

Winter 1994

## Standing Up to Stalkers: South Carolina's Antistalking Law Is a Good First Step

Christine Olle Sloan

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### Recommended Citation

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## STANDING UP TO STALKERS: SOUTH CAROLINA'S ANTISTALKING LAW IS A GOOD FIRST STEP\*

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\* The author would like to acknowledge law professors Eldon D. Wedlock, Jr. and O'Neal Smalls for their assistance with this note.

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I. INTRODUCTION

Following someone in public; placing phone calls; and sending love letters, poems, and gifts are not illegal in South Carolina or in most states. But when these actions are coupled with a credible threat of violence toward the recipient, the actor is guilty of stalking.

The phenomenon of stalking has only recently been recognized in the United States, but the movement to provide protection to the victims has caught on like wildfire. In 1992 South Carolina joined other states in passing legislation to tackle this issue. While its legislative initiative is a good first step, more must follow. This note will provide a cursory view of the phenomenon of stalking.<sup>1</sup> It will analyze the substance of South Carolina's antistalking law,<sup>2</sup> and examine the need for this law in light of other laws that might adequately address stalking. Finally, it will discuss alternatives to the state's antistalking law and present means by which the law can be strengthened to provide relief to victims and stalkers alike.

II. THE PHENOMENON OF STALKING

Stalking is the "willful, malicious, and repeated following and harassing of another."<sup>3</sup> One commentator described stalking as "a crime which, in the past, has all too often been dismissed or ignored until . . . it's too late, until someone has been hurt, or even killed."<sup>4</sup> Stalking behavior often accompanies an abnormal fixation towards the victim and includes unsolicited phone calls, correspondence, gifts, and visits from the stalker; surveillance of the victim; and vandalism.<sup>5</sup> "Quite often, although not criminal in nature, these

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1. See Kathleen G. McAnaney & Laura A. Curliss, Note, *From Imprudence to Crime: Antistalking Laws*, 68 NOTRE DAME L. REV. 819 (1993), for an in-depth look at the behavioral aspects of stalking.

2. For a discussion of the technical deficiencies of the law, see Thomas R. Haggard, *The South Carolina Anti-Stalking Statute: A Study in Bad Drafting*, S.C. LAW., Mar.- Apr. 1994, at 13.

3. Robin Westen, *Stalkers Must Be Stopped*, NEW WOMAN, May 1993, at 122.

4. *Nightline: Antistalker Laws* (ABC television broadcast, Sept. 3, 1992).

5. See John C. Lane, *Threat Management Fills Void in Police Services*, THE POLICE CHIEF, Aug. 1992, at 27 (describing the threat management program instituted by the Los

situations create a harassing, even threatening, environment for the targeted individual."<sup>6</sup>

There is no single stalker profile. Stalking's causes are not necessarily related to poor financial standing or other motives for criminal behavior; not all stalkers have a previous criminal record and some might even be considered upstanding citizens.<sup>7</sup> However, most stalkers share some common characteristics, which one authority has labeled "pre-incident indicators" of stalking.<sup>8</sup> These indicators include "references to obsessive love, weapons, death, suicide, religious themes and a common destiny with the stalked figure."<sup>9</sup> In addition, research on celebrity stalkers reveals that more than ninety percent suffer from mental disorders.<sup>10</sup> Often their crime is one of obsession and falls into one of three distinct groups: erotomania,<sup>11</sup> love obsessional,<sup>12</sup> and simple obsession<sup>13</sup> - the most common group.<sup>14</sup>

The victims of stalking range from high-profile celebrities,<sup>15</sup> politicians,

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Angeles Police Department to address the crime of stalking).

6. *Id.*

7. *Outlawing Stalkers*, CALGARY HERALD, May 4, 1993, at A4.

8. Gavin de Becker is an authority on protecting celebrities and politicians. De Becker compiled a database of approximately 9,000 potential and actual stalkers. His pre-incident indicators were developed from his research of the issue of stalking using behavioral records and approximately 200,000 letters. Mike Tharp, *In the Mind of a Stalker*, U.S. NEWS & WORLD REP., Feb. 17, 1992, at 28, 28.

9. *Id.* at 28-29.

10. Maria Puente, *Legislators Tackling the Terror of Stalking*, USA Today, July 21, 1992, at 9A.

11. This type of stalker has

the delusional belief that one is passionately loved by another. . . . The delusion is frequently one of an idealized love, a "perfect match." The person is convinced that the object, usually of the opposite sex, fervently loves him or her, and would return the affection if not for some external influence. The onset of symptoms is sudden; the person often has had only brief or no prior contact with the object.

Michael A. Zona et al., *A Comparative Study of Erotomaniac and Obsessional Subjects in a Forensic Sample*, AM. ACAD. FORENSIC SCI. J., June 1993, at 894, 894-95.

12. These individuals may or may not have the delusional belief that the victim is also in love, but do believe that their victims might love them if only given the chance. Consequently, stalkers in this category begin a campaign to make their existences known to the victims. Here, the stalkers almost always know the victims through the media only. *Id.* at 896.

13. Stalkers in this category had some prior connection with the victim, usually as a customer, acquaintance, neighbor, professional associate, lover, or friend. The stalking activities begin after the relationship sours or the stalker perceives a mistreatment from the victim. Here, the stalking campaign is begun either to rectify the relationship or to seek retribution. *Id.*

14. Nine and one-half percent of stalkers suffer from erotomania; 43% from love obsession; and 47% from simple obsession. *Stalkers and Their Victims*, USA TODAY, July 21, 1992, at 9A.

15. David Letterman is stalked by an obsessed fan named Margaret Ray who continues to

and their families<sup>16</sup> to the girl next door.<sup>17</sup> One source indicates that seventeen percent of stalking victims are highly recognizable celebrities, thirty-two percent are lesser known entertainment figures, thirteen percent are former employers or other professionals associated with the stalker, and thirty-eight percent are ordinary citizens.<sup>18</sup> One study has reported that approximately one in twenty adults will be stalked at some time in his or her life.<sup>19</sup> Another study reported that 200,000 people in the United States are stalking someone.<sup>20</sup> Finally, while stalking is a crime that can happen to both men and women, most victims are women.<sup>21</sup> Consequently, for the purposes of discussion this note will assume that the stalker is male and the victim is female.

Until recently the police have told victims that there was nothing authorities could do to thwart the undesired attention until their stalkers harmed them. Then in 1989, nineteen-year-old Robert Bardo gunned down television actress Rebecca Schaffer as she stood in the door of her home.<sup>22</sup> Schaffer's death ended Bardo's two-year fascination with the actress who starred on "My Sister Sam."<sup>23</sup> After the Los Angeles Superior Court sentenced him to life in prison without parole, "[h]is case became a frightening symbol of a growing phenomenon in the past decade - stalking."<sup>24</sup>

California was the first state to tackle this issue. In 1990 it enacted the first antistalking law in response partly to the murders of four other young women, all of whom died at the hands of their stalkers.<sup>25</sup> Since 1990 all fifty states have enacted legislation; forty-eight statutes directly address stalking.<sup>26</sup>

break into his house. David Ellis et al., *What the New Antistalking Laws Mean*, PEOPLE, May 17, 1993, at 72, 72.

16. Kathleen Tobin Krueger, wife of former Texas Senator Bob Krueger, has been stalked for nine years by an ex-campaign staffer. David Ellis et al., *Nowhere to Hide*, PEOPLE, May 17, 1993, at 63, 63.

17. Kristin Lardner was a college student murdered by her stalker, an ex-boyfriend. George Lardner Jr., *The Stalking of Kristin: The Law Made It Easy For My Daughter's Killer*, WASH. POST, Nov. 22, 1992, at C1.

18. *Stalkers and Their Victims*, *supra* note 14, at 9A.

19. Tharp, *supra* note 8, at 28.

20. Ellis, *supra* note 16, at 63 (referring to a study conducted by Dr. Park Dietz, a forensic psychiatrist).

21. *Nightline*, *supra* note 4.

22. Tharp, *supra* note 8, at 28.

23. *Id.* at 30.

24. *Id.* at 28.

25. The four women each had taken out temporary restraining orders and had communicated to their families, friends, and police that they thought they were going to be killed. *Sonya Live: Stalker Laws* (CNN television broadcast, June 8, 1992) "[I]n each case, police had indicated, 'Let us know when he attacks you physically, and then we can get involved.'" *Id.*

26. Anne Seymour of the National Victim Center credits the recent rash of antistalking laws to the lack of an adequate remedy to stalking:

South Carolina jumped on the bandwagon in 1992 when it passed antistalking legislation,<sup>27</sup> modeled after the California law.<sup>28</sup> The significance of this momentum is that the nation is seeing for the first time laws which are preemptive rather than reactionary. Police who have felt their hands tied behind their backs finally can assist a stalking victim before violence occurs rather than arresting the stalker only after he has battered or murdered his victim.

### III. A SOUTH CAROLINA CASE IN POINT

A South Carolina case in point is the story of Ann, a graduate of a South Carolina college who has been stalked by Bob for the past six years.<sup>29</sup> Ann's stalker is a man with whom Ann had one date while both were juniors in college. Bob repeatedly called Ann, sent her gifts, and followed her to classes against Ann's request while they were in school. Bob moved out of state upon graduation; however, since that time he has continuously sent threatening letters addressed to Ann at her family's home and has made threatening phone calls to her family members.

In early January 1993, Bob traveled to Ann's hometown trying to locate her family's residence. Bob called Ann's father from a pay phone to obtain directions to Ann's house. Bob threatened Ann's father when her father denied the request. Unbeknownst to Bob, at the time of the call he was less than three miles from Ann's home. The police arrested Bob for stalking several days later. Prior to the passage of the antistalking law, the police had told Ann that there was nothing they could do until Bob harmed her.

The facts of Ann's case will be referred to in the following discussion to highlight the inadequacies of the remedies available to the victim prior to the enactment of the state's antistalking law. It is important to keep in mind throughout this discussion that for a victim, the significance of South Carolina's antistalking law is that a stalker can be arrested *before* he inflicts

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There are very few laws . . . that have been effective in preventing harassment and repeated acts where there have been credible threats of violence. And I think one of the reasons the stalker laws have passed with such expediency in many, many states is that people want to fill the gaps, people like us at the National Victims Center are tired of hearing from victims, who could do nothing, from law enforcement, whose hands were tied because they had no legal authority to prevent such crimes from occurring.

*Nightline*, *supra* note 4.

27. S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993).

28. Telephone Interview with South Carolina House Representative Irene Rudnick, co-sponsor of the antistalking bill - H:4086, S.C. General Assembly (1993). Compare South Carolina's version with CAL. PENAL CODE § 646.9 (West Supp. 1994).

29. Ann and Bob are pseudonyms used here to keep private the identity of the stalker, the victim, and the victim's family.

injury on the victim.<sup>30</sup> Thus, while civil remedies and criminal sanctions addressing actual physical and emotional harm inflicted on a victim are also available, these remedies are less valuable to a victim in the sense that some harm must be incurred before they can be utilized. Because one purpose of this note is to discuss those remedies a victim might employ to prevent harm, the remedies for use after actual harm is incurred are deemed irrelevant.

