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#### LIFESAVING LEGISLATION: BUT WILL THE WASHINGTON STALKING LAW SURVIVE CONSTITUTIONAL SCRUTINY?

#### Jennifer A. Hueter

Abstract: In 1992, the Washington Legislature responded to public demand for a law that would allow criminal prosecution of stalkers by enacting Washington Revised Code section 9A.46.110. This stalking legislation makes it a crime to harass or repeatedly follow another person. This law may infringe an individual's right to speak and move freely and, because the law may unconstitutionally limit protected conduct, a defendant may successfully challenge this statute's constitutionality in the future. This Comment examines the potential constitutional challenges to the stalking law and suggests revisions to the current language in the statute.

Kristin Lardner, a 21-year-old art student in Boston, met Michael Cartier, a bouncer, at a bar.<sup>1</sup> They dated for five months before she broke up with him.<sup>2</sup> He beat her badly when she attempted to end the relationship.<sup>3</sup> Kristin obtained a restraining order against him.<sup>4</sup> She was unaware at that time that he had a rap sheet three pages long that included convictions for robbery, abusing a former girlfriend, and killing animals.<sup>5</sup> Ultimately, Michael shot Kristin three times at point-blank range on a busy Boston street and then killed himself shortly afterwards.<sup>6</sup> Kristen's father, George Lardner, an investigative reporter for *The Washington Post*, published an account of the brutal murder.<sup>7</sup>

Highly publicized incidents such as this illustrate the need for laws that protect victims of stalking. The public has become more familiar with the term "stalking" in recent years due in part to the media's

<sup>1.</sup> George Lardner, The Stalking of Kristin: A Father Investigates the Murder of His Daughter 3, 70 (1995); see Brian Reilly, How a System Failed, Aiding a Young Girl's Murder, Wash. Times, Feb. 4, 1996, at B7 ("Mr. Lardner...hammers out the ugly truth that happened to his loving, creative and painfully innocent 21-year -old daughter.").

<sup>2.</sup> Lardner, supra note 1, at 23.

<sup>3.</sup> Id. at 12.

<sup>4.</sup> Id. at 23.

<sup>5.</sup> Id. at 33, 72, 85-89; see also Judy Mann, Victims of Love, Wash. Post, Nov. 29, 1995, at C15.

<sup>6.</sup> Lardner, supra note 1, at 6, 9, 32; Reilly, supra note 1, at B7; Erika Taylor, In Brief: Nonfiction, L.A. Times, Feb. 11, 1996 (reviewing George Lardner, The Stalking of Kristin: A Father Investigates the Murder of His Daughter (1995)). Taylor notes that Lardner "won a Pulitzer Prize for writing the story of his daughter's tragic death."

<sup>7.</sup> See Lardner, supra note 1, at xi; Mann, supra note 5, at C15; Reilly, supra note 1, at B7 (describing Mr. Lardner's book as "an account of his daughter's murder and a diatribe against the system that let it happen ....").

increased documentation of victims who turned to a legal system that failed them.<sup>8</sup>

Nationwide, lawmakers have attempted to address this widespread problem by enacting stalking laws that criminalize threatening or harassing behavior.<sup>9</sup> Many of these laws have been challenged on constitutional grounds.<sup>10</sup> Stalking laws that are struck down because of hasty enactment and poor drafting obviously fail to achieve the objective of protecting victims such as Kristin.

The Washington Legislature enacted a stalking law in 1992. Washington's law will likely be challenged as unconstitutional by future criminal defendants. This Comment explores the constitutional implications of stalking laws and examines the Washington statute for constitutional infirmities. Part I describes the development of stalking as an increasing social problem and documents the historical impetus to enact stalking laws nationwide and in Washington. Part II analyzes the Washington legislation and its specific provisions. Part III provides an overview of the potential constitutional challenges and describes the analysis a Washington court would likely apply. Part IV concludes that revisions to the Washington stalking law, such as the inclusion of a credible threat requirement and exemptions for constitutionally protected

10. See, e.g., People v. McClelland, 49 Cal. Rptr. 2d 587 (1996); State v. Culmo, 642 A.2d 90 (Conn. Super. Ct. 1993); Bouters v. State, 659 So. 2d 235 (Fla. 1995); Johnson v. State, 449 S.E.2d 94 (Ga. 1994); People v. Bailey, 657 N.E.2d 953 (Ill. 1995); Johnson v. State, 648 N.E.2d 666 (Ind. Ct. App. 1995); People v. White, 536 N.W.2d 876 (Mich. App. 1995); State v. Martel, 902 P.2d 14 (Mont. 1995); Commonwealth v. Schierscher, 668 A.2d 164 (Pa. Super. Ct. 1995); State v. Fonseca, 670 A.2d 1237 (R.I. 1996); State v. McGill, 536 N.W.2d 89 (S.D. 1995); Woolfolk v. Commonwealth, 447 S.E.2d 530 (Va. Ct. App. 1994); Vit v. State, 909 P.2d 953 (Wyo. 1996).

<sup>8.</sup> Lardner, supra note 1, at 33-35.

<sup>9.</sup> See, e.g., Ala. Code §§ 13A-6-90 to -94 (1994); Ark. Code Ann. § 5-71-229 (Michie Supp. 1995); Cal. Penal Code § 646.9 (West Supp. 1996); Del. Code Ann. tit. 11, § 1312A (1995); Fla. Stat. Ann. § 784.048 (West Supp. 1997); Ga. Code Ann. §§ 16-5-90 to -93 (1996); Idaho Code § 18-7905 (Supp. 1996); Ind. Code Ann. ch. 35-45-10 (Michie 1994 & Supp. 1996); Kan. Stat. Ann. § 21-3438 (Supp. 1997); La. Rev. Stat. Ann. § 14:40.2 (West Supp. 1997); Mich. Comp. Laws Ann. § 750.411h-.411i (West Supp. 1996); Minn. Stat. Ann. § 609.749 (West Supp. 1997); Miss. Code Ann. § 97-3-107 (Supp. 1996); Mo. Ann. Stat. § 565.225 (West Supp. 1996); Mont. Code Ann. § 45-5-220 (1996); Nev. Rev. Stat. Ann. § 200.571-.601 (Michie 1995); N.H. Rev. Stat. Ann. § 633:3a (1996); N.J. Stat. Ann. § 2C: 12-10 (West 1995); N.D. Cent. Code § 12.1-17-07.1 (Supp. 1995); Okla. Stat. Ann. tit. 21, § 1173 (West Supp. 1997); 18 Pa. Cons. Stat. Ann. § 2709 (West Supp. 1996); RI. Gen. Laws §§ 11-59-1 to -3 (1994 & Supp. 1995); S.C. Code Ann. § 16-3-1700 to -1840 (Law. Co-op. Supp. 1995); S.D. Codified Laws Ann. §§ 22-19A-1 to -7 (Supp. 1996); Tex. Penal Code Ann. § 42.071 (West Supp. 1997); Utah Code Ann. § 76-5-106.5 (1995 & Supp. 1996); Vt. Stat. Ann. tit. 13, §§ 1061-1063 (Supp. 1996); Wash. Rev. Code § 9A.46.110 (1996); W. Va. Code § 61-2-9a (1992 & Supp. 1996); Wyo. Stat. § 62-506 (Supp. 1996).

activities, are necessary to improve the likelihood that it will withstand judicial scrutiny of its constitutionality.

#### I. STALKING: A PERVASIVE SOCIETAL PROBLEM

#### A. The Backdrop Nationwide

"Stalking" is a term that was popularized recently by its addition to the statutory lexicon, but the harassing behavior it describes is not a new phenomenon. Prior to 1990, the law generally offered no redress for victims of stalking.<sup>11</sup> Domestic violence experts, law enforcement officers, and the victims of stalking were well aware of this inadequacy in the law.<sup>12</sup>

Reports of celebrity stalking first commanded the attention of the American public.<sup>13</sup> Recently, the conviction of Madonna's stalker again focused the media on this problem.<sup>14</sup> Allegations that O.J. Simpson stalked his former wife also acted as an impetus for domestic violence groups to speak out about the problems of stalking.<sup>15</sup> Celebrities are not the only victims of stalking. One study concludes that fifty-one percent of stalking victims are ordinary citizens.<sup>16</sup> Of the other victims, seventeen percent are highly recognizable celebrities and thirty-two percent are lesser known celebrities.<sup>17</sup>

Victims report being harassed, threatened, or followed in a variety of situations. Stalking is a gender-neutral crime, although the most commonly documented stalking incidents arise after a woman ends a

<sup>11.</sup> James C. Wickens, Comment, Michigan's New Anti-Stalking Laws: Good Intentions Gone Awry, 1994 Det. C.L. Rev. 157, 158 (1994).

<sup>12.</sup> Id. at 161.

<sup>13.</sup> Heather M. Stearns, Comment, *Stalking Stuffers: A Revolutionary Law to Keep Predators Behind Bars*, 35 Santa Clara L. Rev. 1027, 1027 (1995). The murder of the actress, Rebecca Schaeffer, acted as an impetus for the California Legislature to enact its stalking law. *Id.* 

<sup>14.</sup> *People in the News*, Agence France Presse, Jan. 9, 1996, *available in* 1996 WL 3785525 (reporting conviction of Robert Dewey Hoskins for stalking Madonna).

