitutional recognition by the United States Supreme Court.49 The seminal cases in this area involved criminal prosecutions in which issues were raised concerning improper conduct by police.50 However, in 1965 the Court made a swift departure

Gundersen, supra note 10, at 221 (stating that basis for a tort action in harassment cases falls under Prosser’s first category — the plaintiff’s interest in solitude or seclusion).

47. PROSSER & KEETON, supra note 39, at 854. See generally id. at 854-56; Prosser, Privacy, supra note 42, at 389-92.

48. PROSSER & KEETON, supra note 39, at 855; see also Comment, The Emerging Tort of Intrusion, 55 IOWA L. REV. 718, 721 (1970) (stating that appearance in a public place may waive some degree of privacy).

49. PROSSER & KEETON, supra note 39, at 855. Compare Pemberton v. Bethlehem Steel Corp., 502 A.2d 1101 (Md. App. 1985) (holding that surveillance by following and observing plaintiff in public places in such a way that plaintiff was unaware of being observed is not an invasion of privacy) with Nader v. General Motors Corp., 255 N.E.2d 765, 771 (N.Y. 1970) (holding that mere observation of the plaintiff in a public place does not amount to an invasion of privacy, but, under certain circumstances, surveillance may be so “overzealous” as to render it actionable) and Pinkerton Nat'l Detective Agency v. Stevens, 132 S.E.2d 119 (Ga. App. 1963) (finding invasion of privacy where egregious shadowing on public streets drew public attention).

50. The crime of stalking would appear, by its very nature, to be one which would take place in public places. Most anti-stalking statutes contemplate harassing behavior occurring in public by using broad terms such as “follows or harasses,” and not specifying the places where this conduct may occur. For example, the Oklahoma anti-stalking law simply states that “[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat . . . against that person . . . shall be guilty of the crime of stalking.” Act of Apr. 20, 1992, ch. 107, § 1(A), 1992 Okla. Sess. Law Serv. 335, 335 (West) (codified at 21 OKLA. STAT. ANN. § 1173 (West Supp. 1993)). The only qualification on this language is that constitutionally protected conduct is exempted from the definition of “harass.” Id. § 1(E)(2), 1992 Okla. Sess. Law Serv. at 336. Other statutes are more explicit. See, e.g., Act of July 12, 1992, Pub. Act 87-870, 1992 Ill. Legis. Serv. 951 (West) (codified at ILL. COMP. STAT. ANN. ch. 720, para. 5/12-7.3 to 5/12-7.4, ch. 725, para. 5/110-4 (1992)) (defining stalking by requiring a threat and the act of placing another under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant); Act of Apr. 2, 1992, ch. 186, 1992 Wash. Legis. Serv. 577 (West) (defining stalking as intentionally and repeatedly following a person to that person’s home, school, place of employment, business, or any other location, or following the person while the person is in transit between location).


52. PROSSER & KEETON, supra note 39, at 866. Prosser characterized these early cases as “intrusions,” in reference to the first of his categories of privacy interests listed supra note 45. According to Prosser, the leading case of this type is Rochin v. California, 342 U.S. 165 (1952), where police forced
from prior cases and applied the privacy concept in a decidedly different setting. In the case of Griswold v. Connecticut,53 the Court invalidated on constitutional grounds a statute which prohibited the dissemination of contraceptive information. The Court held that the statute deprived married couples of a "right of privacy" guaranteed by the Constitution.54 The holding in this case was significant because the right of privacy is not mentioned anywhere in the Constitution itself. Nevertheless, the Court has continued to expand this "zone of privacy"55 to other situations which typically involve some sort of governmental intrusion upon an individual's right to make certain important decisions of a highly personal nature.56

Underlying the implicit right of privacy in the Constitution is the need to protect human worth and dignity.57 The constitutional right of privacy focuses inward to protect fundamental, intensely personal individual decisions. In contrast, the privacy concept in tort law extends outward to include the right to be free from unwarranted attention by another person. Similarly, anti-stalking laws seek to protect a quasi-privacy interest by deterring behavior which is calculated to threaten or intimidate another person. Moreover, state anti-stalking laws, unlike the constitutional basis for privacy, may apply to private persons as well as government officials by virtue of a state's general police power.58

53. 381 U.S. 479 (1965).
54. Id. at 485-86. The Court characterized the marital relationship as "lying within the zone of privacy created by several fundamental constitutional guarantees." Id. at 485. The Court observed that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." Id. at 484. The specific provisions in the Bill of Rights that the Court based its holding on are: the right of association found in the First Amendment; the Third Amendment's prohibition against the quartering of soldiers; the Fourth Amendment's prohibition against unreasonable searches and seizures; the Fifth Amendment's prohibition against self-incrimination; and the Ninth Amendment which stands for the proposition that the rights explicitly stated in the Bill of Rights are not to be construed as an exhaustive list. Id.
55. PROSSER & KEETON, supra note 39, at 866.
57. Gunderson, supra note 10, at 231 (stating that the societal interest in human dignity underlies the right to privacy implied in the federal constitution); see also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (stating that the right to be let alone has been regarded as the right most valued by civilized persons).
58. The guarantees in the Bill of Rights protect private individuals from intrusive governmental conduct. JOHN C. KLOTTEN & JACQUELINE R. KANOVITZ, CONSTITUTIONAL LAW § 1.17, at 35 (5th ed. 1985). In addition, most of the provisions of the Bill of Rights have been made applicable to the states through the Fourteenth Amendment. Id. However, the states remain primarily responsible for the protection of the health, welfare and morals of the people who reside in the state. Id. § 1.10, at 18.

The courts have agreed that the police power of the state is inherent in the government of the state and that this is a power which the state did not surrender by becoming a member of the Union. The police power of the state comprehends all those general laws

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B. Remedies

Identifying the underlying interests in protecting persons from harassment is, of course, only part of the solution to the stalking problem. The remaining challenge lies in finding an adequate remedy to combat the conduct which impinges upon the interests to be protected. Legal remedies designed to give relief to victims of harassment are found in both civil and criminal contexts.

1. Civil Remedies

Prior to the enactment of specific legislation dealing with the problem of stalking, victims of stalkers could choose from a wide range of legal remedies, most of which offered little, if any, real relief. There were several common law causes of action which could have been applicable to stalking or harassment. These included defamation, nuisance, trespass, assault, invasion of privacy, and intentional infliction of emotional distress. Most of these were of little use to a victim of stalking because they require proof of certain elements which are often absent in the stalking context. The tort actions of invasion of privacy and intentional infliction of emotional distress offered harassment victims their best chance for meaningful relief.

However, even these causes of action have serious shortcomings. As previously discussed, one of the privacy interests recognized in tort protects intrusions upon "solitude or seclusion." Thus, the interest diminishes substantially when the harassment occurs in public. Victims of stalkers who are followed or harassed

and internal regulations necessary to secure the peace, good order, health and prosperity of the people, and the regulation and protection of property rights. . . . Under this power, the states have passed laws defining crimes, regulating traffic, and providing for criminal procedural rules.

Strictly speaking, the federal government has no police power. However, Congress may exercise a similar power as incident to powers expressly conferred upon it by the Constitution. Therefore, the validity of any statute so enacted depends upon whether it directly relates to one of the powers delegated to the federal government.

Id.; see also District of Columbia v. Brooke, 214 U.S. 138, 149 (1909) (stating that state police power is one of the most essential and least limited of the powers of government); Doyle v. State, 511 P.2d 1133, 1137 (Okla. Crim. App. 1973) (holding that under its general police power, the legislature is vested with the authority to define those acts or omissions which constitute a criminal offense and to prescribe the punishment therefor).

60. Id. at 516.
61. Id. at 516-17. Robinson states that defamation, for example, requires publication; nuisance requires some interference with the plaintiff's property rights; trespass is useful only when the defendant has physically invaded the plaintiff's property; and assault requires, at a minimum, some action to create apprehension of a battery. Id.
62. Id. at 517.
63. Id. See generally PROSSER & KEETON, supra note 39, at 854-56.
64. Robinson, supra note 10, at 518 (stating that the privacy interest will be insubstantial when the harassment occurs in public, and the public interest in protecting legitimate activity, such as private investigative work, may mitigate against recovery). See supra notes 48-50 and accompanying text.
in public may reasonably feel threatened and violated, yet would not be able to show the violation of a substantial privacy interest which would sustain the cause of action.

Intentional infliction of emotional distress would seem to be an appropriate cause of action in a case of stalking. Although at common law courts would not award compensation for a plaintiff's mental anguish without a showing of an independent tort or some type of physical injury, a majority of modern courts recognize intentional infliction of emotional distress as an independent tort. However, under both of these causes of action, even if a plaintiff in a stalking case is successful, the damages would probably not deter a determined or obsessed person from further episodes. In addition, even if a court were to grant an injunction instead of damages, the relief would likely be inadequate due to problems concerning the

65. Id. See generally PROSSER & KEETON, supra note 39, at 54-66.
67. Gunderson, supra note 10, at 224. Perhaps a distinction could be drawn here between a vindictive ex-spouse or ex-lover on the one hand, and the truly obsessive individual on the other. Because emotions often run extremely high when a significant romantic relationship is severed, the parties involved may engage in petty confrontations and harassment during the death throes of a romantic involvement. However, even if these confrontations take place, the majority of people go through separate ways when it is clear that the relationship is over. In these situations the threat of money damages may well deter any excess bickering or unwarranted harassment between the parties.