#### IV. THE INADEQUACY OF OTHER REMEDIES AGAINST STALKING

There are no statistics available in South Carolina indicating the frequency of stalking because stalking only recently became a criminal offense. However, a National Institute of Justice report states that, in general, "there have been as many attacks on public figures by mentally disordered people in the past [twenty] years as there were in the preceding 175 years."<sup>31</sup> In addition, the behavior preceding some murders, as reported in South Carolina news accounts, indicates that stalking behavior has occurred in South Carolina for some time.<sup>32</sup> However, until last year there was no satisfactory recourse available, statutory or civil, for a victim in South Carolina. That is, there were no remedies which would assist a victim before her stalker inflicted harm.

##### A. Civil Remedies

Various civil remedies may be available to a stalking victim. However, civil remedies are inadequate to protect a victim from the potential danger that lays ahead. It is doubtful that a pending lawsuit deters a stalker. Additionally, the prospect of receiving a monetary award does little to assuage a victim's fear of imminent peril. It is reasonable to believe that most victims, instead,

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30. See S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993).

31. Lane, *supra* note 5, at 27.

32. For example, Brenda Fellers's estranged husband threatened her in a poem he wrote and sent to her before he shot her to death in her backyard. Michelle R. Davis, *Man Charged in Wife's Death*, THE STATE, June 2, 1993, at 2B. Sixteen year-old Amber Owen received threatening messages on her answering machine from her ex-boyfriend for months before he entered her mother's apartment and shot Amber Owen to death. Suellen E. Dean, *'Put a Gun in Every Room,' Advises Mother of Slain Teen*, THE STATE, August 22, 1993, at 4B. Finally, Lisa Woodfin Smith moved and obtained an unlisted phone number in an attempt to divert the harassment of her ex-husband following their divorce. But her attempts were to no avail; he shot her to death outside a shopping mall approximately four months later. Suellen E. Dean, *Woman Slain at Spartanburg Mall; Ex-Husband Held*, THE STATE, July 10, 1993, at 1B (reporting that the stalker yelled as he shot the victim: "Where are you going to run now, Lisa?"). No article reported that any of the victims had attempted to utilize the South Carolina antistalking law even though the law was in effect during all of these incidents.

would rather receive assurances of safety from the future actions of their stalker.

Moreover, one expert on stalking states that a victim who has her stalker arrested should encourage his prosecution and imprisonment: "As a general rule, [arresting but failing to prosecute or imprison the stalker is] perceived by the mentally ill stalker as a confirmation of the relationship, and by the less seriously ill stalker as an angering challenge."<sup>33</sup> Consequently, it is reasonable to believe that a civil lawsuit against the stalker could bring about the same attitude.

While this discussion includes an analysis of Ann's situation in relation to the following civil actions, it is this author's belief that they are all inadequate.

### 1. Assault

Often plaintiffs bring actions in tort for assault and battery. However, a victim can bring an action in tort for assault alone, even though her stalker has committed no battery.<sup>34</sup> A victim can prove assault by showing that her stalker's actions placed her in "reasonable fear of bodily harm."<sup>35</sup> Although assault is an intentional tort, a victim need not prove that her stalker intended to place her in such fear if her stalker's actions were reckless.<sup>36</sup>

A victim must prove more than threatening words to prove the existence of reasonable fear of bodily harm.<sup>37</sup> In *Brooker v. Silverthorne* the South

33. Puente, *supra* note 10, at 9A (quoting stalking expert, Dr. Park Dietz).

34. The South Carolina Supreme Court recognized a cause of action for assault in *Griner v. Columbia Creamery Co.*, 118 S.C. 225, 110 S.E. 116 (1921), when employees of the defendant company assaulted the plaintiff. In *Griner* the supreme court failed to discuss in any detail the civil cause of action for assault but focused instead on whether or not an agency relationship existed whereby the defendant company could be held liable for the assault by its employees. *Id.* at 227-28, 110 S.E. at 117. More recently the South Carolina Court of Appeals recognized assault independent from battery in *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984); the court found that the trial judge had properly distinguished the torts of assault and battery in the jury instructions. *Id.* at 230, 317 S.E.2d at 755.

35. *Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952) (per curiam); see also *Gathers*, 282 S.C. at 230, 317 S.E.2d at 754-55 (citing *Herring* to define assault). Interestingly, in 1931 the South Carolina Supreme Court upheld the definition of assault "as any improper familiarity with a female against her consent." *Kirven v. Kirven*, 162 S.C. 162, 169, 160 S.E. 432, 435 (1931).

36. See *Herring*, 222 S.C. at 241, 72 S.E.2d at 458.

37. *Brooker v. Silverthorne*, 111 S.C. 553, 557, 99 S.E. 350, 351 (1919) ("Words never constitute an assault, is a time-honored maxim." (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS 29 (1880) [hereinafter COOLEY])). A plaintiff can rely upon threatening words alone only when the defendant has a legal or contractual duty to protect the plaintiff from insult, abusive language, or assault as found in carrier-passenger relationships. See *id.* at



Carolina Supreme Court distinguished an assault from a threat, stressing that the difference which exists is due to "the reluctance of the law to give a cause of action for mere words."<sup>38</sup> The court observed that an assault "must be resisted on the instant" while a "threat only promises a future injury;" a threat provides ample time to protect oneself from the injury.<sup>39</sup>

Additionally, the *Brooker* court noted that a threat is actionable when a plaintiff can prove that the threat was "adequate" in law to produce the resulting damage.<sup>40</sup> A threat is adequate in law when the threat is

of such nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear that the person against whom it is made was peculiarly susceptible to fear, and that the person making the threat knew and took advantage of the fact that he could not stand as much as an ordinary person.<sup>41</sup>

The court did not state whether an action for a threat is distinct from an action for an assault or whether the threatening language at issue rose to the level of an assault. However, it appears that the standard by which one can prove an action for a threat would also support the reasonable fear requirement in an action for assault.

In *Brooker* the supreme court found that the defendant's conduct was not adequate when he proclaimed over a telephone to the plaintiff, a telephone operator: "You God damned woman! None of you attend to your business." and "You are a God damned liar. If I were there, I would break your God damned neck."<sup>42</sup> The court found that nothing in the defendant's statements expressed an intention to go to where the plaintiff was to injure her. Nor was there any evidence that the defendant knew that the plaintiff was peculiarly susceptible to fear.<sup>43</sup>

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558, 99 S.E. at 352.

[A] carrier's liability for abusive language to a passenger is exceptional, on account of the special and peculiar relations, obligations, and duties existing between carrier and passenger, which differ in kind and degree from almost every other legal or contractual relation, since the carrier is in duty bound to protect his passengers from assault or insult by his servants, and to afford them courteous and respectful treatment.

*Id.* (citing *Lipman v. Atlantic Coast Line R.R.*, 108 S.C. 151, 93 S.E. 714 (1917); *Cave v. Seaboard Airline Ry.*, 94 S.C. 282, 77 S.E. 1017 (1913)).

38. *Id.* at 557, 99 S.E. at 351 (quoting *COOLEY*, *supra* note 37, at 29).

39. *Id.*

40. *Id.* at 558, 99 S.E. at 352.

41. *Id.* at 558-59, 99 S.E. at 352 (citing *Grimes v. Gates*, 47 Vt. 594 (1873)).

42. *Brooker*, 111 S.C. at 555, 99 S.E. at 351.

43. *Id.*

A threat of harm other than physical violence may be actionable as an assault when physical or bodily damages arise directly and proximately therefrom. In *Turner v. ABC Jalousie Co.*<sup>44</sup> the plaintiff and her husband entered into a contract with the defendant whereby the defendant agreed to deliver and install aluminum siding on the couple's home for a special sales price. The defendant returned to the couple's home approximately one hour after executing the contract to alert them that the siding would cost approximately \$2300 more than originally contracted for. When the couple refused to agree to a new contract, the defendant became enraged "and in a loud and threatening voice, and with vile, profane and abusive language, threatened to bring suit against the [couple], sell their said dwelling house and throw them and their children into the street."<sup>45</sup> Consequently, the plaintiff became greatly frightened, went into shock, and required medical treatment because her nervous system had collapsed. Additionally, the plaintiff remained highly nervous after that occasion, lost time from her employment, and was unable to perform her duties in the usual manner.<sup>46</sup>

The supreme court held that the plaintiff's complaint stated a cause of action because it alleged a physical or bodily injury.<sup>47</sup> The court focused its analysis on the damage the plaintiff suffered rather than the nature of the defendant's threats. The court did not address whether this case presented a cause of action for assault or for threats. Recognizing that injury to one's nervous system may result from "an attack of sudden fright, or an exposure to imminent peril,"<sup>48</sup> the court held that an injury of this nature is a physical one, actionable in tort.<sup>49</sup> In addition, the victim is entitled to punitive damages if there is proof that the tortfeasor acted recklessly, evidencing "malice or the conscious disregard of [the victim's] rights."<sup>50</sup>

Over the course of six years, Ann and her family could not bring an action for assault against Bob because his threats were no more than mere words. While his comments were disturbing enough to cause worry and fear in Ann and her family, they were not actionable because they did not indicate imminent danger. In fact, it is questionable whether an assault action would lie for Bob's threats to Ann's father that Bob made when he attempted to locate Ann's house. On the one hand, even though Bob was only three miles

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44. 251 S.C. 92, 160 S.E.2d 528 (1968).

45. *Id.* at 95, 160 S.E.2d at 529.

46. *Id.*

47. *Id.* at 97, 160 S.E.2d at 530.

48. *Id.* at 96, 160 S.E.2d at 530 (quoting *Padgett v. Colonial Wholesale Distrib. Co.*, 232 S.C. 593, 605, 103 S.E.2d 265, 271 (1958)).

49. *Turner*, 251 S.C. at 97, 160 S.E.2d at 530.

50. *Payne v. Bouharoun*, 292 S.C. 390, 391, 356 S.E.2d 438, 439 (Ct. App. 1987) (citing *Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729, *cert. denied*, 349 U.S. 953 (1955); *Willis v. Floyd Brace Co.*, 279 S.C. 458, 463, 309 S.E.2d 295, 298 (Ct. App. 1983)).

from Ann's home, the threat of peril was neither immediate nor imminent because Bob did not know their exact whereabouts. On the other hand, the threat was imminent because Bob had the family's street address and easily could have located the house had he driven around the area looking at street names.

## 2. Trespass

A stalking victim might be able to bring an action in trespass against her stalker when she suffers damages as a result. To constitute an actionable trespass a victim must show an affirmative act on the part of her stalker, that the invasion was intentional, and a threat which was the direct result of the invasion.<sup>51</sup> "Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the [trespass] would follow from his act."<sup>52</sup> A stalker is liable even if he did not intend or expect damage to result from his entry.<sup>53</sup>

Theoretically, the harm from the trespass could be the unwarrantable entry onto the land itself.<sup>54</sup> Consequently, a victim can sue even if she did not suffer damages to her property. However, without proof of actual damage to the property, the victim would be entitled to mere nominal damages.<sup>55</sup>

Additionally, injunctive relief is available when the trespass to a victim's land is continuous.<sup>56</sup> "Because of the permanent and recurring nature of the injury, which cannot otherwise be prevented, the courts should enjoin the continuous trespasser to protect the landowner's property rights from hurt or destruction."<sup>57</sup> The South Carolina cases addressing injunctive relief pertain to situations in which the trespass was created by an instrumentality of the

51. See *Snow v. City of Columbia*, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) (citing *Alabama Power Co. v. Thompson*, 178 So. 2d 525 (Ala. 1965)), *cert. denied*, (1992).