<sup>15.</sup> Nicole Hit Me, Simpson Says, Calgary Herald, Feb. 8, 1996, at A5 (reporting advocate for battered women Carolann Peterson's descriptions of Simpson's behavior as typical of "having been a batterer and a stalker"); Simpson Scoffs at Claims He Stalked Ex-Wife, Seattle Times, Feb. 6, 1996, at A2.

<sup>16.</sup> Wickens, supra note 11, at 162 & n.25 (citing Hearings on S. 719 Before the Michigan House Judiciary Comm., 86th Leg., Reg. Sess. (May 5, 1992) (statement of Mich. State Sen. Geake)).

<sup>17.</sup> Id.

relationship and is then harassed by her former boyfriend or spouse.<sup>18</sup> Nearly one-third of all women murdered annually die at the hands of a lover.<sup>19</sup> As many as ninety percent of women killed by their former partners have been stalked prior to their murder.<sup>20</sup> Furthermore, in many rape and assault cases, the victim sees the attacker repeatedly before the crime is committed.<sup>21</sup>

Experts suggest that stalking is a pervasive problem.<sup>22</sup> Psychiatrists estimate that five percent of women in the United States will be victims of unwanted pursuit at some time in their lives.<sup>23</sup> In at least seventy to eighty percent of reported stalking cases, the victim knows the stalker, whereas in approximately twenty percent of reported cases, the stalker is a stranger.<sup>24</sup> A major psychiatric study estimates that there are 200,000 people in the United States who are stalking someone.<sup>25</sup>

Prior to 1990, most stalking behavior was not punishable.<sup>26</sup> Stalking behavior encompasses a wide range of activities, including threatening or repeatedly following someone, electronic surveillance of another, writing unsolicited letters and notes, and persistently calling or electronically contacting a victim.<sup>27</sup> Although every state prohibited threatening or obscene telephone calls, few imposed penalties for other stalking

25. Puente, supra note 22, at 9A.

<sup>18.</sup> Melinda Beck, *Murderous Obsession*, Newsweek, July 7, 1992, at 60, 60–61. Although some men have reported being stalked and some stalkers are strangers to their victims, the majority of cases are reported by women who are being stalked by an ex-boyfriend or ex-husband. *Id*.

<sup>19.</sup> J. William David, Comment, Is Pennsylvania's Stalking Law Constitutional?, 56 U. Pitt. L. Rev. 205, 208 (1994).

<sup>20.</sup> Beck, supra note 18, at 60-61.

<sup>21.</sup> Cheryl Laird, Stalking: Laws Confront Obsession That Turns Fear Into Terror and Brings Nightmares To Life, Houston Chron., May 17, 1992, at 1.

<sup>22.</sup> Maria Puente, Legislators Tackling the Terror of Stalking: But Some Experts Say Measures are Vague, USA Today, July 21, 1992, at 9A.

<sup>23.</sup> Id.

<sup>24.</sup> Tamar Lewin, New Laws Address Old Problem: The Terror of a Stalker's Threats, N.Y. Times, Feb. 8, 1993, at A1.

<sup>26.</sup> In 1984, only three states, Arkansas, Colorado, and New York, had statutes that broadly criminalized forms of harassment. Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 Va. L. Rev. 507, 523 n.77 (1984).

<sup>27.</sup> See, e.g., Richard Seven, Terror and Taps: Ex-Boyfriend Held in Stalking; Home Bugged, Broken Into; Woman Moves From Area, Seattle Times, Dec. 23, 1994, at B1; see also Gene Barton, Comment, Taking a Byte Out of Crime: E-Mail Harassment and the Inefficacy of Existing Law, 70 Wash. L. Rev. 465, 467-68 (1995) (describing e-mail stalking, such as flaming and letter mail bombing, as communications designed to harass another person); David, supra note 16, at 208; Robert A. Guy, Jr., Note, The Nature and Constitutionality of Stalking Laws, 46 Vand. L. Rev. 991, 994 & nn.23-25 (1993).

behaviors, such as following or threatening an individual.<sup>28</sup> Thus, law enforcement officers could only advise complaining victims of other types of harassment to seek a restraining order. Officers could not arrest a threatening individual, even if the perpetrator followed and harassed a victim for years, unless a physical act was committed against the victim or the victim's property. Critics noted the widespread inefficacy of a restraining order to actually stop a violent attack or murder of a victim of stalking<sup>29</sup> and this inefficacy led some to refer to the lack of legislation as a "life-threatening hole in the law."<sup>30</sup>

#### B. National Response

California enacted the first stalking legislation in the nation in response to public outcry after the 1989 murder of actress Rebecca Schaeffer and the 1990 murders of four Orange County women in a five week period.<sup>31</sup> These women had reported stalking behavior by their attackers and obtained restraining orders against their eventual murderers.<sup>32</sup>

Forty-seven states and the District of Columbia followed the example set by California and quickly passed stalking, or "anti-stalking," legislation.<sup>33</sup> The haste with which states enacted these laws prompted many experts to criticize such legislation as vague, overbroad, and in some cases, unconstitutional as applied to a case where activities are arguably constitutionally protected.<sup>34</sup>

32. Stearns, supra note 13, at 1027.

<sup>28.</sup> David, supra note 19, at 208.

<sup>29.</sup> Lewin, *supra* note 24, at A1, A12 ("The police would get a call saying the guy's coming over, even though there's a restraining order, and they'd tell the woman there's nothing they can do until he gets there. And then the next call they'd get is the neighbor saying, 'He shot her.'") (quoting David Beatty, Director of Public Policy, National Victim Center, Wash. D.C.); Mann, *supra* note 5, at C15.

<sup>30.</sup> Stalking the Stalkers, USA Today, Feb. 26, 1992, at 10A.

<sup>31.</sup> Miles Corwin, When The Law Can't Protect, L.A. Times, May 8, 1993, at 1A.

<sup>33.</sup> Harvey Wallace, *Stalkers, The Constitution, and Victims' Remedies*, Crim. Just., Spring 1995, at 16, 16. Only two states, Arizona and Maine, have not enacted stalking laws, but these two states prosecute stalking behavior under broader harassment statutes that protect a victim from being harassed or terrorized. *Id.* 

<sup>34.</sup> Puente, supra note 22, at 9A.

#### C. The Backdrop in Washington

Stalking laws in many states addressed the increasing local concern about the inability of law enforcement officers to arrest individuals who threatened their victims prior to an overt criminal act.<sup>35</sup> In Washington, citizens echoed the national call for laws to criminalize stalking.<sup>36</sup> Immediately preceding the enactment of the law in 1992, the Washington media focused on two local issues that both indicated the need for new, tougher laws to combat threatening behavior.

The first major issue to draw public attention was an increase in sexual harassment lawsuits.<sup>37</sup> Many sexual harassment claims reported in the local media in 1992 involved allegations of repeated acts of intimidation over a period of time.<sup>38</sup> The second controversial issue to rise to the forefront of public concern involved threatening behavior against racial minorities.<sup>39</sup> The newspapers documented the terror felt by minorities who experienced cross burnings, harassing telephone calls, and other threats designed to intimidate and cause fear.<sup>40</sup> Existing harassment laws failed to adequately protect victims who were threatened with violence because they required an overt act for conviction.

#### D. Washington's Response

Substitute House Bill 2702, the stalking bill, received broad public support when it was introduced to the House of Representatives by

<sup>35.</sup> Id.

<sup>36.</sup> Editorial, Stalking Women: Law Needs Deterrence Before It's Too Late, Seattle Times, Feb. 10, 1992, at A8.

<sup>37.</sup> See, e.g., Jill Leovy, Kent Official Battles Harassment Lawsuit, Seattle Times, Feb. 14, 1992, at F2; Peter Lewis, Savant Labels Boeing Plant a Haven For Harassment, Seattle Times, Feb. 8, 1992, at A6; Robert T. Nelson, A Lose-Lose Harassment Case, Seattle Times, Jan. 27, 1992, at E1.

<sup>38.</sup> Peter Lewis, 'The Men Got Nasty,' Stapp Testifies; Harassment at Boeing Worsened After Complaint, Ex-Worker Says, Seattle Times, Feb. 12, 1992, at B1; Jim Simon & Barbara Serrano, Accuser Wanted Johnson Out: GOP Senator Steps Down Amidst Harassment Charges, Seattle Times, Jan. 23, 1992, at B1.

<sup>39.</sup> See, e.g., Stephen Clutter, Justice Slow, Uncertain For Man Claiming Harassment, Seattle Times, Feb. 10, 1992, at B1; Nancy Montgomery, Cross-Burning Puzzles, Anger: Bellevue Officials, Seattle Times, Jan. 31, 1992, at B1; Police Have No Leads in Recent Cross-Burning, Seattle Times, Feb. 4, 1992, at B3.