In contrast, some individuals may simply become so impassioned or have sufficiently developed mental problems that they reach a point where their conduct is simply beyond the control of the civil process. Anti-stalking laws are designed to redress behavior which has fallen well below an acceptable standard of conduct. People willing to violate criminal laws, and subject themselves to imprisonment, are not likely to be deterred by any civil penalty that they may receive. Once a truly obsessive person's conduct has reached the point where criminal anti-stalking laws are implicated, it would seem that civil sanctions would have little deterrent effect upon his behavior. Moreover, even if money damages would deter such a person, the Oklahoma criminal statute dealing with stalking provides for a range of punishment upon conviction which includes fines. See id. at 228 (stating that harassment cases involve litigants with strong feelings that the law is unlikely to affect).
68. Although injunctive may in some cases be the best remedy for harassment, courts are sometimes hesitant to grant them. Robinson, supra note 10, at 519. Traditionally, courts have refused to enjoin the commission of a crime because the remedy at law is adequate. See Bates v. Bates, 793 S.W.2d 788 (Ark. 1990). The court in Bates held that except in narrow circumstances equity will not enjoin the commission of a crime because the remedy at law is adequate; the limited exception arises when the criminal act is ir-cident, and there is danger of irreparable pecuniary injury to property rights. Id. at 791. In addition, it has been held that equity protects property but not personal rights. Gunderson, supra note 10, at 225. However, courts have "gradually eroded these rules . . . by straining to construe them in ways that protect[] personal interests and by carving out exceptions." Robinson, supra note 10, at 520. Most modern courts reject these traditional rules against injunctive relief and grant injunctions to protect personal rights even when criminal statutes are applicable. Id.; see, e.g., Anderson v. Trimble, 519 P.2d 1352, 1356 (Okla.), cert. denied, 419 U.S. 995 (1974) (where an injunction is otherwise warranted, a court may enjoin certain acts affecting rights, property and general welfare of people even though such acts are also criminal offenses).
constitutionality of the scope of the injunction,\textsuperscript{69} enforcement,\textsuperscript{70} and the nature of stalking itself which involves conduct generally beyond the control of the civil process.\textsuperscript{71}

2. Criminal Remedies

States have also attempted to deal with the general problem of harassment by enacting criminal laws which proscribe a wide variety of conduct deemed to be harassment.\textsuperscript{72} Every state has a law which criminalizes at least some form of telephonic harassment.\textsuperscript{73} Recognizing the multitude of forms in which harassment manifests itself in a rapidly changing society, there is a trend to greatly broaden the scope of harassment statutes.\textsuperscript{74} Examples include statutes which address conduct similar to stalking,\textsuperscript{75} and a few which are essentially "catch-all" statutes prohibiting a course of conduct engaged in with intent to harass, annoy, or alarm another which in fact does alarm or seriously annoy.\textsuperscript{76}

Since 1990, there has been an avalanche of state legislation dealing with the problem of stalking. All fifty states and the District of Columbia have passed anti-stalking legislation.\textsuperscript{77} The federal government has also recognized that a major

69. Gunderson observed that injunctions against harassing conduct must be able to pass the same scrutiny that a proposed criminal statute would have to undergo as far as specificity of the prohibited conduct; if the injunction is too broad or vague, it will be unenforceable. Gunderson, supra note 10, at 225; cf. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973) (upholding but modifying injunction to stop the harassing tactics of a photographer trying to photograph a celebrity).

70. Gunderson states:

Even if it is phrased with adequate specificity, an injunction will not be issued where enforcement of it cannot be practically carried out. If an injunction is obtained in a harassment action, enforcement may be difficult and impractical. The police are unable to be with the plaintiff continually to enforce the defendant's compliance with the injunction, so the injunction can only be enforced by contempt proceedings. If the defendant is charged with criminal contempt, the proceedings must adhere to the rigorous protections of criminal procedure. This may make a district attorney reluctant to initiate the contempt proceedings, especially if the injunction is somewhat vague or overbroad so that its constitutionality may be readily attacked.

Gunderson, supra note 10, at 226.

71. It has been observed that harassment cases, and also stalking cases, often involve "litigants with strong feelings that the law is unlikely to affect." Gunderson, supra note 10, at 228. Even though criminal statutes may not deter a harasser or stalker, the victim would at least have the benefit of immediate police intervention. \textit{Id}.

72. \textit{See generally} Robinson, supra note 10, at 536-44 (surveying the various state anti-harassment provisions); Gunderson, supra note 10, at 233-48.


74. Robinson, supra note 10, at 525.


76. Robinson, supra note 10, at 525 & n.99.

77. Although each state's enactment deals with the problem of stalking, each statute has its own peculiar provisions: Alabama, Ala. Code §§ 13A-6-90 to 13A-6-94 (Supp. 1993) (stating that the threat may be express or implied, and containing a savings clause and an instruction that it should be construed and, if necessary, construed to sustain its constitutionality); Alaska, Act of May 27, 1993, 1993 Alaska
Sess. Laws ch. 40, available in LEXIS, States Library, AKCODE File (amending ALASKA STAT. § 11.41 (1989 & Supp. 1992)) (stating that stalking occurs when the defendant "recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member," and that stalking in the first degree occurs when the stalking activity violates a court order, the victim in under age 16, or the defendant possessed a deadly weapon during the course of conduct constituting the offense); Arizona, ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1993) (prohibiting a person from following another in or about a public place for no legitimate purpose after being asked to desist, and specifically excepting lawful or constitutionally protected activity); Arkansas, Act of Mar. 8, 1993, 1993 Ark. Acts 379, available in LEXIS, States Library, ARCODE File (to be codified at Ark. CODE ANN. § 5-71-229) (introduced as House Bill 1201 and Senate Bill 2) (using similar language to the Oklahoma statute, and setting up affirmative defenses to the charge of stalking whenever the person who engages in stalking activity is a law enforcement officer, licensed private investigator, attorney, process server, licensed bail bondsman, or a store detective acting within the reasonable scope of his or her duty); California, CAL. PENAL CODE § 646.9 (West Supp. 1993) (amending the 1990 law to include threats to a person's immediate family, increasing punishments for subsequent violations, and requiring counselling for violators out on parole); Colorado, COLO. REV. STAT. § 18-9-111 (Supp. 1992) (requiring a consecutive, not concurrent, sentence, for stalking in violation of a court order); Connecticut, CONN. GEN. STAT. ANN. § 53a-181c, -181d (West Supp. 1993) (defining stalking to include repeatedly following or lying in wait for another, and declaring stalking to be a felony if there is a subsequent violation, violation of a court order, or the person stalked is under the age of sixteen); Delaware, DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992) (stating that lawful labor picketing creates a rebuttable presumption that the defendant does not have the required intent, and exempting from prosecution persons engaged in law enforcement or the private detective business); District of Columbia, D.C. CODE ANN. § 22-504 (Supp. 1993) (temporary enactment) (criminalizing stalking activity, requiring harassing conduct on more than one occasion, and providing for penalties of up to one year in jail and a $500 fine); Florida, Fla. STAT. ch. 784.048 (Supp. 1993) (allowing in a controversial section any law enforcement officer to arrest, without a warrant, any person he or she has probable cause to believe has committed the crime of stalking); Georgia, Act of Apr. 27, 1993, 1993 Ga. Laws 1534, available in LEXIS, States Library, GATRCK File (to be codified at GA. CODE ANN. § 16-5-90 to -5-93) (introduced as Senate Bill 13) (forbidding the law from being construed to require an overt threat of death or bodily injury, providing for giving victims notice of the release from custody of the person arrested for and charged with stalking, and providing for notice of a bail hearing for the person charged with stalking); Hawaii, HAW. REV. STAT. § 711-1106.5 (Supp. 1992) (stating that stalking occurs when, with intent to harass, annoy, or alarm another person, or in reckless disregard of the risk thereof, the stalker pursues or conducts surveillance upon another person); Idaho, IDAHO CODE § 16-7905 (Supp. 1993) (providing, in addition to provisions similar to the Oklahoma anti-stalking law, that a subsequent conviction within seven years of the first constitutes a felony, and containing no expanded definition of the phrase "immediate family"); Illinois, ILL. COMP. STAT. ANN. ch. 720, para. 5/12-7.3 to 5/12-7.4, ch. 725, para. 5/110-4 (1992) (stating that stalking occurs when there is a threat which places a person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and, on at least two separate occasions, the defendant follows the person, other than within the residence of the defendant, or places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than that of the defendant) (excluding picketing activity during bona fide labor disputes and containing a provision for denial of bail for stalkers who pose a real and present threat to the physical safety of the victim); Indiana, Act of May 6, 1993, Pub. L. No. 242, 1993 Ind. Acts 242, available in LEXIS, States Library, INCODE File (to be codified at IND. CODE § 35-45-10) (introduced as Senate Act 97) (containing language similar to the Oklahoma statute, providing that stalking becomes a class A misdemeanor from a class B misdemeanor if the defendant makes an explicit or an implicit threat with the intent to place the victim in reasonable fear of sexual battery, serious bodily injury, or death); Iowa, IOWA CODE ANN. § 708.11 (West Supp. 1993) (declaring stalking to be punishable as an aggravated misdemeanor for a second offense within six years involving the same or a different victim, and using similar language as the Oklahoma law); Kansas, Act of May 17, 1993, 1993 Kan. Sess. Laws
291, available in LEXIS, States Library, KSCODE File (introduced as Senate Bill 423) (amending 1992 Kan. Sess. Laws ch. 298, § 95) (containing language similar to the Oklahoma statute); Kentucky, Act of Apr. 13, 1992, ch. 443, 1992 Ky. Rev. Stat. & R. Serv. 1272 (Baldwin) (defining stalking in the first degree to be when the defendant has a deadly weapon on his person, and excluding constitutionally protected activity from the statute as a matter of law); Louisiana, LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993) (using provisions very similar to the Oklahoma statute, but not covering members of a victim’s immediate family); Maine, Act of July 13, 1993, ch. 475, 1993 Me. Legis. Serv. ch. 475, (West), available in LEXIS, States Library, MECODE File (introduced as H.P. 1147) (amending Me. REV. STAT. ANN. tit. 19, § 762 (West Supp. 1992)) (defining stalking as repeatedly and without reasonable cause following the victim or being at or in the vicinity of the plaintiff’s home, school, business, or place of employment); Maryland, Md. ANN. CODE art. 27, § 121A (1992) (prohibiting following another person in or about a public place, specifically excluding peaceable activity intended to express political views or provide information to others, and requiring that a reasonable warning or request to desist be made by or on behalf of the other person); Massachusetts, MASS. ANN. LAWS ch. 265, § 43 (Law. Co-op. Supp. 1993) (imposing very tough punishments, by imprisonment for not more than five years, a fine not exceeding $1,000, or both, and declaring that a stalker who violates a court order faces imprisonment for one or five years, with a mandatory minimum sentence of one year); Michigan, MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993) (stating that the course of conduct element consists of a pattern of conduct composed of a series of two or more separate noncontinuous acts, evidencing a continuity of purpose; providing that the mental distress of the victim need not necessarily be so severe as to require professional treatment or counseling; providing specific instances of "unconsented contact" such as following or appearing within the sight of the individual, confronting the victim in a public place, appearing at the victim’s workplace, telephone contact, etc.; and providing further that if evidence is introduced that the stalker continued harrassing the victim after being told to desist, there is a rebuttable presumption that the continuation of the conduct caused the victim to become frightened or intimidated); Michigan, MICH. COMP. LAWS ANN. § 750.411i (West Supp. 1993) (providing for factors which increase charge from stalking to aggravated stalking, including stalking behavior in violation of a restraining order or injunction, provided that the defendant has actual notice of such order, the stalking activity violated a condition of probation, the stalking activity includes one or more credible threats to kill or injure the victim or her family or another living in the victim’s household, and a previous violation of the stalking law; Michigan, MICH. COMP. LAWS ANN. § 600.2954 (West Supp. 1993) (providing for a civil cause of action for injury resulting from stalking activity); Minnesota, Act of May 20, 1993, ch. 326, 1993 Minn. Sess. Law Serv. 1310 (West) (to be codified at MINN. STAT. § 609.749) (including a prohibition of harassing conduct which interferes with another person or intrudes on the person’s privacy or liberty; aggressors include stalking because of the victim’s or another’s actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin); Mississippi, MISS. CODE ANN. § 97-3-107 (Supp. 1993) (using provisions very similar to the Oklahoma statute, expressly excluding constitutionally protected activity and not covering the victim’s immediate family); Missouri, MO. ANN. STAT. §§ 455.010, .020, .040, .045, .050, .085 (Vernon Supp. 1993) (containing provisions similar in language to that of the Oklahoma statute); Montana, Act of Apr. 9, 1993, 1993 Mont. Laws ch. 292, available in LEXIS, States Library, MTCODE File (introduced as Senate Bill 37) (containing very broad language, which, without narrowing constructions, may cause an argument that the law is unconstitutionally vague to be upheld); Nebraska, Neb. REV. STAT. § 42-924 (Supp. 1992) (stating that stalking occurs only when a restraining order is violated); Nevada, Act of June 11, 1993, 1993 Nev. Stat. 233, available in LEXIS, States Library, NVCODE File (introduced as A.B. 199) (exempting lawful conduct such as picketing, or the activities of reporters, photographers, cameramen or other persons while gathering information for communication to the public if that person is employed or engaged by or has contracted with a newspaper, periodical, press association, or radio or television station, and is acting solely within that professional capacity); New Hampshire, Act of May 27, 1993, 1993 N.H. Laws ch. 173, available in LEXIS, States Library, NHCODE File (to be codified at N.H. REV. STAT. ANN. § 633.3-a) (introduced as House Bill 476) (containing provisions similar to the Oklahoma law); New Jersey, N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993) (containing language similar to the Oklahoma statute, and excluding
conduct which occurs during organized group picketing); New Mexico, N.M. STAT. ANN. §§ 30-3A-1 to 3A-4 (Michie Supp. 1993) (containing provisions similar to the Oklahoma statute, and excluding activity pursuant to pickets, public demonstrations, bona fide labor disputes, and lawful duties of law enforcement personnel); New York, N.Y. PENAL LAW § 120.13 (McKinney 1992) (referring to the conduct as "menacing," and stating that "menacing" in the second degree occurs when a person intentionally places another in reasonable fear of physical injury or death by displaying a deadly weapon, dangerous instrument, or what appears to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm); North Carolina, N.C. GEN. STAT. § 14-277.3 (Supp. 1992) (requiring a reasonable warning or request to desist by or on behalf of the victim); North Dakota, Act of Apr. 1, 1993, 1993 N.D. LAWS —, available in LEXIS, States Library, NDCODE File (to be codified at N.D. CENT. CODE § 12.1-17) (providing that it is not a defense that the defendant was not given actual notice that the person did not want the actor to contact or follow the person, nor is it a defense that the actor did not intend to frighten, intimidate, or harass the person, and further providing that an attempt to contact or follow a person after being given actual notice that the person does not want to be contacted or followed is prima facie evidence that the actor intends to stalk that person); Ohio, OHIO REV. CODE ANN. § 2903.211 (Anderson 1993) (establishing the crime of menacing by stalking, declaring that subsequent conviction involving the same victim is a felony in the fourth degree, and placing no specific time limitation on the subsequent offense); Oklahoma, OKLA. STAT. ANN. § 1173 (West Supp. 1993) (see the appendix to this comment); Oregon, Act of Aug. 12, 1993, 1993 Or. Laws ch. 626, available in LEXIS, States Library, ORCODE File (introduced as Senate Bill 833) (defining stalking as knowingly alarming or coercing another person or a member of that person's immediate family or household by engaging in repeated and unwanted contact with the other person without legitimate purpose, the term "coerce" meaning to restrain, compel, or dominate by force or threat); Pennsylvania, Act of June 23, 1993, 1993 Pa. Laws 28, available in LEXIS, States Library, PACODE File (amending 18 PA. CONS. STAT. § 2709 (1983)) (introduced as House Bill 2) (containing provisions similar to the Oklahoma law); Rhode Island, R.I. GEN. LAWS §§ 11-59-1 to 11-59-3 (Supp. 1992) (using provisions very similar to the Oklahoma statute); South Carolina, S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1992) (using provisions similar to the Oklahoma statute, and excluding constitutionally protected activity and conduct occurring during labor picketing); South Dakota, S.D. CODED LAWS ANN. §§ 22-19A-1 to 22-19A-6 (Supp. 1992) (using provisions similar to the Oklahoma statute, but not covering members of the victim's immediate family); Tennessee, TENN. CODE ANN. § 39-17-315 (Supp. 1992) (declaring the statute not to be construed to prohibit following another person during the course of a lawful business activity); Texas, Act of Mar. 19, 1993, ch. 10, 1993 Tex. Sess. Law Serv. 47 (Vernon) (amending TEX. PENAL CODE ANN. § 42.07 (West 1989); TEX. CRIM. PAC. CODE ANN. arts. 17.46, 42.12, 42.18, 56.11 (West Supp. 1993); TEX. GOV'T CODE ANN. § 501.026 (West Supp. 1993)) (providing for victim notification in cases where a stalker is released or escapes from prison); Utah, UTAH CODE ANN. § 76-5-106.5 (Supp. 1992) (making no reference to increased punishment for subsequent convictions or violations of court orders, and excluding constitutionally protected activity); Vermont, Act of June 15, 1993, 1993 Vt. Laws 95, available in LEXIS, States Library, VTTRCK File (to be codified at VT. STAT. ANN. tit. 13, § 1601) (introduced as Senate Bill 46) (defining "following" as maintaining over a period of time a visual or physical proximity to another person in such manner as would cause a reasonable person to have a fear of unlawful sexual conduct, unlawful restraint, bodily injury, or death); Virginia, VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992) (offering a terse definition of stalking and very little definitional language); Washington, WASH. REV. CODE § 9A.46.110 (West Supp. 1993) (specifying that the stalker must intentionally and repeatedly follow another person to that person's home, school, place of employment, business, or any other location, or must follow the person while the person is in transit between locations, and stating that victim may be placed in fear that the stalker intends to injure the person or property of the person being followed or of another person); West Virginia, W. VA. CODE § 61-2-91 (Supp. 1992) (requiring the stalker and the victim to have cohabitated or been involved in an intimate relationship prior to the stalking conduct, and making no provision for subsequent offenses); Wisconsin, Wis. STAT. ANN. § 947.013 (West Supp. 1992) (excluding labor disputes); Wyoming, WYO. STAT. § 6-2-206 (1993) (exempting lawful demonstration, assembly or picketing); Wyoming, WYO. STAT. § 1-1-126 (1993)
problem exists in this area. While there is not yet a federal law which criminalizes stalking, the first rumblings of federal legislation have already been felt in the 1992 congressional session.78

