

Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges

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INTRODUCTION

It began like any other dating relationship: John and Jane met through mutual friends on several occasions and then began to date. However, after a few months, the dating relationship ended, and their relationship transformed into a stalking nightmare. Immediately after the break-up, John began contacting Jane frequently and begging her to take him back. John called Jane's cell phone, left her voice mail messages and text messages, and eventually left her messages on MySpace.¹ With his Blackberry,² John had the ability to contact Jane at any time through its Internet and phone functions. One message was remorseful and sensitive, filled with thoughts of longing, love, and eternal happiness, and the next was full of anger and jealousy because the relationship had ended and Jane had moved on. Weeks turned into months, and months turned into years, as John continued with this behavior. At points, John even contacted Jane's friends and family members begging for her new address and questioning whether she had a new cell phone number because she refused to return his calls. Almost two years later, Jane logged on to her MySpace account to find message after message from John begging her to take him back and marry him, to give him a current address, and to just call him so he could hear her voice again. John had found Jane on MySpace and had written her messages for months. Scared and

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¹ "MySpace" is a "[s]ocial networking site that allows its users to create webpages to interact with other users." *MySpace*, BUSINESSDICTIONARY.COM (Oct. 18, 2010), <http://www.businessdictionary.com/definition/Myspace.html>.

² A "Blackberry" is a "[m]obile smart device that combines a number of functions including emails, web browsing, text messaging, schedule management, and mobile phone into one portable handset." *Blackberry*, BUSINESSDICTIONARY.COM (Oct. 18, 2010), <http://www.businessdictionary.com/definition/BlackBerry.html>.

frustrated, Jane deleted her MySpace account in the hopes of finally erasing John from her life.

While the names have been changed, the story is real and is becoming all too common as technology continues to increase and expand the ways in which stalkers can stalk and harass their victims.³ Each year, approximately 3.4 million people over the age of eighteen are stalked in the United States, according to the Supplemental Victimization Survey (SVS) of 2006.⁴ Approximately twenty-five percent of victims reported being stalked through a medium such as e-mail or instant messaging, and more than half of all stalking and harassment victims reported being stalked by the telephone or through phone messages.⁵ While stalking is often analyzed and categorized by the type of stalker committing the unwanted behavior, the resulting harm to stalking victims spans a wide spectrum, leaving victims scared, traumatized, and depressed for years after stalking incidents.⁶

This Comment analyzes current anti-stalking statutes in the United States as they apply to stalking that occurs through the mediums of the Internet and the telephone. It focuses on the need to protect stalking victims by broad stalking legislation that can withstand constitutional challenges, and argues that existing statutes should be amended, or new statutes enacted, in order to cover all forms of stalking behavior.⁷ Part I provides an in-depth overview of stalking in the United States by describing the types of stalkers, typical stalker characteristics, methods of stalking, and effects on the victim. Part I also addresses the history of anti-stalking law in the United States by detailing the law prior to the enactment of anti-stalking statutes and discussing general

³ This story is real and ongoing, with the last MySpace incident occurring about one and a half years prior to the date of this Comment. The names have been changed for the purpose of respecting the involved parties' privacy.

⁴ KATRINA BAUM ET AL., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: STALKING VICTIMIZATION IN THE UNITED STATES 1 (2009).

⁵ *Id.* Approximately 62.5% of all stalking and harassment victims reported phone stalking in the form of phone calls and messages. *Id.* at 2.

⁶ Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 261, 264-65 (2001). "Thirty percent of female victims and twenty percent of male victims seek psychological counseling" as a result of stalking, and approximately twenty-five percent of stalking victims consider suicide. *Id.* at 265.

⁷ In discussing anti-stalking statutes in this Comment, "general anti-stalking statutes" refer to the initial anti-stalking statutes enacted to address stalking which focus on physical contact, and "specialized anti-stalking statutes" refer to statutes that address stalking by the mediums of the Internet and the telephone. In analyzing specialized anti-stalking statutes, this Comment addresses both stalking and harassment laws as they generally cover the same behavior as it relates to stalking through the mediums of the Internet and the phone, and "stalking" statutes will therefore include both stalking and harassment laws.

anti-stalking statutes and constitutional challenges to anti-stalking statutes. Part II analyzes current anti-stalking statutes as they relate to stalking through the mediums of the Internet and telephone and discusses continuing constitutional challenges to anti-stalking statutes. Part III proposes amendments to existing laws so as to withstand constitutional scrutiny and encourage states to enact amendments to cover all forms of stalking in order to ensure that victims stalked through newer mediums are adequately and consistently protected.

I. HISTORY OF STALKING AND ANTI-STALKING STATUTES IN THE UNITED STATES

A. Overview of Stalking Behavior

Stalking involves “repeated harassing or threatening behavior,” rather than an isolated instance of criminal conduct.⁸ In California, for example, the crime of stalking is defined as “willfully, maliciously, and repeatedly follow[ing] or willfully and maliciously harass[ing] another person and . . . [making] a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety or his or her immediate family.”⁹ Merely annoying, bothersome contact can develop into a serious, life-threatening situation.¹⁰ Stalking behavior is not limited to males or females, although stalkers are predominantly male and their victims are predominantly female.¹¹ Stalkers’ motivations vary according to their typology, and include anger, jealousy, revenge, delusion, fantasy, and an endeavor to win the victim’s affection.¹²

⁸ Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 126 (2007). See also Merschman, *supra* note 6, at 260 (noting that less than half of all stalking victims are directly threatened, and instead a stalker’s accumulated conduct creates reasonable fear in the minds of their victims).

⁹ CAL. PENAL CODE § 646.9 (West 2010). Compare ALA. CODE § 13A-6-90 (LexisNexis 2005), COLO. REV. STAT. ANN. § 18-9-111 (West 2009), and FLA. STAT. ANN. § 784.048 (West 2008) (requiring a credible threat), with ARIZ. REV. STAT. ANN. § 13-2923 (West 2010), and TEX. PENAL CODE ANN. § 42.072 (Vernon 2003) (rejecting a credible threat requirement).

¹⁰ Christine B. Gregson, *California’s Antistalking Statute: The Pivotal Role of Intent*, 28 GOLDEN GATE U. L. REV. 221, 226 (1998). The ultimate potential consequence of stalking is the victim’s death, and approximately 67% of homicides committed against women by their intimate partners involved prior stalking of the female victim by the male perpetrator. STALKING RESOURCE CTR., STALKING FACT SHEET (2009), http://www.ncvc.org/src/main.aspx?dbID=DB_statistics195 (follow “Stalking Fact Sheet” hyperlink) [hereinafter STALKING FACT SHEET].

¹¹ According to the SVS, twenty out of one thousand females were likely to be stalking victims compared to approximately seven out of one thousand males. BAUM ET AL., *supra* note 4, at 3. Additionally, “[f]emale victims of stalking were significantly more likely to be stalked by a male (67%) rather than a female (24%) offender.” *Id.* at 4.

¹² Gregson, *supra* note 10, at 226; Merschman, *supra* note 6, at 260.

Stalkers can be divided into three main categories that describe their stalking relationship with their victim: erotomaniacs, love obsessional stalkers, and simple obsessional stalkers.¹³ An understanding of each type is necessary to formulate and assess effective anti-stalking legislation.

1. Stalker Types

The first stalking category consists of individuals who have “erotomania,” known as “erotomaniacs.”¹⁴ Erotomaniacs have a delusional belief that their victim loves them and they view their victim as unattainable, such as the classic example of celebrity stalking.¹⁵ This stalker becomes obsessed with his or her victim and creates an imaginary relationship with the victim.¹⁶ The erotomaniac does not know his or her victim and rarely will initiate face-to-face contact. Instead, this type of stalker uses less confrontational stalking methods, such as phone calls or letters; therefore, the erotomaniac is the least likely of the three stalker types to become violent.¹⁷ An erotomaniac is most often a socially immature individual who is unable to maintain close relationships.¹⁸ Unlike the other two types of stalkers, this stalker is more likely to be a female, and the majority of her victims are likely to be older men with a higher socioeconomic status.¹⁹ Overall, erotomaniacs compose only ten percent of all stalkers.²⁰

¹³ Belinda Wiggins, *Stalking Humans: Is There a Need for Federalization of Anti-Stalking Laws in Order to Prevent Recidivism in Stalking?*, 50 SYRACUSE L. REV. 1067, 1072–73 (2000).

¹⁴ Tatia Jordan, *The Efficacy of the California Stalking Law: Surveying Its Evolution, Extracting Insights from Domestic Violence Cases*, 6 HASTINGS WOMEN'S L.J. 363, 365 (1995); Merschman, *supra* note 6, at 263. “Erotomania . . . is classified diagnostically as a delusional disorder, known as ‘de Clerambault’s syndrome.’” Joseph A. Davis & Marcella A. Chipman, *Stalkers and Other Obsessional Types: A Review and Forensic Psychological Typology of Those Who Stalk*, in STALKING CRIMES AND VICTIM PROTECTION: PREVENTION, INTERVENTION, THREAT ASSESSMENT, AND CASE MANAGEMENT 3, 4 (Joseph A. Davis ed., 2001) (hereinafter STALKING CRIMES).

¹⁵ Davis & Chipman, *supra* note 14; Wiggins, *supra* note 13, at 1072.

¹⁶ Merschman, *supra* note 6, at 263.

¹⁷ Davis & Chipman, *supra* note 14, at 9. The SVS reports that approximately 9.7% of stalking victims identified their stalker as a stranger. BAUM ET AL., *supra* note 4, at 4. See also Merschman, *supra* note 6, at 261 (“[T]he NVAW [National Violence Against Women] Survey [from 1998] found that only 23% of female victims reported being stalked by strangers . . .”).

