Taking a Byte Out of Crime: E-Mail Harassment and the Inefficacy of Existing Law

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TAKEING A BYTE OUT OF CRIME:
E-MAIL HARASSMENT AND THE INEFFECTICY OF
EXISTING LAW

Gene Barton

Abstract: Computer abuse is advancing as quickly as computer technology. The laws, however, have yet to address computer harassment to a significant degree. Existing law is insufficient, and current efforts fall short of what is needed. This Comment identifies the need for new law, examines the shortcomings of what has been tried to date, and proposes general concepts for a comprehensive computer harassment law. This Comment concludes with a proposal for specific legislation for the state of Washington.

Much like other technological advancements, the improved accessibility and flexibility of the computer not only have enhanced human capability but also have broadened the opportunity for mischief. As a result, federal and state laws now address several types of computer misuse and abuse in the commercial and research sectors, such as intrusive and unauthorized computer access, or "hacking," the fraudulent transfer of funds, and viral vandalism. As personal computer use has expanded, computer abuse has invaded the personal arena as well. It is time again for the law to catch up to the technology.

Electronic mail, or E-mail, is one form of technology that has outstripped the law's ability to keep pace. As E-mail use has grown,

2. The Computer Abuse Amendments Act of 1994 broadened the federal law regarding the introduction of computer viruses. The act was a small part of the much larger omnibus crime bill, the Violent Crime Control and Law Enforcement Act of 1993, which President Clinton signed into law in September 1994.
4. In 1991, it was estimated that the more than 8 million Americans using E-mail for business purposes alone, up from 430,000 in 1980, would transmit approximately 8.5 billion messages that year. Jennifer J. Griffin, The Monitoring of Electronic Mail in the Private Sector Workplace: An Electronic Assault on Employee Privacy Rights, 4 Software L.J. 493, 494–95 (1991).
5. The number of E-mail addresses in the United States has increased by 26,250,000 since 1987. Rick Tetzel, Surviving Information Overload, Fortune, July 11, 1994, at 60, 62.
6. The Microsoft Network will be included with Microsoft's Windows 95 software, due for release later this year. It will be preloaded on virtually every Intel-based personal computer sold, which is expected to add instant network access to 40 million computer purchases annually. Paul Andrews, 'Network' Rattles the Competition, Seattle Times, Nov. 15, 1994, at A1, A21.
new forms of computer mischief unique to E-mail and its personal applications also have arisen. Yet few laws address this problem. For example, much of what might be illegal harassment if committed via other media, such as the telephone, slips through the fingers of existing law. Although the need for new laws has been recognized, attempts to use or amend existing state and federal laws do not account for the full scope of E-mail technology or harassment.

This Comment seeks to direct attention to the threat E-mail harassment poses to computer privacy and provide some guidance in developing laws in the area. Part I discusses the emerging nature and scope of E-mail harassment and the need for criminal laws addressing the problem. Part II then explores ways that existing laws might be used to combat some forms of E-mail abuse and explains why efforts to apply these laws to E-mail harassment in general will fail. Part III next examines the shortcomings of two congressional bills designed to address the problem. Part IV discusses general provisions for a comprehensive E-mail harassment law. Finally, part V presents a proposal for model legislation in Washington.

I. THE EMERGING NOTION OF E-MAIL HARASSMENT AND THE NEED FOR CRIMINAL LAWS

The technology that has facilitated communication between once-isolated computer users has an unfortunate side effect. It also fosters a wide range of abuse, from the innocent to the intentional and harmful. The latter, which makes headlines on a regular basis, is best dealt with in a criminal context that can serve notice on would-be violators, act as a deterrent, and impose meaningful penalties.

When computers first evolved from massive machines that filled entire rooms to devices no larger than portable television sets, each computer user was isolated. Today, because of major international computer networks, anyone with a computer or access to one can enjoy inexpensive and virtually instantaneous communication with any other network user in the world. These E-mail systems make possible the free exchange of messages in a manner similar to talking on the telephone.

3. The federally subsidized Internet connects more than 5,000 networks and 1.7 million computers throughout the United States and abroad, and is now frequented by more than 20 million users. Davis, supra note 1, at 418 n.40. Growth on the Internet is estimated to be as high as 15% a month. Michael W. Miller, Contact High, Wall St. J., Nov. 15, 1993, at R4.


5. Griffin, supra note 2, at 498.
and writing a letter, but with advantages over both, combining the telephone's immediacy with a letter's thoroughness.6

E-mail is computer text sent instantaneously over telephone lines,7 requires no middleman other than a network relay computer, and needs no human receiver on the other end, merely another computer ready to receive the incoming message.8 Some internal E-mail systems can be set up without using telephone lines by connecting desktop computers through a main-frame computer.9 In a basic telephone connection between two computers,10 each user needs a computer with word processing capabilities; a modem, which connects computers over telephone lines; a telephone; and communications software.11 Under more elaborate telephone set-ups, an E-mail network provides services to subscribers.12 The sender types the message and designates its destination.13 The network's central computer then either directly transmits the message to the recipient's “mailbox”14 or stores it until the recipient electronically collects it.15

Due to the flood of users caused by E-mail's ease of access16 and relatively low cost, E-mail sent for improper purposes, including harassment, has followed.17 In the E-mail lexicon, a harassing message is known as “flaming,” a general term describing vitriolic E-mail sent to the

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8. Milrad, supra note 6, at 20.
10. Griffin, supra note 2, at 496–97 n.18.
11. Id.
12. Id.
13. Id.
14. “The 'mailbox' is a storage area for digitally encoded information; the message remains there until the recipient checks the mailbox and reads his messages. Either party may store the message electronically, on magnetic media, or print the message onto paper.” John Robinson Thomas, Legal Responses to Commercial Transactions Employing Novel Communications Media, 90 Mich. L. Rev. 1145, 1146 n.9 (1992).
15. Griffin, supra note 2, at 496–97 n.18.
16. Many major universities, such as the University of Washington, Yale, and Harvard, provide free E-mail access for their students, staff, and faculty. Laura Duncan, Egregious E-Mail Etiquette Sparks Seminar, Chi. Daily L. Bull., June 17, 1994, at 3.
17. Rochelle Sharpe, Work Week, Wall St. J., Nov. 22, 1994, at A1 (“Electronic mail opens new avenues for harassing colleagues . . . . Some employees sexually harass coworkers via computer, sending vulgar notes. Divorcing couples who work together have signed on using their spouse's name and password—then sent inflammatory messages to their spouse's supervisor.”).
person insulted or derided. In its most egregious manifestation, flaming is a massive "mailing" of vituperative, sexually suggestive, or meaningless messages by a group of E-mail users acting either in concert or not, which is designed to intimidate one or more other users. The targets often are women. Another form of E-mail abuse is the mail bomb or letter bomb, a long E-mail message that ties up a recipient's system by consuming its computer memory.