52. *Id.* (citing *Snakenberg v. Hartford Casualty Ins. Co.*, 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989) (providing that the defendant need only intend the actual trespass and that neither deliberation, purpose, motive, nor malice is a necessary element of intent)).

53. *Id.* (citing *Phillips v. Sun Oil Co.*, 121 N.E.2d 249 (N.Y. 1954); *Lee v. Stewart*, 10 S.E.2d 804 (N.C. 1940)).

54. *Id.* At common law, "[t]he unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted." *Id.* at 552, 409 S.E.2d at 802 (citing *Lee*, 10 S.E.2d at 804). All land held in peaceable possession was deemed to be enclosed at common law. *Id.* (citing *Harris v. Baden*, 17 So. 2d 608 (Fla. 1944)).

55. See *id.* at 553, 409 S.E.2d at 802 (citing *Lee*, 10 S.E.2d at 804 (N.C. 1940)).

56. *Mack v. Edens*, 306 S.C. 433, 437, 412 S.E.2d 431, 434 (Ct. App. 1991) (citing *McClellan v. Taylor*, 54 S.C. 430, 32 S.E. 527 (1899)), *cert. denied*, (1992).

57. *Id.* (citing *Carter v. Lake City Baseball Club*, 218 S.C. 255, 62 S.E.2d 470 (1950); *Shelley v. Hucks*, 282 S.C. 124, 317 S.E.2d 470 (Ct. App. 1984)).

defendant rather than the defendant himself.<sup>58</sup> However, it is arguable that a victim of stalking is entitled to injunctive relief when her stalker continuously trespasses upon her land because the stalker infringes on her right of peaceable possession.<sup>59</sup> Furthermore, the victim can receive injunctive relief through a temporary restraining order available in the South Carolina Rules of Civil Procedure.<sup>60</sup>

Fortunately for Ann and her family, a civil action for trespass was unnecessary because Bob has never located their property. However, many unfortunate victims, especially victims who are stalked by an ex-spouse, are taunted by their stalkers in their own backyards.

### 3. *Intentional Infliction of Emotional Distress*

In 1981 the South Carolina Supreme Court expressly recognized a cause of action in tort for the intentional infliction of emotional distress or "outrage."<sup>61</sup> However, the court had recognized, either expressly or impliedly, an action arising out of the current elements of outrage for several years beforehand.<sup>62</sup>

To prove the intentional infliction of emotional distress, a victim must show the following:

(1) [her stalker] intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of [her stalker] caused [the victim's] emotional distress; and (4) the emotional distress suffered by the [victim] was "severe" so that "no reasonable man could be expected to endure it."<sup>63</sup>

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58. See, e.g., *Mack*, 306 S.C. 433, 412 S.E.2d 431 (property owner's downstream pond flooded plaintiff's property); *Snow*, 305 S.C. 544, 409 S.E.2d 797 (city's leaking pipe damaged plaintiff's residence).

59. See *Mack*, 306 S.C. at 437, 412 S.E.2d at 434 (granting injunctive relief because "[i]f a court refuses to restrain [defendant] from backing water on [plaintiff's] land, [plaintiff] will lose the right to peaceable possession of his land").

60. S.C. R. Civ. P. 65(b). See generally *infra* notes 126-33 and accompanying text, explaining how a victim can obtain a TRO in South Carolina.

61. *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (adopting the rule of liability provided in RESTATEMENT (SECOND) OF TORTS § 46 (1965)).

62. *Id.* at 161, 276 S.E.2d at 778 (citing *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 259 S.E.2d 812 (1979); *Bellamy v. General Motors Acceptance Corp.*, 269 S.C. 578, 239 S.E.2d 73 (1977); *Rhodes v. Security Fin. Corp.*, 268 S.C. 300, 233 S.E.2d 105 (1977); *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968)).

63. *Ford*, 276 S.C. at 162, 276 S.E.2d at 778 (quoting *Vicnire v. Ford Motor Credit Co.*,

To prove that the stalker's conduct was "extreme and outrageous" a victim must prove more than simply the stalker acted with a criminal or tortious intent or that he intended to inflict emotional distress.<sup>64</sup> Proof that the stalker's "conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the [victim] to punitive damages for another tort" is insufficient to impose liability.<sup>65</sup> Such proof alone does not present a situation in which the "conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."<sup>66</sup> Whether a stalker's conduct meets the test for liability is a question for the court.<sup>67</sup>

South Carolina courts have not provided many guidelines as to what type of conduct meets this test. However, a verbal assault or a hostile, abusive encounter by the stalker might amount to sufficient outrageous conduct,<sup>68</sup> especially when the victim establishes a pattern of verbal assaults and abusive encounters taking place over a substantial length of time.<sup>69</sup>

Finally, physical illness or some other non-mental damage is not essential to recovery in this action.<sup>70</sup> However, "where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious."<sup>71</sup>

Whether Ann could have successfully brought an outrage action against Bob is questionable. Ann should have no difficulty in proving that Bob's

401 A.2d 148 (Me. 1979)) (citations omitted).

64. See *Hudson*, 273 S.C. at 770, 259 S.E.2d at 814 (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).

65. See *id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d).

66. *Id.*

67. *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 371, 377 S.E.2d 127, 129 (Ct. App. 1989) (per curiam) (citing *Butts v. AVX Corp.*, 292 S.C. 256, 355 S.E.2d 876 (Ct. App. 1987)).

68. See *Hudson*, 273 S.C. at 770, 259 S.E.2d at 814.

69. See *Ford v. Hutson*, 276 S.C. 157, 166, 276 S.E.2d 776, 780 (1981). The supreme court upheld the jury verdict for the plaintiff based upon "evidence [that was] susceptible of the inference that the conduct complained of herein was not a mere complaint by a dissatisfied homeowner, but was instead a continuing pattern of highly questionable conduct over a period of almost two years." *Id.* Plaintiff contended that defendant "orally accosted her with insulting and/or profane remarks on no less than seven different occasions." *Id.* at 163, 276 S.E.2d at 779. Additionally, the South Carolina Court of Appeals has held that the following acts do not constitute outrageous conduct: violating a statute or lying, *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 173, 321 S.E.2d 602, 612 (Ct. App. 1984), *rev'd on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985), and negligence in performing one's duty, *Caddell v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct. App. 1984).

70. *Ford*, 276 S.C. at 157, 276 S.E.2d at 776.

71. *Id.* at 166, 276 S.E.2d at 780 (citing WILLIAM L. PROSSER ET AL., *LAW OF TORTS* (4th ed. 1971)).

conduct inflicted severe emotional distress on Ann and her family. However, Ann may have encountered difficulty proving that her stalker intended to produce such a result because many stalkers suffer from mental infirmity.<sup>72</sup>

### B. Criminal Laws

While civil remedies are inadequate to protect victims from the potential dangers that lay ahead, most of the criminal laws do little to aid victims either. The following discussion delineates the criminal laws predating the antistalking law which do, indeed, address stalking activities. However, with the exception of the Protection from Domestic Abuse Act, these laws involve misdemeanors which appear trivial in nature and are not zealously enforced. Additionally, not all stalking activities fit neatly into the activities proscribed by these laws.

While the antistalking law is also a misdemeanor,<sup>73</sup> its passage reflects the state's awareness of the seriousness of the crime. The legislature's decision to recognize stalking as a crime separate from other crimes suggests the urgency of this issue. Consequently, public awareness has increased, resulting in pressure on the law enforcement community to react quickly when addressing stalkings. The attention that Ann received from the police after six years of tribulation exemplifies police response to the public's new awareness and the effectiveness of the law.<sup>74</sup>

#### 1. Protection from Domestic Abuse Act

The South Carolina Protection from Domestic Abuse Act<sup>75</sup> provided a stalking victim something similar to the antistalking law. However, the Domestic Abuse Act is applicable only to those situations where a victim's

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72. See *supra* note 10 and accompanying text (discussing a stalker's mental condition).

73. See S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993).

74. The years preceding the passage of this law were agonizing for Ann and her family. On one occasion, the police told Ann that they could not respond to the threats Bob made to her over the phone. Instead, they could only advise Ann to run in the opposite direction and find a crowd of people if she encountered Bob in public. In contrast, the police responded quickly to her father's plea for help after South Carolina's enactment of the antistalking law. The police arrested Bob within days after his threat made over the phone was reported.

One should note, however, that the new zealotry with which the police are enforcing the new law could be detrimental to the recognition of the stalking phenomenon. Police may use this law as another weapon against domestic abusers even though not all such abusers fit the definition of a stalker. See Westen, *supra* note 3 and accompanying text. Misapplication of this law will erode its reliability and its effectiveness. Therefore, the police must exercise careful judgment when determining whether to charge an accused with stalking.

75. S.C. CODE ANN. §§ 20-4-10 to -130 (Law. Co-op. 1985).

stalker is a spouse, ex-spouse, parent, child, and certain other relatives.<sup>76</sup> This scenario may seem common, but it is not the most prevalent.<sup>77</sup> The law excludes from its protection a victim of stalking by an ex-boyfriend or a relative stranger, like Bob.

A victim can petition the Family Court for an order of protection pursuant to the Domestic Abuse Act.<sup>78</sup> The order may enjoin the stalker from attempting to communicate with his victim or entering her place of residence, employment, or education<sup>79</sup> for up to six months.<sup>80</sup> A victim may file a petition for this order with a magistrate in the event the Family Court is not in session.<sup>81</sup> Additionally, the court can extend the six month period upon a motion by the victim and a showing of good cause.<sup>82</sup>

The petition for the order of protection must allege abuse to the petitioner, a family member, or a household member and can be filed by either the victim or a member of her household.<sup>83</sup> The definition of abuse includes the threat of physical harm.<sup>84</sup> If good cause is shown, then the court may hold an emergency hearing on the petition within twenty-four hours of service of a petition upon the stalker.<sup>85</sup> Otherwise the hearing is held within fifteen days of the victim's petition.<sup>86</sup>

The court will issue the order of protection upon proof by a preponderance of the evidence of the allegation of abuse: "A prima facie showing of immediate and present danger of bodily injury, which may be verified by supporting affidavits, shall constitute good cause for purposes of this section."<sup>87</sup> Violation of the order of protection is a criminal offense punishable by thirty days in jail or a fine of two hundred dollars.<sup>88</sup> Alterna-

76. *Id.* § 20-4-209(b).

77. A 1991 Justice Department study of violence against women revealed that the offenders are as follows: husbands - 9%; ex-husbands - 35%; boyfriends/ex-boyfriends - 32%. *Nightline*, *supra* note 4.

78. S.C. CODE ANN. § 20-4-40. The Act expressly requires the clerk of court to provide simplified forms to facilitate the application process for those not represented by counsel. *Id.* § 20-4-40(e).

79. *Id.* § 20-4-60(a)(2).

80. *Id.* § 20-4-70.

81. *Id.* § 20-4-30.

82. *Id.* § 20-4-70 (requiring notice to the subject of the order as well).

83. S.C. CODE ANN. § 20-4-40(a) to -(b).

84. *Id.* § 20-4-20(a).

85. *See id.* § 20-4-50(a).

