U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

JANUARY 2002

STRENGTHENING ANTISTALKING STATUTES

LEGAL SERIES #1 BULLETIN

Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. To date, all states have passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

Strengthening Antistalking Statutes, the first in the series, provides an overview of state legislation and current issues related to stalking. Although stalking is a crime in all 50 states, significant variation exists among statutes as to the type of behavior prohibited, the intent of the stalker, whether a threat is required, and the

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Introduction

Stalking is a crime of intimidation. Stalkers harass and even terrorize through conduct that causes fear or substantial emotional distress in their victims. A recent study sponsored by the National Institute of Justice (NIJ) (U.S. Department of Justice) and the Centers for Disease Control and Prevention estimates that 1 in 12 women and 1 in 45 men have been stalked during their lifetime.[1] Although stalking behavior has been around for many years, it has been identified as a crime only within the past decade. Most laws at the state level were passed between 1991 and 1992. As more is learned about stalking and stalkers, legislatures are attempting to improve their laws.[2]

In 1993, under a grant from NIJ, a working group of experts was assembled to develop a model state stalking law.[3] Many of its recommendations have been followed as states have amended their laws.[4]

Status of the Law

Generally, stalking is defined as the willful or intentional commission of a series of acts that would cause a reasonable person to fear death or serious bodily injury and that, in fact, does place the victim in fear of death or serious bodily injury. Stalking is a crime in every state. Every state has a stalking law, although the harassment laws of some states also encompass stalking behaviors. In most states, stalking is a Class A or first degree misdemeanor except under certain circumstances, which include stalking in violation of a protective order, stalking while armed, or repeat offenses. In addition, states typically have harassment statutes, and one state's harassment law might encompass behaviors that would be considered stalking in another state.

Significant variation exists among state stalking laws. These differences relate primarily to the type of repeated behavior that is prohibited, whether a threat is required as part of stalking, the reaction of the victim to the stalking, and the intent of the stalker.

Prohibited Behavior

Most states have broad definitions of the type of repeated behavior that is prohibited, using terms such as "harassing," "communicating," and "nonconsensual contact." In

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reaction of the victim to the stalking. This bulletin and the others in the Legal Series highlight various circumstances in which relevant laws are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

some states, specific descriptions of stalking behavior are included in the statute. For example, Michigan's stalking law provides that unconsented contact includes, but is not limited to, any of the following:

1. Following or appearing within sight of that individual.
2. Approaching or confronting that individual in a public place or on private property.
3. Appearing at that individual's workplace or residence.
4. Entering onto or remaining on property owned, leased, or occupied by that individual.
5. Contacting that individual by telephone.
6. Sending mail or electronic communications to that individual.
7. Placing an object on or delivering an object to property owned, leased, or occupied by that individual.[5]

A handful of states have narrow definitions of stalking. Illinois, for example, limits stalking to cases involving following or keeping a person under surveillance.[6] Maryland requires that the pattern of conduct include approaching or pursuing another person.[7] Hawaii is similar, limiting stalking to cases in which the stalker pursues the victim or conducts surveillance of the victim.[8] Connecticut limits stalking to following or lying in wait.[9] Wisconsin requires "maintaining a visual or physical proximity to a person."[10]

Threat

When stalking laws were first adopted in states across the country, many laws required the making of a "credible threat" as an element of the offense. Generally, this was defined as a threat made with the intent and apparent ability to carry out the threat. As understanding of stalking has grown, however, most states have modified or eliminated the credible-threat requirement. Stalkers often present an implied threat to their victims. For example, repeatedly following a person is generally perceived as threatening. The threat may not be expressed but may be implicit in the context of the case.

Only two states—Arkansas and Massachusetts—require the making of a threat to be part of stalking,[11] although a few other states require an express threat as an element of aggravated stalking. Most states currently define stalking to include implied threats or specify that threats can be, but are not required to be, part of the pattern of harassing behavior.