II. Oklahoma’s Anti-Stalking Law

Oklahoma’s contribution to the flood of state anti-stalking legislation was approved by Governor David Walters on April 20, 1992.79 Although the statute is broken down into sections, subsections, and further subdivisions, there are basically three main parts: (1) the definition of the crime of stalking;10 (2) the definitions of specific words and phrases used in the definition of stalking;31 and (3) circumstances which enhance punishment for stalking convictions.82

Under the statute, a person who "willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat against that person or a member of the immediate family of that person . . . shall be guilty of the crime of stalking."83 The two main elements of stalking as set out in the statutory language are repeatedly following or harassing another; and making a credible threat against that person or his or her immediate family. However, this statutory definition is further refined in subsection (E) which defines certain key terms.84 This section defines the term "harasses" as

(providing for civil liability of picketers, regardless of whether the stalker has been charged or convicted under the criminal statute).

78. Congress passed a bill in 1992 to create a model state law dealing with stalking behavior. Louise Palmer, Cohen’s Anti-Stalking Bill Passes Senate, STATES NEWS SERVICE, Sept. 16, 1992, available in LEXIS, Nexis Library, Wires File. Sen. William Cohen (R-Maine), who introduced the bill, stated in a Senate speech, "A sad truth of life in America today is that the leading cause of injury among American women is being beaten by a man." Id. Sen. Joseph Biden, D-Delaware, the leading cosponsor of the bill and chair of the committee that approved it, observed that domestic violence against women has reached epidemic proportions. He noted that more than four million women are beaten or killed every year by the men they live with. Id. The bill, which was attached to a larger piece of legislation, was enacted as part of an appropriations package. It provides:

(b) The Attorney General, acting through the Director of the National Institute of Justice, shall: (1) evaluate existing and proposed anti-stalking legislation in the states, (2) develop model anti-stalking legislation that is constitutional and enforceable, (3) prepare and disseminate to State authorities the findings made as a result of such evaluation, and (4) report to the Congress the findings and the need or appropriateness of further action by the Federal Government by September 30, 1993.


80. Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335.

81. Id. § 1(B), 1992 Okla. Sess. Law Serv. at 336.

82. Id. §§ 1(B)-(D), 1992 Okla. Sess. Law Serv. at 335-36.

83. Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335.

84. Id. § 1(B), 1992 Okla. Sess. Law Serv. at 336.
a knowing and willful course of conduct directed at a specific person which seriously alarms or annoys 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 distress to the person.\footnote{85}

In addition, the phrase "course of conduct" found in the definition of "harasses" is itself defined in the statute. "Course of conduct" is taken to mean a "pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."\footnote{86} Constitutionally protected activity is explicitly excluded from the scope of conduct encompassed by the statute.\footnote{87}

The second element of the crime of stalking consists of making a credible threat against the person or members of his or her immediate family.\footnote{88} The term "credible threat" is one that is "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 for the safety of a member of his or her immediate family."\footnote{89} In addition, the threat must be made against the life of, or a threat to cause great bodily injury to, the person receiving the threat.\footnote{90}

The statute also gives a rather expansive definition of the phrase "member of the immediate family."\footnote{91} In addition to spouses, children, and parents, blood relatives within the third degree of consanguinity or affinity are also included.\footnote{92} Non-relatives who regularly reside in the household or who had regularly resided in the household within six months prior to the threat are also covered.\footnote{93}

Finally, the third general part of the statute deals with repeat offenders and other circumstances which increase the criminal penalties for stalking from a misdemeanor to a felony.\footnote{94} A first offense of stalking is treated as a misdemeanor and is punishable by up to one year in jail, up to a $1000 fine, or both.\footnote{95} However, statutory provisions may serve to increase the amount of punishment if certain circumstances are present. These provisions are contained in subsections (B), (C), and (D) of the statute.

Subsection (B) consists of an enumeration of certain conditions which, if present at the time a person commits the crime of stalking, serve to increase the initial stalking offense to a felony.\footnote{96} Paragraph (1) of this subsection makes stalking a

\footnote{85} Id. § 1(E)(1), 1992 Okla. Sess. Law Serv. at 336.
\footnote{86} Id. § 1(E)(2), 1992 Okla. Sess. Law Serv. at 336.
\footnote{87} Id.
\footnote{88} Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335.
\footnote{89} Id. § 1(E)(3), 1992 Okla. Sess. Law Serv. at 336.
\footnote{90} Id.
\footnote{91} Id. § 1(E)(4), 1992 Okla. Sess. Law Serv. at 336.
\footnote{92} Id.
\footnote{93} Id.
\footnote{94} Id. §§ 1(B), (C), (D), 1992 Okla. Sess. Law Serv. at 335-36.
\footnote{95} Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335.
\footnote{96} Id. §§ 1(B)(1), (2), (3), 1992 Okla. Sess. Law Serv. at 335-36.
felony when either a temporary restraining order, a protective order, emergency ex parte order, or an injunction was in place for the protection of the same party which prohibited conduct amounting to stalking. However, the defendant must have had actual notice of the existence of such an order or injunction.