86. *Id.* § 20-4-50(b) (upon the finding of no good cause or when a victim fails to request the emergency hearing, a victim may request and the court will grant a hearing to be held within fifteen days; the respondent must receive service of the petition at least five days prior to the hearing or the court can grant a continuance).

87. *Id.* § 20-4-50(a).

88. S.C. CODE ANN. § 20-4-60(b).

tively, violation of the order may constitute contempt of court punishable by a maximum of one year in jail, a fine of up to fifteen hundred dollars, or both.<sup>89</sup>

Additionally, a victim of stalking by her spouse or ex-spouse can receive a temporary restraining order against him pending the termination of an action for divorce, or a final order thereupon.<sup>90</sup> The order would enjoin her ex-husband from "in any manner interposing any restraint upon the personal liberty of, or from harming, interfering with or molesting, [his victim] during the pendency of the suit or after final judgment."<sup>91</sup> An individual seeking such relief must show facts and circumstances entitling her to relief.<sup>92</sup> The standard to prove entitlement to relief is not expressed in the statute. However, the supreme court indicated that one must prove evidence of physical harm done or threatened to the victim-petitioner or that the ex-spouse has previously interfered with the petitioner's personal liberty or has molested her.<sup>93</sup>

## 2. *Disturbing Schools*

Stalking behavior often includes surveillance of the victim by the stalker. Consequently, a victim who is followed to school could ask the police to arrest her stalker if he is loitering about a school or is acting in an obnoxious manner there.<sup>94</sup> This law is inapplicable to a stalker who is on the school premises for business reasons and has permission to be there from the principal or the president of the institution.<sup>95</sup> For example, although Bob followed Ann on campus, this law provided Ann no relief because her stalker was a fellow student. Finally, a person found guilty of this law is guilty of a misdemeanor and must pay a fine between one hundred and one thousand dollars.<sup>96</sup> Alternatively, the individual may be imprisoned in the county jail for thirty to ninety days.<sup>97</sup>

## 3. *Trespass*

Trespass was not an issue in Ann's situation because Ann and her family

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89. *Id.* § 20-4-60(b).

90. *Id.* § 20-3-110.

91. *See id.* (referring to divorce suits).

92. *Odom v. Odom*, 248 S.C. 144, 147, 149 S.E.2d 353, 355 (1966).

93. *Id.* at 147, 149 S.E.2d at 355.

94. S.C. CODE ANN. § 16-17-420(1)(b)-(c) (Law. Co-op. 1985). This law is applicable to any school or college.

95. *Id.* § 16-17-420(2).

96. *Id.* § 16-17-420.

97. *Id.*



made certain that her whereabouts were unknown to Bob after he left the state. In addition, his attempt to locate her family's residence was unsuccessful. However, a victim may have her stalker arrested if he enters her dwelling, place of business, or the premises of another without legal cause or good excuse and has been warned not to do so within the previous six months.<sup>98</sup> A victim may also have a stalker arrested even if he has not been warned if the person in possession of the property orders or requests the stalker to leave and the stalker refuses to do so without legal cause or good excuse.<sup>99</sup> Upon conviction, the stalker will be imprisoned for up to thirty days or fined up to two hundred dollars.<sup>100</sup> It is important to note that the statute provides relief in the form of a monetary fine or imprisonment; the landowner may not herself eject the trespasser.<sup>101</sup>

#### 4. Public Disorderly Conduct

A stalker who conducts himself in a disorderly or boisterous manner or uses obscene or profane language in any public place or gathering is guilty of a misdemeanor and can be fined up to one hundred dollars or imprisoned up to thirty days.<sup>102</sup> The supreme court indicated that an arrest under this provision of the statute requires the utterance of fighting words.<sup>103</sup> For example, the supreme court upheld a finding of probable cause to arrest two men for a violation of this statute in *State v. Roper*.<sup>104</sup> The police arrested the men when they jumped from their car and shouted profanities in a residential neighborhood.<sup>105</sup>

This law also was unavailable to Ann and her family because it only applies to public occurrences. Ann never saw Bob in public after he moved out of state. Therefore, his profane language and menacing utterances in his letters and phone calls went unpunished.

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98. *Id.* § 16-11-620. See generally *City of Greenville v. Peterson*, 239 S.C. 298, 303, 122 S.E.2d 826, 828 (1961) (providing that the predecessor statute was "clearly for the purpose of protecting the rights of the owners or those in control of private property"), *rev'd on other grounds*, 373 U.S. 244 (1963).

99. S.C. CODE ANN. § 16-11-620.

100. *Id.*

101. *Town of Springdale v. Butler*, 299 S.C. 276, 279, 384 S.E.2d 697, 698 (1989).

102. S.C. CODE ANN. § 16-17-530. This statute also applies to the use of obscene or profane language within hearing distance of any schoolhouse or church. *Id.*

103. *State v. Perkins*, 306 S.C. 353, 354, 412 S.E.2d 385, 386 (1991) (reversing a conviction of appellants who voiced their objections to sheriff's officers because the record indicated no use of fighting words).

104. 274 S.C. 14, 260 S.E.2d 705 (1979).

105. *Id.* at 17, 260 S.E.2d at 706.

### 5. Breach of Peace

A magistrate may have a stalker arrested who disturbs the peace, utters menaces, or is an otherwise dangerous and disorderly person.<sup>106</sup> A stalker may be held in jail until he is tried before the court of general sessions when the offense is of a high and aggravated nature.<sup>107</sup> Alternatively, a stalker may be tried by the magistrate and required to post a peace bond.<sup>108</sup>

Certainly, this law appears to provide a remedy for stalking victims such as Ann. The law makes threats, in and of themselves, criminal offenses. Facially, it appears to cover threats made in letters or over the phone because the law neither requires the threats to be made in public or with the ability to carry out the threat. However, this law is rarely used and was not used in Ann's situation.

Interestingly, the only case cited in the code annotation for this law is from 1850, in which South Carolina's high court upheld the defendant's indictment for an "affray."<sup>109</sup> The court defined "affray" in *State v. Sumner* as "the fighting of two or more persons, in some public place, to the terror of the people. If the fight be in some private place, it is no affray, but an assault."<sup>110</sup> The *Sumner* decision indicates that the law requires the threat to be made in public. Consequently, it appears to provide the same relief as that in the public disorderly conduct law outlined above. Thus, the police's use of the latter might explain the former's infrequent use.

The police never offered to arrest Bob under this provision when she first contacted them approximately six years ago. In fact, a police officer confided during a phone interview for this note that it is rare to see this law enforced.<sup>111</sup> In addition, he stated that it is even rarer to see a magistrate issue a peace bond pursuant to the law.<sup>112</sup>

### 6. Unlawful Uses of Telephone

Probably the most common form of stalking is the unwelcome phone call. A stalking victim can have her stalker arrested for communicating on the phone words which are "of a profane, vulgar, lewd, lascivious, or an indecent nature" communicating by phone an "obscene, vulgar, indecent, profane,

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106. See S.C. CODE ANN. § 22-5-150 (Law. Co-op. 1989).

107. *Id.*

108. *Id.*

109. *State v. Sumner*, 36 S.C.L. (5 Strob.) 53 (1850) (per curiam).

110. *Id.* at 56.

111. Telephone Interview with an anonymous source, Richland County Sheriff's Department, Nov. 1, 1993.

112. *Id.* See generally *infra* notes 153-60 and accompanying text (discussing the adequacy of peace bonds as an alternative to stalking violations).

suggestive, or immoral message[;]" or threatening by phone any unlawful act with the intent to intimidate, harass or coerce the victim.<sup>113</sup> The South Carolina Supreme Court indicated that in construing this statute the court defines these words as they are "generally defined and understood."<sup>114</sup> The supreme court provided further that the unsolicited telephonic message must be obscene, imminently threatening, or harassing.<sup>115</sup>

Additionally, the stalker can be arrested for repeatedly telephoning the victim "for the purpose of annoying or harassing [the victim] or his [or her] family."<sup>116</sup> Violation of this law is a felony, and the punishment is a fine in the court's discretion or imprisonment for not more than thirty days.<sup>117</sup>

This law was available to Ann and her family because Bob repeatedly telephoned Ann's family to threaten and harass them. However, Ann's stalker made his telephone calls from out of state. Thus, a warrant for his arrest would be outstanding until he entered the state. While his entry into the state would ensure imprisonment upon notice of his arrival, notice of his arrival would not be certain until his actions alerted the police. Moreover, it is unlikely that a violation of this law warrants the immediate attention of the police, as does the stalking law.

### 7. *Eavesdropping or Peeping*

A stalking victim can have her stalker arrested if he invades her privacy by eavesdropping or spying and if these activities occur on the victim's private property.<sup>118</sup> A stalker who eavesdrops on or about his victim's premises or enters her premises to eavesdrop is guilty of a misdemeanor.<sup>119</sup> Consequently, the stalker must pay a fine of not more than five hundred dollars, must be imprisoned for not more than three years, or both.<sup>120</sup>

Additionally, the same penalties are available for stalkers who are

113. See S.C. CODE ANN. § 16-17-430(A)(1) (Law. Co-op. Supp. 1993).

114. *State v. Brown*, 274 S.C. 506, 508, 266 S.E.2d 64, 65 (1980) (providing that the statute sought to protect one's privacy interest "from an invasion made in a shocking manner").

115. *Id.*

116. See S.C. CODE ANN. § 16-17-430(A)(2).

117. S.C. CODE ANN. § 16-17-430(B)(1). The stalker also can be arrested for calling his victim and intentionally failing to hang up for the purpose of interfering with her telephone service, a misdemeanor punishable by a fine of not more than \$100 or imprisonment for not more than 30 days. See *id.* § 16-17-430(A)(3), (B)(2).

118. See *id.* § 16-17-470; see also *Herald Publishing Co. v. Barnwell*, 291 S.C. 4, 12-13, 351 S.E.2d 878, 883 (Ct. App. 1986) (holding that the statute was inapplicable to the conduct of newspaper reporters who eavesdropped during a city council proceeding because "the reporters were on public property and not 'on or about the premises of another'").

119. See S.C. CODE ANN. § 16-17-470 (Law. Co-op. Supp. 1993).

120. See *id.*

"Peeping Toms."<sup>121</sup> A Peeping Tom is someone who "peeps through windows or doors or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any acts of a similar nature, tending to invade the privacy of such persons."<sup>122</sup> However, this statute only applies to incidents occurring on private property.<sup>123</sup> Thus, Bob did not violate this law because he never came onto Ann's property.

### C. Temporary Restraining Orders

A common tool utilized in stalking situations is the civil temporary restraining order (TRO), which merits special attention. In South Carolina a circuit court judge<sup>124</sup> can issue a TRO prohibiting the stalker from contacting or following his victim during the pendency of the order.<sup>125</sup>

In South Carolina a victim desiring a TRO must pay a filing fee,<sup>126</sup> and file a motion for the order with the clerk of the circuit court in her county.<sup>127</sup> The victim may alternatively file directly with a judge when the judge permits.<sup>128</sup> A judge can immediately grant the motion for a TRO in a stalking situation when "it clearly appears . . . that immediate and irreparable injury, loss or damage will result to the [victim] before notice can be served [to the stalker] and a hearing had thereon."<sup>129</sup> The victim must show immediate and irreparable injury, loss or damage from specific facts by affidavit or verified complaint.<sup>130</sup>

Once granted the TRO will expire after ten days of entry into the record unless the court extends that time "for a like period" upon a showing of good cause.<sup>131</sup> A hearing regarding a temporary injunction against the stalker must be set "at the earliest possible time" when a TRO is granted without

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121. *See id.*

122. *Id.*

123. *See id.*

124. People often mistakenly believe that a magistrate can issue a TRO. However, magistrates only can issue peace bonds when offenders breach the peace, *see supra* notes 106-12 and accompanying text, or protective orders pursuant to the Protection Against Domestic Abuse Act, *see supra* notes 75-93 and accompanying text.