<sup>40.</sup> See, e.g., Diane Brooks, As Snohomish County Grows, So May Racial Incidents, Seattle Times, Feb. 12, 1992, at A6; Stephen Clutter, 2 Guilty in Mischief Against Black Family, Seattle Times, Feb. 25, 1992, at C2; Blake DeYoung, Letter, 'The Color of Fear' Stop Ignoring Reality of Racism, Seattle Times, Feb. 16, 1992, at A19.

Representative Robert Johnson, Mount Vernon, in February, 1992.<sup>41</sup> Groups calling for legislative action to address the problem of stalking included the Washington Coalition of Sexual Assault Programs and Washington Association of Police Chiefs.<sup>42</sup> An editorial supporting the bill described its enactment as a necessary measure.<sup>43</sup> Amid public pressure to address the problem quickly, the Washington Legislature hastily enacted the law without adequate consideration of its constitutionality.<sup>44</sup>

#### 1. Legislative History

The legislative history of the Washington stalking law reveals the speed with which it was enacted. Substitute House Bill 2702 was introduced on February 7, 1992, and passed by unanimous vote on February 17, 1992.<sup>45</sup> The Senate first read the Engrossed Substitute House Bill 2702 on February 19, 1992.<sup>46</sup> The bill passed unanimously on March 3, 1992, and was signed by the Governor less than one month later.<sup>47</sup> The entire process took only eight weeks.

The Legislature amended the bill only slightly before enacting it into law. The House of Representatives voted to include an increased penalty if the stalker had been previously convicted of harassment or had violated a court order.<sup>48</sup> The Senate amended the bill to include a defense to the crime of stalking if the defendant is a licensed private detective acting within the capacity of his or her license.<sup>49</sup>

The Legislature passed the bill with minimal discussion about the constitutionality of the measure. Just prior to its enactment, Senator Talmadge asked a proponent of the bill, Senator Nelson, during a Point

<sup>41.</sup> Wash. House J. at 1174–77 (1992) (originally sponsored by Representatives R. Johnson, Belcher, Paris, Schmidt, Anderson, Roland, Bray, Jacobsen, Spanel, Scott, Leonard, Sheldon, Wynne, Lisk, Ebersole, Brough, Basich, R. King, Valle, Zellinsky, Kremen, Hochstatter, Wineberry, Winsley, Van Luven, Forner, P. Johnson, Bowman, Pruitt, Fraser, Tate, Ogden, J. Kohl, McLean, Wood, and Rasmussen).

<sup>42.</sup> Stalking Women, supra note 36, at A-8.

<sup>43.</sup> Id.

<sup>44.</sup> One Senator, Phillip Talmadge, questioned the constitutionality of the stalking bill. Wash. Sen. J. at 838 (1992). Notably, this Senator is currently a Justice sitting on the Washington Supreme Court.

<sup>45.</sup> Wash. House J., *supra* note 41, at 1174–77.

<sup>46.</sup> Wash. Sen. J., supra note 44, at 838.

<sup>47.</sup> Wash. Legis. Dig. at 709-10 (1992).

<sup>48.</sup> Wash. House J., supra note 41, at 1176.

<sup>49.</sup> Wash. Sen. J., supra note 44, at 837.

of Inquiry, whether the provisions of the bill would "pass constitutional muster" in light of the requirement for statutes to punish a specific or "overt" act.<sup>50</sup> The issue raised by Senator Talmadge focused on whether this statute could survive a challenge of vagueness cr overbreadth. Senator Nelson responded that conviction depended on the victim's subjective feeling of fear or intimidation, but the Senator failed to indicate how this law might affect constitutionally protected activity.<sup>51</sup>

The Senate debate also raised questions about increasing the penalty for repeat offenders.<sup>52</sup> A proponent of the bill clarified the circumstances under which an increased penalty applied, indicating the inclusion of situations in which the perpetrator violates a protective order or court order.<sup>53</sup> The bill also mandates a higher penalty if a perpetrator with a prior stalking conviction harasses a victim.<sup>54</sup> Under these circumstances, the defendant is guilty of a class C felony.<sup>55</sup>

The Legislature amended the statute in 1994<sup>56</sup> to broaden the circumstances under which a defendant could be convicted.<sup>57</sup> The original version of the statute was amended to require that a stalker either "intentionally and repeatedly" harass or "repeatedly follow" another person to be convicted of the crime of stalking.<sup>58</sup> The effect of the amendments was to add "intentionally and repeatedly harassing" to the list of stalking behavior. The original language prohibited the intentional and repeated following of another person to that person's home, school, place of employment, business, or "any other location."<sup>59</sup> The statute further prohibited following another person "while the person is in transit between locations."<sup>60</sup> During the 1994 session, the Legislature amended that provision to state that it is not necessary to establish that the alleged stalker follows the person "while in transit from one location to

- 51. *Id*.
- 52. Id. (statement of Sen. Haynor).
- 53. Id. (statement of Sen. Nelson).
- 54. Wash. Rev. Code § 9A.46.110(5)(c) (1996).
- 55. § 9A.46.110(5).

57. § 801. For the full text of the amended stalking law, see infra note 71.

58. § 801.

- 59. Wash. Rev. Code § 9A.46.110(1)(a) (1982), amended by § 801.
- 60. § 9A.46.110(1)(a) (1982), amended by § 801.

<sup>50.</sup> Id. at 838.

<sup>56.</sup> Act of Apr. 1, 1994, ch. 271, § 801, 1994 Wash. Laws 1719 (codified at Wash. Rev. Code § 9A.46.110 (1996)).

another."<sup>61</sup> The amended statute applies to a expanded range of activities because it now criminalizes both harassing and following.<sup>62</sup>

#### 2. Implementation

Judges in Washington have imposed criminal sentences on stalkers since the enactment of the law, and highly publicized cases continue to bring the crime of stalking to the forefront of public attention.<sup>63</sup> For example, a Seattle woman dated William Carey, a Bellevue resident and Microsoft employee, for two years.<sup>64</sup> When she broke up with him, Carey reacted violently, causing her to obtain a no-contact order and request an unlisted telephone number.<sup>65</sup> Carey, however, installed electronic surveillance equipment in her home, followed her to a local shopping mall, robbed her home, and, finally, broke into her house while she was taking a shower.<sup>66</sup>

Seattle Police searched Carey's car and found burglary tools, a crossbow, two assault rifles, and bullets. In his home, police discovered surgical gloves, receipts from a local surveillance store, and notes that appeared to be handwritten transcriptions of the woman's telephone conversations.<sup>67</sup> A King County judge sentenced Carey to twenty-six months in prison in April, 1995, for felony stalking, burglary, and cocaine possession.<sup>68</sup>

The appropriateness of the law in situations like this is undisputed. Carey committed illegal acts throughout his stalking of the victim. He tapped her phone, committed burglary, and was armed with deadly weapons. His actions indicate that he intended his victim to be frightened and that a reasonable person under similar circumstances would have experienced fear. His conduct clearly falls outside the scope of

<sup>61. § 801.</sup> 

<sup>62.</sup> Wash. Rev. Code § 9A.46.110 (1996).

<sup>63.</sup> See, e.g., Richard Seven, Stalker-Murderer Sentenced to Spend Rest of Life Behind Bars, Seattle Times, Nov. 11, 1994, at B3; see also Man Pleads Guilty in Stalking of Wife, Seattle Times, Oct. 13, 1995, at B2; Peyton Whitely et al., Shoreline Warned of 'Sexual Psychopath': Slain Women May Have Been Stalked as They Did Their Laundry Late At Night, Seattle Times, Mar. 29, 1995, at A1; Wayne Wurzer & Dianne Brooks, Man Likely to be Charged with Stalking Boy, 11, Seattle Times, Oct. 21, 1994, at B3.

<sup>64.</sup> Stalker May Get 2-Year Term, Seattle Times, Mar. 18, 1995, at A8.

<sup>65.</sup> Seven, supra note 27, at B1.

<sup>66.</sup> Id.

<sup>67.</sup> Id.

<sup>68.</sup> Stalker Sentenced To Prison, Seattle Times, Apr. 15, 1995, at A5.

constitutional protection. Situations arise, however, that are not as clearcut. For example, the Washington statute may allow prosecution for behavior such as leaving love letters for a former partner or attempting to talk with a spouse when that person has indicated his or her nonconsent.<sup>69</sup> The subjective feelings of the victim, measured by a standard of reasonableness, may define stalking behavior in closer situations.<sup>70</sup> An examination of the specific provisions of the statute highlights the behavior that is punishable under the Washington law.

#### II. PROVISIONS OF THE WASHINGTON LAW

#### A. Elements of the Crime

The stalking statute is codified at Washington Revised Code section 9A.46.110.<sup>71</sup> The basic elements of the crime are: (1) that a person acts

71. § 9A.46.110 provides:

<sup>69.</sup> Wash. Rev. Code § 9A.46.110(1)(b) (1996).