Paragraphs (2) and (3) have similar provisions. Paragraph (2) makes stalking a felony if committed while the defendant was on parole or probation, a condition of which prohibited the act of stalking against the same party. Paragraph (3) makes stalking a felony if, within ten years prior to the act, the person had been convicted of a crime "involving the use or threat of violence against the same party, or against a member of the immediate family of such party." The range of punishments under subsection (B) consists of up to five years in prison, up to a $2,500.00 fine, or both.

In a similar vein, violations of subsections (C) and (D) will also boost the punishment for a stalking conviction. Subsection (C) simply makes a second stalking conviction within ten years of the first a felony. Subsection (D) provides for even harsher penalties for defendants who, within ten years of a violation under subsections (B) or (C), commit yet another stalking violation. The penalty for violating this section is a fine of not less than $2,500.00 nor more than $10,000.00, up to ten years in prison, or both.

The Oklahoma statute employs language which is very similar to that found in the anti-stalking laws of other states. However, the Oklahoma law, like the majority of state anti-stalking laws, is a very recent addition to the penal statutes. Thus, it remains to be seen whether it will have a positive impact upon the problem of stalking in Oklahoma.

As the new law is put into effect and suspects are arrested and convicted under its provisions, it will have to be interpreted by the appellate courts when criminal defendants challenge its validity. Because of the lack of appellate court decisions construing anti-stalking legislation, an analysis of case holdings is not possible. However, the statute on its face raises certain constitutional concerns which are worth considering even in the absence of any reported cases. The next section analyzes some of these constitutional considerations.

97. Id. § 1(B)(1), 1992 Okla. Sess. Law Serv. at 335.
98. Id.
100. Id. § 1(B)(3), 1992 Okla. Sess. Law Serv. at 336.
101. Id.
102. Id. § 1(C), 1992 Okla. Sess. Law Serv. at 336.
103. Id. § 1(D), 1992 Okla. Sess. Law Serv. at 336.
104. Id.
III. Constitutional Challenges

In Oklahoma, there are no common-law crimes.106 No act or omission can be considered criminal unless expressly made so by the legislature.107 Under a state’s general police power, the legislature has broad powers to define the specific acts or omissions which constitute criminal offenses, and to prescribe appropriate punishments.108 Generally, when a court passes upon the validity of a statute made pursuant to a state’s general police power, there is a presumption in favor of the validity of the statute.109 Of course, this does not mean that all legislative enactments are constitutionally valid. Statutes are invalidated through the process of litigating actual controversies in court. However, because Oklahoma’s anti-stalking law is such a recent addition to the criminal code, there are not any published appellate court decisions which consider the constitutional validity of the new law.

Even in the absence of any controlling case law construing the Oklahoma anti-stalking statute, there are at least three bases upon which a criminal defendant may attack the statute on its face. First, section 1(B)(3) could be attacked on the grounds that it is an impermissible ex post facto provision. Second, a defendant could argue that the statute is unconstitutionally vague in that reasonable people would not be placed on notice as to what conduct is prohibited. Finally, the law may be attacked on the ground that it is unconstitutionally overbroad in that otherwise lawful or constitutionally protected activity is prohibited by the statutory language.

A. Ex Post Facto Analysis

The United States Constitution forbids both the federal government and the states from enacting ex post facto laws.110 In addition, the Oklahoma constitution similarly limits the legislature from enacting such laws.111 Generally, the ex post facto prohibition is designed to prevent the legislature from punishing a criminal defendant112 by retroactively applying laws which criminalize prior legal conduct or enhance punishment.113

106. See 21 OKLA. STAT. ANN. § 2 (West 1983) (providing that "[n]o act or omission shall be deemed criminal or punishable except as prescribed or authorized by this code"); see also Salyers v. State, 755 P.2d 97, 100 (Okla. Crim. App. 1988) (stating that all crimes in Oklahoma are statutory, and no act is a crime unless made so by statute); Traxler v. State, 251 P.2d 815, 829 (Okla. Crim. App. 1952) (stating that there are no common law crimes in Oklahoma).
107. 21 OKLA. STAT. ANN. § 2 (West 1983).
108. See supra note 58.
109. See the cases cited infra note 147.
110. See U.S. CONST. art. I, § 9 (federal); id. art. I, § 10 (state).
111. See OKLA. CONST. art. II, § 15 (stating that no bills of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed).
112. The prohibition of ex post facto laws applies "only to criminal matters, although retroactive civil statutes have sometimes been held unconstitutional on some other ground, usually as a taking or property rights without due process of law." LAFAVE & SCOTT, supra note 38, at 97-98.
113. The Supreme Court very early on set out the contours of the Constitution’s ex post facto provisions. In an early case, the Court defined ex post facto laws as follows: 
The Supreme Court has recognized two underlying purposes for proscribing ex post facto laws. First, it assures that the criminal laws enacted by the legislature "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."114 Second, it acts as a restriction upon legislative power by restraining arbitrary and potentially vindictive legislation.115

The most obvious manifestation of an ex post facto law is one which creates a new crime and applies it retroactively to acts or omissions which were not criminal at the time they were committed.116 However, ex post facto questions may arise in situations where the new law imposes an enhanced penalty for later offenses if the defendant has been previously convicted of one or more crimes.117

Section 1(B)(3) of the Oklahoma anti-stalking statute provides that any person who violates the stalking law, and within ten years previously had been convicted of a crime involving the use or threat of violence against the same party or member of the party’s immediate family, shall be guilty of a felony.118 This language clearly states that prior criminal conduct will be taken into account if a person is

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.


115. Miller, 482 U.S. at 429; see also LAFAVE & SCOTT, supra note 38, at 97 (noting that there has been yet a third basis for the ex post facto prohibition, "namely, that it 'assures [that] the legislature can make recourse to stigmatizing penalties of the criminal law only when its core purpose of deterrence could thereby possibly be served.'" (quoting Warren v. United States Parole Comm'n, 659 F.2d 183, 189 (D.C. Cir.), cert. denied, 455 U.S. 950 (1981))).
116. LAFAVE & SCOTT, supra note 38, at 98.
117. Id. at 100. This situation is typical of habitual criminal statutes. These laws enhance the punishment for an offense if the offender had been previously convicted of one or more crimes. For example,

[i]f the defendant commits crime A at a time when there is no habitual criminal statute, then such a statute is passed imposing increased punishment for a second offense, and then the defendant commits crime B, it is not within the ex post facto prohibition to apply the . . . statute to crime B.

Id.; see, e.g., McDonald v. Massachusetts, 180 U.S. 311 (1901); Finley v. State, 666 S.W.2d 701 (Ark. 1984); Sims v. State, 556 S.W.2d 141 (Ark. 1977); State v. Holloway, 130 A.2d 562 (Conn. 1957). LaFave and Scott also provide an alternate fact pattern which would invoke the ex post facto provision: D commits crime A, then he commits crime B, then the habitual criminal statute is passed, then D is convicted of crime A, then he is convicted of crime B; application of the statute to crime B would be ex post facto. LAFAVE & SCOTT, supra note 38, at 100 n.28; see People v. d’A Philippo, 32 P.2d 962 (Cal. 1934).

convicted of stalking. The prior conduct will be used to enhance the punishment substantially. A defendant could argue that such a punishment enhancing provision is an ex post facto law which retroactively applies to prior conduct which, at the time committed, did not form a basis for enhanced penalties. However, such an argument would be very difficult to sustain. The Supreme Court has construed such provisions as falling outside the scope of ex post facto law prohibitions.

The Court addressed the issue in the case of McDonald v. Massachusetts. In this case, McDonald was convicted under a Massachusetts habitual criminal statute. Under the statute, a person who was convicted of a felony, and who also had been convicted of at least two prior felonies, was a habitual criminal. McDonald had been previously convicted of two felonies. Upon his conviction for the third, he was sentenced under the statute to a prison term of twenty-five years. His argument before the Supreme Court was that the statute imposed additional punishment on crimes for which he had already been convicted.

In rejecting McDonald's reading of the ex post facto provision, the Court observed that the statute did not increase the punishment of the prior offenses. Rather, it "simply impose[d] a heavy penalty upon conviction [under the statute] since its passage." In other words, the statute only punished criminal conduct occurring after its enactment. The fact that the punishment was derived, in part, from prior criminal acts was of no consequence.

This reasoning would appear to lead to the same result when applied to the Oklahoma statute. Under the Oklahoma statute, the penalty is enhanced if the person convicted had, within the previous ten years, been convicted of or had served a sentence for a crime involving conduct similar to that of stalking. The Oklahoma law, like the one in the McDonald case, merely enhances the punishment for an offense which was prohibited by a criminal law already in existence. Thus, under the Oklahoma law, a person would be punished for stalking under section 1(A), but the punishment would be more severe because of prior criminal conduct; it would not be an additional punishment added to the original sentences of the prior convictions.

119. The punishment for a first-time stalking conviction under § 1(A) is "imprisonment in a county jail for not more than (1) year or by a fine of not more than One Thousand Dollars ($1,000.00), or both such fine and imprisonment." Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335. In contrast, a first-time stalking conviction for a person who has been previously convicted of a similar crime against the same persons within the previous ten years is a felony punishable by "imprisonment in the State Penitentiary for a term not exceeding (5) years or by a fine of not more than Two Thousand Five Hundred Dollars ($2,500.00), or by both such fine and imprisonment." Id. § 1(B)(3), 1992 Okla. Sess. Law Serv. at 336.
120. 180 U.S. 311 (1931).
121. Id. at 312.
122. Id.
123. Id. at 312-13; see also Gryger v. Burke, 334 U.S. 728, 732 (1948) (holding that sentence as a habitual criminal not to be viewed as an additional penalty for earlier crimes, that it is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because of the prior conviction); Finley v. State, 666 S.W.2d 701, 703 (Ark. 1984) (holding that the enhanced penalty is not for the first or second offense, but is for the third offense, which is considered as aggravated by reason of the preceding offenses).
Even if section 1(B)(3) were to be held unconstitutional, the main body of the anti-stalking statute would most likely be upheld. Although the Oklahoma statute does not explicitly contain a "saving clause," courts will generally sever unconstitutional provisions from a statute if the remaining portions are capable of being executed independently in a constitutional manner. The controlling principle is whether "the legislature would be presumed to have enacted the valid portion without the invalid [portion]." In making this determination, courts analyze whether the valid and invalid portions are not so "intimately connected" as to raise the presumption that the lawmaking body would not have enacted the one without the other.