125. *See* S.C. R. Civ. P. 65; *see also infra* note 170 and accompanying text (regarding the increased penalty for stalkers who continue their stalking activities in violation of an outstanding TRO).

126. Richland County requires a \$55 filing fee for all new motions filed. (Telephone interview with Richland County Clerk, Nov. 1, 1993).

127. *See* S.C. R. Civ. P. 3(a), 5(e).

128. *See* S.C. R. Civ. P. 5(e).

129. *See* S.C. R. Civ. P. 65(b).

130. *See id.*

131. *Id.*

notice.<sup>132</sup> Temporary injunctions are issued in contemplation of a hearing requesting permanent relief, and it is customary for them to continue until completion of the trial.<sup>133</sup>

There are no South Carolina cases contemplating the issuance of a permanent injunction in harassment situations. In addition, there are no cases discussing situations in which a court may grant a TRO in order to prevent physical injury to its applicant. However, it is reasonable to believe that the latter is relatively common. Ann and her family obtained a TRO against Bob when he arrived in her hometown. However, a TRO is not an effective tool in providing relief from further harassment and potential harm.

The skepticism surrounding TROs results from the appearance of arbitrariness and the lack of seriousness given to most TRO violations.<sup>134</sup> In most states a TRO violation amounts to a civil violation, a mere contempt of court charge, rather than a criminal violation.<sup>135</sup> Consequently, a victim is not entitled to immediate relief upon a TRO violation. Police do not have authority to arrest a stalker in violation of a civil order unless the stalker simultaneously engages in criminal conduct, for example, trespass or public disorderly conduct. Therefore, the victim is left unprotected from her stalker because not all TRO violations are coupled with criminal activity.

To obtain relief from a TRO violation in South Carolina, a victim must first petition the court that granted the order and seek to hold her stalker in contempt of court.<sup>136</sup> Upon notice to the stalker, the court will hold a

132. *See id.* The court will dissolve the TRO if the victim does not apply for a temporary injunction during the TRO hearing. *See id.*

133. *See Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 32, 413 S.E.2d 824, 826 (1992).

134. "The consequences of violating [Canada's proposed antistalking law] would . . . be much more clearly spelled out for would-be stalkers who are unimpressed with the arbitrariness and lack of consequences which are thought to accompany violations of restraining orders." *Outlawing Stalkers*, *supra* note 7, at A4. *See generally* Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Perceived Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271, 279-81 (1992) (discussing the police preference for arbitration rather than arrest in TRO violation situations).

135. Thirty-one states classify the violation of a TRO as civil contempt. Twenty states and the District of Columbia classify the violation as criminal contempt. In 11 states a violation is both civil and criminal contempt. Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 FAM. L.Q. 43, 55 (1989).

136. The South Carolina Rules of Civil Procedure do not provide penalties for TRO violations. Thus, courts must look to the common law of England for guidance. *See* S.C. CODE ANN. § 14-1-50 (Law. Co-op. 1976). The state supreme court has held that the power to punish for contempt is inherent in all courts. *State v. Buchanan*, 279 S.C. 194, 196, 304 S.E.2d 819, 820 (1983) (citing *Curlee v. Howle*, 277 S.C. 377, 287 S.E.2d 915 (1982)). Additionally, a person's wilful disobedience of a court's prior decree constitutes contempt. *Edwards v. Edwards*, 254 S.C. 466, 469, 176 S.E.2d 123, 124 (1970) (citing *Long v. McMillan*, 226 S.C. 598, 86 S.E.2d 477 (1955)).

hearing on the issue of contempt at which the stalker is permitted to show good cause for his violation. The court must find that the stalker was guilty of contempt before a sentence can be imposed: "The record must be clear and specific as to the acts or conduct upon which such finding is based."<sup>137</sup> Once the stalker is found guilty of contempt, the court will hold him in either civil contempt<sup>138</sup> or criminal contempt,<sup>139</sup> depending upon the nature of the sentence imposed. A contempt charge results in either a fine or imprisonment, both of which are meted out in the discretion of the court.<sup>140</sup> Because of the seriousness surrounding most situations warranting a TRO, it is likely that a court would hold a stalker in criminal contempt and impose imprisonment rather than a fine.

South Carolina's TRO is an ineffective remedy to stalking for many reasons. First, it may be difficult for victims to obtain a TRO due to procedures surrounding its issuance. For example, many harassment victims are unaware that only circuit court judges can issue TROs.<sup>141</sup> In addition, victims may not possess the funds necessary to pay the court filing fee. Furthermore, the court rules neither require clerks of court to assist victims proceeding pro se in filing their motions, nor do they mandate the education of clerks to deal with the sensitive issues surrounding TRO applications.<sup>142</sup> This problem is exacerbated because victims unable to afford the filing fee are less likely to be able to afford a lawyer to explain the process to them. Secondly, a victim is not provided immediate relief, such as police assistance, upon the TRO violation because it is a civil violation. Unfortunately, "most [stalking] victims assume that a violation will result in the immediate arrest of the stalker. Often these mistaken assumptions lead to dangerous and sometimes fatal consequences."<sup>143</sup>

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137. *Edwards*, 254 S.C. at 468, 176 S.E.2d at 124.

138. A civil contempt charge requires the violator to pay a per diem fine or to serve time in jail until he complies with the order. DAN B. DOBBS, *LAW OF REMEDIES*, § 2.8(1), at 130 (2d ed. 1993). This penalty is the means by which a court can force compliance with its order. *Id.*

139. A criminal contempt charge will result in the imposition of a set fine or imprisonment to punish the violator for his disobedience of the court order. *Id.*

140. *See Greenwood County v. Shay*, 202 S.C. 16, 23, 23 S.E.2d 825, 828 (1943) (providing that a court or judge granting an injunction is vested with "large discretion in enforcing obedience to its mandate"); *see also* S.C. CODE ANN. § 14-5-320 (Law. Co-op. 1976) (providing that circuit court judges may fine or imprison one guilty of contempt of "authority in any cause or hearing before the [court]").

141. *See supra* note 124 and accompanying text.

142. Bradburn, *supra* note 134, at 273. *Compare* S.C. R. Civ. P. 65(b) (providing no special assistance) with S.C. CODE ANN. § 20-4-40(e) (Law. Co-op. 1985) (mandating that clerks of court must provide simplified forms to victims when filing for a protective order pursuant to the Protection from Domestic Abuse Act).

143. Bradburn, *supra* note 134, at 274.

Finally, stalking usually occurs when most courts are not in session, in the evening or over the weekend.<sup>144</sup> While South Carolina provides that a victim can file a TRO motion with a circuit judge instead of the court, the judge's permission is required.<sup>145</sup> It is unlikely that most victims personally know a judge with whom they can file, and thus, only those victims with access to a lawyer can take advantage of this provision. Consequently, "the victim's only protection is a police officer's unenforceable warning to the stalker to stay away from the victim and the victim's premises."<sup>146</sup>

## V. ALTERNATIVES TO ANTISTALKING LAWS

Some critics dislike antistalking laws because they fear that the laws have potential to abuse the rights of innocent people. Two viable alternatives to antistalking laws are the implementation of more stringent TROs and the legislative adoption of civil peace bonds. These alternatives may appease antistalking law critics because they are less nebulous in the activities they proscribe. However, these alternatives leave gaps in victim relief, which can only be filled by antistalking laws.

### A. Temporary Restraining Orders with Teeth

While some commentators laud the passage of antistalking laws as a needed alternative to the TRO,<sup>147</sup> at least one commentator suggested that legislatures should toughen the penalties for violations of TROs instead.<sup>148</sup>

144. *Id.*; Peter Finn, *Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse*, 23 Fam. L.Q. 43, 58 (1989).

145. See S.C. R. Civ. P. 5(e).

146. Bradburn, *supra* note 134, at 274 (criticizing the fact that only 23 states allow judges to issue after-hour emergency orders).

147. The following statements show some commentators believe the temporariness of the TRO is simply not enough to protect women from the type of harassment which accompanies stalking:

"[T]he problem we found was the temporary restraining orders were simply not enough. We have husbands showing up, the cops would come, and they'd take him away, and he'd be back, you know, a day later." *Sonya Live*, *supra* note 25 (statement of domestic violence worker commenting on her experience with TROs). "With a temporary restraining order, it's generally, at most, 48 hours. And, of course, the perpetrator knows that." *Id.* (statement of California state senator Edward Royce agreeing with the statement that restraining orders have no teeth). "Ask any battered woman who's taken out 5, 10, 20 restraining orders, who now feels that God or something is on her side, that she can press charges under a stalker law." *Nightline*, *supra* note 4 (statement of Anne Seymour of the National Victims Center, discounting a suggestion that temporary restraining orders are a sufficient remedy to stalking).

148. [I]f there's a pattern, a violation of a court order, that's all you should need. The problem with court orders is that they're not enforced. It is, I think, much more effective when some cop knocks on the door of

States can toughen TROs by changing the nature of the violation and the sentencing guidelines. These changes may add the much needed credibility TROs currently lack in many states.

Changing a TRO violation to a criminal contempt charge, a misdemeanor permitting arrest, in states where the violation constitutes civil contempt will permit police to provide the victim with the much needed assistance these states deny her now: the ability to get the stalker away from her. Arrest prevents the stalker from harming his victim. A victim would not have to petition the court to find her stalker in contempt, postponing relief until the conclusion of the contempt proceeding. Rather, police could arrest the stalker upon witnessing the violation or upon obtaining a warrant for the stalker's arrest. Additionally, adding a predetermined penalty such as a fine up to \$1000, a jail sentence up to one year, or both would ensure consistent penalty distribution for these violations.<sup>149</sup> Currently, judges have discretion in meting out the penalties accompanying a contempt charge.<sup>150</sup>

However, toughening TROs is not sufficient to protect all individuals from stalking. Presumably antistalking legislation is written so that a victim may have her stalker arrested regardless of whether a TRO is in place. Without antistalking laws, no relief is given to victims who do not take out a TRO. For example, Laura Black did not take out a TRO against her stalker because she was afraid that he might retaliate.<sup>151</sup> Instead, TROs should be used in conjunction with antistalking laws to provide the victim the greatest assurance for her safety without abusing the stalker's constitutional rights.

some stalker and says, "Listen, if you violate this court order, if I see you in that area, I'm going to be on you like ugly on moose."

*Nightline*, *supra* note 4 (statement of Professor Jonathan Turley, George Washington University).

149. *See, e.g.* WIS. STAT. § 813.125 (7) (West Supp. 1993) (providing a fine of not more than \$1000 or imprisonment for not more than 90 days for a TRO violation).

150. *See supra* notes 138-39 and accompanying text.