¹⁸ Merschman, *supra* note 6, at 263. Additionally, this stalker tends to be older and more intelligent than other mentally ill persons who commit crimes. *Id.*

¹⁹ Wiggins, *supra* note 13, at 1072.

²⁰ *Id.* The case of Rebecca Schaeffer, see *infra* Part I.C, involved the case of an erotomaniac stalker. See also Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67, 80–81 (1993).

The second type of stalker is labeled the “love obsessive” stalker.²¹ This stalker does not have a relationship with his or her victim; however, unlike erotomaniacs, he or she has usually had some sort of contact with the victim.²² The love obsessive stalker engages in a campaign to make his or her victim aware of the stalker’s existence.²³ This stalker is often a well-educated, affluent professional whose personal life revolves solely around stalking the victim.²⁴ Unlike the erotomaniac, the love obsessive stalker is not under a delusion that the victim loves him or her.²⁵ Instead, the obsessive stalker is likely to suffer from a personality disorder such as schizophrenia.²⁶ In contacting their victims, love obsessive stalkers are most likely to use mediums such as phone calls and letters.²⁷ As with erotomania, celebrity stalkers often fall within the love obsessive typology.²⁸

The final category of stalkers is known as the “simple obsessive” stalker.²⁹ The simple obsessive stalker traditionally has had a previous relationship with his or her victim or “some previous knowledge” of his or her victim.³⁰ The simple obsessive stalker usually becomes a stalker when prompted by a specific event, such as the ending of a relationship, or a perception of mistreatment by the victim.³¹ As a result of this

²¹ Wiggins, *supra* note 13, at 1072–73.

²² *Id.*; Davis & Chipman, *supra* note 14, at 5. This contact could be a fleeting occasion such as at the bank or in the grocery store, or on a more regular basis such as a co-worker or neighbor. *Id.* at 10. Approximately 45.1% of stalking victims know their stalker in a capacity such as a neighbor, co-worker, or acquaintance. BAUM ET AL., *supra* note 4, at 4.

²³ Davis & Chipman, *supra* note 14, at 5.

²⁴ *Id.* at 10. A specific type of love obsessive stalker is known as the “workplace-type stalker,” a “workaholic . . . who perceives proof of reciprocal interaction with the victim through innocuous circumstances.” *Id.* A workplace stalker’s behavior is often overt rather than hidden and is observed by other co-workers. *Id.* at 11.

²⁵ Jordan, *supra* note 14, at 365–66. Unlike the love obsessive stalker who may have schizophrenia, the erotomaniac generally does not suffer from a mental condition other than the delusion that they are loved by their victim. *Id.*

²⁶ *Id.* “Schizophrenia is a serious mental illness characterized by incoherent or illogical thoughts, bizarre behavior and speech, and delusions or hallucinations such as hearing voices.” *Schizophrenia*, AM. PSYCHOL. ASS’N (2009), <http://www.apa.org/topics/schiz/index.aspx>.

²⁷ Gregson, *supra* note 10, at 227.

²⁸ *Id.* at 226; Wiggins, *supra* note 13, at 1072–73.

²⁹ Jordan, *supra* note 14, at 366.

³⁰ *Id.*; Wiggins, *supra* note 13, at 1072. This relationship or knowledge can be that of co-workers, acquaintances or former intimate partners such as an ex-girlfriend or ex-wife. *Id.* The SVS found that 30.3% of stalking victims either were or had been in an intimate relationship with their stalking offender. BAUM ET AL., *supra* note 4, at 4.

³¹ Davis & Chipman, *supra* note 14, at 5. Because stalking laws criminalize otherwise constitutional conduct, there is some concern that a former partner’s behavior could be misinterpreted as stalking rather than as an innocent, harmless attempt to regain their partner’s love. *See generally* Kenneth R. Thomas, *The Problem of the*

event, the stalker seeks to “either restore the relationship or [to] seek retribution.”³² The stalker has usually preceded the stalking behavior with domestic violence or similar behavior, and during the stalking “mission,” he or she maintains an outwardly normal appearance.³³ Simple obsessional stalkers are the most dangerous stalker type and the most likely to confront their victim in person and to physically harm their victim or their victim’s property.³⁴ Accordingly, the simple obsessional victim is the most common and least protected type of victim.³⁵

2. Typical Characteristics

Stalkers in general, regardless of their typology, have certain characteristics in common, the existence of which is higher than among the average population. Initially, people with “attachment difficulties and a history of failed relationships” are more likely to become stalkers.³⁶ Additionally, persons with a history of violence, violent criminals, and persons who threaten former partners are also more likely to become stalkers.³⁷ Most stalkers are also emotionally or mentally disturbed, and a majority of stalkers suffer from personality disorders such as histrionic, antisocial, or borderline personalities.³⁸

Persistent Suitor: Can Antistalking Laws Distinguish Between Love and Madness?, 41 FED. B. NEWS & J. 620 (1994) (questioning whether stalking laws can effectively separate constitutional conduct from unconstitutional stalking). However, stalking laws intentionally address otherwise constitutional conduct when that conduct reaches a certain level and then becomes criminal and is no longer entitled to constitutional protection. Merschman, *supra* note 6, at 272–73. Additionally, many stalking laws include provisions that expressly exclude constitutional conduct. *See, e.g.*, ALA. CODE § 13A-6-92 (LexisNexis 2005) (excluding constitutional conduct from conduct addressed by the statute).

³² Jordan, *supra* note 14, at 366.

³³ Davis & Chipman, *supra* note 14, at 5. “Many simple obsessional cases of stalking fall into the domestic violence realm where ex-spouses or ex-partners are stalking victims who are attempting to escape abusive relationships.” Jordan, *supra* note 14, at 366.

³⁴ Gregson, *supra* note 10, at 228.

³⁵ Davis & Chipman, *supra* note 14, at 5. Simple obsessional stalking victims are the least protected victim because of the nature of their prior relationship with their stalker. This victim often rationalizes and excuses the stalker’s behavior until the victim has been harmed. *Id.*

³⁶ STEPHEN J. MOREWITZ, STALKING AND VIOLENCE: NEW PATTERNS OF TRAUMA AND OBSESSION 1 (2003). Additional common “stalker” characteristics include “difficulty in establishing an identity, and a desire for attention.” Jennifer L. Bradfield, *Anti-Stalking Laws: Do They Adequately Protect Stalking Victims?*, 21 HARV. WOMEN’S L.J. 229, 235 (1998).

³⁷ MOREWITZ, *supra* note 36.

³⁸ Bradfield, *supra* note 36; DETECTIVE MIKE PROCTOR, HOW TO STOP A STALKER 260 (2003). Histrionic personality disorder is a disorder where the afflicted person shows a continuing pattern of dramatic and attention-seeking behaviors. *Histrionic Personality Disorder*, ENCYCLOPEDIA OF MENTAL DISORDERS, <http://www.minddisorders.com/Flu-Inv/Histrionic-personality-disorder.html> (last visited Oct. 19, 2010). Antisocial personality disorder is “a pervasive pattern of disregard for, and violation of, the rights of others.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF

3. Stalking Methods

In order to accomplish their stalking behavior, stalkers use a variety of mediums and methods. This behavior can be passive, such as making unwanted phone calls to their victim's home and work, stealing and reading their victim's e-mail, calling their victim and hanging up repeatedly, and sending their victim unwanted photos and harassing messages.³⁹ Bolder stalking behaviors include following a victim, spying on a victim or standing outside a victim's home or work, vandalizing a victim's property, and threatening to harm a victim, or a victim's family or pets.⁴⁰ The worst-case stalking scenario results in violence toward the victim, including rape, assault, and murder.⁴¹

As technology continues to develop, stalkers are taking advantage of new mediums such as the Internet to stalk their victims.⁴² A relatively recent and growing form of stalking behavior occurs through electronic media and is known as "cyberstalking."⁴³ Cyberstalking is defined as stalking involving the "use of the Internet, e-mail, or other electronic communications devices to stalk another person,"⁴⁴ and has effectively expanded the ways in which stalkers harass their victims.⁴⁵ Cyberstalkers have unique characteristics that distinguish them

MENTAL DISORDERS: DSM-IV-TR 701 (2000) [hereinafter DSM-IV]. Borderline personality disorder is "a pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity." *Id.* at 706.

³⁹ TK LOGAN ET AL., PARTNER STALKING: HOW WOMEN RESPOND, COPE, AND SURVIVE 19 (2006).

⁴⁰ Mary L. Boland, *Model Code Revisited: Taking Aim at the High-Tech Stalker*, 20 CRIM. JUST. 40, 41 (2005).

⁴¹ Merschman, *supra* note 6, at 260.

⁴² Boland, *supra* note 40, at 41.

⁴³ *Id.* See also Ann Wolbert Burgess & Timothy Baker, *Cyberstalking*, in STALKING AND PSYCHOSEXUAL OBSESSION: PSYCHOLOGICAL PERSPECTIVES FOR PREVENTION, POLICING AND TREATMENT 201, 205-06 (Julian Boon & Lorraine Sheridan eds., 2002) (discussing cyberstalking in the collegiate context).

⁴⁴ Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1376 (2000).