<sup>70. § 9</sup>A.46.110(1)(b). For example, whether communication by a former spouse constitutes stalking may depend on how the communication is perceived by the other spouse. Thus, this subjective perception will often be the dividing line separating criminal and non-criminal acts. It still must be proven, however, that an alleged stalker intended to harass or repeatedly followed the person and the subjective feelings of the person will be measured by what a reasonable person would have felt in the situation. However, it should be noted that the element of "repeated following" of an another person is satisfied if the defendant appears twice in any location in which visual or physical proximity is deliberately maintained. Thus, if a former spouse appears at the family home twice in an effort to reconcile with his or her partner, this constitutes "repeated following." § 9A.46.110 (1)(a), (1)(b), (6)(d) (1996).

<sup>(1)</sup> A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime: (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and (c) The stalker either; (i) Intends to frighten, intimidate, or harass the person; or (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person. (2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and (b) did not intend to frighten, intimidate, or harass the person. (3) It shall be a defense to the crime of stalking that the defendant is a licensed private detective acting within the capacity of his or her license as provided by chapter 18.165 RCW. (4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. (5) A person who stalks another person is guilty of a gross misdemeanor except that the person is guilty of a class C felony if any of the following applies: (a) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective

without lawful authority; (2) that a person intentionally and repeatedly harasses or repeatedly follows another person; (3) the person being harassed or followed experiences subjective fear; (4) the feeling of fear is one that a reasonable person in the same situation would experience under all the circumstances; and (5) the stalker either intends to frighten, intimidate, or harass, or knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend this response.<sup>72</sup>

Intent can be inferred if a victim of stalking gives actual notice to a defendant that he or she did not want to be contacted or followed. Actual notice constitutes prima facie evidence that the stalker possessed the requisite intent to intimidate or harass the other person.<sup>73</sup> Thus, if the victim proves that the defendant was notified that further contact was undesired, the victim need not prove that the defendant possessed the requisite intent to cause the victim fear or anxiety.<sup>74</sup> The statute also provides that it is not a defense to a charge of stalking that the victim failed to give actual notice to the alleged stalker that the perpetrator should refrain from contacting or following the person.<sup>75</sup> Thus, an individual attempting to contact another person could be charged with this crime even if he or she did not know that the other person objected to the attempted communication.

order; (b) the stalking violates any protective order protecting the person being stalked; (c) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (d) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.125, while stalking the person; (e) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (f) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony. (6) As used in this section: (a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another. (b) "Harasses" means unlawful harassment as defined in RCW 10.14.020. (c) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person. (d) "Repeatedly" means on two or more separate occasions.

<sup>72. § 9</sup>A.46.110(1)(a), (1)(b), (1)(c).

<sup>73. § 9</sup>A.46.110(4).

<sup>74. § 9</sup>A.46.110(4).

<sup>75. § 9</sup>A.46.110(2)(a).

A defendant accused of stalking may not raise as a defense his or her lack of intent to frighten, intimidate, or harass another person.<sup>76</sup> The statute states that the subjective intent of the defendant shall not be a defense to the crime.<sup>77</sup>

There is one exception to the intentional behavior prohibited by the statute. The Washington Senate amended the statute during the 1992 session to include a defense for a licensed private detective acting within the capacity of his or her license.<sup>78</sup> Apparently, the Senate acted out of concern that professional detectives would be severely limited in tracking leads if they could not "repeatedly follow" another person.

#### B. Increased Penalties

The crime of stalking is a gross misdemeanor, but a defendant may be convicted of class C felony stalking under certain circumstances. The statute delineates six situations under which defendants will be guilty of a felony if they are convicted of stalking.<sup>79</sup>

First, the penalty for stalking is increased if the stalker previously has been convicted of any crime of harassment in Washington or any other state. To be punished more severely, the defendant must have harassed either the same victim, members of the victim's family or household, or any person specifically named in a protective order. Second, the stalker commits a felony if he or she violates any protective order of the person being stalked in the charge being brought. Third, the statute provides for increased punishment if the stalker has previously been convicted of any stalking offense. Fourth, the penalty is increased if the offender was armed with a deadly weapon at any time during the stalking of the victim. Fifth, the defendant is guilty of a felony if the victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community corrections officer, and if the stalker acted in retaliation for an act the victim performed during the course of official duties or to influence the victim's performance of official duties. Finally, the stalker is subject to increased punishment if the victim is a current or former witness in an adjudicative proceeding, and the stalker acted to

<sup>76. § 9</sup>A.46.110(2)(b).

<sup>77. § 9</sup>A.46.110(2)(b).

<sup>78. § 9</sup>A.46.110 (3); Wash. Sen. J., supra note 44, at 837-38 (on motion of Sen. Nelson).

<sup>79. § 9</sup>A.46.110(5).

retaliate against the victim for testifying or in advance of potential testimony.<sup>80</sup>

These provisions of the statute offer increased protection for victims who are in danger of retaliation. The concern that these situations implicate constitutionally protected activities, such as free speech, is slight.<sup>81</sup> A constitutional challenge based on retaliation would have less likelihood of success than a challenge where the defendant was charged with misdemeanor stalking based on attempting to communicate with a former spouse or lover. Where a defendant plotted retaliation or acted in violation of a known protective order, the stalker's intent may be less disputed.<sup>82</sup>

#### III. OVERVIEW OF CONSTITUTIONAL CHALLENGES

Stalking laws, which may penalize a defendant's conduct or speech, have been challenged as both vague and overbroad.<sup>83</sup> Without question, stalking laws impact a defendant's right to speak and act freely.<sup>84</sup> Challenges for vagueness arise when a statute does not state clearly enough what behavior is prohibited.<sup>85</sup> Overbreadth challenges arise when a statute prohibits constitutionally protected behavior in additional to culpable behavior.<sup>86</sup> Finally, the constitutional right to travel may be

<sup>80. § 9</sup>A.46.110(5).

<sup>81.</sup> Cf. State v. Talley, 122 Wash. 2d 192, 858 P.2d 217 (1993). In *Talley*, the Washington Supreme Court upheld part of the Washington hate crimes statute and partially invalidated the law. The court held that section 1 of the statute withstands constitutional scrutiny because it is aimed at criminal conduct and only incidentally affects speech. The court, in striking down section 2 for overbreadth, explained that the law inhibited free speech on the basis of its content. The court found that section 2 made content distinctions within the fighting words category, and thus drew impermissible distinctions based on content. Id. In a potential challenge to the stalking law, a defendant might challenge the statute after being charged with retaliating against a law enforcement officer or a judge. The challenge would be premised on the claim that the law impermissibly regulates both unprotected conduct, and reaches protected conduct, such as exercising the right to speak to one's spouse in the volatile setting of personal relationships.

<sup>82.</sup> But see State v. Norris-Romine, 894 P.2d 1221 (Or. Ct. App.), review denied, 900 P.2d 509 (1995) (affirming ruling that Oregon statute was unconstitutional where defendants violated protective orders).

<sup>83.</sup> See, e.g., State v. Lee, 82 Wash. App. 298, 917 P.2d 159 (1996); Vit v. State, 909 P.2d 953, 954 (Wyo. 1996); see also Bouters v. State, 659 So. 2d 235 (Fla. 1995).

<sup>84.</sup> See Bouters, 659 So. 2d at 237-38.

<sup>85.</sup> Wickens, supra note 11, at 193.

<sup>86.</sup> *Id.* at 196. Vagueness and overbreadth challenges are frequently analyzed together because a vague statute that inhibits First Amendment freedoms may also be overbroad. *Id.* 

implicated by stalking statutes' restrictions on defendants' movements.<sup>87</sup> The Washington stalking law may be challenged under these doctrines because it regulates speech, expressive conduct, and behavior.

#### A. Void for Vagueness Doctrine

Although most state courts have upheld their stalking laws against vagueness challenges,<sup>88</sup> three courts declared their statutes facially unconstitutional due to vagueness.<sup>39</sup>

The void for vagueness analysis is based on a due process requirement that a criminal statute convey a sufficiently definite warning of the conduct prohibited when measured by common understanding and practice.<sup>90</sup> Vagueness challenges thus are premised on the due process guarantees of the Fifth and Fourteenth Amendments. A court must consider two factors when examining a statute for vagueness: (1) whether the statute either requires or forbids the doing of an act in undefined terms such that persons of common intelligence must necessarily guess at its meaning and differ as to its application; and (2) adequately guards whether the statute against arbitrary and discriminatory enforcement.<sup>91</sup> The concerns reflected in this two-part test are whether individuals are given "fair notice" that their conduct is

<sup>87.</sup> Although the right to travel is constitutionally protected, Shapiro v. Thompson, 394 U.S. 618 (1969), no court has struck down a state stalking law on this ground. A defendant challenged the Connecticut stalking law, alleging that it impermissibly infringed his right to travel, but the court found that the state has a sufficiently compelling interest in restricting the movement of its citizens when the protection of individuals from stalking is at issue. State v. Culmo, 642 A.2d 90 (Conn. Super. Ct. 1993). Similarly, a challenge to the Washington stalking law based on the right to travel would likely be unsuccessful because it restricts only the right to follow another person when it causes the victim to reasonably fear for his or her safety. *See* State v. Lee, 82 Wash. App. 298, 307, 917 P.2d 159, 165 (1996) (rejecting right-to-travel challenge to Washington stalking law); *See also* text of Wash. Rev. Code § 9A.46.110, *supra* note 71.