151. Linden Gross, *Twisted Love: A Deadly Obsession*, COSMOPOLITAN, July 1992, at 190. Black eventually obtained a TRO although she was reluctant to do so. After the court served the TRO on her stalker, Richard Wade Farley, he panicked and concocted a plot to save "the relationship."

[Farley] purchased a six-hundred-dollar state-of-the-art semiautomatic shotgun and fourteen hundred dollars' worth of ammunition for that gun as well as for the other six he owned. In order to display his arsenal in a manner that would properly impress Black, he rented a motor home, hoping to lure her inside somehow so that he could take photographs of their 'domestic interaction.' Farley figured that if he could establish proof of their relationship, the court would not issue a permanent restraining order. He even hoped to convince Black to drop the matter completely.

*Id.* Nine days later, Farley armed himself from his arsenal, drove to Black's office, and shot and killed most every one who crossed his path. Farley shot Black in the shoulder, but she escaped the death that her co-workers did not. *Id.*



### B. Civil Peace Bonds

Several states provide for civil peace bonds when it is probable that an individual will engage in an activity causing a breach of peace.<sup>152</sup> A peace bond is a "[t]ype of surety bond required by a judge or magistrate of one who has threatened to breach the peace or has a history of such misconduct."<sup>153</sup> A person who posts a peace bond forfeits the bond when he carries out the acts proscribed in the bond.

Peace bonds are statutory animals. Currently, South Carolina employs peace bonds for criminal disorderly conduct, allowing magistrates to require the posting of a peace bond upon an individual's arrest.<sup>154</sup> However, it is arguable that states should employ civil peace bonds as a means to protect stalking victims instead of imposing a criminal penalty.

Texas permits a magistrate to require a peace bond from an individual who is accused of threatening to commit an offense.<sup>155</sup> A magistrate can have the accused arrested and brought before him upon information from the victim under oath "that an offense is about to be committed against the person or property of the informant, or of another, or that any person has threatened to commit an offense"<sup>156</sup> Upon a finding that the accused intended to commit an offense, the magistrate can require the accused to post a bond conditioned upon his compliance with an order that he will not commit the offense and "will keep the peace toward the person threatened."<sup>157</sup> The bond is relinquished upon a given date, not more than one year after issuance.<sup>158</sup>

152. *E.g.*, GA. CODE ANN. § 17-6-90 (Michie 1990).

153. BLACK'S LAW DICTIONARY 1130 (6th ed. 1990).

154. *See* S.C. CODE ANN. § 22-5-150 (Law. Co-op. 1989); *see also supra* note 108 and accompanying text.

155. *See* TEX. CODE CRIM. PROC. ANN. art. 7.01 (West 1977).

156. *Id.* *American Jurisprudence* provides that peace bond statutes generally are "phrased so that an offense threatened or about to be committed against the person or property of the [victim] affords a basis for the latter's initiating a proceeding to require a peace bond." 12 AM. JUR. 2d *Breach of Peace, Etc.* § 42 (1964). The stalker's threat against the victim must be a serious one which would create reasonable apprehension in the victim. *See id.* One potential problem with this requirement lies in interpreting when the stalker's actions constitute a reasonable threat to the victim, necessitating a peace bond. This issue is the heart of the controversy surrounding antistalking laws.

Additionally, the statutes generally require that the petition be supported by oath, supported by affirmation, or accompanied by a sworn affidavit. *Id.* Finally, statutes may require the affiant to swear "that he [or she] is merely seeking the protection of the law and not acting from anger or malice." *Id.*

157. TEX. CODE CRIM. PROC. ANN. art. 7.03. The amount of the bond is in the magistrate's discretion; however, guidelines for the magistrate to follow in fixing the bond amount are provided. *See id.* art. 7.06.

158. *Id.* art. 7.03.

There are several advantages to a peace bond. First, a petition for the bond can be instituted by the victim instead of the state, whereas the state must charge an individual with the crime of stalking. This gives the victim control over the proceeding and the expediency of the process. Second, the threshold for instituting an action to obtain a peace bond requires fewer acts toward the victim than does an antistalking law; the peace bond requires only a threat against the victim. Third, an individual who cannot post the bond is imprisoned immediately,<sup>159</sup> offering the same relief of an antistalking law. Finally, the hearing on the merits for procurement of the bond provides notice to the accused that his activities are not legitimate in the state's eyes. Opponents of antistalking laws claim that the law provides a stalker with no notice that his actions are illegitimate.

However, there are several problems with using peace bonds. First, an accused who does not post the bond upon a court's order may be imprisoned for the wrong reason. The accused who does not have a job or other means to retain a bonding company will spend time in jail due to his lack of money, not because of his offense. In addition, breach of the bond results in another civil action. The only remedy available in Texas for breach of a peace bond is to bring suit against the accused to recover on the bond.<sup>160</sup> Consequently, civil peace bonds suffer the same infirmities as TROs. Therefore, a TRO with teeth accompanied by antistalking legislation is the best way to address the issue of stalking.

## VI. SOUTH CAROLINA'S ANTISTALKING LAW

In South Carolina the crime of stalking is a misdemeanor.<sup>161</sup> A person is guilty of stalking when he or she "wilfully, maliciously, and repeatedly follow[s] or harass[es] another person *and* make[s] a credible threat with the intent to place that person in reasonable fear of death or great bodily injury."<sup>162</sup> The statute defines "harasses" as a "knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person *and* which serves no legitimate purpose."<sup>163</sup> A "course of conduct" is defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."<sup>164</sup> Excluded from course of conduct are constitutionally protected activities<sup>165</sup>

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159. See, e.g., ALA. CODE § 15-6-60 (1982); TEXAS CODE CRIM. PROC. ANN. art. 7.01 (West 1977).

160. See TEX. CODE CRIM. PROC. ANN. art. 7.17 (West 1977).

161. See S.C. Code Ann. § 16-3-1070(B) (Law. Co-op. Supp. 1993).

162. *Id.* (emphasis added).

163. *Id.* § 16-3-1070(A)(1) (emphasis added).

164. *Id.* § 16-3-1070(A)(2).

165. *Id.*

and conduct occurring during labor picketing.<sup>166</sup> Finally, the statute defines "credible threat" as "a threat made with the intent and the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his safety."<sup>167</sup> The stalker must threaten the life of the victim or threaten to cause her "great bodily injury."<sup>168</sup>

A person found guilty of stalking will be imprisoned for not more than one year, fined not more than one thousand dollars, or both.<sup>169</sup> A person found guilty of stalking when there is a temporary restraining order prohibiting the harassment of the victim will be imprisoned for not more than two years, fined not more than one thousand dollars, or both.<sup>170</sup> Repeat offenders will be imprisoned for not more than three years, fined not more than two thousand dollars, or both when the activity takes place within seven years of the first offense and includes the same victim.<sup>171</sup>

## VII. THE CONSTITUTIONALITY OF SOUTH CAROLINA'S LAW

South Carolina courts must presume the constitutionality of South Carolina's antistalking law in the face of any challenge to its constitutionality.<sup>172</sup> In addition, "[t]he rule has developed that the courts, in applying rules of statutory construction to legislation which is under constitutional attack, must do so with a view to bringing the legislation into line with constitutional requirements, that is, favoring or upholding the legislation rather than invalidating it."<sup>173</sup> However, it is elementary a statute cannot be sustained constitutionally when it is vague or overbroad.<sup>174</sup>

166. S.C. CODE ANN. § 16-3-1070(E) (Law. Co-op. Supp. 1993).

167. *Id.* § 16-3-1070(A)(3).

168. *See id.*

169. *Id.* § 16-3-1070(B).

170. *Id.* § 16-3-1070(C). *See generally supra* notes 125-46 and accompanying text, regarding the difficulties in obtaining a temporary restraining order and the infirmities with the TRO process.

171. S.C. CODE ANN. § 16-3-1070(D) (Law. Co-op. Supp. 1993).

172. *See, e.g.,* Beaufort County v. Jasper County, 220 S.C. 469, 478-79, 68 S.E.2d 421, 426 (1951) (per curiam) (citing *Gand v. Walker*, 214 S.C. 451, 53 S.E.2d 316 (1949)); *Townsend v. Richland County*, 190 S.C. 270, 275, 2 S.E.2d 777, 779 (1939). This "presumption is based on the high respect that the judicial branch of the government holds for its co-ordinate branch, the legislature." 16 AM. JUR. 2D *Constitutional Law* § 213 (1979).

173. 16 AM. JUR. 2D *Constitutional Law* § 219; *see also, e.g.,* *Beaufort County*, 220 S.C. at 479, 68 S.E.2d at 426 (citing *Caughman v. Columbia Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948); *Greenville Enter., Inc. v. Jennings*, 210 S.C. 163, 41 S.E.2d 868 (1947)).

174. *See Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

### A. Vagueness

A court will find the South Carolina antistalking law unconstitutionally vague if the statute "forbids . . . 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."<sup>175</sup> The South Carolina law forbids an individual from "wilfully, maliciously, and repeatedly follow[ing] or harass[ing] another person and [from] mak[ing] a credible threat with the intent to place that person in reasonable fear of death or great bodily injury."<sup>176</sup> The law sets out explicit standards by which an individual will be charged with the crime of stalking.<sup>177</sup> In particular, the law provides definitions for the terms: "harass,"<sup>178</sup> "course of conduct,"<sup>179</sup> and "credible threat."<sup>180</sup>

However, a court may find the definition of credible threat vague because it employs a subjective standard to determine its existence. The law defines credible threat as a threat which causes the victim to reasonably fear for her safety.<sup>181</sup> This standard is a subjective one, to be measured by the victim's feelings and not those of a reasonable person. Consequently, legal behavior may be indistinguishable from illegal behavior; what may reasonably cause fear in one person, may not cause fear in another. Therefore, enforcement risks unfair prosecution and potentially deters constitutionally protected activity.<sup>182</sup>

The vagueness flaw exists only with regard to following, because there is no definition of follow as there is for harass. An individual is guilty of stalking when he either (1) follows someone and makes a credible threat, or (2) harasses someone and makes a credible threat.<sup>183</sup> The law provides an

175. *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

176. S.C. CODE ANN. § 16-3-1070(B) (Law. Co-op. Supp. 1993).

177. *See Broadrick*, 413 U.S. at 607 (holding that although the law before it was not vague, it "fails to give adequate warning of what activities it proscribes or fails to set out 'explicit standards' for those who must apply it" (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972))).

178. *See supra* note 163 and accompanying text.

179. *See supra* note 164-66 and accompanying text.

180. *See supra* note 167 and accompanying text. At least one commentator criticizes antistalking laws with a credible threat reference that also do not provide guidance in determining by whose standard the threat must be credible. *Nightline*, *supra* note 4.

181. *See* S.C. CODE ANN. § 16-3-1070(A)(3) (Law. Co-op. Supp. 1993).

182. *See Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 283 (1961) (characterizing these risks as "vices inherent in an unconstitutionally vague statute") (citing *Winters v. New York*, 333 U.S. 507 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Stromberg v. California*, 283 U.S. 359 (1931); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926)).