Using a telephone to constantly call another person, with the intent either to harass the person when the phone is answered or to tie up that person's telephone, is illegal in most states, as are the telephone equivalents of flaming and other abusive E-mail techniques. Although E-mail harassment can be more severe than telephone harassment, few statutes apply to E-mail.

This legal gap is best handled criminally, not in a civil or private commercial context, where an E-mail abuser faces little sanction other than the temporary loss of access to an E-mail network. Given the bulk of messages and subscribers that E-mail networks handle, they are ill-equipped and too inaccessible to efficiently address complaints of E-mail abuse. Networks tend to be distant and impersonal, dealing with

19. Id. at 54 ("Some men say the on-line hostility [toward women] comes from resentment over women's slowly entering what has been an almost exclusively male domain."). See also Deborah Tannen, Gender Gap in Cyberspace, Newsweek, May 16, 1994, at 52, 53.
20. Paul Andrews, Behind the Mask, Seattle Times, Nov. 20, 1994, at J1, J6 ("Mail bombs are going to have to be controlled. Otherwise it's the death of the system because bombs tax resources so heavily.") (quoting University of Wisconsin Professor Leonard Levine, who moderates an Internet forum on computer privacy).
23. In fact, many people say and do things on E-mail that they would not dare say or do over the telephone. See Owen Edwards, The Grating Communicator, Forbes ASAP. Oct. 25, 1993, at 160, 161; Deborah Asbrand, E-mail 'Flame' Messages Can Ignite Office Angst, Infoworld, Dec. 6, 1993, at 74.
24. See infra notes 31–42 and accompanying text.
25. For the civil implications of E-mail and other network abuse, see Henry H. Perritt Jr., Tort Liability, the First Amendment, and Equal Access to Electronic Networks, 5 Harv. J.L. & Tech., Spring 1992, at 65. See also Cubby v. CompuServe, 776 F. Supp. 135 (S.D.N.Y. 1991) (concerning libel suit over statements made in newsletter available through computer network).
26. Independent networks and those "providing services in connection with Internet impose [content-based] 'acceptable use policies' as a condition of supplying their services." Perritt, supra note 25, at 111.
complaints only through warnings to abusers and, ultimately, access denials. Local authorities are closer, act more directly, and wield a strong deterrent. Laws criminalizing anonymous E-mail also may have the dual effect of increasing the use and effectiveness of networks. Finally, mere access sanctions fail to recognize the harm that E-mail abuse causes the recipient. A person who sends abusive E-mail is likely to continue such abuse in other ways even if access is cut off.

II. EXISTING LAWS DO NOT ADEQUATELY ADDRESS THE NATURE AND SCOPE OF E-MAIL HARASSMENT

Many prosecutors facing cases of E-mail harassment will be hamstrung by laws written with other media and/or technology in mind, that fail to address the issue directly, or that are too inflexible to encompass the new technology. Prosecutors could apply existing laws in limited instances, but no general solution is available, even within telephone harassment laws, unless new laws are passed.

Only Alabama, Idaho, New Hampshire, and New York specifically include electronic communication other than the telephone

27. Adam S. Bauman, Computer Pirates Set Sail Upon the Internet, Seattle Times, Nov. 3, 1994, at A1, A2 ("By design, the Internet lacks any central administrative authority, and security procedures could interfere with the philosophy of free and open communications that is integral to the network.").

28. Andrews, supra note 20, at J6 ("In whatever permutation, anonymity may have to ebb for the Internet to be taken seriously as a communications organ and financial-transaction medium. As it stands, 'People don't know what to trust on the Internet.'") (quoting University of Wisconsin Professor Leonard Levine).

29. Cristina Carmody, Stalking by Computer, A.B.A. J., Sept. 1994, at 70 (E-mail is "'just another tool a sophisticated, intellectual, creative stalker will use. They come up with whatever they can.'") (quoting Michigan domestic violence expert Kathleen Hagenian).

30. The inherent difficulties of applying outmoded law and similar examples of historical conflict between old laws and new technology were illustrated in a 1992 symposium at the Villanova University Law School. See Symposium, The Congress, the Courts and Computer Based Communications Networks: Answering Questions About Access and Content Control, 38 Vill. L. Rev. 319, 343-44 (1993).

31. Ala. Code § 13A-11-8(b)(1)(a) (1994) specifically includes "electronic communication" within its proscribed forms of harassing communications. The statute, oddly enough, was passed in 1978, well before the E-mail explosion. Its language is remarkably similar to that of the former Colorado harassment statute ruled unconstitutionally overbroad in Bolles v. People, 541 P.2d 80 (Colo. 1975). This specific issue has not been litigated in Alabama.

32. Idaho Code § 18-6710(3) (Supp. 1994) defines telephone as "any device which provides transmission of messages, signals, facsimiles, video images or other communication between persons who are physically separated from each other by means of telephone, telegraph, cable, wire or the projection of energy without physical connection." This language was added in 1994.
within a general or telephone harassment statute. Michigan and three other states include electronic communication among the elements of "unconsented contact" in anti-stalking statutes. Several states include written communication, which could be applied to E-mail, within the proscriptions of general harassment statutes. Federal law does not define any crimes related to sending E-mail.

Other laws could be applied to certain offenses involving E-mail. Michigan defines crimes of malicious annoyance by writing and malicious use of a service provided by a communications common carrier. Other states present possible applications within their anti-stalking statutes. Washington's statute governing sexual exploitation of children makes it a misdemeanor or a felony to communicate with a minor for immoral purposes.

33. N.H. Rev. Stat. Ann. § 644:4(I) (Supp. 1994) defines "communicates" as "to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail, courier service or electronic transmission." This language was added in 1994.

34. N.Y. Penal Law § 240.30 (McKinney Supp. 1995) includes "communication . . . initiated by mechanical or electronic means" as proscribed forms of harassing communications. This language was added in 1992.

35. R.I. Gen. Laws § 11-35-17 (1994) contains a more vague reference to "telecommunication device," which probably would include a computer-modem-telephone hookup.


38. The Electronic Communications Privacy Act, 18 U.S.C. § 2511 (1994), includes privacy protections for electronic communication, making it illegal for a person to intercept or gain unauthorized access to electronic communication, or alter or obtain stored communications, or to disclose the contents of intercepted E-mail to others. Hernandez, supra note 7, at 29-30.