⁴⁵ Goodno, *supra* note 8, at 126. Cyberstalkers can stalk their victim by using Internet search engines to locate and harass their victims and monitoring their victim's activities through the use of browser history, interception of emails, and spyware. Cindy Southworth & Sarah Tucker, *Technology, Stalking and Domestic Violence Victims*, 76 MISS. L.J. 667, 667-70 (2007). Stalkers can also use "Keystroke Loggers" that record every key typed on a computer to monitor their victim and can set up websites to harass their victim or encourage others to do so. *Id.* Additionally, stalkers can impersonate their victim as a further way to terrorize and harass the victim. Bonnie D. Lucks, *Electronic Crime, Stalkers, and Stalking: Relentless Pursuit, Harassment, and Terror Online in Cyberspace*, in STALKING CRIMES, *supra* note 14, at 161, 187. As a consequence of the relative ease with which a cyberstalker may stalk their victim online as compared to a traditional stalker, a cyberstalker may consider their "online stalking" less harmful than more traditional methods. Joanna Lee Mishler, *Cyberstalking: Can Communication Via the Internet Constitute a Credible Threat, and Should an Internet Service Provider be Liable If It Does?*, 17 SANTA CLARA COMPUTER & HIGH TECH. L.J. 115, 117 (2000).

from an ordinary stalker because of the Internet forum.⁴⁶ Cyberstalkers have the ability to instantly stalk and harass their victims by widely dispersing a stalking message, stalking from a further distance, concealing their own identity, stealing their victim's identity, or stalking their victim through a third party.⁴⁷

In addition to stalking through the Internet, stalkers continue to use more traditional mediums of stalking, such as the phone, although supported by ever-increasing technological advances.⁴⁸ Many stalkers use a telephone as their first weapon of choice to harass and threaten their victims because of the prevalence of phones and their low cost in comparison to other technologies.⁴⁹ In addition to using telephones to make harassing phone calls and leave threatening messages, stalkers can also trace their victim's land line phone records to monitor their victim's activities and whereabouts.⁵⁰ Additionally, with the growth of caller ID and Global Positioning System (GPS) chips in phones that keep internal records of calls and the cell phone users' location, stalkers can access their victim's call-history and location to further monitor their victim.⁵¹ As a result of the prevalence of telephone stalking, many states have enacted criminal statutes that exclusively penalize telephone stalking or telephone harassment.⁵²

To further complicate matters, as technology increases and blurs distinctions between various mediums, stalkers can track and follow their victim's activities using several mediums at once.⁵³ An example is seen in the growth of handheld devices like the Blackberry that provide Internet access, allow instant text

⁴⁶ Goodno, *supra* note 8, at 128–29.

⁴⁷ *Id.* at 128–32. Cyberstalkers can also terrorize their victim by sending viruses, spam, or e-mail bombs, or by flooding their victim's Internet conversation. Kimberly Wingteung Seto, *How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking?*, 9 *CARDOZO WOMEN'S L.J.* 67, 73 (2002). See generally Gene Barton, *Taking a Byte Out of Crime: E-mail Harassment and the Inefficacy of Existing Law*, 70 *WASH. L. REV.* 465 (1995) (discussing stalking by means of e-mail harassment and the interrelation between anti-stalking laws and e-mail stalking). See also Ellen Luu, *Web-Assisted Suicide and the First Amendment*, 36 *HASTINGS CONST. L.Q.* 307, 320–21 (2009) (noting the potential for increased difficulty in the investigation and prosecution of cyberstalking cases because of the ability of a stalker in one jurisdiction to stalk a victim in another jurisdiction over the Internet).

⁴⁸ Southworth & Tucker, *supra* note 45, at 673.

⁴⁹ *Id.*

⁵⁰ *Id.* at 674. State anti-stalking laws may specifically criminalize stalking by means of GPS devices. See, e.g., 720 *ILL. COMP. STAT. ANN.* 5/12-7.3 (West 2010) (defining "stalking" to include "plac[ing] a person under surveillance," which is further defined as including "placing an electronic tracking device on the person or the person's property").

⁵¹ Southworth & Tucker, *supra* note 45, at 674.

⁵² See *infra* Part II.A.

⁵³ Southworth & Tucker, *supra* note 45, at 675.

and e-mail messaging, and allow the user to send photos.⁵⁴ Essentially, a stalker could pursue his or her victim using both the Internet and the phone all at once, potentially complicating prosecution of the stalker's behavior.⁵⁵

4. Effects on the Victim

While stalkers' behavior varies depending on their relationship with the victim and the mediums and methods they use to stalk their victim, the victims generally suffer similar types of harm, which varies only by degree. Stalking victims essentially have their privacy destroyed and, as a result, become paranoid and fearful.⁵⁶ This fear can manifest itself in victims as a fear of others, a fear of new things, and a fear of falling asleep.⁵⁷ As a result of this fear, victims may withdraw from their social world and find it hard to engage in their daily activities and maintain relationships.⁵⁸ Victims can become intensely emotionally disturbed and their lives can be permanently altered, including losing their jobs and even being forced to move to a different location.⁵⁹ "The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed."⁶⁰ A 1998 statistic indicated

⁵⁴ *Id.*; see *supra* note 2. Several states have modified their anti-stalking laws to include stalking by means of text messaging or instant messaging. See, e.g., NEV. REV. STAT. ANN. § 200.575 (LexisNexis 2006); OR. REV. STAT. ANN. § 166.090 (West 2010); UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2008); WASH. REV. CODE ANN. § 9.61.260 (West 2010) (addressing stalking or harassment by means of "text messaging"). See also OKLA. STAT. ANN. tit. 21, § 1172 (West 2009); TEX. PENAL CODE ANN. § 42.07 (Vernon 2003) (addressing stalking or harassment by means of "instant messaging").

⁵⁵ Southworth & Tucker, *supra* note 45, at 675. A stalker's use of a combined medium like the Blackberry could potentially complicate prosecution when the government must decide whether to pursue punishment under a cyberstalking statute or a phone-stalking statute in those states that have specific anti-stalking statutes.

⁵⁶ Gregson, *supra* note 10, at 228.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Merschman, *supra* note 6, at 264-65. Over fifty percent of stalking victims miss five or more work days because of their stalking, and one-in-seven stalking victims move because of the stalking. BAUM ET AL., *supra* note 4, at 6, 7.

⁶⁰ STALKING FACT SHEET, *supra* note 10. Stalking victims may suffer a variety of clinical mental disorders, in addition to depression and generalized anxiety disorder, including obsessive-compulsive disorder and Post-Traumatic Stress Disorder. Radosevich, *supra* note 44, at 1372. Depression is generally defined as the "feeling of dejection, gloominess, cheerlessness, joylessness, and unhappiness." DSM-IV, *supra* note 38, at 788. Anxiety is defined as "an abnormal and overwhelming sense of apprehension and fear often marked by . . . physical symptoms [such] as tension, tremor, sweating, palpitation, and increased pulse rate." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (3d ed. 1993). Obsessive-compulsive disorder, or "OCD," is a neurotic state characterized by "recurrent obsessions and compulsions." DSM-IV, *supra* note 38, at 456-57. Post-traumatic stress disorder, or "PTSD," involves "intense fear, helplessness, or horror" as

that between three and thirty-six percent of stalking victims suffer an assault or battery, and two percent of stalking victims are killed by their stalker.⁶¹ As a result of these serious effects, states have considered stalking a crime and enacted various statutes to punish stalking behavior.⁶²

B. The Law Prior to Anti-Stalking Statutes

Prior to 1990, no criminal statutes dealt specifically with stalking, and the existing legal measures to combat stalking were severely limited and inadequate.⁶³ Under certain previous laws, a stalker could not be legally arrested until he or she had physically harmed his or her victims,⁶⁴ thereby inhibiting the ability to protect victims from injury.⁶⁵ Additionally, some laws, such as California's law prohibiting terrorist threats,⁶⁶ had a heightened requirement that a victim must have been aware that the stalker's threat would be fulfilled immediately in order for it be classified as a violation.⁶⁷ This requirement effectively limited the ability of law enforcement to protect victims before an actual attack.⁶⁸ Furthermore, even if a stalker's threat was held to be sufficient for criminal prosecution, the sanctions were often mild, with some states treating harassment as a misdemeanor.⁶⁹

The statutes used in California to prosecute stalking behavior prior to 1990 included Penal Code sections 653m and 422,⁷⁰ which prohibited placing annoying and obscene phone calls and making terrorist threats, respectively.⁷¹ Both statutes "were designed to protect victims from specific instances of threatening or annoying activities," rather than from a series of harassing acts.⁷² As these statutes did not specifically address cumulative

well as "persistent reexperiencing of the traumatic event . . . resulting from the exposure to . . . extreme trauma." DSM-IV, at 463.

⁶¹ Wiggins, *supra* note 13, at 1073.

⁶² *See infra* Part I.C.

⁶³ Suzanne Cavanagh et al., *Stalking: Recent Developments, in* STALKING AND DOMESTIC VIOLENCE: CURRENT ISSUES 11, 11–12 (L.G. Wang ed., 2004).

⁶⁴ *Id.* *See, e.g.*, ALA. CODE § 13A-11-8(a)(1)(a) (LexisNexis 2005) (requiring physical harm under a harassment statute, including "strik[ing], shov[ing], kick[ing], or otherwise touch[ing] a person or subject[ing] him or her to physical contact"). *See also* Silvija A. Strikis, *Stopping Stalking*, 81 GEO L.J. 2771, 2774 n.21 (1993) (discussing physical contact requirements of laws prior to anti-stalking statutes).

⁶⁵ MOREWITZ, *supra* note 36, at 59.

⁶⁶ CAL. PENAL CODE § 422 (West 2010).