Although these general rules guide courts in deciding severability issues, each case is decided largely upon its unique facts. On this basis, if section 1(B)(3) were invalidated, it seems clear that the Oklahoma legislature's intent would be to uphold the remaining portions of the statute. This subsection is essentially a punishment-enhancing provision. If it were deleted, the original crime of and punishment for stalking would still be valid. Moreover, other punishment-enhancing provisions in the statute would not be affected. Even without the invalid section, the statute would still be a viable tool in dealing with the problem of stalking. In light of the public interest in combating stalking, it would seem likely that the legislature would intend for the valid portions of the law to remain effective.

124. A "saving clause" is a statutory device "which rescues the balance of the statute from a declaration of unconstitutionality if one or more clauses or parts are invalidated." BLACK'S LAW DICTIONARY 1205 (5th ed. 1979). It is sometimes referred to as a "severability clause." Id.; see, e.g., ALA. CODE § 13A-6-94 (Supp. 1993) (stating that this article shall be construed, and, if necessary, reconstituted to sustain its constitutionality).


127. Johnson, 167 P.2d at 894 (quoting 59 C.J.S. Const. Law § 206, at 644 (1932)).

128. Riggins, 554 P.2d at 827.
In any event, a criminal defendant could challenge the remaining portions of the Oklahoma anti-stalking statute on at least two other grounds. First, it could be argued that the rest of the statute is unconstitutionally vague. The criminal defendant would have to convince the court that the statutory language is deficient in that an ordinary person would not be placed on notice as to conduct which is prohibited and that which is not. Second, the statute could be challenged as being unconstitutionally overbroad in that it encompasses conduct which is constitutionally protected, particularly conduct protected by the cherished First Amendment.

B. Vagueness

Common law courts sometimes refused to enforce legislative acts which were deemed too uncertain to be applied to a set of facts. Similarly, the United States Supreme Court has circumvented enforcing vague or ambiguous statutes by invoking the separation of powers doctrine. The Court reasoned that Congress, by enacting an ambiguous statute, could not constitutionally confer lawmaking powers upon the courts. In addition, the Court has reversed convictions under ambiguous criminal laws by invoking the Sixth Amendment. If the criminal statutes were too vague, the accused was denied the right to be informed "of the nature and cause of the accusation" against him. These bases for invalidating ambiguous criminal statutes have gradually given way to what is now called the "void-for-vagueness" doctrine.

This doctrine is rooted in the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Due process is also

129. LaFave & Scott, supra note 38, at 90; Anthony G. Amsterdam, Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 Pa. L. Rev. 67 n.2 (1960).
130. LaFave & Scott, supra note 38, at 90; Amsterdam, supra note 129, at 68 n.3.
131. LaFave & Scott, supra note 38, at 90; see, e.g., United States v. Evans, 333 U.S. 483 (1948); James v. Bowman, 190 U.S. 127 (1903); Trade-Mark Cases, 100 U.S. 82 (1879); United States v. Reese, 92 U.S. 214 (1875).
133. LaFave & Scott, supra note 38, at 90. See generally Amsterdam, supra note 129.
134. The Fifth Amendment provides that "[n]o person shall be ... deprived of life, liberty, or property without due process of law." U.S. Const. amend. V.
135. The Fourteenth Amendment provides that "[n]o state shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.
136. LaFave & Scott, supra note 38, at 90-91; Lady Ann's Oddities, Inc., v. Macy, 519 F. Supp. 1140, 1145 (W.D. Okla. 1981). In addition to due process, the vagueness doctrine is also implicated under the Eighth Amendment. The doctrine is applied differently in these respective constitutional settings. See Maynard v. Cartwright, 486 U.S. 356, 360-62 (1988) (holding that vagueness under due process rests upon the lack of notice and may be overcome in any specific case where reasonable persons would know that their conduct is at risk, and further holding that, under the Eighth Amendment, capital sentencing guidelines must be sufficiently certain to prevent open-ended discretion by juries and appellate courts); VanWoudenberg v. State, 818 P.2d 913 (Okla. Crim. App. 1991) (upholding harmless error doctrine and sentence).
guaranteed under the Oklahoma Constitution. The guiding principle is that a statute which is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates . . . due process of law." Thus, due process requires that a criminal statute comply with two basic principles. First, the law must provide notice to the ordinary person of what conduct or acts are prohibited. Second, it must provide standards to law enforcement authorities in order to prevent arbitrary and discriminatory enforcement.

137. The Oklahoma Constitution simply states that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Okla. Const. art. II, § 7.

138. Connally v. General Constr. Co., 269 U.S. 385, 391 (1925). Contrast this language with Justice Holmes' observation that the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death.

Nash v. United States, 229 U.S. 373, 377 (1913). A vague statute will be unconstitutional if the vagueness is found in three general areas: (1) the persons within the scope of the statute; (2) the conduct which is forbidden; or (3) the punishment which may be imposed. LaFave & Scott, supra note 38, at 91.

139. Kolender v. Lawson, 461 U.S. 352, 357 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Palmer v. City of Euclid, 402 U.S. 544, 546 (1971); United States v. Harris, 347 U.S. 612, 617 (1954); Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952); United States v. Stewart, 872 F.2d 957, 959 (10th Cir. 1989); Lady Ann's Oddities Inc. v. Macy, 519 F. Supp. 1140, 1145 (W.D. Okla. 1981); Turner v. State, 549 P.2d 1346, 1350 (Okla. Crim. App. 1976). But cf. LaFave & Scott, supra note 38, noting that "[a]lthough the Court has said that the law must be clear to the 'average man,' to 'men of common intelligence,' and to 'ordinary people,' such language cannot be accepted at face value." Id. at 92. Vague statutory language may be cured if the terms have a well-settled meaning in the common law or they are used in other legislation. Id. These two sources of statutory interpretation most certainly would not occur to the average person. Thus, there is an inference that the fair warning requirement is satisfied "if a statute suggests the need to seek legal advice and if the statute's meaning might reasonably be determined through such advice." Id.

140. Kolender, 461 U.S. at 357; Papachristou, 405 U.S. at 168; Lady Ann's, 519 F. Supp. at 1145; see also LaFave & Scott, supra note 38, at 94-95. In analyzing a statute under the void-for-vagueness doctrine, the Supreme Court has articulated the values underlying the need for such a rule of construction:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut(s) upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)). As the Court noted in Grayned, vague statutes have a chilling effect upon First Amendment freedoms. Because the freedoms under the First Amendment require "breathing space" to thrive, statutes
Under the void-for-vagueness doctrine, absolute certainty of meaning in statutory language is not required. Rather, the standard is necessarily one of "reasonableness." One purpose of the reasonableness standard inheres in the limitation of words in the English language in articulating specific concepts and ideas. Because most English words and phrases have some intrinsic degree of uncertainty, precision in the drafting of criminal statutes is a virtual impossibility. Moreover, precision in drafting may not even be desirable. Specific terms in a statute necessarily have the effect of limiting its scope. While some ambiguous statutes are the result of poor draftsmanship, ambiguity is sometimes deliberate as a means to better achieve the purpose of a statute by broadening its scope and closing loopholes.

The Supreme Court has recognized this legislative predilection and has made it very clear that lawmakers are entitled to a certain amount of latitude in drafting statutes as far as the void-for-vagueness doctrine is concerned. In chastising the Ninth Circuit Court of Appeals for voiding a federal statute, the Court stated that "[t]he fact that Congress might, without difficulty, have chosen '[c]learer and more precise language' equally capable of achieving the end which it sought which infringe in this area must be drawn with "narrow specificity." NAACP v. Button, 371 U.S. 415, 433 (1963). This aspect of the void-for-vagueness doctrine will not be discussed in this section since it is apparent that the Oklahoma anti-stalking law does not seek to regulate conduct protected under the First Amendment. See generally LAFAVE & SCOTT, supra note 38, at 96-97. See infra notes 220-39 and accompanying text.


142. Grayned, 440 U.S. at 110 (stating that we can never expect mathematical certainty from our language, condemned as we are to the use of words); Boyce, 342 U.S. at 340 (stating that few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions); Lady Ann's, 519 F. Supp. at 1145 (stating that there is uncertainty in most English words); see also LAFAVE & SCOTT, supra note 38, at 91; Amsterdam, supra note 129, at 90-91 (discussing three gradations of uncertainty in statutory language).


144. LaFave & Scott observed, "While some ambiguous statutes are the result of poor draftsmanship, it is apparent that in many instances the uncertainty is merely attributable to a desire not to nullify the purpose of the legislation by the use of specific terms which would afford loopholes through which many could escape." LAFAVE & SCOTT, supra note 38, at 91; see, e.g., KY. REV. STAT. ANN. § 525.070 (Michie/Bobbs-Merrill 1984) (stating in the commentary that subsection (1)(d) is a catch-all provision which was included because of the impossibility of listing all of the specific types of prohibited conduct); N.Y. PENAL LAW § 240.25 (McKinney 1989) (Practice Commentaries by William C. Donnino, subdivision five) characterizing this subdivision as a catch-all provision "deemed necessary because of the numerous specific kinds of conduct logically falling within the proscriptions of the 'harassment' offense.") (quoting Staff Comments of the Commission of Revision of the Revised Penal Law, MCKINNEY SPEC. PAMPH. at 300 (1965)).

does not mean that the statute which it in fact drafted is unconstitutionally vague. Thus, the fact that the Oklahoma legislature could have been more precise in drafting its anti-stalking law will not necessarily void the statute on vagueness grounds.

In addition to the cushion afforded legislative bodies in drafting statutes, courts apply various other rules of interpretation and construction which have the effect of curtailing vagueness challenges. At the outset, a strong presumption of constitutionality attaches to lawfully enacted legislation. Compounding this difficulty is the fact that vagueness challenges to statutes which do not impinge upon First Amendment interests are construed in light of the facts of the case at hand. In such cases, a court generally reviews the statute as it applies to the particular defendant, rather than as it would apply to a hypothetical defendant.

This is a key rule of interpretation in vagueness cases. It forces the criminal defendant to show that the statute did not adequately warn her that her acts constituted an offense. The effect of such an interpretation allows a vague statute to be "saved" when a court determines that a particular defendant had adequate warning that the defendant's conduct fell within the "hard core" of the statutory proscriptions.