42. Wash. Rev. Code § 9.68A.090 (Supp. 1995). The recent E-mail case of a 51-year-old Seattle man, Alan Barlow, was prosecuted under this statute. Barlow contacted underage girls via E-mail and told them of his sexual fantasies about them, asked them to send him nude photographs through regular mail, and arranged personal meetings. Prosecutors said Barlow exchanged E-mail with at least eight adolescent girls over a period of nearly three years. Dan Raley, Man Charged in Computer 'Date' with Teen, Seattle Post-Intelligencer, July 21, 1994, at B1, B2. Barlow pleaded guilty on March 23, 1995, to two counts of communicating with a minor for immoral purposes, in
E-Mail Harassment

An example of the complexities involved in applying such laws to E-mail is being played out in Michigan, where the legislature included an electronic communications provision within its anti-stalking statute after several women testified that they had been harassed by computer users. In what has been recognized as the first prosecution of its kind in the nation, Andrew C. Archambeau has been charged with misdemeanor violations of the statute in connection with E-mail messages that he sent to a woman he had met through a video dating service. Between February 17, 1994, the day they met, and April 24, 1994, Archambeau sent the woman approximately twenty unwelcome or threatening E-mail messages, as well as ten letters and packages.

Because the anti-stalking statute under which Archambeau has been charged is of questionable constitutionality, his lawyers have attacked it on several grounds, alleging it to be overbroad and vague. Their strongest argument is that the statute lacks a specific intent element and addition to other charges. Telephone interview with Mary Koch, King County Prosecutor's Office (March 27, 1995).

43. Mich. Comp. Laws § 750.411h(1)(e) provides: "'Unconsented contact' includes, but is not limited to, any of the following: . . . (vi) Sending mail or electronic communications to that individual."


46. Five days after Archambeau and the woman met, she told him, "via E-mail, that she had no romantic interest in him. He persisted with E-mail, phone messages and postal mail. . . . She responded politely at first, but more angrily as time went on, at one point accusing him of stalking and warning him that she would contact the police if he did not stop."

After Archambeau left an allegedly threatening message on the woman's answering machine, the woman took the tape recording to a police detective, who contacted Archambeau and told him to stop contacting the woman.

"That night, Mr. Archambeau . . . sent her another E-mail note consisting of a symbol that in the peculiar language of E-mail means that the sender is sticking his tongue out at the recipient."

"The woman used a computer alias to respond, reminding Mr. Archambeau that he had been warned to stop messaging her."

"The woman and the police say that Mr. Archambeau then sent E-mail saying that he would discuss the woman's behavior with friends on America Online, her co-workers and supervisors, her family and former boyfriends. . . . Several days later charges were filed." Id.


48. Telephone interview with defense lawyer Matthew Leitman (Oct. 12, 1994). See discussion of constitutional challenges infra part IV.

49. Courts have consistently held that specific intent is vital when statutes seek to proscribe speech. See infra notes 101-107 and accompanying text.
thereby chills certain forms of protected speech.50 A leading Michigan case, People v. Taravella,51 and two commentators52 support the defense’s contentions. The trial court has yet to rule on the defense’s motion to dismiss.

Although the Michigan anti-stalking law could be amended to bring it into line with Taravella, merely adding electronic communication provisions to anti-stalking statutes does not adequately address the scope of E-mail harassment. Such a construction would not proscribe single incidents of anonymous, obscene, or threatening E-mail, or such abuse as mass flaming or letter bombs.53 The very essence of anti-stalking statutes requires repeated contact. Also, such statutes in general have been criticized for their inconsistent wording and application, questionable constitutionality, and duplication of existing harassment statutes.54

Therefore, resorting solely to anti-stalking statutes and other laws applicable only under isolated circumstances would proscribe some forms of E-mail harassment and not others. The varied language and potential for different interpretation and application of such statutes also would prevent the development of any consistent law. Although E-mail also conceivably could be addressed under laws concerning harassment through the mail, only a few states have such provisions and, even then, only within general harassment statutes that also include telephone harassment. Finally, while several federal offenses relate to the content of mail, such as obscene or threatening mail,55 there is no federal statute regarding harassment through the mail.

50. Leitman cites the examples of an aggressive protester in a public park or an intense debate on health care, which conceivably could cause the sort of emotional distress on which the statute hinges. Leitman interview, supra note 48.

51. 350 N.W.2d 780 (Mich. Ct. App. 1984). The Taravella case challenged the constitutionality of a state statute proscribing the malicious use of telephone and telegraph services, Mich. Comp. Laws § 750.540e, for text see supra note 21. In upholding the statute, the court said, “it is the malicious intent with which the transmission is made that establishes the criminality of the conduct. . . . An individual of ordinary intelligence would not have to guess as to the type and scope of conduct prohibited under our statute . . . .” 350 N.W. 2d at 784.


53. See supra notes 18–20 and accompanying text.


E-Mail Harassment

State and federal laws on telephone harassment provide the only realistic basis for a general application of existing law to E-mail. All fifty states have statutes governing telephone harassment. But like anti-stalking statutes and other existing laws that can be applied to E-mail only in piecemeal fashion, the language of most of the telephone harassment statutes restricts their application to E-mail.

The federal and Washington laws present two such examples. The phrase "by means of telephone" in the federal law could be interpreted to

56. Courts extended the First Amendment doctrines, developed in the context of disseminating print-on-paper information, to the first electronic communications in a straightforward manner. It is appropriate to use telephone technology as the basis for further extension to computer communications. Perritt, supra note 25, at 119.


58. The existing statutes, which depend upon communication over telephone lines, also would not address interoffice situations in which E-mail connections are made not via telephone lines, but through an internal computer network. See supra note 9 and accompanying text.

59. 47 U.S.C. § 223(a) (1988); Wash. Rev. Code § 9.61.230. For the text of the Washington statute, see infra note 65. The federal law prohibits obscene or harassing telephone calls in the District of Columbia or in interstate or foreign communications. The statute states:

(a) Whoever

(1) in the District of Columbia or in interstate or foreign communication by means of telephone—

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
incorporate E-mail and other electronic communication over telephone lines. However, specific references to telephone calls in two sections seem to negate such a broad reading.\textsuperscript{60} The connection is further complicated by the phrase "during which conversation ensues,"\textsuperscript{61} which does not describe E-mail in general.\textsuperscript{62} Finally, legislative intent presents a problem.\textsuperscript{63} The federal law was enacted in 1934, decades before the advent of fax machines and E-mail, and was last amended in 1989 without being adapted for such electronic communication.\textsuperscript{64}

The Washington law presents similar, if not graver, problems. The statute clearly limits its reach to "a telephone call."\textsuperscript{65} Giving this phrase

\begin{quote}
\textbf{(C)} makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