Reactions of the Victim

Stalking is defined in part by a victim's reaction. Typically, stalking is conduct that "would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family"[12] or "would cause a reasonable person to suffer substantial emotional distress"[13] and does cause the victim to have such a reaction. Some states refer to conduct that seriously "alarms," "annoys," "torments," or "terrorizes" the victim, although many of those states also require that the conduct result in substantial emotional distress.[14] Others refer to the victim's fear for his or her "personal safety";[15] feeling "frightened, intimidated, or threatened";[16] or fear "that the stalker intends to injure the person, another person, or property of the person."[17] In general, however, stalking statutes provide that the conduct must be of a nature that would cause a specified reaction on the part of the victim and in fact does cause the victim to have that reaction.[18]

Intentions of the Stalker

Originally, most stalking statutes were "specific intent" crimes; they required proof that the stalker intended to cause the victim to fear death or personal injury or to have some other particular reaction to the stalker's actions. The subjective intent of a person, however, can be difficult to prove. Therefore, many states have revised their statutes to make stalking a "general intent" crime; rather than requiring proof that the defendant intended to cause a reaction on the part of the victim, many states simply require that the stalker intentionally committed prohibited acts.

Other states require that in committing the acts, the defendant must know, or reasonably should know, that the acts would cause the victim to be placed in fear. The latter approach was recommended in the NIJ Model Antistalking Code project. At least two courts have discussed the model's language in finding that general intent is sufficient.[19]

Exceptions

Most states have explicit exceptions under their stalking laws for certain behaviors, commonly described simply as "constitutionally protected activity." Many also specifically exempt licensed investigators or other professionals operating within the scope of their duties;[20] however, it may not be necessary to provide such exceptions within the statute itself. The Supreme Court of Illinois interpreted that state's stalking laws to prohibit only conduct performed "without lawful authority," even though the laws do not contain that phrase. The court reasoned that "[t]his construction . . . accords with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions."[21]

Aggravating Circumstances

Many state codes include an offense of aggravated stalking or define stalking offenses in the first and second degrees. Often, the higher level offense is defined as stalking in violation of a protective order,[22] stalking while armed with a deadly weapon,[23] a second or subsequent conviction of stalking,[24] or stalking a minor.[25] Many states without a separately defined higher offense provide for enhanced punishment for stalking under such conditions.

Challenges to Stalking Laws

Most of the cases challenging the constitutionality of stalking laws focus on one of two questions: whether the statute is overbroad or whether it is unconstitutionally vague. A statute is unconstitutionally overbroad when it inadvertently criminalizes legitimate behavior. In a Pennsylvania case, the defendant claimed the stalking statute was unconstitutional because it criminalized a substantial amount of constitutionally protected conduct. In that case, the defendant engaged in a campaign of intimidating behavior against a judge who had ruled against him in a landlord-tenant case. For nearly a year, the defendant made regular phone calls and distributed leaflets calling the judge "Judge Bimbo," "a cockroach," "a gangster," and "a mobster." During one of his many calls to the judge's chambers, her secretary asked him if his intentions were "to alarm and disturb" the judge. The defendant replied, "I would hope that my calls alarm her. I am working very hard at it. If my calls are disturbing, wait until she sees what happens next." He also called and spoke about the bodyguard hired for the judge and the judge carrying a gun "to let [her] know that he's watching and knows what is going on."

The court in that case found that the statute was not overbroad and did not criminalize constitutionally protected behavior. The court noted that "[t]he appellant cites us no cases, nor are we able to locate any, announcing a constitutional right to 'engage in a course of conduct or repeatedly committed acts toward another person [with the] intent to cause substantial emotional distress to the person.' "[26]

Defendants have also argued that stalking laws are unconstitutionally vague. The essential test for vagueness was set out by the U.S. Supreme Court in 1926. A Government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[27] Whether a given term is unconstitutionally vague is left to the interpretation of each state's courts.

In a New Jersey stalking case, the court rejected the defendant's claim that the statute was unconstitutionally vague, finding the defendant's conduct "unquestionably proscribed by the statute." In that case, the defendant had maintained physical proximity to the victim on numerous occasions, late at night, that the court found to be threatening, purposeful, and directed at the victim. He repeatedly asked for sexual contact that he knew was unwanted, and he implied that she had better agree. "To suggest, as the defendant does, that his activity could be seen as the pursuit of 'normal social interaction' is absurd. On the contrary, his conduct was a patent violation of the statute."[28]