146. Powell, 423 U.S. at 94 (quoting United States v. Petrillo, 332 U.S. 1, 7 (1947)).
147. Lady Ann's, 519 F. Supp. at 1144; Madden, 562 F.2d at 1179; Turner, 549 F.2d at 1350; Bachowski v. Salamone, 407 N.W.2d 533, 536 (Wis. 1987).
148. Legislation which seeks to regulate in the area of protected conduct under the First Amendment is given more rigid scrutiny by the courts than other types of regulation as far as vagueness and overbreadth challenges are concerned. See infra notes 211-17 and accompanying text. In contrast, regulatory statutes governing commercial activities are allowed greater leeway. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); see, e.g., Boyce Motor Lines Inc. v. United States, 342 U.S. 337 (1952); United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963); United States v. Petrillo, 332 U.S. 1 (1947).
149. United States v. Powell, 423 U.S. 87, 92 (1975); United States v. Mazurie, 419 U.S. 544, 550 (1975); United States v. Stewart, 872 F.2d 957, 959 (10th Cir. 1989); Turner v. State, 549 P.2d 1346, 1350 (Okla. Crim. App. 1976). When reviewing facial challenges to state laws, federal courts will consider any limiting construction that a state court or enforcement agency has given to the law. Kolender, 461 U.S. at 355; Amsterdam, supra note 129, at 73. However, federal courts will not place their own construction or interpretation upon a state law when considering facial challenges to the state statute. Grayned, 408 U.S. at 110; Gooding v. Wilson, 405 U.S. 518, 520 (1972); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1275 (10th Cir. 1984).
150. See, e.g., Powell, 423 U.S. at 87; Mazurie, 419 U.S. at 544.
151. Powell, 423 U.S. at 93.
152. Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); see, e.g., Rose v. Locke, 423 U.S. 48 (1975); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); Miller v. Strahl, 239 U.S. 426 (1915). Professor Laurence Tribe observed that the Court is unlikely to hold a statute void for vagueness unless "the individual challenging the statute is indeed one of the entrapped innocent, and that it would have been practical for the legislature to draft more precisely." LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-31, at 1034 (2d ed. 1988); see also Amsterdam, supra note 129, at 87; LAFAVE & SCOTT, supra note 38, at 93.
Finally, courts may hold that application of a vague statute does not violate due process when scienter is an element of the offense.\textsuperscript{153} Scienter refers to a person's knowledge of the consequences of his acts, as opposed to an awareness of the existence of a legislative proscription.\textsuperscript{154} This observation is apparently based upon the notion that ignorance of the law is not a defense to a criminal charge. Since a person may be convicted under a statute for intentionally committing the act proscribed, even when the person is unaware that such an act is criminal, courts may sometimes hold that application of vague statutory language is not "so unfair that it must be held invalid."\textsuperscript{155}

But traditional notions of scienter obviously cannot cure vague statutes or regulations in a literal sense.\textsuperscript{156} It seems clear that the inclusion of a scienter requirement does not literally clarify vague statutory language. However, there is no requirement that it do so. The inquiry is not whether the statutory language is made more clear by the inclusion of a scienter element. Rather, it is whether application of the statute comports with notions of fundamental fairness under constitutional due process in a given set of circumstances.

These principles guide courts in deciding whether a statute is unconstitutionally vague. But the most important component of the analysis is the actual language that the legislature incorporates into the statute. Under the Oklahoma anti-stalking law, there are basically two elements which must be proven in order for a person to be convicted. The first element consists of intentionally following or harassing another person.\textsuperscript{157} The second involves the making of a credible threat against the life of that person or a member of her immediate family.\textsuperscript{158}

As to the first element, the language found in the Oklahoma anti-stalking law defines harassment as "a knowing and willful course of conduct directed at a specific person which seriously alarms or annoys the person, and which serves no legitimate purpose."\textsuperscript{159} On its face, this language encompasses a wide variety of...
activities and is not terribly helpful in distinguishing between those activities which are prohibited and those which are not. In addition, the statutory language contains minimal standards to guide state authorities in administering the law. Strikingly similar statutory language has been found to be unconstitutionally vague by the Supreme Court of Colorado in the case of People v. Norman.\textsuperscript{160}

In Norman, the defendant and a co-worker entered into a series of dubious transactions involving a particular piece of real estate. A dispute between the two over the ownership of the land quickly ensued. The defendant followed the co-worker on several occasions, apparently attempting to spy. At one point, the defendant threatened to "dispose" of the co-worker's personal property which was located in a cabin on the land. Intent upon carrying out this threat, the defendant followed the co-worker to the cabin one afternoon and was arrested. Among other things, the defendant was convicted under Colorado's anti-harassment statute.\textsuperscript{161}

Under the statute, a person committed the crime of harassment when, "with intent to harass, annoy, or alarm another person," such person "[e]ngages in conduct or repeatedly commits acts that alarm or seriously annoy another person and that serve no legitimate purpose."\textsuperscript{162} The court concluded that this language was unconstitutionally vague.\textsuperscript{163} The court stated that the statute simply afforded too much prosecutorial discretion in construing acts which constituted harassment and those that did not.\textsuperscript{164} The court noted that the statute addressed no particular legislative concern.\textsuperscript{165} Under the statute, an "actor, a clown, a writer or a speaker all might be subject to criminal prosecution because their acts are perceived by some official to annoy or alarm others."\textsuperscript{166}

The court's decision rested upon the fact that the statute did not contain any limiting standards to guide the general public, the police, or the courts as to those acts which were prohibited and those which were not.\textsuperscript{167} Significantly, the court in Norman refused to engraft any such standards to the bare language of the statute. This approach differs significantly from that taken by a Pennsylvania court in the case of Commonwealth v. Duncan,\textsuperscript{168} where the court refused to invalidate a virtually identical statute on the ground that it was unconstitutionally vague.\textsuperscript{169}

In Duncan, a female university student, Hartman, was studying for an exam in a dormitory lounge into the wee hours of the night. She eventually fell asleep shortly before 3:30 a.m. When she awoke a few minutes later she was startled to see that the defendant had maneuvered himself into a position which placed his face in very close proximity to hers. The defendant then made repeated requests for

\textsuperscript{160} 703 P.2d 1261 (Colo. 1985) (en banc).

\textsuperscript{161} Id. at 1264.

\textsuperscript{162} Id. at 1266.

\textsuperscript{163} Id. at 1267.

\textsuperscript{164} Id.

\textsuperscript{165} Id.

\textsuperscript{166} Id.

\textsuperscript{167} Id.


\textsuperscript{169} Id. at 808.
permission to perform cunnilingus on Hartman. Hartman, understandably upset, notified the authorities. The defendant was quickly arrested and convicted of harassment. Under the statute, a person committed criminal harassment when, "with intent to harass, annoy or alarm another person . . . [h]e engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose."170

In upholding the constitutionality of the statute, the court took notice of the fact that a similar statute had been saved by a judicial construction which cured the vagueness problems.171 Relying upon this observation, the court stated that the legislative intent was to prohibit acts other than those which would only be a minor annoyance to the average person.172 In addition, the court construed the statute as requiring: (1) a course of conduct which would seriously offend the average person; (2) a finding of specific intent on the part of the accused; and (3) conduct which would be considered nonlegitimate in nature, that is, conduct not constitutionally protected.173

The definitional language found in the Oklahoma anti-stalking statute is in line with the Pennsylvania court's construction of the vague harassment statute in *Duncan*. In the anti-stalking statute, the Oklahoma legislature has basically codified the Pennsylvania court's approach in construing the broad language of the statute in *Duncan*. The Oklahoma anti-stalking statute is clearly meant to prohibit conduct rising above the level of minor annoyances. Conduct by the defendant must cause the person "substantial emotional distress."174 Not only must the victim actually suffer substantial emotional distress, but also the level of distress must be such that a reasonable person would also suffer the same degree of distress as the victim.175 In addition, the terms "alarm" and "annoy" have been held to be sufficiently clear under similar circumstances.176

In *Duncan*, the element of specific intent was required in order to save the vague language defining the prohibited conduct.177 Specific intent178 on the part of the

170. Id. at 809.

171. Id. at 808. The court relied upon the Supreme Court's treatment of a "disorderly conduct" statute in *Colten v. Kentucky*, 407 U.S. 104 (1972). In *Colten*, the Court held that the statute as construed by the Kentucky courts was neither vague nor overbroad. *Duncan*, 363 A.2d at 808 (citing *Colten*, 407 U.S. at 104). The Kentucky courts had construed the statute as encompassing conduct not constitutionally protected and whose predominant purpose was to cause alarm. Id.

172. Id.

173. Id. (emphasis added).


175. Id.

176. See People v. McBurney, 750 P.2d 916, 919-20 (Colo. 1988) (en banc) (finding presence of the words "alarm" and "annoy" not sufficient to render telephone harassment statute vague); State v. Moyle, 705 P.2d 740, 749-50 (Or. 1985) (holding "alarm" to be sufficiently definite under harassment statute).

177. *Duncan*, 363 A.2d at 808.

178. See *LAFAVE & SCOTT*, supra note 38, at 223-25.
defendant is also required by the Oklahoma statute. The defendant's behavior constituting harassment must not only be "knowing and willful," it must also be directed at a specific person. The statute also requires that the harassing conduct be composed of acts which "evidence a continuity of purpose." 

The court in Duncan interpreted the "no legitimate purpose" language of the statute as excluding constitutionally protected activity. The Oklahoma anti-stalking law expressly excludes constitutionally protected activity from the scope of conduct intended to harass. In addition, the statute defines acts which constitute a "course of conduct." Under the Oklahoma statute, "course of conduct" is defined as a "pattern of conduct composed of a series of acts over time, however short, evidencing a continuity of purpose." It is this section of the statute which is perhaps most susceptible to a vagueness challenge.

Although constitutionally protected activity is excluded from this definition, the statutory language nevertheless creates a sliding-scale definition of conduct which affords prosecutors and courts wide discretion in deciding whether a particular defendant's activity falls under the statute. In Duncan for example, the court held that three or four requests for cunnilingus was sufficient to constitute a course of conduct under the harassment statute. However, this fact situation would appear to be at the fringe of an acceptable definition of "course of conduct." A Duncan-like fact pattern was taken to its logical extreme in the case of People v. Hotchkiss.

In Hotchkiss, a New York court held that a course of conduct is more than an isolated verbal or physical act. In this case, the defendant informed a deputy sheriff, "If I could have drawn my gun fast enough, I would have shot you." The court determined that this one statement did not constitute a course of conduct. The holdings of cases such as Hotchkiss and Duncan illustrate that the gradations of behavior which could fall under a state's harassment statute are not


180. Id.


184. Id.

185. Id.

186. Duncan, 363 A.2d at 805-06.


188. Id. at 407.

189. Id. at 406.

190. Id. at 407.
readily susceptible to precise delineation. However, a literal reading of the Oklahoma statute would conceivably blunt the impact of this vague portion of the statute to a large extent.