⁶⁷ *Id.*; MOREWITZ, *supra* note 36, at 59.

⁶⁸ MOREWITZ, *supra* note 36, at 59.

⁶⁹ ALA. CODE § 13A-11-8(a) (LexisNexis 2005); MOREWITZ, *supra* note 36, at 59.

⁷⁰ CAL. PENAL CODE § 422; CAL. PENAL CODE § 653m (West 2010).

⁷¹ Gregson, *supra* note 10, at 231–32.

⁷² *Id.* at 233.

stalking behavior—a course of stalking conducted over time—they were too narrow to sufficiently protect stalking victims.⁷³

In addition to criminal prosecution of stalking behavior, victims were able to obtain protective orders, such as a temporary restraining order, under limited circumstances.⁷⁴ In order for a stalking victim to obtain a protective order in California, the victim had to prove that “the harassment would cause a reasonable person to suffer substantial emotional distress,” and that the victim had in fact suffered emotional distress.⁷⁵ Without such concrete proof, a stalking victim was helpless.⁷⁶

Despite the limited legal remedies in place for a stalking victim, the members of the criminal legal community were hesitant to pursue criminal remedies for stalking.⁷⁷ To begin with, law enforcement officers were hesitant to enforce the then-existing laws which presumably resulted in fewer arrests.⁷⁸ Should a stalker actually be arrested, prosecutors were reluctant to charge the perpetrator in certain cases such as stalking within a domestic relationship.⁷⁹ Of the cases that were actually prosecuted, judges proffered lighter penalties in stalking cases that involved wife battering.⁸⁰ However, ultimately, stalking statutes were enacted in every state to deal with the insufficiency of existing statutes and to adequately protect stalking victims.⁸¹

C. General State Stalking Statutes

In 1990, California was the first state to enact an anti-stalking statute that directly addressed the criminal prosecution of stalkers.⁸² California enacted this statute largely in response

⁷³ *Id.* at 232–33. Stalking generally consists of multiple acts or cumulative behavior, therefore a statute that fails to criminalize minor acts that accumulate over time will necessarily exclude some stalking behavior. *See supra* Part II.A.

⁷⁴ Gregson, *supra* note 10, at 229–30. A temporary restraining order is “a protective court order that prohibits a stalker from further harassing the victim.” *Id.* Restraining orders provide limited protection for stalking victims because they apply only to certain victims, such as statutes limited only to spousal abuse, and even a victim who receives a restraining order against their stalker is not guaranteed protection. Bradfield, *supra* note 36, at 236–39. Ohio’s domestic abuse restraining order statute is an example of a statute that limits protection to “acts against a family or household member.” OHIO REV. CODE ANN. § 3113.31(A)(1) (West 2009); Bradfield, *supra* note 36, at 237 n.34.

⁷⁵ Gregson, *supra* note 10, at 230.

⁷⁶ *Id.*

⁷⁷ MOREWITZ, *supra* note 36, at 59.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Salame, *supra* note 20, at 70.

⁸² CAL. PENAL CODE § 646.9 (West 2010); Julie A. Finney, *The Paradox of Actual Substantial Emotional Distress Within the Context of California’s Criminal Stalking Law*, 29 W. ST. U. L. REV. 341, 345 (2002).

to the 1989 death of a famous television actress, Rebecca Schaeffer.⁸³ Prior to her murder, Schaeffer had been stalked by Robert Bardo, an obsessed fan, for two years before he ultimately murdered her.⁸⁴ Schaeffer's death brought the need for adequate stalking legislation in California to the media's attention, resulting in California's anti-stalking statute.⁸⁵ Following California's lead, all fifty states had anti-stalking statutes in place by 1995.⁸⁶

Since California was the first to enact an anti-stalking statute, its statute became a model that other states followed in creating their own anti-stalking statutes.⁸⁷ California's statute consists of three elements: an act, a threat, and intent.⁸⁸ The current statute reads as follows:

(a) Any person who willfully, maliciously, and repeatedly *follows* or willfully and maliciously *harasses* another person and who makes a *credible threat* with the *intent* to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking⁸⁹

Anti-stalking statutes in other states can be divided into three groups based on the combination of elements they have adopted from California's statute.⁹⁰ Some states require all three elements of California's anti-stalking statute: an act, a threat, and intent.⁹¹ Another group of states requires either an act or a threat combined with the perpetrator's intent.⁹² The third group of states requires an act and the perpetrator's intent.⁹³ The intent required to satisfy the anti-stalking statutes varies among the states, ranging from those states that require a general intent, such as Idaho and Illinois, to those that require a specific intent, such as Connecticut and Texas.⁹⁴ Additionally, state

⁸³ Finney, *supra* note 82, at 344–45. While Schaeffer's death was the primary impetus for California's enactment of the first anti-stalking law, the stalking murders of four other California women around the same time received additional media attention and contributed to the situation. *Id.*

⁸⁴ Bradfield, *supra* note 36, at 244; Cavanagh, *supra* note 63, at 12.

⁸⁵ CAL. PENAL CODE § 646.9 (West 2010); Jordan, *supra* note 14, at 367.

⁸⁶ Merschman, *supra* note 6, at 266.

⁸⁷ MOREWITZ, *supra* note 36, at 61.

⁸⁸ *Id.*

⁸⁹ CAL. PENAL CODE § 646.9(a) (West 2010) (emphasis added).

⁹⁰ MOREWITZ, *supra* note 36, at 61.

⁹¹ *Id.* These states include Alabama and Arkansas. *Id.* See ALA. CODE § 13A-6-90 (2005); ARK. CODE ANN. § 5-71-229 (West 2009).

⁹² MOREWITZ, *supra* note 36, at 61. The states requiring only two elements include Delaware and South Dakota. *Id.* See also DEL. CODE ANN. tit. 11, § 1312 (2008); S.D. CODIFIED LAWS § 22-19A-1 (2006).

⁹³ MOREWITZ, *supra* note 36, at 61. This grouping of states includes Connecticut and Idaho. *Id.* See also CONN. GEN. STAT. ANN. §§ 53a-181c, 53a-181d (West 2007); IDAHO CODE ANN. §§ 18-7905, 18-7906 (2004).

⁹⁴ MOREWITZ, *supra* note 36, at 62–63.

statutes can further be categorized by their levels of punishment and penalties for stalking behavior, varying in regard to the first offense and subsequent offenses in terms of misdemeanors and penalties.⁹⁵

D. Constitutional Challenges to Stalking Statutes

With the advent of state anti-stalking laws came constitutional challenges from adversely-affected defendants.⁹⁶ The majority of the constitutional challenges to anti-stalking statutes fall into two groups: challenges to the statutes as being overbroad and challenges to the statutes as being unconstitutionally vague.⁹⁷ Challenges claiming stalking statutes are overbroad allege that the statutes penalize conduct that is constitutionally protected.⁹⁸ Vagueness challenges allege that the stalking statutes are insufficient to place the public on notice of what conduct is illegal and that such laws can lead to arbitrary, discriminatory enforcement.⁹⁹ While a few cases have held certain anti-stalking statutes unconstitutional, courts have generally upheld these laws.¹⁰⁰

Broadness challenges to anti-stalking statutes allege that they are overly broad because they criminalize behavior protected under the First Amendment, such as the right to exercise free speech.¹⁰¹ Statutes can survive broadness challenges if a limited but constitutional interpretation of the law is possible, or, more generally, if they do not seriously threaten

⁹⁵ *Id.* See, e.g., CONN. GEN. STAT. ANN. §§ 53a-181c, 53a-181d, 53a-181e (West 2007) (varying the punishments for stalking in the first, second, and third degree to a Class D felony, Class A misdemeanor, and Class B misdemeanor respectively); ALASKA STAT. §§ 11.41.260, 11.41.270 (2008) (varying the punishments for stalking in the first and second degree to a Class C felony and Class A misdemeanor respectively).

⁹⁶ Merschman, *supra* note 6, at 271.

⁹⁷ *Id.*

⁹⁸ Suzanne L. Karbarz, *The First Amendment Implications of Anti-Stalking Statutes*, 21 J. LEGIS. 333, 337 (1995). See, e.g., *Johnson v. State*, 449 S.E.2d 94, 96 (Ga. 1994) (upholding Georgia's stalking law as not unconstitutionally overbroad, reasoning that "to the extent that the challenged statutes do proscribe communicative conduct, their restriction is clearly limited to a 'knowing and willful' course of harassment and intimidation").

⁹⁹ Salame, *supra* note 20, at 94.

¹⁰⁰ MOREWITZ, *supra* note 36, at 64. Compare *State v. Bryan*, 910 P.2d 212, 212 (Kan. 1996) (holding a state stalking law unconstitutionally vague insofar as the statute used the terms "alarms," "harasses," and "annoys" without including definitions for such terms), with *Bouters v. State*, 659 So.2d 235, 238 (Fla. 1995) (upholding Florida's stalking law as neither unconstitutionally overbroad nor overly vague because it applied only to criminal conduct and clearly defined the term "harasses"), and *People v. Bailey*, 657 N.E.2d 953, 961-63 (Ill. 1995) (upholding Illinois' stalking law as not unconstitutionally vague or overbroad because the term "follow" was not vague and the statute did not infringe upon the defendant's freedom of speech).