183. *See* S.C. CODE ANN. § 16-3-1070(B) (Law. Co-op. Supp. 1993).

objective standard in the definition of harass which arguably cures the infirmity in the threat standard. The course of conduct defined as harassing must cause both a reasonable person to suffer substantial emotional distress and distress to the victim.<sup>184</sup> This provision employs both an objective and subjective standard. Because the law provides no such definition for follow, there is no objective standard by which to measure a victim's fear for her safety when her stalker follows rather than harasses her. Consequently, the statute may be found unconstitutionally vague.

### B. Overbreadth

A court will find the antistalking law overbroad on its face if it purports to reach protected, as well as unprotected conduct.<sup>185</sup> The conduct proscribed in the law is the following, harassing, and threatening of an individual.<sup>186</sup>

#### 1. Following<sup>187</sup>

The right of a stalker to follow his victim is addressed by the issues of privacy and liberty. The stalker possesses the right to be left alone by other people or to go about his business without interference from the state or its police.<sup>188</sup> Although his interests are unquestionably strong in the confines of his home,<sup>189</sup> they are limited on public streets.<sup>190</sup>

One limit finds its source in the victim's protection. The United States Supreme Court recognizes the government's interest in protecting its citizens from crime and undue annoyance.<sup>191</sup> The Court stated that this interest is both legitimate and compelling.<sup>192</sup> Consequently, a stalker's right to follow

184. *See id.* § 16-3-1070(A)(1).

185. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972) (citing *Zwickler v. Koota*, 389 U.S. 241 (1967)).

186. *See* S.C. CODE ANN. § 16-3-1070(B) (Law. Co-op. Supp. 1993).

187. The most relevant definition of "follow" is: "To come or go after; Follow the usher." THE AMERICAN HERITAGE DICTIONARY 520 (2d college ed. 1991).

188. *See Katz v. United States*, 389 U.S. 347, 350-51 (1967).

189. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980).

190. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975).

191. *E.g.*, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976) (recognizing "a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing").

192. *Schall v. Martin*, 467 U.S. 253, 264 (1984) (upholding a state juvenile pretrial detention program implemented to protect the public from the juvenile offenders) (quoting *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)).

his victim without law enforcement interference terminates when he couples his right with a credible threat of bodily harm to his victim. Once he threatens his victim he violates the law, and his right to move about freely is constitutionally subordinated.<sup>193</sup> Therefore, the state's infringement upon a stalker's liberty interest is not overbroad on its face. It only limits his right to follow the victim when the following is coupled with a credible threat of violence.

## 2. *Harassing*

The statute defines "harasses" as a "knowing and wilful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person *and* which serves no legitimate purpose."<sup>194</sup> A determination of constitutionality must rest upon an analysis of the words "course of conduct," defined as "a series of acts over a period of time, however short, evidencing a continuity of purpose."<sup>195</sup>

Stalking includes many specific acts which occur in a pattern over a period of time. For example, a stalker may make unwelcome phone calls and visits to the victim; he may send unwelcome correspondence and gifts, despite having been told not to do so.<sup>196</sup> In addition, it is not uncommon for him to spy on the victim or to vandalize her property.<sup>197</sup> Unquestionably, there is no constitutional provision guaranteeing a stalker the right to spy, send gifts, or vandalize. However, the remaining acts superficially fall within the ambit of protected speech.

At the outset, it is important to note that phone calls, visits, and correspondence, may be protected elements of the right to free speech or free association. To be considered a crime, they must both seriously alarm, annoy, or harass the victim and serve no legitimate purpose.<sup>198</sup> Moreover, these acts must be coupled with a credible threat *intended* to place the victim in reasonable fear of death or great bodily injury.<sup>199</sup> Therefore, these acts cannot be analyzed alone, but must be analyzed with the other elements of stalking.

193. The United States Supreme Court has recognized that police may stop an individual when they have an articulate, reasonable suspicion that the individual may be involved in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 26, 30 (1968); *see also Sibron v. New York*, 392 U.S. 40, 66 (1967) (stating that indicia of criminal intent coupled with evidence of a crime are "proper factors to be considered in the decision to make an arrest").

194. S.C. CODE ANN. § 16-3-1070(A)(1) (Law. Co-op. Supp. 1993) (emphasis added).

195. *Id.* § 16-3-1070(A)(2).

196. *See supra* note 5 and accompanying text.

197. *See id.*; *see also Sonya Live, supra* note 25 (interviewing a stalking victim who's stalker spied on her daily as she went to and from school).

198. *See* S.C. CODE ANN. § 16-3-1070(A)(1), (B) (Law. Co-op. 1993).

199. *See id.* § 16-3-1070(A)(2), (B).

It is likely that the prohibition of phone calls, visits, and correspondence directed to a victim's home would survive judicial scrutiny due to the significance placed on the privacy of an individual's home. The United States Supreme Court stated in *Frisby v. Schultz*:<sup>200</sup>

One important aspect of residential privacy is protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.<sup>201</sup>

Consequently, the Court has recognized the right of a state to bar the delivery of certain mail to an unreceptive addressee<sup>202</sup> and the power of a state to regulate door-to-door canvassing and solicitation.<sup>203</sup> It is reasonable to speculate that the Supreme Court also would recognize the right of a state to bar phone calls to unreceptive listeners based upon the rationale behind these rulings.<sup>204</sup>

Finally, in what appears to be an attempt to ensure the statute's constitutionality, the statute provides: "Constitutionally protected activity is not included within the meaning of 'course of conduct.'"<sup>205</sup> Therefore, the

200. 487 U.S. 474 (1988).

201. *Id.* at 484-85 (quoting *Rowan v. United States Post Office Dep't.*, 397 U.S. 728, 738 (1970)) (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15 (1971); *Kovacs v. Cooper*, 336 U.S. 77 (1949)).

202. *Rowan*, 397 U.S. at 737. ("The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967))).

203. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976) ("There is, of course, no absolute right under the Federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety.").

204. The South Carolina Supreme Court upheld the South Carolina harassing telephone call statute, providing that "[t]he State has a legitimate interest in prohibiting obscene, threatening or harassing telephone calls." *State v. Brown*, 274 S.C. 506, 508, 266 S.E.2d 64, 65 (1980) (citing *Miller v. California*, 413 U.S. 15 (1973); *Walker v. Dillard*, 523 F.2d 3 (4th Cir.), *cert. denied*, 423 U.S. 906 (1975); *State v. Hagen*, 558 P.2d 750 (Ariz. Ct. App. 1976)).

205. See *supra* note 165 and accompanying text. It might appear that the exception created by this provision swallows the whole. However, an analysis of the statute reveals that the

prohibition of harassment should sustain a challenge of facial overbreadth.

### 3. *Threatening*<sup>206</sup>

A "statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression" to survive a constitutional challenge when it infringes upon the freedom of speech.<sup>207</sup> Succinctly put, this provision of the statute will be void due to overbreadth<sup>208</sup> unless the statute on its face only prohibits obscenity, profanity, libel, and fighting words or is so interpreted by the South Carolina courts.<sup>209</sup> This analysis, however, must focus on the former rationale because the South Carolina Supreme Court has not yet reviewed the antistalking statute.

A threat likely falls into the unprotected class of speech termed "fighting words." Twice in dicta the United States Supreme Court lumped threatening words together with obscenity and profanity in its discussion of fighting words as unprotected speech in *Chaplinsky v. New Hampshire*.<sup>210</sup> Defining fighting words, the Court stated the following:

The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are *threatening*, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . The statute, as construed, does no more than prohibit . . . words whose speaking

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conduct sought to be curtailed by this statute is not constitutionally protected conduct to begin with.

206. The most relevant definition of "threat" is: "An expression of an intention to inflict pain, injury, evil, or punishment." THE AMERICAN HERITAGE DICTIONARY 1265 (2d college ed. 1991).

207. *Gooding v. Wilson*, 405 U.S. 518, 522 (1972).

208. The overbreadth doctrine traditionally does not invalidate the entire statute on its face even when a portion of the statute is unconstitutionally overbroad. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

209. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). See generally *Gooding*, 405 U.S. at 523 ("Our decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression." (citing *Cohen v. California*, 403 U.S. 15 (1971); *Bachellor v. Maryland*, 397 U.S. 564 (1970); *Street v. New York*, 394 U.S. 576 (1969))).

210. 315 U.S. at 573.



constitutes a breach of the peace by the speaker - including "classical fighting words," words in current use less "classical" but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats.<sup>211</sup>

Additionally, in a dissenting opinion to *Gormley v. Connecticut State Department of Adult Probation*, Justice White listed threats of physical violence as a form of unprotected speech.<sup>212</sup> Therefore, this provision of the statute is also within the parameters of constitutionality. Hence, the statute should withstand a constitutional challenge of overbreadth.

### VIII. SOUTH CAROLINA'S LAW: STANDING UP TO CRITICISM

As is common with the passage of any significant piece of legislation, a great debate about the legitimacy of new antistalking laws surfacing throughout the country has arisen. Critics of antistalking laws fear that vengeful women and men could use these laws to harass ex-spouses in domestic cases.<sup>213</sup> The laws' proponents discount this argument as one raised with regard to every law available to battered and terrorized women.<sup>214</sup> Wherever the cards fall in this debate, South Carolina's antistalking law withstands most of the criticisms against these laws.

The American Civil Liberties Union (ACLU) expressed concern over the potential misuse and abuse of antistalking laws in general.<sup>215</sup> For example, the ACLU is concerned that such laws may be used as vehicles to "suppress the rights of political dissidents," to inhibit investigative reporters from researching a story on a public figure, and to punish fathers, unfairly denied of visitation rights, who sit in their parked cars outside of their child's school

211. *Id.* (emphasis added) (quoting *State v. Chaplinsky*, 18 A.2d 754, 762 (N.H.), *prob. juris. noted*, 62 S. Ct. 89 (1941), *aff'd*, 315 U.S. 568 (1942)).

212. *Gormley v. Director, Connecticut State Dep't of Adult Probation*, 449 U.S. 1023, 1023 (White, J., dissenting) ("To be sure, a State has a valid interest in protecting its citizens against unwarranted invasions of privacy. This is especially true when unprotected speech, such as obscenity or threats of physical violence, is involved." (citing *Rowan v. United States Post Office Dep't*, 397 U.S. 728, (1970)), *denying cert. to* 632 F.2d 938 (1980); cf. *Watts v. United States*, 394 U.S. 705, 707 (1969) (per curiam) (holding that a federal statute prohibiting threats to the United States President's life is constitutional on its face).

213. "Somebody can now then be charged with a felony because of bad feelings from the past, and this doesn't seem like the way for us to go." *Nightline*, *supra* note 4 (statement of Linda Wickenkamp, Public Defender).

214. *See id.* (statement of Lesley Landis, Battered Woman's Advocate) ("It is the defense of the day in domestic violence courtrooms everywhere that, 'Of course, what we're dealing with is an estranged wife and a vindictive woman' . . .").

215. In fact, the ACLU stated that it will challenge the constitutionality of all convictions under antistalking laws "to ensure that the rights of innocent people are not abused." Bradburn, *supra* note 134, at 285 (citing *Sonya Live*, *supra* note 25).

to ensure his wellbeing.<sup>216</sup> However, these laws are unlikely to generate such results.