In a Michigan case, the defendant also argued that the stalking statutes were unconstitutionally vague and violated his first amendment right to free speech. The court disagreed. "Defendant's repeated telephone calls to the victim, sometimes 50 to 60 times a day whether the victim was at home or at work, and his verbal threats to kill her and her family do not constitute protected speech or conduct serving a legitimate purpose, even if that purpose is 'to attempt to reconcile,' as defendant asserts."[29]

Claims that stalking laws were unconstitutionally vague have focused on the wide range of terms commonly used in such laws. For example, courts have ruled that the following terms were not unconstitutionally vague: "repeatedly,"[30] "pattern of conduct,"[31] "series,"[32] "closely related in time,"[33] "follows,"[34] "lingering

outside,"[35] "harassing,"[36] "intimidating,"[37] "maliciously,"[38] "emotional distress"[39] "reasonable apprehension,"[40] "in connection with,"[41] and "contacting another person without the consent of the other person."[42]

Courts have also determined that terms such as "without lawful authority"[43] and "serves no legitimate purpose"[44] were not unconstitutionally vague. The Oregon Court of Appeals, however, did invalidate that state's stalking law on the grounds that the term "legitimate purpose" was unconstitutionally vague.[45] The court found that the statute did not tell a person of ordinary intelligence what was meant by the term "legitimate purpose"; therefore, the statute gave no warning as to what conduct must be avoided. The Oregon legislature later revised the statute to remove the phrase.

The Supreme Court of Kansas found that state's stalking statute unconstitutionally vague because it used the terms "alarms," "annoys," and "harasses" without defining them or using an objective standard to measure the prohibited conduct. "In the absence of an objective standard, the terms . . . subject the defendant to the particular sensibilities of the individual. . . . [C]onduct that annoys or alarms one person may not annoy or alarm another. . . . [A] victim may be of such a state of mind that conduct that would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass this victim."[46] Kansas has since amended its statute, and the amended statute has been ruled constitutional. The court specifically found that the revised law included an objective standard, that is, the standard of a "reasonable person," and defined the key terms "course of conduct," "harassment," and "credible threat."[47]

Similarly, the Texas Court of Criminal Appeals found that state's original antistalking law unconstitutionally vague. Although there were several factors in this ruling, the expansive nature of the prohibited conduct was a key point in the decision. That conduct included actions that would "annoy" or "alarm" the victim. The court observed that "the First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed."[48] The Texas Legislature subsequently revised the law to correct the problem.

Massachusetts's stalking law was also declared unconstitutionally vague because it provided that a person could be guilty of stalking if that person repeatedly harassed the victim. "Harass" was defined as a pattern of conduct or series of acts. Thus, the court found that the statutory requirement of repeated harassment meant that a person "must engage repeatedly (certainly at least twice) in a pattern of conduct or series of acts over a period of time. . . . One pattern or one series would not be enough." The court noted that the legislature presumably intended a single pattern of conduct or a single series of acts to constitute the crime but did not state this with sufficient clarity to meet the constitutional challenges.[49] The Commonwealth has since revised its stalking law to address the issue.

Other courts have disagreed with the reasoning of the Massachusetts decision. The Rhode Island Supreme Court declared that the Massachusetts court's "metaplasmic[†] approach . . . has attracted little, if any following." The court found that the statute, as drafted, met the constitutional test by giving adequate warning to potential offenders of the prohibited conduct. "It indeed defies logic to conclude that a defendant would have to commit more than one series of harassing acts in order to be found guilty of stalking."[50] The D.C. Court of Appeals reached a similar conclusion.[51]

Attempted Stalking

At least one state has grappled with the question of whether a person can be charged with attempted stalking. In Georgia, a defendant made harassing and bizarre phone calls to his ex-wife. The defendant was arrested and released under the condition that he was to have "[a]bsolutely no contact with the victim or the victim's family." A few weeks later, he called his ex-wife's office, claiming to be the district attorney, and asked personal questions about his ex-wife. He later attempted to call his ex-wife at the office, but she was out of town. He told a coworker to tell his ex-wife that "when she gets home she can't get in." The Georgia Supreme Court found that it was not absurd or impractical to criminalize attempting to stalk, which under the terms of the statute meant attempting to follow, place under surveillance, or contact another, when it was done with the requisite specific intent to cause emotional distress by inducing a reasonable fear of death or bodily injury. A concurring Justice noted that to hold otherwise would be to permit a stalker "to intimidate and harass his intended victim simply by communicating his threats to third parties who (the stalker knows and expects) will inform the victim."[52]

[†] *Metaplasmia:* alteration of regular verbal, grammatical, or rhetorical structure usually by transposition of the letters or syllables of a word or of the words in a sentence. *Metaplasmic*, adj. (*Webster's Third New International Dictionary*, 1971).