\textbf{(D)} makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

\textbf{(2)} knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section,

shall be fined not more than $50,000 or imprisoned not more than six months, or both.
\end{quote}

\begin{itemize}
\item \textsuperscript{60} 47 U.S.C. § 223(a)(1)(B), (D).
\item \textsuperscript{61} 47 U.S.C. § 223(a)(1)(D).
\item \textsuperscript{62} A court might deem E-mail sent with software that transmits messages in true or simulated voice or the exchange of E-mail messages in real time over "chat" lines as conversation, but probably would go no further. \textit{Webster's Ninth New Collegiate Dictionary} defines "conversation" as the "oral exchange of sentiments, observations, opinions, or ideas," which would argue against deeming the normal exchange of E-mail messages to be conversation. The leading case construing the federal telephone harassment law and its requirement of conversation also seems to require that some words be spoken, but not exchanged, in order to satisfy the statute's conversational aspect. \textit{United States v. Lampley}, 573 F.2d 783 (3d Cir. 1978). \textit{See infra} notes \textsuperscript{72-77} and accompanying text. \textit{But see} Ethan Katsh, \textit{Law in a Digital World: Computer Networks and Cyberspace}, 38 Vill. L. Rev. 403, 427 (1993) (noting the similarities between E-mail and the telephone). Katsh is a professor of legal studies at the University of Massachusetts, Amherst. \textit{See infra} notes \textsuperscript{68-71} and accompanying text for a discussion of Katsh's analysis.
\item \textsuperscript{63} Hernandez, \textit{supra} note 7, at 18, 28.
\item \textsuperscript{64} Bills introduced in the House and Senate would amend the federal law to address electronic communication. \textit{See infra} notes \textsuperscript{78-94} and accompanying text.
\item \textsuperscript{65} Wash. Rev. Code § 9.61.230 is titled: "Telephone calls to harass, intimidate, torment or embarrass." The statute, in pertinent part, provides:

\begin{enumerate}
\item Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or

\item Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or

\item Threatening to inflict injury on the person or property of the person called or any member of his family or household;
\end{enumerate}

\textsuperscript{474}
its ordinary and customary meaning,\textsuperscript{66} little else can be read into the statute. Had the legislature intended to include E-mail within the law, it easily could have done so when it last amended the law in 1992.

To convince a judge to extend the reach of the Washington or federal statute to E-mail would require Olympic-caliber legal gymnastics.\textsuperscript{67} Still, the connection is possible, though tenuous. First, the analysis by Professor Katsh\textsuperscript{68} equating E-mail with a telephone call\textsuperscript{69} could be applied as a first step in arguing to extend the reach of the Washington statute to E-mail.\textsuperscript{70} Second, his comparison of a computer receiving E-mail to an answering machine bolsters application of the federal law, but requires more roundabout reasoning to extend the reach of the section under which general E-mail harassment would have to fall.\textsuperscript{71}

The effort to apply federal law to E-mail centers on an analysis of United States v. Lampley.\textsuperscript{72} In Lampley, the appellant, Franklin D. Lampley, had been convicted on seven counts of making harassing interstate telephone calls during which conversation ensued. Some of the counts related to Lampley’s attempts to make collect telephone calls to a former girlfriend during a string of harassing calls made to her residence and that of her mother in 1974 and 1975. During some calls, neither Lampley nor the person called would speak. Only the operator would

\textsuperscript{66}. Certain rules of statutory construction apply, including the basic proposition that legislative enactments are to be given their ordinary and customary meaning in the absence of some clear indication of legislative intent to the contrary. See, e.g., State ex rel. State Retirement Bd. v. Yelle, 31 Wash. 2d 87, 201 P.2d 172 (1948); Parkhurst v. Everett, 51 Wash. 2d 292, 318 P.2d 327 (1957).

\textsuperscript{67}. Hernandez, supra note 7, at 28 (""Judges are not authorized to amend statutes even to bring them up-to-date.")."

\textsuperscript{68}. See supra note 62.

\textsuperscript{69}. Professor Katsh makes the following comparison:

In the simplest use of the computer for communication, an individual uses the machine in a manner similar to a telephone, composing a message and sending it over the network to another computer, which stores it until a second human looks at the information. In the future, when sounds may be sent as part of an e-mail message, and when we become accustomed to hearing sounds emanating from the computer, this connection to the telephone will become more obvious and the mail analogy may appear anachronistic.

Katsh, supra note 62, at 427.

\textsuperscript{70}. See Perritt, supra note 25, at 121 ("[P]rotection of commercial speech justifies no distinction between different types of electronic communication.").

\textsuperscript{71}. 47 U.S.C. § 223(a)(1)(D). The other sections of the federal statute, which deal with obscene and anonymous telephone calls and the continuous ringing of another person’s telephone, do not lend themselves to E-mail application.

\textsuperscript{72}. 573 F.2d 783 (3d Cir. 1978).
speak once the connection was made. Upon hearing that Lampley was attempting to make a collect call, the receiving party would hang up. Nevertheless, the court held that the law was violated. In addition, state courts have held that messages left on answering machines can violate telephone harassment laws. Combining these concepts, one could argue that because an E-mail message is equivalent to a message left on an answering machine under Professor Katsh’s analysis, and because verbal contact between the parties is not required for conversation to ensue under Lampley, a harassing E-mail message violates the federal law. But the Lampley court’s reliance on the fact that an operator spoke first to Lampley and then to the party who received the call weakens this argument. Lampley seems to require that some words be spoken, though not necessarily between the calling and receiving parties, before the federal law is violated.

Given the problems such interpretations entail, new laws addressing this new technology are an easier solution than forcing prosecutors to wrestle with laws that were designed for other times and other technologies. Such laws, however, must take a comprehensive approach to the particular problems E-mail abuse presents. This effort requires more than a mere attempt to equate E-mail harassment with telephone harassment.

73. Id. at 788 (“It was not the intention of Congress to permit the person who abuses telephonic communication to evade liability under § 223(1)(D) by the device of placing only operator-assisted calls. . . . Communication sufficient to constitute ‘conversation’ occurs when the operator speaks to the listening recipient.”). Similarly, it could be argued that it was not the intent of Congress to allow persons to evade the law by sending harassing messages via E-mail.

74. State v. Placke, 733 S.W.2d 847, 849 (Mo. Ct. App. 1987) (“The fact that the calls were recorded on tape has no less disturbing impact on the victim than had appellant spoken with him personally.”); see also Jones v. Municipality of Anchorage, 754 P.2d 275 (Alaska Ct. App. 1988); Harris v. State, 380 S.E.2d 345 (Ga. Ct. App. 1989). All of the statutes in question in these cases, however, either proscribed telephone harassment “whether or not conversation ensues” or had no conversation clause.