The courts in Hotchkiss and Duncan dealt with statutes which defined the offense in the disjunctive ("engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy"). In contrast, the Oklahoma statute apparently sets forth a two-tiered definitional scheme. First, harassing conduct consists of "a series of acts over a period of time, however short, evidencing a continuity of purpose." Second, the crime of stalking requires repeated episodes of harassing

191. Indeed, the New York courts have struggled in interpreting the language of that state’s harassment statute. Under the statute, the offense requires that the defendant "engage[] in a course of conduct or repeatedly commit[] acts which alarm or seriously annoy such other person.” N.Y. PENAL LAW § 240.25 (S) (McKinney 1989). In People v. Hotchkiss, 300 N.Y.S.2d 405 (Civ. Ct. 1969), the court held that a single verbal or physical act, in this case a threat to shoot a deputy sheriff, did not constitute a course of conduct. Id. at 407. In People v. Caine, 333 N.Y.S.2d 208 (Crim. Ct. 1972), another New York court held that the statute required both a course of conduct and repeatedly committed acts. Id. at 209. Thus, one isolated act could not constitute a course of conduct. Caine involved a motorist’s obscene language directed toward a police officer during a traffic stop. Id. at 209. However, in People v. Tralli, 387 N.Y.S.2d 37 (App. Term. 1976), yet another New York court departed from these interpretations and held that, because of the disjunctive language found in the statute, it was unnecessary for a defendant to repeatedly commit acts. Id. at 38. Thus, under Tralli, a single isolated act could constitute harassment under the statute. Tralli involved a situation in which the defendant maneuvered the victim into a position whereby she would readily observe his exposed genitals. Id. at 37. One commentator has suggested that these inconsistent results can be reconciled by the fact that the conduct in Tralli was planned and deliberate, whereas Caine and Hotchkiss involved isolated verbal threats in the midst of emotional outbursts. Gunderson, supra note 10, at 238. Gunderson noted that "[p]erhaps the distinction lies in the court’s ability to perceive the presence or absence of specific intent, rather than one or more acts." Id.; see People v. Malauisky, 485 N.Y.S.2d 925, 928 (Crim. Ct. 1985) ("[T]he key to establishing the violation of harassment is evidentiary facts which support or tend to support an intent to annoy, harass or alarm...") (emphasis added). In any event, the New York Court of Appeals has apparently resolved this issue in the case of People v. Wood, 451 N.E.2d 485 (N.Y. 1983). In this case, a heated argument occurred at a wedding reception at a private home and police were summoned. When an officer attempted to separate the defendant and another person, the defendant uttered an obscenity and slapped her arm away from him. In a memorandum opinion, the court stated that "[b]ecause no evidence was presented at trial that defendant’s conduct was anything other than an isolated incident, the People failed to establish that defendant was guilty of harassment under [N.Y. PENAL LAW § 240.25 (5) (McKinney 1989)]." People v. Wood, 451 N.E.2d 485 (N.Y. 1983); see also Malauisky, 485 N.Y.S.2d at 929 (stating that one brief conversation does not establish a course of conduct). Notwithstanding the Tralli case, the general rule seems to be that harassment requires more than an isolated verbal or physical act. See, e.g., Commonwealth v. Tedesco, 550 A.2d 796, 799 (Pa. Super. Ct. 1988); Commonwealth v. Evans, 445 A.2d 1255, 1238 (Pa. Super. Ct. 1982); Commonwealth v. Schnabel, 344 A.2d 896, 898 (Pa. Super. Ct. 1975); Bachowski v. Salamone, 407 N.W.2d 533, 537 (Wis. 1987).

192. See Duncan, 363 A.2d at 805 (construing PA. STAT. ANN. tit. 18, § 2709(3) (1983)) (emphasis added); Hotchkiss, 300 N.Y.S.2d at 406 (construing N.Y. PENAL LAW § 240.25(S) (McKinney 1989)) (emphasis added).

such an interpretation of the Oklahoma statute would essentially add another dimension to the element of course of conduct.

For example, under the first step of the analysis, the defendant's entreaties for cunnilingus in Duncan could be considered a course of conduct on that one occasion as a result of their proximity to each other in terms of both time and location. Under the second step, such a course of conduct would then have to be repeated on at least one other separate occasion. While such a construction does not, of course, eliminate proximity problems in course of conduct issues, it does help ensure to some extent that prosecutors and the courts focus upon the kind of repeated harassment that the statute was designed to combat, rather than upon isolated instances of annoying behavior. This is especially true when the course of conduct element is applied in conjunction with the requirements of substantial emotional distress, specific intent, a credible threat of bodily harm or death, and the exclusion of constitutionally protected activity.

Perhaps a more persuasive constitutional challenge could be mounted regarding the word "follows" in the definition of stalking. The statute requires that a defendant "willfully, maliciously, and repeatedly follow[] or harass[] another person." However, "follow," an everyday word, has a much clearer "plain meaning" than "harass." In the context of an anti-stalking statute, the word "follow" takes on the added gloss of being synonymous with the word "stalk," that is, following in such a way as to menace another person. In addition, the Oklahoma statute requires more than one incident of following or harassing in order to convict a defendant of stalking.

Moreover, any ambiguity that may exist is further diminished by the requirement of the second element of the crime of stalking — a "credible threat." The statute

194. Id. § 1(A), 1992 Okla. Sess. Law Serv. at 335. Under the statute, a defendant must "willfully, maliciously, and repeatedly follow[] or harass[]." Id. A question arises whether the word "repeatedly" modifies "follows" and "harasses" or only "follows." Although both interpretations are plausible, the former allows courts to focus upon the repetitive type of behavior that the statute was designed to address. By requiring repeated incidents of harassment or following, courts may ensure that a Duncan-like situation (see supra notes 168-71 and accompanying text) is not prosecuted as a true case of stalking. The anti-stalking statute was enacted to combat a particular problem and should not be given a lax interpretation in order to encompass isolated instances of annoying conduct.

195. Id.

196. Courts will generally apply statutory terms in accordance with their plain meaning. LaFave & Scott, supra note 38, at 76; see Gilbert v. State, 765 P.2d 1208, 1210 (Okla. Crim. App. 1988) ("[I]t is a common rule of statutory construction that words in a statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."). This is especially true "if they can think of some good reason which the legislature might have had in mind in providing what it literally seems to have provided." Id. In the case of the Oklahoma stalking law, the plain meaning of the term "follow" would seem to be fairly easy to grasp in the context of stalking, especially when coupled with the requirements of specific intent and a credible threat of death or great bodily harm.

197. See Act of Apr. 20, 1992, § 1(A), 1992 Okla. Sess. Law Serv. at 335 ("repeatedly follows or harasses") (emphasis added). See the appendix to this comment for the full text of the Oklahoma anti-stalking statute.

198. Id.
defines a credible threat as one "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 for the safety of a member of his or her immediate family." As with the term "harass," the statute provides guidelines and subdefinitions which serve to clarify this phrase. 

At the outset, the threat must be made with both "the intent and the apparent ability to carry [it out]." In addition, according to the statute, the court must apply an objective standard (i.e. "reasonableness") in order to determine whether the threat would cause the victim to fear for her safety or for the safety of an immediate family member. This is consistent with the requirement under the definition of "harass" that the conduct must rise to such a level as to cause a reasonable person substantial emotional distress.

The definition is further refined, and thus made clearer, by the requirement that the nature of the threat be either against the person's life or one which includes the promise to inflict "great bodily injury." A threat against a person's life is clearly a specific type of threat which entails one idea — the death of the person receiving the threat. In contrast, the phrase "great bodily injury" encompasses less serious, but still severe, threats toward a person's safety. In construing a statute criminalizing assault, the Oklahoma Court of Criminal Appeals has stated that the phrase "great bodily injury" is "sufficiently clear to give notice to those persons potentially liable . . . [and] adequately protects any accused from arbitrary capricious enforce-

Finally, the definition of the phrase "credible threat" is further clarified under the statute by the inclusion of a detailed description of exactly which persons constitute "member[s] of the immediate family." The statute states that members of the immediate family include any "spouse, parent, child, person related within the third degree of consanguinity or affinity or any other person who regularly resides in the household or who regularly resided in the household within the prior six . . . months." This definition, although encompassing a wide range of persons, employs standards which are capable of delineating the class of persons within its scope.

200. Id. (emphasis added).
201. Id.
202. Id.
203. State v. Madden, 562 P.2d 1177, 1179-80 (Okla. Crim. App. 1977); see also State v. Blacksten, 387 P.2d 467 (Idaho 1963) (upholding the phrase "grievous bodily injury"); Froedge v. State, 233 N.E.2d 631 (Ind. 1968) (upholding the phrase "great bodily harm"). In Madden, the Oklahoma Court of Criminal Appeals construed the phrase "great bodily injury" in the context of a statute which prohibited conduct. In the context of the Oklahoma anti-stalking law, the phrase is used to delineate prohibited speech. Since these two situations are qualitatively different, the analysis may be different also. Great bodily injury may be readily ascertainable when referring to actual physical injury to a person; but may be somewhat less clear when referring to a specific type of threat.
In order to comply with constitutional due process, the legislature is not required
to, and indeed cannot, draft a criminal statute in terms which define the elements
of the offense with mathematical precision. All that is required is sufficient
clarity to enable a reasonable person to be placed on notice as to the type of
conduct prohibited by the statute and sufficient guidelines for law enforcement
authorities in order to guard against arbitrary or discriminatory enforcement. The
Oklahoma anti-stalking law meets this fundamental requirement. It identifies a
particular problem and sets forth a reasonably clear solution. The wisdom or
efficacy of the policies implemented in the statute are, of course, open to debate and
criticism. However, the statute itself is drafted well enough to enable it to withstand
a constitutional attack on void-for-vagueness grounds.

C. Overbreadth

Statutes which are drafted with enough precision to withstand vagueness
challenges may nevertheless be unconstitutionally overbroad. Overbreadth is the
doctrine that a criminal law may be held unconstitutional, even when it is not vague,
if the statutory proscription encompasses conduct or acts which are constitutionally
protected. As a general rule, constitutional rights are personal and may not be asserted vicariously. It is well settled that "a person to whom a statute may be
constitutionally applied will not be heard to challenge that statute on the ground that
it may conceivably be applied unconstitutionally to others, in other situations not
before the Court."

Under this rule, a defendant accused under the Oklahoma anti-stalking law would
ordinarily have to show that his conduct was constitutionally protected or otherwise
not illegal; it would not be enough to show that the statute could be applied in such
a way as to infringe upon another person's rights. However, one major exception
to this general rule concerns statutes which may conceivably regulate conduct falling
within the scope of the First Amendment.

The Supreme Court has recognized that First Amendment freedoms require
"breathing space." As a result, statutes which seek to regulate in this area must

205. See supra notes 141-42 and accompanying text.
206. See supra notes 139-40 and accompanying text.
207. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972). In this case, the Court observed that
"[a] clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally
protected conduct." Id. (quoting Zwickler v. Koota, 389 U.S. 241, 249-50 (1967)). The Court noted that
"overbroad laws, like vague ones, deter privileged activity." Id.; see also Armstrong v. State, 811
1978).
208. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973); McGowan v. Maryland, 366 U.S. 420, 429-
30 (1961).
209. Broadrick, 413 U.S. at 610.
210. Id. at 611. Another exception to this general rule occurs when "individuals not parties to a
particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights
themselves." Id.
211. Id.; Gooding v. Wilson, 405 U.S. 518, 522 (1972); NAACP v. Button, 371 U.S. 415, 433
(1963); see also LAFAVE & SCOTT, supra note 38, at 96-97.
be narrowly drawn. By invalidating overbroad statutes, the Court guards against the "chilling effect" on protected speech that such statutes are likely to cause. In order to implement these policies, the Court has altered the traditional rules of standing in order to allow attacks on overly broad statutes without a requirement that the person making the attack show that "his own conduct could not be regulated by a statute drawn with the requisite narrow particularity."