Current Issues

Cyberstalking

As the use of computers for communication has increased, so have cases of "cyberstalking." A 1999 report by the U.S. Attorney General called cyberstalking a growing problem. After noting the number of people with access to the Internet, the report states, "Assuming the proportion of cyberstalking victims is even a fraction of the proportion of persons who have been the victims of offline stalking within the preceding 12 months, there may be potentially tens or even hundreds of thousands of victims of recent cyberstalking incidents in the United States."[53]

Many stalking laws are broad enough to encompass stalking via e-mail or other electronic communication, defining the prohibited conduct in terms of "communication," "harassment," or "threats" without specifying the means of such behavior. Others have specifically defined stalking via e-mail within their stalking or harassment statute.

For example, California recently amended its stalking law to expressly include stalking via the Internet.[54] Under California law, a person commits stalking if he or she "willfully, maliciously, and repeatedly follows or harasses another person and . . . 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." The term "credible threat" includes "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." "Electronic communication device" includes "telephones, cellular phones, computers, video recorders, fax machines, or pagers."

Bail Restrictions

States are grappling with the matter of pretrial release of people charged with stalking. Because stalkers often remain dangerous after being charged with a crime, states have sought means to protect victims at the pretrial stage. Many states permit the court to enter a no-contact order as a condition of pretrial release.[55] A few give the court discretion to deny bail. For example, Illinois allows a court to deny bail when the court, after a hearing, "determines that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim of the offense and denial of . . . bail . . . is necessary to prevent fulfillment of the threat upon which the charge is based."[56]

Lifetime Protection Orders

Stalkers frequently remain obsessed with their targets for years. Requiring victims to file for a new protective order every few years can be unduly burdensome. Because victims may have attempted to conceal their whereabouts from the stalkers, reapplying for a protective order may inadvertently reconnect stalkers with their victims. In New Jersey, this problem has been alleviated. A conviction for stalking in that state operates as an application for a permanent restraining order. The order may be dissolved on application of the victim.[57]

Conclusion

Stalking is a serious and pervasive criminal offense. The Nation is increasingly aware of the danger stalkers pose and of the need for effective intervention. Research into the nature and extent of stalking is ongoing. As more is learned about effective responses to stalkers, laws will continue to evolve. Victim advocates and victim service providers must work closely with law enforcement and prosecutors to identify what additional legislative changes are needed to better protect stalking victims.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or "hot topics" relating to each legal issue.

Notes

1. Tjaden, Patricia, and Nancy Thoennes (1998). *Stalking in America: Findings From the National Violence Against Women Survey*. Washington, DC: U.S. Department of Justice, National Institute of Justice and the Centers for Disease Control and Prevention.

2. This bulletin focuses on state stalking laws. For the federal interstate stalking law, see 18 U.S.C. § 2261A (2001).

3. National Criminal Justice Association (1993). *Project To Develop a Model Anti-Stalking Code for States*. Washington, DC: National Institute of Justice. To receive a copy of the final report of this project, contact the National Criminal Justice Reference Service at 1–800–851–3420 and ask for publication NCJ 144477.

4. For more indepth information on the problem of stalking, see *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act*, Washington, DC: U.S. Department of Justice, Violence Against Women Grants Office, 1998.

5. Mich. Stat. Ann. § 28.643(8) (2000).

6. 720 Ill. Comp. Stat. 5/12-7.3 (2001).

7. Md. Ann. Code art. 27, § 124 (2001).

8. Haw. Rev. Stat. §§ 711-1106.4, -1106.5 (2000).

9. Conn. Gen. Stat. §§ 53a-181d, -181e (2001).

10. Wis. Stat. Ann. § 940.32 (2000).

11. Ark. Stat. Ann. § 5-71-229 (2001); Mass. Gen. Laws Ann. ch. 265, § 43 (2001).

12. N.J. Stat. Ann. § 2C:12-10 (2001).

13. For example, Cal. Penal Code § 646.9 (Deering 2001); Kan. Stat. Ann. § 21-3438 (2000).

14. Kan. Stat. Ann. § 21-3438 (2000). See also Ky. Rev. Stat. § 508.150 (2001); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2000); Miss. Code Ann. § 97-3-107 (2001).