75. Such contortions are unnecessary under Wash. Rev. Code § 9.61.230(2) and 47 U.S.C. § 223(a)(1)(B), which do not require that conversation ensue.

76. See 573 F.2d at 788.

77. See supra note 62.
III. PROPOSED BILLS NOT SPECIFICALLY TAILORED TO THE NATURE AND SCOPE OF E-MAIL HARASSMENT ARE INSUFFICIENT

Bills introduced in the House and Senate to amend the federal law do not fully address the scope and nature of E-mail harassment and are insufficient solutions to the problem. Although the bills recognize that E-mail harassment is a national problem, more comprehensive legislation is required.

A. House Bill Fails to Address Scope of E-Mail; Technological Differences

The Electronic Anti-Stalking Act of 1994 is misguided, though it shows admirable intent. Simply adding electronic communications to the definition of "telephone" does not account for the technological differences between the telephone and the computer and the ways in which they are used. For example, calling that causes another person's telephone to ring "repeatedly or continuously" is not a phenomenon that can be applied to E-mail simply by equating E-mail with a telephone call. An E-mail solution requires statutory language that directly addresses mass flaming and letter bombs.

78. H.R. 5015. Representative Kweisi Mfume, D-Md., introduced the bill on Aug. 21, 1994. In pertinent part, it provides that:

Section 223(a) of the Communications Act of 1934 (47 U.S.C. 223(a)) is amended by adding at the end thereof the following new sentence: "For purposes of subparagraphs (B), (C), and (D), the terms 'telephone' and 'telephone call' include communications by means of computer modem or any other two-way wire or radio telecommunications device."

The bill did not receive substantive consideration before the 103rd Congress adjourned. Representative Mfume reintroduced the measure in the 104th Congress as H.R. 112. Telephone interview with Nyrma Colon, aide to Representative Mfume (Jan. 26, 1995).


80. The amendment does nothing under this section to make any use of E-mail a crime. Sending an E-mail message does not cause another person's computer or modem to ring "repeatedly or continuously." An E-mail user often is not aware that a message is coming in or has come in until the user accesses his or her mailbox, although some programs are designed to emit an audible signal when an E-mail message is received. An effort to apply the language of this section to E-mail simply will not work. One might argue that the policy that prompted Congress to outlaw continuous ringing of a person's telephone applies with equal force to tying up a person's computer line. But an amendment designed to address a specific technological problem should not have to rely upon such a strained analogy in order to be applicable to that technology.

81. See supra notes 18–20 and accompanying text.
The House bill has other shortcomings. By failing to extend its reach to the subsection on obscene telephone calls, the bill ignores the fact that an E-mail message may contain a "comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent." There is no technological nor legal reason for such an exclusion. An obscene E-mail message has the same potential as a telephone call for inflicting emotional distress on the recipient. The social and moral justifications for imposing criminal penalties for such communication also are the same. Further, there is no justification for setting out different definitions of the same term for different sections of the law. Such wording begs for inconsistent interpretation and application.

The amendment also does nothing to pull E-mail under the federal law's conversational requirement. Lampley demonstrates the difficulty of arguing that conversation ensues in the E-mail context. Thus, any attempt to apply the amendment to E-mail under 47 U.S.C. § 223(a)(1)(D), even with a modified definition of telephone and telephone calls, is likely to fail. The proper solution is general wording along the lines of subsection (a)(1)(B), which proscribes anonymous calls "whether or not conversation ensues." This would proscribe harassing E-mail whether messages are read in whole, in part, or at all. However, this distinction should not be restricted to anonymous messages. A person who reads harassing messages and a person who accesses her E-mail mailbox only to see that there are messages from someone whom she fears can be similarly affected.

83. The bill does not extend the new definition to subsection (a)(1)(A) because "telephone" does not appear in the current version of that subsection. The focus of the bill is not on language, but on harassment, repeated calls, intent, and threatening contacts. Colon interview, supra note 78. Subsection (a)(1)(A), however, is modified by the phrase "by means of telephone" in section (a)(1).
84. See United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978), in which the court stated:
Not all speech enjoys the protection of the First Amendment, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and in enacting [47 U.S.C.] § 223 the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives.
86. See supra notes 72–77 and accompanying text.
87. The reason for this distinction between anonymous telephone calls and those in which the caller is identified is not readily apparent, except to the extent that it serves to address some of the peculiarities of anonymous calls, such as "breathers" or callers who do not speak. See, e.g., People v. Klick, 362 N.E.2d 329, 331 (Ill. 1977). Some states do not make this distinction. See, e.g., Ala. Code § 13A-11-8(b)(1)(b) (1994).
88. The list of messages in an E-mail mailbox typically contains the E-mail address and/or name of the sender. The telephone corollary is a caller ID box, which displays the telephone number of
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B. Senate Bill: A More Reasoned Approach Still Falls Short

A Senate bill amending the federal law\textsuperscript{90} takes a much more reasoned approach, noting the differences between telephone and computer technologies.\textsuperscript{91} For example, it does not attempt to pull E-mail and other the person calling. Under federal law and similarly worded state statutes that proscribe repeated calling with the intent to harass whether or not conversation ensues, a person still may be harassed upon recognizing the number of the caller. \textit{See, e.g.}, 47 U.S.C. § 223(a)(1)(C); Wash. Rev. Code § 9.61.230(2).

89. The effect of unread messages is, in fact, one of the issues in the Archambeau case, \textit{supra} notes 43–46 and accompanying text. Archambeau contends that he could not have stalked the woman if she did not read all of the messages. Carmody, \textit{supra} note 29, at 70. The prosecution thinks otherwise. Although the victim did not read some of the messages which Archambeau sent to her, she saw them in her mailbox and recognized Archambeau as the sender. Under the prosecution’s theory, then, the woman was harassed each time she accessed her mailbox and saw a new message from Archambeau. Telephone interview with prosecutor Kelly Chard (Oct. 3, 1994).

Prodigy, one of many commercial on-line networks, offers subscribers something called a “bozo filter,” which enables users to shield themselves from electronic mail sent by certain individuals. Andrews, \textit{supra} note 20, at J6.

90. The amendments, introduced by Senator Jim Exon, D-Neb., on July 26, 1994, were first included in The Telecommunications Reform Act of 1994. The Senate Commerce Committee approved the bill, including Senator Exon’s amendments, but Senator Bob Dole, R-Kan., blocked its introduction on the floor of the Senate. Telephone interview with Mike Kangior, aide to Senator Exon (Sept. 29, 1994). Senator Exon reintroduced his proposed amendments as part of a controversial stand-alone bill, The Communications Decency Act, on Feb. 1, 1995. Senator Slade Gorton, R-Wash., signed on as the first co-sponsor. The bill stands a strong chance of passage without the link to the omnibus telecommunications reform bill, elements of which Senator Dole opposed. Telephone interview with Mike Kangior (Feb. 2, 1995). The Senate Commerce Committee passed the bill in March.