<sup>88.</sup> See, e.g., People v. McClelland, 49 Cal. Rptr. 2d 587 (1996); Culmo, 642 A.2d 90; Bouters, 659 So. 2d 235; Johnson v. State, 449 S.E.2d 94 (Ga. 1994); People v. Bailey, 657 N.E.2d 953 (III. 1995); Johnson v. State, 648 N.E.2d 666 (Ind. Ct. App. 1995); People v. White, 536 N.W.2d 876 (Mich. App. 1995); State v. Martel, 902 P.2d 14 (Mont. 1995); Commonwealth v. Schierscher, 668 A.2d 164 (Pa. Super. Ct. 1995); State v. Fonseca, 670 A.2d 1237 (R.I. 1996); State v. McGill, 536 N.W.2d 89 (S.D. 1995); Woolfolk v. Commonwealth, 447 S.E.2d 530 (Va. Ct. App. 1994); Vit, 909 P.2d 953.

<sup>89.</sup> See State v. Norris-Romine, 894 P.2d 1221 (Or. Ct. App.), review denied, 900 P.2d 509 (1995); Commonwealth v. Kwiatkowski, 637 N.E.2d 854 (Mass. 1994); State v. Bryan, 910 P.2d 212, 214 (Kan. 1996).

<sup>90.</sup> Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972); see also State v. Carver, 113 Wash. 2d 591, 597, 781 P.2d 1308, 1311 (1989) (adopting same analysis in examining Washington statute for vagueness).

<sup>91.</sup> Grayned, 408 U.S. at 108-09.

forbidden and whether the law "encourages arbitrary and erratic arrests and convictions."  $^{92}\,$ 

Two rationales have been advanced to support this doctrine. The first rationale is that a state should provide fair warning to ordinary citizens so behavior may comport with the dictates of the statute. Second, a state should preclude arbitrary, capricious, and generally discriminatory enforcement by avoiding statutory language that gives officials too much authority while providing too few constraints.<sup>93</sup>

The U.S. Constitution demands clarity in laws that threaten to impinge constitutionally protected conduct.<sup>94</sup> The Washington Supreme Court held that if First Amendment speech freedoms are involved, the court will consider whether a statute is facially unconstitutional. If a law does not implicate freedom of speech, the court will usually only consider whether it is unconstitutional as applied to the facts of a specific case.<sup>95</sup> The court will consider a facial challenge even where freedom of speech is not at issue if a defendant shows the following: (1) the statute criminalizes behavior that would not normally be considered criminal with no requirement of mens rea; (2) the statute invites an inordinate amount of police discretion; or (3) the statute's vagueness is egregious.<sup>96</sup>

Long-standing rules guide a court in analyzing a vagueness challenge to the stalking law. A well-established principle is that the constitutionality of a statute is presumed.<sup>97</sup> The challenging party has the burden to establish the statute's unconstitutionality beyond a reasonable doubt.<sup>98</sup> Even though a law must provide ascertainable standards of guilt, it is not considered vague merely because a person cannot predict with complete certainty the exact point at which his or her conduct would be prohibited.<sup>99</sup> Moreover, courts have held that an intent element of a statute may provide a sufficient limit to police discretion.<sup>100</sup> Finally, a court must view a statute as a whole to determine if it has the required

100. Id. at 814, 903 P.2d at 983.

<sup>92.</sup> Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

<sup>93.</sup> State v. Tanner, 472 N.E.2d 689, 691 (Ohio 1984).

<sup>94.</sup> Grayned, 408 U.S. at 108-09.

<sup>95.</sup> State v. Carver, 113 Wash. 2d at 599, 781 P.2d at 1312 (1989); see also In re Dependency of C.B., 79 Wash. App. 686, 689, 904 P.2d 1171, 1173 (1995), review denied, 128 Wash. 2d 1023, 913 P.2d 816 (1996).

<sup>96.</sup> Carver, 113 Wash. 2d at 599 n.2, 781 P.2d at 1312 n.2.

<sup>97.</sup> Fairbank v. United States, 181 U.S. 283, 285 (1901).

<sup>98.</sup> In re C.B., 79 Wash. App. at 689, 904 P.2d at 1173.

<sup>99.</sup> State v. Myles, 127 Wash. 2d 807, 812, 903 P.2d 979, 982 (1995).

degree of specificity rather than analyzing only portions of the statute in isolation.<sup>101</sup>

#### 1. U.S. Supreme Court's Application of the Vagueness Doctrine

The U.S. Supreme Court has considered vagueness challenges to many statutes.<sup>102</sup> In *Coates v. City of Cincinnati*,<sup>103</sup> the Court examined a Cincinnati municipal ordinance prohibiting disorderly conduct to determine whether it was unconstitutionally vague. The ordinance prohibited three or more persons from assembling on public property and conducting themselves in a manner "annoying" to other persons.<sup>104</sup> The Court struck down the statute, finding that it was impermissibly vague<sup>105</sup> because it failed to specify any standard of conduct.<sup>106</sup> The Court noted that "[c]onduct that annoys some people does not annoy others."<sup>107</sup> The statute was facially unconstitutional because the prohibited conduct was not sufficiently defined.

#### 2. Washington Supreme Court's Application of the Vagueness Doctrine

The Washington Supreme Court demands specificity with regard to legislative language that criminalizes otherwise constitutionally protected conduct. In *City of Bellevue v. Miller*,<sup>108</sup> the court held that the terms "unlawful purpose" and "alarm" in a vagrancy statute defined illegality in inherently subjective terms and that the statute was, thus, facially unconstitutional.<sup>109</sup> The statute prohibited wandering or prowling that manifested an "unlawful purpose" or that warranted "alarm for the safety

101. Id.

- 103. Id.
- 104. *Id*.

- 106. Id. at 614.
- 107. Id.

108. 85 Wash. 2d 539, 536 P.2d 603 (1975).

109. Id. at 543 n.2, 536 P.2d at 606 n.2. The municipal ordinance stated in relevant part:

Among circumstances which may be considered as manifesting an unlawful purpose or property, for purposes of this section, is flight by a person upon the appearance of a police officer, the refusal of a person to identify himself to a police officer, or an attempt by a person to conceal himself or any object from a police officer.

Id.

<sup>102.</sup> See, e.g., Coates v. City of Cincinnati, 402 U.S. 611, 612 n.1 (1971).

<sup>105.</sup> Id. at 616.

of persons or property in the vicinity."<sup>110</sup> Although the ordinance listed examples of prohibited conduct, this did not save the statute because the list was not intended to be exclusive.<sup>111</sup> The ordinance did not place any actual limitations on the exercise of police discretion and the reach of the ordinance was "unbounded and indeterminate."<sup>112</sup>

The Washington Supreme Court has not yet examined the constitutionality of the stalking law. Such an examination would likely focus in part on the use of the term "harasses." The Washington statute defines harassing conduct as that which "seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose."<sup>113</sup> The stalking law may not possess the requisite specificity to pass constitutional muster under the standards enunciated by the state's highest court.

#### 3. Washington Court of Appeals' Application of the Vagueness Doctrine

In *State v. Lee*,<sup>114</sup> a Washington court of appeals rejected the defendant's contention that the stalking law was vague. The court held that the term "follows" was not vague because it assumed that persons of ordinary intelligence would interpret the term to include deliberately and repeatedly traveling to a location in order to see and watch another person.<sup>115</sup> This decision does not, however, end the inquiry as to whether the Washington stalking law may be vague.

In *City of Everett v. Moore*,<sup>116</sup> a Washington court of appeals found a general harassment statute to be both vague and overbroad. In discussing the vagueness of the terms "annoyance" and "alarm," the court found that this language did not properly warn citizens of conduct that was criminalized under the ordinance.<sup>117</sup> The court invalidated the ordinance because "[t]he people of Everett must not live in the continual fear that

<sup>110.</sup> Id. at 542, 536 P.2d at 605.

<sup>111.</sup> Id. at 545, 536 P.2d at 607.

<sup>112.</sup> Id.

<sup>113.</sup> Wash. Rev. Code § 10.14.020(1) (1996) (referring to § 9A.46.11096)(b)).

<sup>114. 82</sup> Wash. App. 298, 917 P.2d 159 (1996).

<sup>115.</sup> Id. at 311, 917 P.2d at 166.

<sup>116. 37</sup> Wash. App. 862, 683 P.2d 617 (1984).