¹⁰¹ Jordan, *supra* note 14, at 374-75.

constitutionally protected conduct.¹⁰² The U.S. Supreme Court has held that “a government may criminalize true threats without violating the First Amendment’s protections against overly broad statutes.”¹⁰³ Therefore, since most stalking behavior can be interpreted as creating a violent threat, this conduct may be penalized under anti-stalking statutes consistent with the Constitution.¹⁰⁴

The second type of constitutional challenge to state anti-stalking statutes involves claims that the statutes are overly vague. To comply with the Due Process Clause, a penal statute must “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”¹⁰⁵ Ultimately, statutes must sufficiently put people on notice of what conduct is prohibited. “However, this requirement ‘does not preclude the use of ordinary terms’ in the statute, as long as the terms have a common usage and understanding.”¹⁰⁶

While many defendants have brought vagueness challenges, courts have generally upheld anti-stalking statutes.¹⁰⁷ *Bouters v. State* is an example of a vagueness challenge that failed.¹⁰⁸ In *Bouters*, the defendant was prosecuted for terrorizing his ex-girlfriend under Florida’s anti-stalking statute, which prohibited harassment, and the defendant challenged the statute’s use of the term “harasses” as unconstitutionally vague.¹⁰⁹ The Florida Supreme Court held that the statute was not “impermissibly vague”—and therefore was constitutional—because the statutory use of “harasses” did not create a subjective standard, but rather created a “reasonable person” standard.¹¹⁰

¹⁰² MOREWITZ, *supra* note 36, at 64–65.

¹⁰³ Merschman, *supra* note 6, at 272 (citing *Watts v. United States*, 394 U.S. 705, 707 (1969)).

¹⁰⁴ *Id.*

¹⁰⁵ Merschman, *supra* note 6, at 273 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

¹⁰⁶ Gregson, *supra* note 10, at 241 (quoting *People v. Heilman*, 30 Cal. Rptr. 2d 422, 427 (Cal. Ct. App. 1994)).

¹⁰⁷ Merschman, *supra* note 6, at 274. See, e.g., *State v. Whitesell*, 13 P.3d 887, 900 (Kan. 2000) (upholding Kansas’ stalking statute as not unconstitutionally vague); *People v. Stuart*, 797 N.E.2d 28, 41 (N.Y. 2003) (upholding New York’s stalking statute as not unconstitutionally vague); *Luplow v. State*, 897 P.2d 463, 464, 472 (Wyo. 1995) (upholding Wyoming’s stalking statute as not unconstitutionally vague).

¹⁰⁸ See generally *Bouters v. State*, 659 So.2d 235 (Fla. 1995).

¹⁰⁹ *Id.* at 236, 238. “Under the [Florida] statute, ‘[h]arasses’ means ‘to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.’” *Id.* at 238. See also FLA. STAT. ANN. § 784.048(1)(a) (West 2008).

¹¹⁰ *Bouters*, 659 So.2d at 238 (citing *Pallas v. State*, 636 So.2d 1358, 1361 (Fla. Dist. Ct. App. 1994)). Additionally, states that have modeled their anti-stalking statute

Ultimately, statutes with adequate definitions of prohibited conduct and objective (i.e., reasonable person) standards are more likely to withstand vagueness challenges, and statutes that exclude constitutional conduct are more likely to withstand broadness challenges.

II. SPECIALIZED ANTI-STALKING STATUTES AND LINGERING CONSTITUTIONAL CHALLENGES

As stalking became more prevalent and new mediums, such as the Blackberry, surfaced, state law evolved to create statutes that specifically addressed the newer forms of stalking and interpreted older, general stalking statutes to cover this behavior as well.¹¹¹ Anti-stalking statutes can be divided into three main categories based on how they address cyberstalking and stalking by use of a telephone: (1) states that have enacted new anti-stalking statutes to deal with changing mediums,¹¹² (2) states that have amended and modified existing anti-stalking statutes to incorporate newer mediums,¹¹³ and (3) states that have general anti-stalking statutes that do not specifically discuss the newer mediums of stalking.¹¹⁴ Throughout the addition and amendment process, state anti-stalking statutes have continued to face constitutional challenges on vagueness and overbreadth grounds.¹¹⁵ A court's holding that a stalking statute is unconstitutional renders uncertain the legal basis for any stalking cases prosecuted after such a finding until a subsequent statutory amendment can be passed, and thereby leaves stalking victims unprotected in the meantime.

A. Specific Anti-Stalking Statutes

Specific Anti-Stalking statutes are statutes that states have created to directly address stalking by a specific medium. This may be accomplished through enactment of a new statute or amendment of an existing statute in order to encompass stalking

language after the federal laws and define "harassment" according to the federal definition have also survived constitutional challenges on vagueness grounds. MOREWITZ, *supra* note 36, at 68. Federal law defines "harassment" as "a course of conduct that causes the victim to experience substantial emotional distress." *Id.* See, e.g., FLA. STAT. ANN. § 784.048(1)(a) (West 2008); GA. CODE ANN. § 16-5-90(a)(1) (2007); OKLA. STAT. ANN. tit. 21, § 1173(F)(1) (West 2002) (defining harassment to include a "course of conduct" and "emotional distress").

¹¹¹ Statutes criminalizing stalking behavior through both traditional mediums and newer mediums such as the Internet can be found in stalking and harassment statutes. See *supra* note 7.

¹¹² See *infra* Part II.A.1.

¹¹³ See *infra* Part II.A.2.

¹¹⁴ See *infra* Part II.B.

¹¹⁵ See *infra* Part II.C.

through the newer medium.¹¹⁶ These statutes are comprised of those that address telephone stalking, and those that address cyberstalking—that is, stalking by means of the Internet. Approximately one-third of all states have anti-stalking statutes that specifically address cyberstalking.¹¹⁷ The majority of the remaining states have amended their general anti-stalking statutes to cover stalking by electronic means or the Internet.¹¹⁸ Additionally, many states have anti-stalking statutes that address stalking or harassment by use of the telephone.¹¹⁹ However, some state statutes address substantially more conduct and mediums than others, and consequently appear to provide more complete protection for victims stalked by various electronic and telephone mediums, such as the Blackberry.¹²⁰

1. New Statutes

As stalkers increasingly began to use new technologies such as the Internet to stalk their victims, some states chose to address the issue of cyberstalking head-on by specifically enacting statutes that covered cyberstalking in addition to their existing general anti-stalking statutes.¹²¹ The creation of

¹¹⁶ Goodno, *supra* note 8, at 141, 144.

¹¹⁷ Mike Harris, *Cyberstalking Case Linked to State Law from 1990: Expert Finds Little Similarity with L.A. Cyberbullying Trial*, VENTURA COUNTY STAR (Jan. 4, 2009), <http://www.vcstar.com/news/2009/jan/04/cyberstalking-case-linked-to-state-law-from-1990/>.

¹¹⁸ See *infra* Part II.A.2.

¹¹⁹ See *infra* Part II.A.1, 2.

¹²⁰ See *infra* Part II.A.1.

¹²¹ Goodno, *supra* note 8, at 144 (noting that as of 2007, six states had created new “cyberstalking” statutes that specifically and solely address cyberstalking: Illinois, Louisiana, Mississippi, North Carolina, Rhode Island and Washington). See 720 ILL. COMP. STAT. ANN. 5/12-7.5 (West 2009); LA. REV. STAT. ANN. § 14:40.3 (2007); MISS. CODE ANN. § 97-45-15 (West 2008); N.C. GEN. STAT. ANN. § 14-196.3 (West 2000); R.I. GEN. LAWS § 11-52-4.2 (2002); WASH. REV. CODE ANN. § 9.61.260 (West 2010). Other states have enacted new laws or amended existing statutes to essentially become new laws that address stalking through the Internet, electronic means, and electronic communication, including: Arkansas, California, Illinois, Maryland, Michigan, Mississippi, Montana, Oklahoma, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin. ARK. CODE ANN. § 5-41-108 (2006) (penalizing “[u]nlawful computerized communications”); CAL. PENAL CODE § 653.2 (West 2010) (addressing “electronic communication device[s]”); CAL. PENAL CODE § 653m (West 2010) (criminalizing “contact by electronic communication device” with “intent to annoy,” and created by amending a telephone statute to become a telephone and electronic communication statute); 720 ILL. COMP. STAT. ANN. 135/1-2 (West 2009) (addressing “[h]arassment through electronic communications,” and created by amending statute to become an electronic communications harassment statute); MD. CODE ANN., CRIM. LAW § 3-805 (LexisNexis 2002) (addressing the “[m]isuse of electronic mail”); MICH. COMP. LAWS ANN. § 750.411s (West 2004) (including “posting messages through electronic medium[s]”); MISS. CODE ANN. § 97-29-45 (West 2008) (addressing “[o]bscene electronic and telecommunications,” created by amending statute to become an “electronic and telecommunications” statute); MONT. CODE ANN. § 45-8-213 (2009) (discussing “[p]rivacy in communications” and including “electronic communication[s],” and created by amending statute to focus on

additional anti-stalking statutes by these states indicates legislative recognition that existing general anti-stalking statutes are insufficient to address the problem of cyberstalking.¹²² The state of Washington provides a good example of a state's decision to enact a new statute despite the fact that an existing statute could have been used to prosecute cyberstalking.¹²³ Although Washington's general statute included electronic communications, the Washington legislature felt the need was sufficiently great to enact a new statute that specifically addressed cyberstalking.¹²⁴

As with statutes addressing cyberstalking, states enacted similar laws to address stalking by means of the telephone.¹²⁵

electronic communications); OKLA. STAT. ANN. tit. 21, § 1172 (West 2008) (penalizing “[o]bscene, threatening or harassing telecommunication or other electronic communications,” and created by amending phone calls statute); S.D. CODIFIED LAWS § 49-31-31 (2009) (criminalizing “[t]hreatening or harassing contacts by telephone or other electronic communication device,” and created by amending telecommunications statute); TEX. PENAL CODE ANN. § 33.07 (Vernon 2010) (addressing “[o]nline harassment”); UTAH CODE ANN. § 76-9-201 (2010) (criminalizing “[e]lectronic communication harassment,” and created by amending phone statute); VT. STAT. ANN. tit. 13, § 1027 (2009) (penalizing “[d]isturbing the peace by use of telephone or other electronic communications,” and created by amending phone statute); VA. CODE ANN. § 18.2-152.7:1 (2009) (punishing “[h]arassment by computer”); W. VA. CODE ANN. § 61-3C-14a (LexisNexis 2005) (discussing “[o]bscene, anonymous, harassing and threatening communications by computer”); WIS. STAT. ANN. § 947.0125 (West 2005) (criminalizing the “[u]nlawful use of computerized communication systems”).