91. Senator Exon’s amendments, in pertinent part, would result in a new version of 47 U.S.C. § 223 as follows:

(a) Whoever -

(1) in the District of Columbia or in interstate or foreign communication by means of telecommunications device -

(A) makes, transmits, or otherwise makes available any comment, request, suggestion, proposal, image, or other communication which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call or utilizes a telecommunications device, whether or not conversation or communications ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communication;

\ldots

(D) makes repeated telephone calls or repeatedly initiates communication with a telecommunications device, during which conversation or communication ensues, solely to harass any person at the called number or who receives the communication; or

(2) knowingly permits any telecommunications facility under his control to be used for any purpose prohibited by this section,

shall be fined not more than $100,000 or imprisoned not more than 2 years, or both.
electronic communication into the section proscribing the repeated or continuous ringing of another person’s telephone.\textsuperscript{92} Also, the changes in the other sections recognize that electronic communication requires different statutory language.\textsuperscript{93}

However, the bill contains no protections against mass flaming or letter bombs, or for persons who receive harassing E-mail but do not read it. This reflects the bill’s greatest flaw: It fails to define “communication.” This creates a semantic problem similar to the interpretation of “conversation” illustrated by \textit{United States v. Lampley}.\textsuperscript{94} That is, at what stage of an electronic communication does communication ensue? Nothing within the amendment suggests a conclusion, leaving the subject open to various interpretations by the courts.

Senator Exon’s proposal is more comprehensive, is a strong step in the right direction, and would serve a useful purpose, but it is not ideal. Language that addresses the above concerns would result in a more workable federal law that recognizes the realities of E-mail harassment and its scope. For the reasons set out in part IV, however, Congress should consider separate provisions for telephone and E-mail harassment.

IV. STANDARDS FOR AN EFFECTIVE E-MAIL HARASSMENT LAW

Several elements will help an E-mail harassment law survive constitutional challenges and promote its effectiveness. First, the statute should require that an actor possess a specific intent to harass the victim. Second, it should have separate sections to recognize the technological differences between the telephone and other forms of electronic communication. Third, it should proscribe anonymous E-mail and single, identified messages sent in a mass flaming. Finally, the statute ought to recognize that repeated contact should include a combination of telephonic and other forms of electronic communication.

\textsuperscript{92} 47 U.S.C. § 223(a)(1)(C).

\textsuperscript{93} For example, Senator Exon’s inclusion of “image” in 47 U.S.C. § 223(a)(1)(A) recognizes the realities of fax machines and digitized computer images.

\textsuperscript{94} 573 F.2d 783 (3d Cir. 1978). \textit{See supra} notes 72–77 and accompanying text.
A. Specific Intent: A Safeguard Against Infringing Free Speech

The potential for treading on constitutional rights is a primary concern in any effort to criminalize E-mail harassment. However, there is no absolute rule against proscriptions on speech. This principle is embodied in statutes that take telephone harassment out of the realm of speech and define it as conduct under a specific intent element. Such a conduct-based approach also would support efforts to make E-mail harassment a crime.

Nevertheless, the courts clearly have said that laws proscribing some forms of speech must not restrict protected speech nor be vague regarding the types of conduct they prohibit. A statute is overly broad if it may reasonably be interpreted to prohibit conduct that is constitutionally protected. Laws are void for vagueness and thus violate due process if they fail to give an average person adequate notice of what constitutes prohibited conduct or provide too little guidance to police, judges, and juries, thereby forcing them to apply their own standards.

Rulings on the constitutionality of telephone harassment statutes provide guidance for designing E-mail harassment laws. Courts generally have judged telephone harassment statutes on two grounds. First, United States v. Lampley and the long line of cases that follow its reasoning stand for the premise that the caller must possess the specific intent to harass the person called. A subjective standard that bases

95. Id. at 787. See supra note 84.
100. Grayned, 408 U.S. at 108–09.
101. 573 F.2d 783 (3d Cir. 1978).
culpability too much on the effect on the victim is insufficient. Second, statutes that might otherwise infringe on protected freedoms also must proscribe specific conduct that goes beyond pure speech. A statute that proscribes a telephone call made with the specific intent to annoy or harass another person, without more, is overbroad.

Statutes are saved by proscribing the manner and means of telephone calls, rather than their content. Calls that violate standards of reasonable time, place, and manner, including anonymous calls, repeated calls, and calls made late at night, do not elicit free speech concerns. Similarly, proscriptions against mass flaming and letter bombs would be conduct-based and not subject to free speech concerns. Nevertheless, conduct generally is not proscribed under telephone harassment statutes unless the applicable statute also includes an element of specific intent. Thus, an E-mail harassment statute designed with an element of specific intent tied to specific conduct, such as anonymous or obscene E-mail, repeated or serial flaming, and letter bombs, should pass constitutional muster.

Vagueness concerns in telephone harassment statutes usually arise with sections proscribing obscene telephone calls and including such amorphous terms as “lewd,” “profane,” “indecent,” “lascivious,” “filthy,” and “vulgar.” As in State v. Hagen, courts generally have held that such wording is saved by its connection to conduct and intent.


Some statutes combine a subjective element with a specific intent element. See, e.g., Ky. Rev. Stat. Ann. § 525.080 (Baldwin 1984). Other statutes include an objective standard along with a specific intent requirement. See, e.g., Ala. Code § 13A-11-8(b)(1) (1994). In such statutes, any subjective standard apparently is presumed to be included within the complaint feature. That is, a person who feels harassed will complain. The state must then prove that the defendant possessed the requisite intent to harass the victim and, in states such as Alabama that also include an objective standard, whether a reasonable person would have felt harassed.

104. Foster, supra note 103, at 415.

105. Klick, 362 N.E.2d at 331 (Otherwise, “[t]he act constituting the offense is complete when the call is made, regardless of the character of the conduct that subsequently occurs.”).


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rather than to speech alone.\textsuperscript{110} Although a section proscribing obscene E-mail is warranted and would be constitutional, Texas took a different tack. Despite a favorable ruling on the state's telephone harassment statute,\textsuperscript{111} the Texas legislature struck all terms except "obscene" and then defined the term.\textsuperscript{112}

B. The Statute Must Recognize Technological Differences

Separate sections, although they will be duplicative in parts, are needed to address the basic technological differences between the telephone and other electronic communication. For example, a statute that discusses the continuous ringing of a telephone\textsuperscript{113} or calling at an inconvenient hour\textsuperscript{114} cannot be easily adapted to a mass flaming by E-mail.\textsuperscript{115} Also, a separate section can address letter bombs better than an analogy to non-stop calling that ties up a person's telephone or forces that person to disconnect it.