<sup>117.</sup> *Id.* The ordinance prohibited "communicat[ion] with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm." *Id.* at 863, 683 P.2d at 618.

something they say to another might bother the listener to the point of invoking the ordinance."<sup>118</sup>

#### 4. Constitutional Infirmities in the Washington Stalking Statute

The Washington stalking law may suffer two constitutional infirmities arising from its definition of stalking behavior. Both relate to vagueness. First, a court might find that the term "harasses" in the statute is unconstitutionally vague.<sup>119</sup> Second, a court might hold that the law is vague because the words "serve no legitimate or unlawful purpose" fail to provide an ascertainable standard of behavior.<sup>120</sup>

Washington law arguably fails to provide notice to a defendant, such as a former spouse or lover,<sup>121</sup> concerning precisely which types of conduct or avenues of communication will be considered harassment. Furthermore, a defendant might claim that this statute invites arbitrary enforcement because conviction depends heavily on the subjective feelings experienced by the complainant.<sup>122</sup> The statute specifically precludes a defendant from raising a defense that he or she did not intend to frighten, intimidate, or harass the other person by the attempted communication or behavior.<sup>123</sup> Furthermore, even if a complaining party did not notify an alleged stalker that his or her behavior was a cause of anxiety for the victim, the stalker may not raise this lack of notice as a defense.<sup>124</sup>

121. See Beck, supra note 18 (noting that stalking is most commonly reported by victims of former spouses or lovers once relationship has been terminated by one person).

<sup>118.</sup> Id. at 865, 683 P.2d at 618.

<sup>119.</sup> See M. Katherine Boychuk, Comment, Are Stalking Laws Unconstitutionally Vague or Overbroad? 88 Nw. U. L. Rev. 769, 796 (1994). The author notes that four different courts reached four different conclusions when analyzing the language "alarms" or "annoys." The four results were void for vagueness, void for overbreadth, not void for vagueness, and not void for overbreadth. The Washington court reached the conclusion that the language in the Moore ordinance was both vague and overbroad. Id.

<sup>120.</sup> See State v. Norris-Romine, 894 P.2d 1221, 1224–25 (Or. Ct. App.), review denied, 900 P.2d 509 (Or. 1995). The court held that the statute was unconstitutionally vague because the words "serves no legitimate purpose" did not provide an ascertainable standard of conduct. The Oregon Legislature amended the statute in June 1995, by eliminating the phrase. The new version of the law was upheld by Multnomah County Circuit Judge Roosevelt Robinson. See Judge Upholds Oregon's New Stalking Law, Seattle Times, Nov. 5, 1995, at B3. But see Lee, 82 Wash. App. 298, 917 P.2d 159 (holding that phrase "without lawful authority" is not vague).

<sup>122.</sup> Wash. Rev. Code § 9A.46.110(1), (2) (1996).

<sup>123.</sup> Wash. Rev. Code § 9A.46.110(2)(b) (1996).

<sup>124. § 9</sup>A.46.119(2)(a).

Thus, a defendant to a stalking charge may argue that the law fails to provide fair notice of what constitutes harassment "when measured by common practice and understanding" of what behavior is acceptable.<sup>125</sup> Fair notice may be especially difficult to ascertain in the context of intimate relationships.<sup>126</sup> A defendant may further argue that the law fails to provide ascertainable standards for adjudication because it invites arbitrary enforcement by law enforcement officers and judges who are forced to rely on the subjective perceptions of the victim.<sup>127</sup>

A second potential constitutional infirmity in the Washington statute may lie in the phrase "serves no legitimate or lawful purpose," which is similar to wording that was deemed vague in Oregon's stalking law. An Oregon Court of Appeals decided that the phrase "without legitimate purpose" in Oregon's stalking law was impermissibly vague.<sup>128</sup> The Oregon statute provided that a stalking protective order could be issued if the person, "without legitimate purpose, intentionally, knowingly or recklessly engages in repeated and unwanted contact with the person or a member of that person's immediate family."<sup>129</sup> The court held that the phrase "without legitimate purpose" failed to sufficiently inform persons of common intelligence of the conduct they must avoid.<sup>130</sup> Because the statute implicated expressive activity, the court found the statute was facially invalid rather than merely holding that the law was unconstitutional as applied to the facts before the court.<sup>131</sup>

The Washington stalking law suffers from the same constitutional infirmity that caused the Oregon stalking law to be struck down. Washington's statute provides that a person commits stalking when he or she engages in behavior "without lawful authority."<sup>132</sup> This language is strikingly similar to the terms "without legitimate purpose" that invalidated the Oregon law.<sup>133</sup> Under Washington precedent, the word

131. Id. at 1224 n.1.

<sup>125.</sup> See State v. Smith, 48 Wash. App. 33, 35, 737 P.2d 723, 724 (1987), aff'd, 111 Wash. 2d 1, 759 P.2d 372 (1988) (quoting State v. Carter, 89 Wash. 2d 236, 239, 570 P.2d 1218 (1977)).

<sup>126.</sup> See Beck, supra note 18.

<sup>127.</sup> See id. Although the statute requires that a reasonable person must have experienced fear in the same situation, the arrest and conviction of a stalker will depend heavily on whether the person bringing the charge can demonstrate that he or she subjectively felt fear as a result of the other person's actions.

<sup>128.</sup> State v. Norris-Romine, 894 P.2d 1221 (Or. Ct. App.), review denied, 900 P.2d 509 (1995).

<sup>129.</sup> Id. at 1222.

<sup>130.</sup> Id. at 1224.

<sup>132.</sup> Wash. Rev. Code § 10.14.020(1) (1996).

<sup>133.</sup> Norris-Romine, 894 P.2d at 1222.

"lawful" is not inherently vague.<sup>134</sup> However, the statutory term "lawful" will be considered unconstitutionally vague if there are no "readily ascertainable sources of law" to illuminate the meaning in the context of the particular statute.<sup>135</sup> Thus, a Washington court may determine that an ordinary citizen is not adequately informed as to what constitutes prohibited conduct under the stalking law.<sup>136</sup> Because the term "harasses" may not be defined precisely enough, as discussed above, the Washington law arguably does not provide ascertainable standards in the current language of the statute.

#### 5. Remedies for Vagueness in a Stalking Law

The drafters of other state stalking laws devised three ways to remedy the vagueness inherent in the terms such as "harasses" or "annoys" used to describe stalking behavior.<sup>137</sup> First, many statutes require the communication of a credible threat in addition to harassing behavior.<sup>138</sup> Second, most stalking laws exempt constitutionally protected activity from the scope of the statute.<sup>139</sup> Third, many statutes include an objective

139. Ala. Code §§ 13A-6-90 to -94 (1994); Ark. Code Ann. § 5-71-229 (Michie Supp. 1995); Cal. Penal Code § 646.9 (West Supp. 1996); Del. Code Ann. tit. 11, § 1312A (1995); Fla. Stat. Ann. § 784.048 (West Supp. 1997); Ga. Code Ann. §§ 16-5-90 to -93 (Michie 1996): Idaho Code § 18-7905 (Supp. 1996); Ind. Code Ann. ch. 35-45-10 (Michie 1994 & Supp. 1996); Kan. Stat. Ann § 21-3438 (West Supp. 1997); La. Rev. Stat. Ann. § 14:40.2 (West Supp. 1997); Mich. Comp. Laws Ann. § 750.411h-.411i (West Supp. 1996); Minn. Stat. Ann. § 609.749 (West Supp. 1997); Miss. Code Ann. § 97-3-107 (Supp. 1996); Mo. Ann. Stat. § 565.225 (West Supp. 1996); Mont. Code Ann. § 45-5-220 (1996); Nev. Rev. Stat. Ann. § 200.571-.601 (Michie 1995); N.H. Rev. Stat. Ann. § 633:3a (1996); N.J. Stat. Ann. § 2C: 12-10 (West 1995); N.D. Cent. Code § 12.1-17-07.1 (Supp. 1995); Okla. Stat. Ann. tit. 21, § 1173 (West Supp. 1997); 18 Pa. Cons. Stat. Ann. § 2709 (West. Supp. 1996); R.I. Gen. Laws §§ 11-59-1 to -3 (1994 & Supp. 1995); S.C. Code Ann. §§ 16-3-1700 to -1840 (Law. Co-op. Supp. 1995); S.D. Codified Laws Ann. §§ 22-19A-1 to -7 (Michie Supp. 1996); Tex. Penal Code Ann. § 42.071 (West Supp. 1997); Utah Code Ann. § 76-5-105.5 (1995 & Supp. 1996); Vt. Stat. Ann. tit. 13, § 1061–1063 (Supp. 1996); W. Va. Code § 61-2-9a (1992 & Supp. 1996); Wyo. Stat. § 6-2-506 (Supp. 1996).

<sup>134.</sup> See State v. Lee, 82 Wash. App. 298, 310, 917 P.2d 159, 166 (1996); State v. Carver, 113 Wash. 2d 591, 599, 781 P.2d 1308, 1312–13 (1989).

<sup>135.</sup> State v. Smith, 111 Wash. 2d 1, 11, 759 P.2d 372, 377 (1988).

<sup>136.</sup> See Carver, 113 Wash. 2d at 599–600, 781 P.2d at 1312–13. But see Lee, 82 Wash. App. at 310, 917 P.2d at 166.

<sup>137.</sup> State v. Bryan, 910 P.2d 212, 217 (Kan. 1996) (citing Boychuk supra note 119, at 788-89).