¹²² Goodno, *supra* note 8, at 144.

¹²³ *Id.* Washington's general anti-stalking statute penalizes conduct that an individual “[k]nows or reasonably should know that the person is afraid, intimidated, or harassed, even if the stalker did not intend to place the person in fear or intimidate or harass the person.” WASH. REV. CODE ANN. § 9A.46.110(1)(c)(ii) (West 2009); Goodno, *supra* note 8, at 144. The statute then includes “electronic communication” within its definition of criminal “contact.” WASH. REV. CODE ANN. § 9A.46.110(4) (West 2009).

¹²⁴ WASH. REV. CODE ANN. § 9.61.260 (West 2010); Goodno, *supra* note 8, at 144. Additional states have enacted new statutes to address cyberstalking or stalking by means of the Internet or electronic communication although their existing general anti-stalking statutes had been amended to incorporate such conduct, including: California, Illinois, Louisiana, Michigan, Montana, North Carolina, Oklahoma, South Dakota, Texas, Utah, Vermont, and Wisconsin. See CAL. PENAL CODE § 646.9 (West 2010); 720 ILL. COMP. STAT. ANN. 5/12-7.3 (West 2009); 720 ILL. COMP. STAT. ANN. 5/12-7.4 (West 2002); LA. REV. STAT. ANN. § 14:40.2 (2007); MICH. COMP. LAWS ANN. §§ 750.411h, 750.411i (West 2004); MONT. CODE ANN. § 45-5-220 (2009); N.C. GEN. STAT. ANN. § 14-277.3A (LexisNexis 2009); OKLA. STAT. ANN. tit. 21, § 1173 (West 2002); S.D. CODIFIED LAWS § 22-19A-1 (2006); TEX. PENAL CODE ANN. § 42.07 (Vernon 2003); UTAH CODE ANN. § 76-5-106.5 (2008); VT. STAT. ANN. tit. 13, § 1061 (2009); WIS. STAT. ANN. § 940.32 (West 2009).

¹²⁵ See, e.g., CAL. PENAL CODE § 653m (West 2010) (addressing “[t]elephone calls or contact by electronic communication device with intent to annoy”); MISS. CODE ANN. § 97-29-45 (West 2008) (penalizing “[o]bscene electronic and telecommunications”). Specialized statutes that were created to address stalking or harassment by means of the telephone include: harassing communications statutes, phone harassment statutes, phone misuse statutes, and criminal threats statutes. See ARK. CODE ANN. § 5-71-209 (2005) (“[h]arassing communications” statute); KAN. CRIM. CODE ANN. § 21-4113 (West 2008) (“[h]arassment by telephone” statute); CAL. PENAL CODE § 422 (West 2010) (“[c]riminal threats” statute that includes “cellular telephones” and “telephones” within its definition

Unlike cyberstalking laws however, many telephone harassment laws pre-date the first anti-stalking law of 1990.¹²⁶ As technology increased and expanded, states even extended stalking or harassment statutes to incorporate text messaging.¹²⁷ Some states expanded the definitions of stalking to include harassment by “electronic communication” that appear to encompass a wider range of mediums, including mediums such as the Blackberry or the iPhone.¹²⁸

2. Amended Statutes

A second group of states amended existing general anti-stalking statutes to incorporate cyberstalking or stalking by electronic means.¹²⁹ The majority of state anti-stalking statutes

of “electronic communication device”); MD. CODE ANN., CRIM. LAW § 3-804 (LexisNexis 2002) (“[m]isuse of telephone facilities and equipment” statute).

¹²⁶ Bradfield, *supra* note 36, at 240–41. *See, e.g.*, FLA. STAT. ANN. § 365.16 (West 1999) (first enacted in 1963); IDAHO CODE ANN. § 18-6710 (2004) (first enacted in 1980); OHIO REV. CODE ANN. § 2917.21 (West 2006) (first enacted in 1972).

¹²⁷ *See supra* note 54.

¹²⁸ Compare N.Y. PENAL LAW § 240.30 (McKinney 2008), *with* OKLA. STAT. ANN. tit. 21, § 1172 (West 2008), *and* OR. REV. STAT. ANN. § 166.065 (West 2010).

¹²⁹ Goodno, *supra* note 8, at 145. States that amended their general statutes to cover stalking or harassment by electronic means or cyberstalking include: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. *See* ALA. CODE § 13A-11-8 (LexisNexis 2005) (amending “[h]arassing communications” to include “electronic communication”); ALASKA STAT. §§ 11.41.260, 11.41.270, 11.61.120 (2008) (including “electronic communications”); ARIZ. REV. STAT. ANN. §§ 13-2921, 13-2921.01 (2010) (including electronic means); CAL. PENAL CODE § 646.9 (Deering 2008) (including “electronic communication device”); CAL. PENAL CODE § 422 (Deering 2008) (including “electronic communication device”); COLO. REV. STAT. ANN. § 18-9-111 (West 2004) (including a “computer”); CONN. GEN. STAT. ANN. §§ 53a-182b, 53a-183 (West 2007) (including a “computer network”); DEL. CODE ANN. tit. 11, §§ 1311, 1312 (2008) (including “telephone” communication and “by any action, method, device or means” respectively); FLA. STAT. ANN. § 784.048 (West 2008) (including “cyberstalk[ing]”); GA. CODE ANN. § 16-5-90 (2007) (including a “computer,” “computer network,” and an “electronic device”); HAW. REV. STAT. ANN. §§ 711-1106, 711-1106.4, 711-1106.5 (LexisNexis 2009) (including “electronic communication”); IDAHO CODE ANN. §§ 18-7905, 18-7906 (2004) (including “electronic communications”); 720 ILL. COMP. STAT. ANN. 5/12-7.3, 5/12-7.4 (West 2010) (including “electronic communications”); IND. CODE ANN. § 35-45-2-2 (West 2004) (including a “computer network” and “electronic communication”); IOWA CODE ANN. § 708.7 (West 2003) (including “electronic communication”); KAN. STAT. ANN. § 21-3438 (West 2008) (including “electronic means”); KY. REV. STAT. ANN. §§ 508.130-508.150 (West 2009) (including by “computer,” “Internet,” and “electronic network”); LA. REV. STAT. ANN. § 14:40.2 (2009) (including “electronic mail”); ME. REV. STAT. ANN. tit. 17-A, § 210-A (2009) (including “electronic means”); MASS. GEN. LAWS ANN. ch. 265, §§ 43, 43A (West 2008) (including “electronic mail”); MICH. COMP. LAWS ANN. §§ 750.411h, 750.411i (West 2004) (including “electronic communications”); MINN. STAT. ANN. § 609.749 (West 2009) (including electronic means); MO. ANN. STAT. § 565.225 (West 2009) (including “by any means”); MO. ANN. STAT. § 565.090 (West 2009) (including “electronic communication”); MONT. CODE ANN. § 45-5-220 (2009) (including “any other action, device, or method”); NEV. REV. STAT. ANN.

fall into this category.¹³⁰ States have amended their statutes to incorporate cyberstalking or stalking by means of electronic communication in several different ways.¹³¹ States incorporated cyberstalking into their general statutes by either amending statutes to include “cyberstalk[ing],”¹³² or stalking by “electronic communications.”¹³³ “Electronic communications” are defined as communications using either a general “electronic communication device” or by specific mediums such as “electronic mail,” “computer,” or “computer network.”¹³⁴ Additionally, states amended their general statutes to cover cyberstalking behavior by punishing stalking with phrases such as any “method,” “means,” “medium,” or “device.”¹³⁵

California is an example of a state law that was amended to incorporate cyberstalking or stalking by electronic means.¹³⁶ California’s general anti-stalking statute was amended by chapters 825 and 826 in 1998 to address credible threats or harassment made with electronic communications to a victim