Similarly, the conversational aspect of many telephone harassment statutes poses a significant hurdle to prosecuting E-mail abuse. Verbal conversation per se does not take place during E-mail communication\textsuperscript{116} and the electronic equivalent of conversation (i.e., message exchange) is not required for E-mail harassment to occur.\textsuperscript{117} Such considerations also should address the potential effects of unread E-mail.\textsuperscript{118}

Other technological differences also require separate sections. For example, because computers and fax machines\textsuperscript{119} can transmit images as well as words, telephone statutes limited to words or language are not sufficient. Finally, a separate provision that defines electronic

\textsuperscript{110} Baker, 494 P.2d at 70; Anonymous, 389 A.2d 1270; Yates v. Commonwealth, 753 S.W. 2d 874, 875–76 (Ky. Ct. App. 1988).


\textsuperscript{112} Tex. Penal Code Ann. § 42.07(b) (West 1994).

\textsuperscript{113} See, e.g., 47 U.S.C. § 223(a)(1)(C).

\textsuperscript{114} See, e.g., Wash. Rev. Code § 9.61.230(2).

\textsuperscript{115} See supra note 80.

\textsuperscript{116} See supra note 62.

\textsuperscript{117} See supra notes 74–75 and accompanying text.

\textsuperscript{118} See supra notes 88–89 and accompanying text.

communication\textsuperscript{120} will be adaptable to advances in electronic media as well as to new technologies, including cellular and other wireless communication. Such provisions will provide a more effective tool against harassment across all media.

C. \textit{The Statute Must Proscribe Anonymous E-mail and Single, Identified Contact in Mass Flaming}

Just as telephone harassment laws recognize that anonymous telephone calls, regardless of content, constitute a form of harassment, laws addressing E-mail harassment also should recognize the reality and effect of anonymous E-mail.\textsuperscript{121} Although an anonymous E-mail message may not elicit the same response as a midnight call from a "breather," neither do all anonymous telephone calls have the same effect. Yet blanket provisions in telephone harassment laws fail to differentiate between types of anonymous calls.\textsuperscript{122} Further, an anonymous E-mail message, like an anonymous telephone call, may be symptomatic of a much larger scheme of harassment.\textsuperscript{123}

Single, identified contact that is neither obscene nor threatening also needs to be addressed, at least in the mass flaming context.\textsuperscript{124} The court in \textit{United States v. Darsey}\textsuperscript{125} described the purpose of laws that do not proscribe single calls from an identified caller\textsuperscript{126} as insurance against a

\textsuperscript{120} 18 U.S.C.A. \S 2510(12) (Supp. 1995) defines electronic communication as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photoptical system."

\textsuperscript{121} Andrews, supra note 20, at J6, explained the scope of the anonymity problem:

Hackers, software pirates and outlaws use anonymity to avoid the law. The Internet's highly publicized negatives—flaming, stalking, letter bombing—often can be traced back to the ease with which one can use an assumed name or false ID.... Although not all flamers decline to use their real names, anonymity encourages flaming, or hate e-mail, by protecting the sender from the usual social sanctions.

\textsuperscript{122} See, e.g., Wash. Rev. Code \S 9.61.230(2).

\textsuperscript{123} See supra note 29.

\textsuperscript{124} A state considering an electronic communications harassment statute may wish to follow Connecticut's example, infra note 128, and proscribe single, identified contact that constitutes harassment, but is neither obscene nor threatening. This would incorporate all such single messages, not just those sent in a mass flaming. Such a provision is not included in the proposed statute, infra part V.A, which still would require repeated contact in non-obscene, non-threatening circumstances. If the Washington legislature takes this step, however, it also should consider adding a third element to the felony section of proposed Wash. Rev. Code \S 9.61.230(c), infra part V.A., including harassing messages or telephone calls that are part of concerted action.


\textsuperscript{126} See, e.g., 47 U.S.C. \S 223(a)(1)(D).
flood of complaints stemming from unpleasant calls between acquaintances, which it called one of the ordinary consequences of telephone usage.\textsuperscript{127}

Many states, however, proscribe such calls\textsuperscript{128} and language in \textit{Darsey} actually supports such a proscription.\textsuperscript{129} A mass flaming is repeated contact constituting a "single episode"\textsuperscript{130} and does not involve a "single unpleasant call with some acquaintance,"\textsuperscript{9131} but a series of such contacts. Because Congress wrote the federal law to prevent "ingenious persons from escaping the effect of the other sections by the structuring of their harassment,"\textsuperscript{9132} mass flaming should not be disregarded simply because it involves individual action.\textsuperscript{133}

\textbf{D. The Statute Must Provide for a Combination of Harassment by Telephone and Other Electronic Communication to Constitute Repeated Harassment}

A new statute must address the possibility that a person may commit harassment by both telephone and other electronic communication. Most telephone harassment statutes proscribe repeated telephone calls made with the intent to harass or intimidate the person called. Two calls in "close enough proximity" to constitute a "single episode" suffice.\textsuperscript{134} A person who harasses another person first with a telephone call and then follows up with a harassing E-mail message, or vice versa, should not be

\begin{itemize}
\item \textsuperscript{127} \textit{Darsey}, 342 F. Supp. at 313.
\item \textsuperscript{128} See, e.g., Conn. Gen. Stat. § 53A-183(a)(3) (1994). This section was added in 1971 specifically to "include the single telephone call for the purpose of annoyance or harassment." Conn. Gen. Stat. § 53A-183, Historical Notes.
\item \textsuperscript{129} Ideally, an E-mail harassment law should encompass mass flaming situations in which computer users either take concerted action or take it upon themselves to send a flaming message. \textit{See supra} note 124. In the latter instance, most E-mail users are sophisticated enough to know that a flaming message sent in response to a message circulated on a network is going to be one of many such messages that person receives.
\item \textsuperscript{130} \textit{Darsey}, 342 F. Supp. at 313.
\item \textsuperscript{131} Id.
\item \textsuperscript{132} Id.
\item \textsuperscript{133} Messages placed on electronic bulletin boards also could fall under the intent of the model statute, \textit{infra} part V.A. Electronic bulletin boards generally are governed by the precepts of the public forum doctrine. Just as persons at a speech in a public square are free to shout epithets at the speaker, the users of electronic bulletin boards are free to voice their opinions, subject to the limitations of libel, privacy, and other civil concerns. However, messages that are sent with the requisite intent and exceed the bounds of the statute, such as threatening messages, would be proscribed.
\item \textsuperscript{134} \textit{Darsey}, 342 F. Supp. at 313.
\end{itemize}
able to avoid prosecution under electronic communication harassment statutes that require repeated contact by the same person.