<sup>138.</sup> Ala. Code §§ 13A-6-9 to -94 (1994); Ark. Code Ann. § 5-71-229 (Michie Supp. 1995) (requiring a "terroristic threat"); Colo. Rev. Stat. Ann. § 18-9-111 (West 1990 & Supp. 1996); Iowa Code Ann. § 708.11 (West Supp. 1996); Ky. Rev. Stat. Ann. §§ 508.130–.150 (1995); Mass. Ann. Laws ch. 265, § 43 (Law. Co-op. Supp. 1996); N.M. Stat. Ann. §§ 30-3A-1 to -4 (Michie 1994 & Supp. 1996); S.C. Code Ann. §§ 16-3-1700 to -1840 (Law. Co-op. Supp. 1995); Tex. Penal Code Ann. § 42.071 (West Supp. 1997); Utah Code Ann. § 76-5-106.5 (1995 & Supp. 1996); W. Va. Code § 61-2-9a (1992 & Supp. 1996).

standard by requiring that the harassing behavior be severe enough to cause a "reasonable person to suffer substantial emotional distress."<sup>140</sup>

These three remedies mitigate against the probability that a statute will be found inherently vague. The inclusion of each provision helps provide notice to an ordinary citizen of what conduct is specifically proscribed and further, delineates ascertainable standards that decrease the opportunity for arbitrary enforcement of the law.<sup>141</sup> The Washington stalking law fails to include two of the three remedies. It does not contain "credible threat" language<sup>142</sup> and, furthermore, fails to include an exemption for constitutionally protected activities.<sup>143</sup>

#### a. First Remedy: Including a Credible Threat Requirement

The Washington law would be better protected from an attack of vagueness if it included a credible threat requirement as does the California stalking statute.<sup>144</sup> The California law requires proof of three elements. First, an offender must willfully, maliciously, and repeatedly follow or harass another person; second, the offender must make a credible threat; and, third, the offender must intend to place the other person in reasonable fear of death or great bodily injury.<sup>145</sup> An appellate court upheld the California stalking law against a vagueness challenge, holding that the term "credible threat" did not require an intent to kill or

- 144. § 646.9.
- 145. § 646.9.

<sup>140.</sup> Wash. Rev. Code § 9A.46.110(1)(b); see also Ala. Code §§ 13A-6-90 to -94 (1994); Cal. Penal Code § 646.9 (West Supp. 1996); Colo. Rev. Stat. Ann. § 18-9-111 (West 1990 & Supp. 1996); Del. Code Ann. tit. 11, § 1312A (1995); Idaho Code Ann. § 18-7905 (Supp. 1996); Ind. Code Ann. ch. 35-45-10 (Michie 1994 & Supp. 1996); Iowa Code Ann. § 708.11 (West. Supp. 1996); Kan. Stat. Ann § 21-3438 (West Supp. 1997); La. Rev. Stat. Ann. § 14:40.2 (West Supp. 1997); Mass. Ann. Laws ch. 265, § 43 (Law. Co-op. Supp. 1996); Mich. Comp. Laws Ann. § 750.411h-.411i; Minn. Stat. Ann. § 609.749 (West Supp. 1997); Miss. Code Ann. § 97-3-107 (Supp. 1996); Mo. Ann. Stat. § 565.225 (West Supp. 1996); Nev. Rev. Stat. Ann. §§ 200.571-.601 (Michie 1995); N.H. Rev. Stat. Ann. § 633:3a (1996); N.J. Stat. Ann. § 2C:12-10 (West 1995); N.M. Stat. Ann. § 30-3A-1 to -4 (Michie 1994 & Supp. 1996); N.D. Cent. Code § 12.1-17-07.1 (Supp. 1995); Okla. Stat. Ann. tit. 21, § 1173 (West Supp. 1997); R.I. Gen. Laws §§ 11-59-1 to -3 (1994 & Supp. 1995); S.C. Code Ann. §§ 16-3-1700 to -1840 (Supp. 1995); Tenn. Code Ann. § 39-17-315 (Supp. 1996); Utah Code Ann. § 76-5-106.5 (1995 & Supp. 1996); Wyo. Stat. § 6-2-506 (Supp. 1996).

<sup>141.</sup> See State v. Carver, 48 Wash. App. 33, 35, 737 P.2d 723, 724 (1987), aff d, 111 Wash. 2d 1, 759 P.2d 372 (1988).

<sup>142.</sup> See, e.g., Cal. Penal Code § 646.9.

<sup>143. § 646.9.</sup> 

cause great bodily harms, but only an intent to threaten another person so as to make that person reasonably frightened.<sup>146</sup>

The inclusion of the credible requirement better defines what kind of harassing behavior is prohibited.<sup>147</sup> Additionally, adoption of this remedy protects against an overbreadth challenge because the communication of a credible threat is not protected speech.<sup>148</sup> The current language of the Washington statute fails to require that an actual threat be communicated; rather, the language is broader. The Washington law requires only that a stalker "harasses" or "repeatedly follows" another, and that the victim reasonably experience fear.<sup>149</sup> A credible threat requirement defines the proscribed behavior more precisely and narrows the application of the statute to circumstances in which a threat is communicated. Thus, the inclusion of a credible threat requirement in the Washington statute would improve the likelihood that it will be upheld against an attack for vagueness or overbreadth.<sup>150</sup>

#### b. Second Remedy: Inclusion of an Exemption for Constitutionally Protected Activities

The addition of a provision exempting activities protected by the First Amendment would also repel a challenge for vagueness. Although a court ultimately must decide what behavior is protected, an exemption specifically removes any constitutionally protected conduct from the scope of the statute.<sup>151</sup> A reviewing court is clearly put on notice that the scope of the statute is narrowed to include only behavior that is not protected by the First Amendment. Thus, a court may decide that a particular case before it falls within the reach of the exemption. The exemption saves the statute from being struck down as unconstitutional as the court may hold that the law is merely inapplicable to a specific case in which protected activities are implicated.

151. Id.

<sup>146.</sup> People v. Carron, 44 Cal. Rptr. 2d 328, 333 (Ct. App. 1995).

<sup>147.</sup> See Boychuk, supra note 119, at 787.

<sup>148.</sup> Id. at 788-89.

<sup>149.</sup> See supra note 70.

<sup>150.</sup> See, e.g., Boychuk, supra note 119, at 799 (noting requirement that threat be communicated mitigates against arbitrary and discriminatory enforcement because law enforcement officer cannot make arrest based on his or her subjective determination of what constitutes "harassing" or "following" behavior in particular situation).

#### c. The Washington Statute Currently Provides the Third Remedy: Inclusion of an Objective Standard

The third remedy for vagueness is the inclusion of an objective standard in the definition of the harassing conduct. In *State v. Bryan*,<sup>152</sup> the Kansas Supreme Court struck down the state stalking law because the statute provided no guidelines to determine when "following" becomes alarming, annoying, or harassing. The statute failed to include an objective standard by which to judge the conduct of one charged with the crime of stalking.<sup>153</sup> The court found that although stalking is a specific intent crime, the intent element did not ameliorate its vagueness.<sup>154</sup> The statute required only an intentional following, but did not require an intent to alarm, annoy, or harass a victim.<sup>155</sup> According to the court, the law failed to provide an adequate standard of conduct by which ordinary citizens could judge their conduct.<sup>156</sup>

The Washington law, however, does provide an objective standard by which to measure the conduct of a stalker. The harassing behavior is measured by whether it causes a feeling of fear "that a reasonable person in the same situation would experience under all the circumstances."<sup>157</sup> Thus, the Washington law includes an objective standard that somewhat ameliorates a problem of vagueness.<sup>158</sup> Because the statute fails to require a credible threat or include an exemption for constitutionally protected activities, however, the objective standard may be insufficient to allow the Washington law to withstand a constitutional challenge that it is impermissibly vague.

#### B. Overbreadth Doctrine

As noted above, vagueness and overbreadth challenges are intertwined.<sup>159</sup> Overbreadth challenges, however, apply only to statutes

<sup>152.</sup> State v. Bryan, 910 P.2d 212, 214–15 (Kan. 1996). The court in *Bryan* considered the language of the statute prior to the 1992 amendments.

<sup>153.</sup> Id. at 217.

<sup>154.</sup> Id. at 221.

<sup>155.</sup> Id. at 220.

<sup>156.</sup> Id.

<sup>157.</sup> Wash. Rev. Code § 9A.46.110(1)(b) (1996).

<sup>158.</sup> See Boychuk, supra note 119, at 789 n.115. The author notes that the reasonable person standard "is not a panacea for the fickleness of judges and juries. It does, however, distance application of the stalking laws from the subjective state of mind of the victim."