§ 200.575 (West 2009) (including “Internet” and “electronic mail”); N.H. REV. STAT. ANN. § 633:3-a (LexisNexis 2007) (including electronic and computer communication); N.H. REV. STAT. ANN. § 644:4 (LexisNexis 2007) (including electronic and computer communication); N.J. STAT. ANN. § 2C:12-10 (West 2009) (including “by any action, method, means, or device”); N.M. STAT. ANN. §§ 30-3A-3, 30-3A-3.1 (West 2009) (including “by any action, method, device, or means”); N.Y. PENAL LAW § 240.30 (McKinney 2008) (including by “electronic means”); N.C. GEN. STAT. § 14-277.3A (2008) (including “electronic transmissions”); N.D. CENT. CODE § 12.1-17-07 (2009) (including electronic communication or transmission); OHIO REV. CODE ANN. § 2903.211 (West 2009) (including “electronic method”); OKLA. STAT. ANN. tit. 21, § 1173 (West 2002) (including “electronic communications”); OR. REV. STAT. ANN. §§ 163.730 (West 2010) (including “electronic communication”); OR. REV. STAT. ANN. § 166.065 (West 2010) (including “electronic threat”); 18 PA. CONS. STAT. ANN. §§ 2709, 2709.1 (West 2009) (including “electronic means”); S.C. CODE ANN. § 16-3-1700 (2008) (including “electronic contact”); S.D. CODIFIED LAWS § 22-19A-1 (2006) (including electronic communication); TENN. CODE ANN. § 39-17-315 (2006) (including “electronic communications”); TENN. CODE ANN. § 39-17-308 (2006) (including “electronic communication”); TEX. PENAL CODE ANN. § 42.07 (West 2003) (including “electronic communication”); UTAH CODE ANN. § 76-5-106.5 (West 2008) (including by “any action, method, device, or means”); VT. STAT. ANN. tit. 13, §§ 1061, 1062, 1063 (2009) (including “electronically communicated threats”); WASH. REV. CODE ANN. § 9A.46.110 (West 2009) (including “electronic communication”); WASH. REV. CODE ANN. § 10.14.020 (West 2002) (including “electronic communication”); WIS. STAT. ANN. § 940.32 (West 2009) (including “electronic means”); WYO. STAT. ANN. § 6-2-506 (2009) (including electronic means). Some of the states that amended their general statutes also enacted new statutes. *See supra* note 124.

¹³⁰ Goodno, *supra* note 8, at 141.

¹³¹ *Id.*

¹³² *See, e.g.*, FLA. STAT. ANN. § 784.048 (West 2008).

¹³³ Goodno, *supra* note 8, at 141.

¹³⁴ *Id.* States adopting this method of amendment include: California, Georgia, Hawaii, and New York. *Id.* at 141 n.99, 142 n.100. *See also* CAL. PENAL CODE § 646.9 (Deering 2008); GA. CODE ANN. § 16-5-90 (2007); HAW. REV. STAT. §§ 711-1106, 711-1106.5 (LexisNexis 2009); N.Y. PENAL LAW § 240.30 (McKinney 2008).

¹³⁵ *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 210-A (2008); MO. ANN. STAT. § 565.225 (West 2009); N.J. STAT. ANN. § 2C:12-10 (West 2005).

¹³⁶ CAL. PENAL CODE § 646.9(g) (West 2008).

over the Internet.¹³⁷ The California statute now states that a “credible threat” means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct¹³⁸

Although many states already had statutes in place to deal with harassing telephone calls and other threatening conduct by means of the telephone,¹³⁹ some states amended their general stalking or general harassment statutes to cover stalking by means of the telephone or initially created stalking statutes to incorporate such behavior.¹⁴⁰ Such amendments to include stalking by means of the telephone are particularly important because of the high percentage of stalking victims that report being stalked through phone calls and voice mail messages.¹⁴¹

B. General, Un-Amended Anti-Stalking Statutes

The third and final category consists of general anti-stalking statutes that have not been amended to include electronic communication but that may be subject to a judicial interpretation that they cover cyberstalking.¹⁴² Crimes committed in

¹³⁷ Lisa A. Karczewski, *Stalking in Cyberspace: The Expansion of California's Current Anti-Stalking Laws in the Age of the Internet*, 30 MCGEORGE L. REV. 517, 521 n.40 (1999) (noting that chapters 825 and 826 amended Cal. Penal Code sections 422, 646.9, 653m). “Chapters 825 and 826 provide that an offense committed through the medium of an electronic communication device is deemed to have been committed where the communication was initially sent or first viewed by the other party.” *Id.* at 521. *See also* 1998 Cal. Legis. Serv. 825 (West).

¹³⁸ CAL. PENAL CODE § 646.9(g) (West 2008).

¹³⁹ *See supra* Part II.A.1.

¹⁴⁰ *See, e.g.*, GA. CODE ANN. § 16-5-90(a)(1) (West 2000); IDAHO CODE ANN. § 18-7906(c)(v) (2004); KAN. STAT. ANN. § 21-3438 (2008). Additionally, some states amended their general statutes to include “electronic communications” with expansive definitions of “electronic communications” that include the telephone. *See, e.g.*, CAL. PENAL CODE § 646.9(g), (h) (West 2008) (amending general stalking statute to include “electronic communications” that defines “electronic communication device” as including “telephones” and “cellular phones”).

¹⁴¹ *See supra* Part I.

¹⁴² Goodno, *supra* note 8, at 141. Note that some states have amended a harassment statute to incorporate stalking by electronic means instead of amending a stalking statute, however, this final category is composed of states that have neither amended a harassment statute nor a stalking statute. Nebraska is currently the only state that appears to fall into this category. Nebraska has neither a specialized anti-stalking statute covering stalking by electronic communication nor has it amended its general anti-stalking statute to cover stalking by electronic communication. *See* NEB. REV. STAT. § 28-311.03 (LexisNexis 2006). According to the National Conference of State Legislatures, three states that do not have statutes that cover cyberstalking behavior are Kentucky, Nebraska, and New Mexico. State Electronic Harassment or “Cyberstalking” Laws, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2009), <http://www.ncsl.org/IssuesResearch/TelecommunicationsInformationTechnology/CyberstalkingLaws/tabid/13495/Default.aspx>. However, Kentucky’s stalking definition statute

these states may be punishable under the general anti-stalking statute or a telephone anti-stalking statute if the crime involves use of the Internet or a telephone.¹⁴³ These states and their corresponding general anti-stalking statutes are the most ill-equipped to deal with cyberstalking because it is not clear whether their general anti-stalking statutes cover any form of cyberstalking or whether telephone anti-stalking statutes might cover cyberstalking.¹⁴⁴

C. Constitutional Challenges to Specialized Anti-Stalking Statutes and the Case of *Scott v. State*

While specialized anti-stalking statutes are significant improvements over the original stalking statutes in that they cover more stalking behavior and therefore provide more protection for stalking victims, these specialized statutes remain open to vagueness and overbreadth challenges.¹⁴⁵ Specialized anti-stalking statutes continue to use flawed, weak language and are being challenged for failing to sufficiently define terms and for excluding constitutional conduct from within the statute's scope.¹⁴⁶ Without a constitutional law defining stalking or harassment offenses by use of newer mediums, the status of victims subjected to stalking through the use of these newer mediums remains unclear.

includes within its "course of conduct" description, the "use of any equipment, instrument, machine, or other device by which communication or information is transmitted, including computers, the Internet or other electronic network . . ." KY. REV. STAT. ANN. § 508.130(2) (West 2009). Therefore, it appears that Kentucky's general stalking statutes include stalking by means of electronic communication. KY. REV. STAT. ANN. §§ 508.140–508.150 (West 2009). Similarly, New Mexico's general stalking statute was recently rewritten in 2009 to include stalking by "any action, method, device or means," and therefore New Mexico's statute appears to cover stalking by means of electronic communication. N.M. STAT. ANN. § 30-3A-3(B)(2) (2009).

¹⁴³ Goodno, *supra* note 8, at 141. Note that statutes that do not directly address stalking by means of the telephone may not cover all stalking incidents by means of the telephone. For example, Rhode Island's general stalking law prohibits "harassment," and "harasses" is defined as

a knowing and willful course of conduct directed at a specific person with the intent to seriously alarm, annoy, or bother the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, or be in fear of bodily injury.

R.I. GEN. LAWS § 11-59-1(2) (2002); R.I. GEN. LAWS § 11-59-2(a)(1) (2002) (providing that stalking law does not address stalking by specific mediums). *See also* R.I. GEN. LAWS § 11-52-4.2 (2008) (noting that cyberstalking law refers only to "electronic device" and does not directly include stalking by the telephone). A court could find that repeated phone calls or voice messages do not constitute a "course of conduct" or an "electronic device" and therefore would not be covered by the statutes.

¹⁴⁴ Goodno, *supra* note 8, at 141.

¹⁴⁵ *See infra* note 161.

¹⁴⁶ *Id.*

An example of a recent challenge to an anti-stalking statute is *Scott v. State*.¹⁴⁷ In *Scott*, the defendant was convicted of harassing his former wife under a state harassment statute, and the defendant challenged the statute as overbroad and unconstitutionally vague.¹⁴⁸ The defendant's harassing behavior consisted of making repeated telephone calls to his former wife and leaving her "abusive and harassing voice mail messages."¹⁴⁹ The defendant was charged under two sections of Texas' harassment statute.¹⁵⁰ The relevant parts of the statute are as follows:

(a) A person commits an offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he:

...

(4) causes the telephone of another to ring repeatedly or makes repeated telephone communications anonymously or in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another; . . . [or]

...

(7) sends repeated electronic communications in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another.¹⁵¹

In challenging the constitutionality of the statute, the defendant alleged that the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another" was unconstitutionally vague because "[i]t is impossible for a citizen to know what, in the disjunctive, is meant by this statute's series of vague terms."¹⁵² The defendant also noted the lack of an objective standard.¹⁵³ Furthermore, the defendant alleged that the statute's prohibition of "repeated" communications was unconstitutionally vague because the statute

¹⁴⁷ See generally *Scott v. State* 298 S.W.3d 264 (Tex. Ct. App. 2009).

¹⁴⁸ TEX. PENAL CODE ANN. § 42.07 (West 2003); *Scott*, 298 S.W.3d at 267.

¹⁴⁹ *Scott*, 298 S.W.3d at 266.