V. A PROPOSAL FOR MODEL LEGISLATION IN WASHINGTON

Washington, like most states, has yet to adapt its harassment statute to encompass E-mail. In fact, the Washington law would be one of the most difficult in the nation to extend to E-mail harassment. Washington also has no specific provision within its anti-stalking statute for contact by electronic communication, including the telephone.

While several states have addressed electronic communication harassment within anti-stalking statutes, the federal government and several states are moving in the telephone harassment area. Given the uncertain and fluid nature of anti-stalking statutes, their limited applicability to E-mail harassment, and the more solid footing of telephone harassment laws in general, Washington would be well-advised to address this problem via its own telephone harassment statute.

In addition to the elements noted in part IV, a Washington statute should allow a judge to order forfeiture of computer hardware and software used in the commission of electronic communication harassment. California and New Mexico, for example, provide for forfeiture for violations of their computer crime statutes. Washington law also provides for the forfeiture of any property used in the

136. See supra notes 66–70 and accompanying text. The statute also does not proscribe harassment by written communication in general.
139. Washington's statute includes a specific intent element. The statute has been the subject of appellate review only once, but the court was not asked to rule on its constitutionality. State v. Ashker, 11 Wash. App. 423, 523 P.2d 949 (1974), partially overruled on other grounds by State v. Braithwaite, 92 Wash. 2d 624, 600 P.2d 1260 (1979).
140. This approach was suggested by Davis, supra note 1, at 440, as an added deterrent against the creation or transmission of malevolent software, such as viruses. Similarly, a forfeiture provision would serve as an added deterrent within a new Washington law on electronic communication harassment. The proposed forfeiture provision would allow seizure of either telephone or computer equipment. The equipment of persons other than the offender also would be subject to forfeiture if the owners had prior knowledge of the offense. Such persons already are subject to criminal prosecution under the existing telephone harassment statute. See infra note 144.
commission of a felony and includes authority for forfeiture in some misdemeanor cases.

Finally, language needs to be added to other statutes, including those that extend proscriptions to persons who knowingly allow their telephones to be used for harassment, establish that harassment is committed at either end of a harassing telephone call, and list crimes included in the term “harassment.”

A. Washington Revised Code § 9.61.230

Under the proposals outlined above, the existing statute would be retitled: “Communications to harass, intimidate, torment, or embarrass.” The existing statute through section (3) would be lettered (a) and would conclude with the language “shall be guilty of a gross misdemeanor, except as provided in subsection (c).” The rest of the statute, beginning with a new subsection (b), would read as follows:

(b) Every person who, with intent to harass, intimidate, torment, or embarrass any other person, shall send a written or electronic communication received or read by such other person or any other person, whether or not such communication or communications are read in their entirety or at all:

(1) Using any lewd, lascivious, profane, indecent, or obscene words, language, pictures, images, or graphics, or suggesting the commission of any lewd or lascivious act; or

(2) Anonymously or repeatedly or in connection with repeated or serial communications by another person or persons or in a manner


A forfeiture provision in the E-mail harassment law should contain procedures similar to those outlined in Washington’s existing forfeiture law, supra note 142, or make specific reference to that statute. The proposed statute, infra part V.A., takes the latter approach. However, this may be insufficient. The forfeiture statute deals exclusively with felonies, while most E-mail harassment would be defined as a misdemeanor.


145. Wash. Rev. Code § 9.61.250 (1988) provides: “Any offense committed by use of a telephone as set forth in RCW 9.61.230 may be deemed to have been committed either at the place from which the telephone call or calls were made or at the place where the telephone call or calls were received.”

which (i) causes interruption in telephone service or (ii) prevents the person contacted from utilizing his or her telephone service or electronic communications device;

(3) Threatening to inflict injury on the person or property of the person to whom the communication is directed or any member of his or her family or household;

shall be guilty of a gross misdemeanor, except as provided in subsection (c).

(c) Any person convicted under either subsection (a) or subsection (b) of this section is guilty of a class C felony if:

(1) That person has previously been convicted of any crime of harassment, as defined in RCW 9A.46.060, with the same victim or member of the victim's family or household or any person specifically named in a no-contact or no-harassment order in this or any other state; or

(2) That person harasses another person under subsection (a)(3) or subsection (b)(3) of this section by threatening to kill the person threatened or any other person.

(d) In accordance with RCW 10.105.010, the court may order forfeiture of telephonic or electronic communications equipment used in violation of this statute if such equipment either is owned by the offender or by a person who, in violation of RCW 9.61.240, knowingly allows such equipment to be used in violation of this section.

(e) For the purposes of this section, "electronic communication" is defined as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system.

(f) For the purposes of subsections (a)(2) and (b)(2) of this section, a combination of one telephone call and one electronic communication made or sent within a six-month period with intent to harass, intimidate, torment, or embarrass any other person, shall constitute repeated contact.
B. *Washington Revised Code* § 9.61.240

This statute would be amended to read as follows:

Any person who knowingly permits any telephone or electronic communications device under his control to be used for any purpose prohibited by RCW 9.61.230 shall be guilty of a misdemeanor.

C. *Washington Revised Code* § 9.61.250

This statute would be amended to read as follows:

Any offense committed by use of a telephone or electronic communications device as set forth in RCW 9.61.230 may be deemed to have been committed either at the place from which the telephone call or calls were made or electronic communication or communications were sent or at the place where the telephone call or calls or the electronic communication or communications were received.

D. *Washington Revised Code* § 9A.46.060

Section (3) would be amended to read as follows:

Communications harassment (RCW 9.61.230);

VI. CONCLUSION

Computer abuse is expanding more rapidly than the applicable law. E-mail harassment is one area where the law is lagging. Efforts at both the state and federal levels either fail to recognize fully the scope of the problem or the technology involved, or pin their hopes on statutes with a short and shaky constitutional history. Something more comprehensive is required. A constitutional model exists in telephone harassment statutes that can be expanded to address adequately the characteristics and scope of electronic communication harassment. Washington, in particular, is in need of such legislation. By acting now, the state can take the lead in responding to the challenges presented by developing technology in this area.

Given the rapid growth of electronic communication, the problem of harassment only threatens to worsen. If this problem is met head-on,
society stands a better chance of heading it off. Today, because of laws that set out the legal rules for telephone use, people know what type of behavior is proscribed and that those who cross the line will be punished. Likewise, years from now, we should be able to say that we have made it easier and safer for everyone to travel along the information superhighway.