<sup>159.</sup> See Wickens, supra note 11, at 193.

that inhibit First Amendment rights—the freedoms of speech and expression—although any statute may be struck down as vague. An overbroad statute is one designed to prohibit behavior or activities that are not constitutionally protected, but that includes within its scope activities protected by the Constitution.<sup>160</sup>

#### 1. U.S. Supreme Court's Application of the Overbreadth Doctrine

The U.S. Supreme Court has held that the overbreadth of a statute must not only be real, but substantial.<sup>161</sup> A court must examine a statute's "plainly legitimate sweep" in relation to the degree of constitutionally protected behavior that is within the scope of the law.<sup>162</sup>

The Court addressed content-based speech restrictions in R.A.V. v.*City of St. Paul*,<sup>163</sup> and held that a statute that restricts protected speech, no matter how objectionable, is unconstitutional. Furthermore, the Court held in *R.A.V.* that even proscribable speech such as "fighting words" may not be regulated based on their content.<sup>164</sup>

#### 2. Washington Supreme Court's Application of the Overbreadth Doctrine

The Washington Supreme Court relied on R.A.V. to partially invalidate the Washington "hate crimes statute" insofar as it regulated constitutionally protected speech rather than conduct.<sup>165</sup> The court held that although certain well-defined categories of speech, such as obscenity, defamation, and fighting words, are "low value speech," a finding that speech has low First Amendment value does not mean that it is wholly without constitutional protection.<sup>166</sup> Racial harassment prosecuted under the Washington hate crimes statute was "odious behavior," but it fell within the realm of constitutionally protected

<sup>160.</sup> Coates v. City of Cincinnati, 402 U.S. 611, 614-16 (1971).

<sup>161.</sup> Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

<sup>162.</sup> Id.

<sup>163. 507</sup> U.S. 377 (1992).

<sup>164.</sup> *Id.* "Fighting words" are "words... which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (White, J., concurring)).

<sup>165.</sup> State v. Talley, 122 Wash. 2d 192, 216, 858 P.2d 217, 230 (1993).

<sup>166.</sup> Id. at 217, 858 P.2d at 231.

speech.<sup>167</sup> The court held, therefore, that the part of the statute that regulated speech based on content was unconstitutionally overbroad.

The court, applying the same principles to a challenge to the Washington stalking law, must determine whether the statute regulates only conduct or whether it regulates speech and conduct.<sup>168</sup> If the court finds that the law specifically regulates conduct and only incidentally touches speech, the statute will be held constitutional.<sup>169</sup> If the court, however, determines that the statute unduly restricts an individual's right of expression, in addition to regulating his or her conduct, the statute will be struck down as an unconstitutional infringement of First Amendment rights.<sup>170</sup>

Because of the context in which most documented stalking cases arise, defendants may face a charge of stalking for an effort at communication that they did not intend to be threatening to the other person.<sup>171</sup> Although the communication of a threat is not constitutionally protected speech,<sup>172</sup> other forms of speech are proscribed by this statute. For example, at the end of a relationship, one person may contact the former partner in an effort to re-establish the relationship. If the complaining party gives an alleged stalker actual notice that he or she does not want to be contacted, any indication that the stalker has attempted contact will constitute prima facie evidence that the stalker has intentionally intimidated or harassed the other person.<sup>173</sup> Thus, a defendant to an allegation of stalking may be

<sup>167.</sup> *Id.* at 218, 858 P.2d at 231. Mr. Talley's action of burning a cross on his own lawn to intimidate a racially-mixed couple who were considering purchasing the home next door could not be prosecuted under the statute as the law was overbroad in proscribing his constitutionally protected symbolic speech. The actions of two boys, in a lawsuit consolidated with Mr. Talley's, were arguably criminal under the portion of the statute which regulated only conduct and which was upheld. The boys burned a cross on the law of an African-American rather than on their own lawn. The claim against the boys was remanded for further proceedings, whereas the lawsuit against Mr. Talley was dismissed. *Id.* 

<sup>168.</sup> See State v. Culmo, 642 A.2d 90 (Conn. Super. Ct. 1993). The Connecticut court upheld its stalking law, in part because the word "harass" had been removed from an early version of the statute. Thus, the court determined that its statute, without the term "harass," did not implicate speech, but rather criminalized conduct only.

<sup>169.</sup> Seattle v. Huff, 111 Wash. 2d 923, 767 P.2d 572 (1989) (upholding telephone harassment statute); State v. Smith, 48 Wash. App. 33, 35, 737 P.2d 723, 724 (1987), *aff'd*, 111 Wash. 2d 1, 759 P.2d 372 (1988) (upholding harassment statute); Seattle v. Camby, 104 Wash. 2d 49, 701 P.2d 499 (1985) (upholding malicious harassment statute).

<sup>170.</sup> See City of Everett v. Moore, 37 Wash. App. 862, 683 P.2d 617 (1984).

<sup>171.</sup> See Beck, supra note 18.

<sup>172.</sup> R.A.V. v. City of St. Paul, 507 U.S. 377 (1992).

<sup>173.</sup> Wash. Rev. Code § 9A.46.110 (4) (1996) ("Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person.").

restricted in his or her ability to express opinions. The defendant's speech may be unconstitutionally regulated by this statute, causing a chilling effect on free speech in violation of the First Amendment.

#### 3. Washington Court of Appeals' Application of the Overbreadth Doctrine

A Washington court of appeals held that the stalking statute is not overbroad because it is "plainly" aimed at regulating conduct rather than speech.<sup>174</sup> The court acknowledged that a person could "provoke a reasonable but mistaken sense of fear" in another person.<sup>175</sup> The court, however, concluded that overbreadth challenges should be addressed on a case-by-case basis and declined to prospectively invalidate the statute.<sup>176</sup>

A Washington court of appeals found a harassment statute that is similar to the stalking law to be overbroad as well as vague.<sup>177</sup> In *City of Everett v. Moore*, the court struck down its ordinance because the words "alarms or seriously annoys" could be applied to constitutionally protected speech.<sup>178</sup> The court held that discourse concerning "any political, social, economic, philosophic or religious topic" might alarm or annoy a listener, but that discussion may be protected by the First Amendment.<sup>179</sup> Thus, the ordinance at issue could have been applied to proscribe constitutionally protected speech because of the particular sensibilities of the complainant.<sup>180</sup>

In addition to finding that the ordinance was unconstitutionally vague, the court also held that it was overbroad.<sup>181</sup> It was vague because the terms used to describe prohibited conduct did not provide notice to an ordinary citizen and because the terms were subject to a wide range of

<sup>174.</sup> State v. Lee, 82 Wash. App. 298, 307, 917 P.2d 159, 165 (1996).

<sup>175.</sup> Id. at 309, 917 P.2d at 166.

<sup>176.</sup> Id. at 309–10, 917 P.2d at 166.

<sup>177.</sup> City of Everett v. Moore, 37 Wash. App. 862, 683 P.2d 617 (1984).

<sup>178.</sup> Id.

<sup>179.</sup> *Id.* at 864, 683 P.2d at 618. The court, addressing the alarm aspect stated, "the public is constantly being put on alert about the disastrous effects of everything from vitamin deficiencies in the blood to nuclear obliteration.... And such alarms are often legitimate."

<sup>180.</sup> Id. at 864-65, 683 P.2d at 618-19. Conviction under the Washington stalking law does depend on the subjective feelings of a victim, but the drafters of the law included a "reasonable person standard" in the language of the statute. This provides an objective standard that the ordinance at issue in *Moore* did not contain.

<sup>181.</sup> See supra text accompanying notes 116–118.

meanings depending on the sensibilities of the complainant.<sup>182</sup> Further, the ordinance was overbroad because protected speech and conduct were proscribed in the same manner as unprotected speech and conduct.<sup>183</sup> The stalking law arguably suffers from the same defect as the ordinance at issue in *Moore* because the plainly legitimate sweep of the statute extends to protected speech and conduct as well as implicating unprotected behavior.<sup>184</sup>

The two remedies for vagueness that the Washington law is lacking could shield against an attack for overbreadth. First, the inclusion of a credible threat requirement would narrow the scope of activities within the reach of the statute because the proscribed behavior would more closely resemble the elements of criminal assault. Such behavior would be unlikely to fall in the realm of protected behavior. Second, an exemption for constitutionally protected activities would mitigate against overbreadth because any behavior that implicates constitutional protection would be excluded from conviction under the stalking law.

## V. CONCLUSION: SUGGESTED REVISIONS TO THE WASHINGTON LAW

Although most state laws criminalizing stalking have been upheld against constitutional challenges, courts have examined the particular statutory language carefully to determine whether it is narrowly drafted to provide a citizen with ascertainable standards of conduct and to determine whether it proscribes only activity that is not constitutionally protected.

The Washington stalking law will likely withstand constitutional attack if it is amended to include two provisions that mitigate against challenges claiming vagueness and overbreadth. First, the Legislature should amend the law to include the requirement of a credible threat to ameliorate vagueness in the definition of "harasses" in the statute. Second, the Legislature should add a provision exempting constitutionally protected activities, such as lobbying and picketing. The efficacy of this law in addressing the serious danger inherent in stalking will ultimately turn on whether the law is upheld when its

<sup>182.</sup> Moore, 37 Wash. App. at 864, 683 P.2d at 618-20.

<sup>183.</sup> *Id*.

<sup>184.</sup> See State v. Culmo, 642 A.2d 90 (Conn. Super. Ct. 1993). The court held that the stalking statute did not reach protected speech, but rather only unprotected conduct. The court found it persuasive that the Connecticut legislature deleted the word "harasses" from its statute, thereby eliminating the possibility that the statute would regulate protected speech.

constitutionality is challenged. By providing a remedy to the current constitutional infirmities, the Washington Legislature can ensure that the law stands and achieves its intended purpose of protecting victims of stalking.