15. N.H. Rev. Stat. Ann. § 633:3-a (2000).

16. N.M. Stat. Ann. § 30-3A-3 (2000).

17. Wash. Rev. Code Ann. § 9A.46.110 (2001).

18. The specific terms are subject to the interpretation of each state's courts.

19. *State* v. *Neuzil*, 589 N.W.2d 708 (Iowa 1999); *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

20. For example, Ark. Stat. Ann. § 5-71-229 (2001).

21. *People* v. *Bailey*, 167 Ill. 2d 210, 657 N.E.2d 953 (1995).

22. For example, Ala. Code § 13A-6-91 (2001); N.M. Stat. Ann. § 30-3A-3.1 (2000).

23. For example, Ark. Stat. Ann. § 5-71-229 (2001) (stalking in the first degree).

24. For example, Vt. Stat. Ann. § 13-1063 (2001).

25. For example, Fla. Stat. § 784.048 (2000).

26. *Commonwealth* v. *Schierscher*, 447 Pa. Super. 61, 668 A.2d 164 (Pa. Super. Ct. 1995).

27. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

28. *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

29. *People* v. *White*, 212 Mich. App. 298, 536 N.W.2d 876 (Mich. Ct. App. 1995).

30. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995); *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

31. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

32. *State* v. *Randall*, 669 So.2d 223 (Ala. Crim. App. 1995).

33. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

34. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998); *People* v. *Zamudio*, 293 Ill. App. 3d 976, 689 N.E.2d 254 (Ill. App. Ct. 1997).

35. *State* v. *Schleirermacher*, 924 S.W.2d 269 (Mo. 1996).

36. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

37. Id.

38. *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

39. *Woolfolk* v. *Commonwealth*, 18 Va. App. 840, 447 S.E.2d 530 (Va. Ct. App. 1994); *Salt Lake City* v. *Lopez*, 313 Utah Adv. Rep. 26, 935 P.2d 1259 (Utah Ct. App. 1997).

40. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

41. *People* v. *Baer*, 973 P.2d 1225 (Colo. 1999).

42. *Johnson* v. *State*, 264 Ga. 590, 449 S.E.2d 94 (1994).

43. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998).

44. *People* v. *Tran*, 47 Cal. App. 4th 253, 54 Cal. Rptr. 2d 650 (Cal. Ct. App. 1996).

45. *State* v. *Norris-Romine*, 134 Or. App. 204, 894 P.2d 1221 (Or. Ct. App. 1995).

46. *State* v. *Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

47. *State* v. *Rucker*, 1999 Kan. LEXIS 410 (1999).

48. *Long* v. *State*, 931 S.W.2d 285, 290 n. 4 (Tex. Crim. App. 1996).

49. *Commonwealth* v. *Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (1994).

50. *State* v. *Fonseca*, 670 A.2d 1237 (R.I. 1996).

51. *United States* v. *Smith*, 685 A.2d 380 (App. D.C. 1996).

52. *State* v. *Rooks*, 266 Ga. 528, 468 S.E.2d 354 (1996).

53. *Cyberstalking: A New Challenge for Law Enforcement and Industry*, A Report From the Attorney General to the Vice President, August 1999, p. 6.

54. Cal. Penal Code § 646.9 (Deering 2001).

55. For example, Alaska Stat. § 12.30.025 (2001); Md. Ann. Code art. 27, § 616½ (2001).

56. 725 Ill. Comp. Stat. 5/110-4, -6.3 (2001).

57. N.J. Stat. § 2C:12-10.1 (2001).

The OVC Legal Series bulletins were created by the National Center for Victims of Crime (NCVC) under grant number 1999–VF–GX–K007 awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this bulletin are those of the author/NCVC and do not necessarily represent the official position or policies of the U.S. Department of Justice.

The Office for Victims of Crime is a component of the Office of Justice Programs, which also includes the Bureau of Justice Assistance, the Bureau of Justice Statistics, the National Institute of Justice, and the Office of Juvenile Justice and Delinquency Prevention.

NCJ 189192