¹⁵⁰ TEX. PENAL CODE ANN. § 42.07(a)(4), (7); *Scott*, 298 S.W.3d at 266. Texas' stalking statute is in the amended category. See *supra* note 129.

¹⁵¹ TEX. PENAL CODE ANN. § 42.07(a)(4), (7). The statute goes on to define "electronic communication" as

a transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system. The term includes: (A) a communication initiated by electronic mail, instant message, network call, or facsimile machine; and (B) a communication made to a pager.

TEX. PENAL CODE ANN. § 42.07(b)(1)(A), (B). The *Scott* court then found that voice mail messages were included within "electronic communications." *Scott*, 298 S.W.3d at 267.

¹⁵² *Scott*, 298 S.W.3d at 267.

¹⁵³ *Id.* at 270.

failed to define the number of communications that constituted “repeated.”¹⁵⁴

The *Scott* court first found that First Amendment freedoms were implicated under the statute, then went on to hold that the phrase “in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another” was unconstitutionally vague on its face.¹⁵⁵ The *Scott* court further held that the phrase “repeated” was unconstitutionally vague because it could technically encompass “three phone calls over ten years.”¹⁵⁶ Therefore, the court acquitted the defendant and held sections (a)(4) and (a)(7) of the statute unconstitutional.¹⁵⁷

Currently, there is no pending legislation to amend the statutory sections found unconstitutional by the *Scott* court’s holding on June 24, 2009.¹⁵⁸ The general stalking statute in Texas does not directly cover stalking by means of electronic communication or the telephone, and therefore the harassment statute held unconstitutional by *Scott* was likely the primary means to prosecute stalking or harassing behavior committed through these means.¹⁵⁹ On September 1, 2009, a new Texas statute governing “Online Harassment” became effective; however, the online harassment statute does not appear to cover the full range of activities prohibited under the general harassment statute.¹⁶⁰ Therefore, the current state of Texas stalking and harassment law, as well as that of certain stalking victims, is uncertain.¹⁶¹ Consequently, statutory change is needed in order to ensure that all stalking victims are protected.

¹⁵⁴ *Id.* at 267.

¹⁵⁵ *Id.* at 269, 273.

¹⁵⁶ *Id.* at 273.

¹⁵⁷ TEX. PENAL CODE ANN. § 42.07(a)(4), (7); *Scott*, 298 S.W.3d at 273.

¹⁵⁸ TEX. PENAL CODE ANN. § 42.07(a)(4), (7).

¹⁵⁹ TEX. PENAL CODE ANN. § 42.072 (West 2003); TEX. PENAL CODE ANN. § 42.07.

¹⁶⁰ TEX. PENAL CODE ANN. § 33.07 (West 2003).

¹⁶¹ In states that have not enacted new specialized anti-stalking provisions but that have amended general statutes to incorporate stalking by electronic means or the phone, holding the general statute unconstitutional would potentially harm victims stalked by electronic means or the telephone since there would be no other statute governing such behavior. For example, Texas’s general stalking law does not include stalking by electronic means or the telephone, so holding the harassment statute that covered such stalking methods unconstitutional may leave victims stalked by these methods unprotected, excluding the online harassment statute. See TEX. PENAL CODE ANN. § 42.072; TEX. PENAL CODE ANN. § 42.07; TEX. PENAL CODE ANN. § 33.07. In addition to Texas, several other states have pending constitutional anti-stalking statute problems including Utah and New Hampshire. In *Provo City Corp. v. Thompson*, a “repeated calls” provision of Utah’s electronic communication harassment statute similar to that in *Scott v. State* was challenged as overly broad. UTAH CODE ANN. § 76-9-201 (LexisNexis 2008); *Provo City Corp. v. Thompson*, 86 P.3d 735, 740 (Utah 2004). The Utah Supreme Court refused to reach the constitutionality of the provision because they found that the defendant lacked standing to bring an overbreadth challenge. *Provo City Corp.*, 86 P.3d at 741. Although Utah has amended the statute since 2004, the word “repeated” remains

III. FURTHER STATUTORY AMENDMENT IS NEEDED TO
ADEQUATELY COVER STALKING BY ELECTRONIC MEANS AND THE
TELEPHONE AND TO ENSURE THE CONSTITUTIONALITY OF ANTI-
STALKING STATUTES

In order to provide the best, most complete protection for stalking victims, statutes must cover a broad range of stalking behavior but exclude otherwise constitutional conduct. While the majority of states have enacted new statutes or amended existing statutes to cover stalking by means of the phone or the Internet,¹⁶² at least one state does not have a stalking statute that directly addresses stalking by electronic means, and at least one state has a stalking law that fails to address stalking by means of the telephone.¹⁶³ Other states have stalking laws in place that have been held unconstitutional or could be found unconstitutional.¹⁶⁴

Therefore, states with general, un-amended anti-stalking statutes—Nebraska, and potentially Kentucky and New Mexico—should either amend their general stalking statutes to include stalking by electronic means or cyberstalking, or alternatively, enact new statutes that specifically encompass such stalking behavior.¹⁶⁵ Additionally, there are states with general anti-stalking statutes that have not been amended to include stalking by means of the telephone, as well as states that have not enacted new statutes to cover such behavior.¹⁶⁶ Furthermore, as technology continues to increase and consequently expand the means in which stalkers may stalk their victims, states should continue to amend their statutes proactively to encompass new behaviors and mediums such as text messaging and stalking through use of a Blackberry or an iPhone.¹⁶⁷

undefined. UTAH CODE ANN. § 76-9-201. In *State v. Pierce*, the New Hampshire Supreme Court found the state's harassment statute unconstitutionally overbroad under the state's constitution. N.H. REV. STAT. ANN. § 644:4(I)(f) (LexisNexis 1996); *State v. Pierce*, 887 A.2d 132, 135 (N.H. 2005). Although the New Hampshire statute has been amended since 2005, the overbreadth issue appears to remain uncorrected. N.H. REV. STAT. ANN. § 644:4.

¹⁶² See *supra* Part II.A.

¹⁶³ See *supra* Part II.B (detailing three states without cyberstalking statutes: Kentucky, Nebraska, and New Mexico). See also R.I. GEN. LAWS § 11-52-4.2 (2008) (showing that Rhode Island's anti-stalking statute does not include stalking by telephone).

¹⁶⁴ See *supra* note 161.

¹⁶⁵ See *supra* note 142 and accompanying text.

¹⁶⁶ One of those states is Rhode Island. See *supra* note 143.

¹⁶⁷ See, e.g., NEV. REV. STAT. ANN. § 200.575 (LexisNexis 2006); OR. REV. STAT. ANN. § 166.090 (West 2005); UTAH CODE ANN. § 76-5-106.5 (LexisNexis 2008); WASH. REV. CODE ANN. § 9.61.260 (West 2010) (addressing stalking or harassment by means of "text messaging"). See also N.Y. PENAL § 240.30 (McKinney 2008) (covering a broad range of mediums in its harassment statute including, "causes a communication to be initiated by

States that have stalking statutes that address stalking via newer mediums but that have been found unconstitutional, or may be found unconstitutional, should amend their statutes to exclude constitutional conduct and adequately define statutory terms that may be subject to vagueness challenges.¹⁶⁸ In doing so, these states should look for guidance from other states whose similar statutes have passed constitutional muster.¹⁶⁹ Additionally, court decisions holding a given statute unconstitutional generally discuss the statute's deficiencies; these discussions may also provide the states with helpful guidance in the amendment process.¹⁷⁰

CONCLUSION

As Jane's experience illustrates, advances in technology have expanded the ways in which stalkers can harass their victims, and this has blurred the distinctions between various stalking mediums. While statutory law has similarly increased and developed in an attempt to accommodate stalking through newer mediums, existing laws remain subject to constitutional challenges and vary in the coverage afforded to stalking victims who have been stalked via the Internet and the phone. Stalking victims are best protected by broad legislation that covers stalking by various means, including the Internet and the telephone, but that excludes otherwise constitutional conduct. Therefore, states should proactively amend their existing laws to

mechanical or electronic means or otherwise with a person . . . by telephone . . . or by transmitting or delivering any other form of written communication . . .").

¹⁶⁸ See *supra* note 161.

¹⁶⁹ Statutes that have been found unconstitutional because they appear to criminalize constitutional conduct could be amended to include a proviso that they exclude constitutional conduct. Alabama, for example, has narrowly tailored its harassment statute to pass constitutional review. It defines "harasses" as:

Engages in an intentional course of conduct directed at a specified person which alarms or annoys that person, or interferes with the freedom of movement of that person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress. Constitutionally protected conduct is not included within the definition of this term.

See, e.g., ALA. CODE § 13A-6-92 (LexisNexis 2005). Statutes that have been held unconstitutional for failure to define a particular word, such as Texas' failure to define "repeated," should look to states that have defined that term. See TEX. PENAL CODE ANN. § 42.07 (West 2003). See, e.g., COLO. REV. STAT. § 18-9-111(4)(c)(IV) (West 2009) (defining "repeated" or "repeatedly" as "on more than one occasion").

¹⁷⁰ For example, *Scott v. State* held Texas' harassment statute unconstitutional because of its "repeated calls" provision as well as for the statute's failure to define the phrase "in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass, or offend another." TEX. PENAL CODE ANN. § 42.07; *Scott v. State* 298 S.W.3d 264, 269 (Tex. Ct. App. 2009). Therefore, Texas should amend its statute to include definitions for the words "repeated," "alarm," "embarrass," and any similar terms.

withstand constitutional scrutiny and include expansive definitions for stalking through the mediums of the Internet and the telephone.