Because application of the overbreadth doctrine in this fashion is "strong medicine," the Court has applied it sparingly and only as a last resort. In addition, the application of facial overbreadth challenges may be curtailed in situations where a limiting construction has been or could be placed upon the challenged statute. More importantly, the Court has held that where conduct, and not merely speech is involved, the overbreadth of the statute "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

In light of these considerations, the Oklahoma anti-stalking statute should not be found to be unconstitutionally overbroad. The Oklahoma law was drafted in order to ensure that the problem of stalking would be properly addressed by the statutory language; yet it was also worded in such a way as to be flexible enough to cover the wide variety of fact situations in which stalking occurs. Under the Oklahoma statute, as previously discussed, stalking basically consists of two elements: (1) repeatedly following or harassing a person, and (2) making a credible threat to that person or his or her family.

Under the statute, harassing conduct which encompasses constitutionally protected activity is expressly excluded. Since the statute is worded in the disjunctive with regard to the first element, it would appear that harassing conduct is not required in order to convict under the statute. Presumably, repeatedly following the person and issuing a credible threat would constitute stalking under the statute. Since this statutory definition involves conduct as well as speech, any overbreadth must be not only real, but substantial when judged in relation to the statute's legitimate scope.

Moreover, it is not even clear if the statute on its face infringes upon any First Amendment freedoms. Constitutionally protected activity is clearly excluded from

212. Gooding, 405 U.S. at 522; see also Susan M. Finegan, Anti-Harassment Disciplinary Policies: A Violation of First Amendment on the Public University Campus?, 11 B.C. THIRD WORLD L.J. 107, 126 (1991) (stating that even though the government may constitutionally prohibit speech under certain conditions, the regulations must be written with "narrow particularity") (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

213. Finegan, supra note 212, at 126 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967)).


215. Broadrick, 413 U.S. at 613.

216. Id.

217. Id. at 615; see, e.g., United States v. Maxton, 940 F.2d 103, 106 (4th Cir. 1991).


219. Id. § 1(E)(2), 1592 Okla. Sess. Law Serv. at 336.
the scope of harassment.220 Furthermore, although it may not be illegal to "follow" a person,221 the statute requires repeated followings coupled with a credible threat of great bodily injury or death.222 The type of threats contemplated in the Oklahoma statute are clearly at the fringe of expressions protected by the First Amendment and very probably fall outside the scope of protected speech.

In the landmark case of Chaplinsky v. New Hampshire,223 the Supreme Court observed that the freedoms protected under the First Amendment are not absolute.224 The Court recognized certain categories of speech which are of such slight social value in the exchange of ideas that any benefit gained from them is outweighed by social interests in order and morality.225 Such categories include "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."226 In addition, the Court observed that epithets or personal abuse cannot be considered to further the policies underlying the First Amendment's protection of speech, namely, communication of information, opinions, and ideas.227

The term "credible threat," as defined and used in the Oklahoma anti-stalking statute, would easily fall within the category of speech not protected by the First Amendment under Chaplinsky. In the context of the statute, the prohibition on threatening language is clearly intended to encompass more than mere unpleasant verbal contact among citizens. The threat must be against the life of the person or one which includes a promise to cause great bodily injury.228 Moreover, the threat must be "credible."229 Not only must the person making the threat intend to make it, he must also have the apparent ability to carry out the threat.230 Such a requirement goes a long way toward making such statements "fighting words" under Chaplinsky.

The Supreme Court considered a statute prohibiting threats in the case of Watts v. United States.231 This case involved a federal statute which punished a person

220. Id.
221. Some state anti-harassment statutes contain provisions which seem to actually outlaw conduct consisting of following another person in a public place. See, e.g., Ky. REV. STAT. ANN. § 525.070(1)(e) (Michie/Bobbs-Merrill 1990); N.Y. PENAL LAW § 240.25(3) (McKinney 1989); Pa. STAT. ANN. tit. 18, § 2707(2) (1983). However, such statutes also require that the defendant have the intent to harass or annoy the person being followed. Id. Legitimate activity is excepted. See, e.g., People v. Weiler, 72 N.E. 1127 (N.Y. 1904) (holding conduct of duly licensed private detective in "shadowing" a person not to be harassment); Di Donna v. Di Donna, 339 N.Y.S.2d 592 (Fam. Ct. 1972) (holding efforts to save marriage not to be harassment).
223. 315 U.S. 568 (1942).
224. Id. at 571.
225. Id. at 572.
227. Chaplinsky, 315 U.S. at 512.
229. Id.
230. Id.
for "knowingly and willfully . . . [making] any threat to take the life or to inflict bodily harm upon the President of the United States." The statute was found to be constitutional on its face because of the Court's judicial narrowing of the term "threat." The Court stated that, in order for a conviction under the statute to stand, it must be shown that the defendant had made a "true threat" as distinguished from political hyperbole which is constitutionally protected speech.

The Oklahoma Court of Criminal Appeals has recognized that such speech is not entitled to constitutional protection in situations analogous to a typical pattern of stalking. In Gilbert v. State, the defendant violated a protective order issued against him pursuant to the Protection from Domestic Abuse Act. The order enjoined the defendant from, among other things, assaulting, molesting or otherwise interfering with his wife and from approaching her residence. Approximately one month later, however, the defendant was arrested and charged with violating the order by kicking down his wife's door, breaking out the rear window and damaging the grille of her car, and threatening her over the telephone. The defendant was given a six month suspended sentence on each charge.

Several months later, the state made a motion to revoke the suspended sentences on the basis of several harassing telephone calls made by the husband to the wife. The phone calls involved abusive language and a host of assorted threats including physical harm, preventing the wife from seeing her son, and an ominous warning that someone may have tampered with the brakes on her car. The defendant argued that the Act was unconstitutionally overbroad because it interfered with a person's right to freedom of speech with his or her spouse.

Addressing this argument, the court rejected "any notion that the First Amendment to the United States Constitution or article 2, section 22 of the Oklahoma Constitution ever covered threatening or abusive communications to persons who have demonstrated a need for protection from an immediate and present danger of domestic abuse." This language clearly supports the policies of the Oklahoma anti-stalking statute. The court in Gilbert recognized that abusive and threatening language of the type contemplated in the anti-stalking statute is simply not worthy of constitutional protection.

In sum, the Oklahoma anti-stalking statute should withstand a constitutional challenge on overbreadth grounds. The statute's effect on constitutionally protected speech is tenuous at best. There is definitional language in the statute which expressly excludes protected activity from its scope. The statute is not aimed solely

232. Id. at 705 (quoting 18 U.S.C. § 871(a) (1917)).
233. Id. at 707.
234. Id. at 708; see, e.g., United States v. Maxton, 940 F.2d 103, 106 (4th Cir. 1991); United States v. Lampl, 573 F.2d 783 (3d Cir. 1978); United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).
236. Id. at 1209.
237. Id. at 1209-10.
238. Id. at 1210.
239. Id.
at speech per se. Rather, it encompasses a range of nefarious conduct which includes speech elements. Moreover, it is highly doubtful that the speech the statute does seek to limit is entitled to any protection under the First Amendment. In any event, authoritative, narrowing constructions and interpretations by Oklahoma courts can cure any constitutional infirmities that the statute may contain.

IV. Conclusion

In light of the avalanche of anti-stalking statutes across the nation, it is difficult to judge whether the behavior described as "stalking" is a new and increasing social problem, or whether such behavior has existed in society all along and only recently has been accorded recognition by state governments as a specific problem. Regardless of how the problem is viewed, it is clear that the states, and perhaps the federal government, are looking toward criminal legislation for solutions.

The specific anti-stalking law enacted by the Oklahoma legislature incorporates broad language in an effort to encompass the varied methods that stalkers use to threaten and harass their victims. As a result, the statute is subject to the constitutional challenges of vagueness and overbreadth. As written, Oklahoma's anti-stalking law comes perilously close to being unconstitutional on either of these grounds. It will be the task of the Oklahoma judiciary to implement the new law in a way that strikes the delicate balance between the rights of an accused and those of stalking victims.

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APPENDIX:
OKLAHOMA'S ANTI-STALKING LAW

SECTION 1. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1173 of Title 21, unless there is created a duplication in numbering, reads as follows:

A. Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat as defined in subsection E of this section against that person or a member of the immediate family of that person as defined in subsection E of this section, upon conviction, shall be guilty of the crime of stalking, which is a misdemeanor punishable by imprisonment in a county jail for not more than one (1) year or by fine of not more than One Thousand Dollars ($1,000.00), or by both such fine and imprisonment.

B. Any person who violates the provisions of subsection A of this section when:

1. There is a temporary restraining order, a protective order or emergency ex parte order, or an injunction in effect prohibiting the behavior described in subsection A of this section against the same party, when the person violating the provisions of subsection A of this section has actual notice of the issuance of such order or injunction; or

2. Said person is on probation or parole, a condition of which prohibits the behavior described in subsection A of this section against the same party; or

3. Said person, within (10) years preceding the violation of subsection A of this section, completed the execution of sentence or conviction of a crime involving the use or threat of violence against the same party, or against a member of the immediate family of such party, upon conviction, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for a term not exceeding five (5) years or by a fine of not more than Two Thousand Five Hundred Dollars ($2,500.00), or by both such fine and imprisonment.

C. Any person who commits a second act of stalking within ten (10) years of the completion of sentence for a prior conviction under subsection A of this section, upon conviction thereof, shall be guilty of a felony punishable by imprisonment in the State Penitentiary for a term not exceeding five (5) years, or by a fine of not more than Two Thousand Five Hundred Dollars ($2,500.00), or by both such fine and imprisonment.

D. Any person who commits an act of stalking within ten (10) years of the completion of execution of sentence for a prior conviction under subsections B and C of this section, shall, upon conviction thereof, be guilty of a felony punishable by a fine of not less than Two Thousand Five Hundred Dollars ($2,500.00) nor more than Ten Thousand Dollars ($10,000.00), or by imprisonment in the State Penitentiary for a term not exceeding ten (10) years, or by both such fine and imprisonment.

E. For purposes of this section:

1. "Harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms or annoys 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 distress to the person;

2. "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct";

3. "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 for the safety of a member of his or her family. The threat must be against the life of or a threat to cause great bodily injury to a person; and

4. "Member of the immediate family" means any spouse, parent, child, person related within the third degree of consanguinity or affinity or any other person who regularly resides in the household or who regularly resided in the household within the prior six (6) months.