First, South Carolina's law requires that a pattern of conduct serving no legitimate purpose be directed at a particular person.<sup>217</sup> This requirement excludes political dissidents merely conducting protests at abortion-clinics. Their protests are legitimate in light of a state's power to regulate abortions.<sup>218</sup> Second, this conduct must be coupled by a threat against the life of the recipient or a threat to cause great bodily harm, made with the intent and the apparent ability to carry it out.<sup>219</sup> This requirement excludes the ambitious investigative reporter who follows a target, but makes no threat against the target's life or limb. The same exclusion applies to the worried father.

An Illinois criminal defense attorney criticized the Illinois antistalking law that permits a judge to deny bail to an alleged stalker when concluding the stalker is too dangerous to be freed, emphasizing that this restraint is usually reserved for murder suspects.<sup>220</sup> "They think that it creates a punishment before the crime, or before the ultimate decision as to whether or not a crime was committed."<sup>221</sup> This criticism is inapplicable to South Carolina's law because the law does not provide for the denial of bail.<sup>222</sup>

Others criticize the vagueness of the criminal element of following. These critics complain that most antistalking laws do not provide a distance requirement in the definition of following, creating uncertainty over how close a stalker may follow his victim before committing a crime.<sup>223</sup> As previously discussed, the South Carolina law does not provide a definition for following.<sup>224</sup> However, a definitional provision imposing a distance constituting a stalking offense would be ludicrous. The provision would either be so broad as to be ridiculous or so narrow as to be ineffective in carrying out the law's underlying purpose.

216. *Sonya Live*, *supra* note 25 (statement of Loren Siegel, ACLU).

217. S.C. CODE ANN. § 16-3-1070(A)(1), (B) (Law. Co-op. Supp. 1993).

218. *But see* Bruce Smith, *Abortion Foe Accused of Stalking Clinic Director*, THE STATE, April 2, 1993, at 3B (reporting arrest warrant's allegations that the protestor told the clinic director that the clinic director better get police protection and a bullet-proof vest).

219. S.C. CODE ANN. § 16-3-1070(A)(3), (B).

220. *Nightline*, *supra* note 4 (statement of Jack Rimland, criminal defense attorney).

221. *Id.*

222. This consideration is one which ought to be incorporated into the law. *See generally infra* notes 235-64 (discussing the inclusion of pretrial detention in the South Carolina law).

223. The course of conduct requirement of antistalking statutes bothers at least one commentator. Professor Jonathan Turley of George Washington University opined that the offensive distance is primarily defined by the victim's feelings because most statutes do not specify the terms of a pattern of conduct. *Nightline*, *supra* note 4.

224. *See supra* notes 183-84 and accompanying text (discussing the absence of a definition for "follow").

Alternatively, the South Carolina statute provides that following must be accompanied by a pattern of conduct, existing over a period of time and evidencing a continuity of illegitimate purposes.<sup>225</sup> Thus, a stalker who merely follows his victim, regardless of how closely he does so, does not violate the law. This provision adequately provides the safeguard that critics seek in the implementation of a distance requirement.

Finally, antistalking laws which both penalize the mere presence of the stalker and utilize a subjective standard in the determination of the victim's reasonable fear are criticized as being too vague.<sup>226</sup> South Carolina's antistalking law requires more than the mere presence of an alleged stalker in regard to harassment. It requires the stalker's repeated presence to be coupled with a credible threat that would cause a reasonable person to suffer emotional distress; it also must actually cause such distress.<sup>227</sup> Thus, this section may appear safe from criticism for vagueness. However, the provision penalizing the following of a victim<sup>228</sup> arguably is vague. Although the following must be repeated, the definition of "credible threat" employs a subjective standard that may be unconstitutionally vague.<sup>229</sup> This "credible threat" language is the South Carolina law's greatest flaw and must be remedied.<sup>230</sup>

While the debate over the legitimacy of antistalking laws continues, one fact is certain: The South Carolina antistalking law provided the first adequate remedy to Ann, her family, and other victims of stalking. Moreover, it provided the immediate relief Ann and her family required. The police arrested Bob for stalking because the facts established probable cause to believe that he stalked Ann and her family.<sup>231</sup> First, his willful, malicious, and repeated harassment of Ann and her family was evidenced by a course of conduct directed at Ann and her family; Bob's conduct served no legitimate

225. See S.C. CODE ANN. § 16-3-1070(A)(1) (Law. Co-op. Supp. 1993).

226. [T]his system essentially criminalizes . . . the mere presence in an area, when coupled with reasonable fear . . . on the accusing parties' behalf. Now, that's a very troubling standard, because not only is it highly subjective, but it also means that some legal behavior may be indistinguishable from some illegal behavior. That leaves it to the police officer to make the determination whether somebody is a stalker, whether someone is obnoxious.

*Nightline*, *supra* note 4 (statement of Professor Turley).

227. S.C. CODE ANN. § 16-3-1070(B) (Law. Co-op. Supp. 1993)

228. *Id.*

229. See *id.*; see also *supra* notes 175-84 and accompanying text (discussing this provision's vagueness).

230. See *infra* notes 233-34 and accompanying text (suggesting a cure for the vagueness).

231. An officer has probable cause to arrest if the facts and circumstances are sufficient to warrant a prudent man in believing the suspect has committed the crime with which he is charged. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975); accord *Fisher v. Washington Metro. Area Transit Auth.*, 690 F.2d 1133 (4th Cir. 1982).

purpose, and seriously alarmed and annoyed them. Months of daily letters and late-night phone calls established a pattern of conduct evidencing a continuity of purpose.

Second, he threatened Ann's father over the phone intending to place him in fear of death or great bodily injury, and he caused such reasonable fear. Bob's threat was credible because it was made with the ability to carry out the threat: He was within three miles of Ann's father's home and had knowledge of their street address, as evidenced by the letters he sent daily. Furthermore, the threat was made with the intent to carry it out because the stalker made efforts to locate the home.

## IX. IMPROVEMENTS TO SOUTH CAROLINA'S LAW

The passage of South Carolina's antistalking legislation is a great stride forward. However, the legislature must not stop there. The state's antistalking law may be unconstitutionally vague in an important respect. In addition, it fails to address several important issues such as the stalker's potential violence to the victim in retaliation for his arrest, the stalker's potential need for psychological counseling, the need of the victim's family for protection, and the need to protect harassed victims who are just short of being "stalked."

Addressing these issues will not free the state from stalking. However, additional initiatives will offer victims added protection and provide help to stalkers who often need psychological treatment. Therefore, South Carolina should first rectify the vagueness in its definition of a "credible threat."<sup>232</sup> It also should add to its statute the denial of bail in appropriate cases. It should require a compulsory mental health evaluation upon a conviction for stalking to determine if counseling is warranted. It should include threats to immediate family members in its definition of stalking. It should strengthen temporary restraining orders, allow them in cases of harassment, and simplify the process to obtain one. Finally, it should train and educate police officers regarding the significance and implications of this crime and should instate "Threat Management Teams" in each county.

### A. *Curing Vagueness*

First, and foremost, the potential unconstitutional vagueness of South Carolina's law must be corrected. The flaw appears in the definition of "credible threat" which employs a subjective standard in determining a violation.<sup>233</sup> The simple addition to the definition of "credible threat" of an

232. S.C. CODE ANN. § 16-3-1070 (A)(3) (Law. Co-op. Supp. 1993).

233. See *id.*; see also *supra* notes 167-68, 181-84 and accompanying text (discussing the

objective standard similar to the one found in the definition of "harasses"<sup>234</sup> would remedy this problem. The provision should read as follows: A "credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause *a reasonable person* to fear for his safety, *and which threat actually causes the person who is the target of the threat to fear for his safety.*

### B. Pretrial Detention

All persons arrested in South Carolina may be entitled to pay bail in exchange for pretrial release unless they are charged with a capital offense or an offense punishable by life in prison.<sup>235</sup> Traditionally, these persons were denied their liberty because their release would not reasonably assure their appearance at trial. However, a later trend permits pretrial detention in cases where the individual's release poses a threat to the safety of any person or the community.<sup>236</sup> A person convicted of stalking poses such a serious threat to the stalker's victim.

The South Carolina legislature has recognized that the safety of the community is an interest worthy of protection in the bail and recognizance section of the code.<sup>237</sup> However, it has failed to develop fully the security of this interest, especially with respect to stalkings. For example, Chapter 15 of Title 17 addresses public safety, providing that a person charged with a noncapital offense may be required to post an appearance bond when "the court determines in its discretion that such a release will not reasonably assure the appearance of the person as required, *or unreasonable danger to the community will result.*"<sup>238</sup> However, this section only allows a court to require pretrial detention as an alternative to an appearance bond when it is reasonably necessary to assure an individual's appearance at trial.<sup>239</sup> A court may not detain in custody a person who is a danger to the community, but may only require him to post an appearance bond, to remain in the custody of a designated person, such as a family member, or to refrain from travel or

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language of the statute and its vagueness).

234. See S.C. CODE ANN. § 16-3-1070(A)(1).

235. S.C. CONST. art. I, § 15.

236. See *United States v. Salerno*, 481 U.S. 739 (1987) (upholding the constitutionality of the Federal Bail Reform Act of 1984, which permits pretrial detention upon a showing that no release conditions "will reasonably assure . . . the safety of any other person and the community").

237. S.C. CODE ANN. § 17-15-10 (Law. Co-op. 1985).

238. *Id.* § 17-15-10 (emphasis added).

239. *Id.* § 17-15-10(d). A court may "[i]mpose any other condition[] deemed reasonably necessary to assure appearance as required, including a condition that the person return to custody after specified hours." *Id.*

association with a designated person.<sup>240</sup>

Alternatively, a court may order an individual to be committed for examination and observation by a mental health facility if it determines that the individual is incompetent to stand trial.<sup>241</sup> While ninety percent of all stalkers suffer from some type of mental infirmity,<sup>242</sup> it is unlikely that most of their conditions are serious enough to warrant commitment for mental examination and observation. Those stalkers who pose a danger to their victims, but who are not a flight risk or incompetent to stand trial, fall through the statutory cracks. Consequently, a suspect arrested for stalking is free to retaliate against his victim once he is released on bail from his arrest. Therefore, the legislature should consider the denial of bail, or a pretrial detention, for violators of the antistalking law when there is clear and convincing evidence<sup>243</sup> that the violator poses a serious and immediate threat to the victim if he is released.<sup>244</sup>

Careful consideration must be given to any proposed system denying one his liberty before a finding of guilt. The United States Supreme Court stated: "[P]unishment imposed without a prior adjudication of guilt is *per se* illegitimate . . . [.]"<sup>245</sup> However, pretrial detention is not barred by the United States Constitution. The United States Supreme Court held in *United States v. Salerno*<sup>246</sup> that the pretrial detention of an arrestee pending federal criminal trial does not violate the Due Process Clause of the Fifth Amendment when the detention meets a legitimate regulatory goal to prevent danger to the community and the detention is not excessive in relation to the regulatory goal Congress seeks to achieve.<sup>247</sup>

240. *Id.* § 17-15-10(a)-(c).

241. *Id.* § 44-23-410.

242. Puente, *supra* note 10, at 9A.

243. In *United States v. Salerno*, 481 U.S. 739 (1987), the United States Supreme Court upheld the constitutionality of the Bail Reform Act of 1984, in part because it required a showing articulated in writing that the arrestee posed a threat to an individual or the community by clear and convincing evidence.

244. Passage of a provision of this sort would be difficult, for it would require an amendment to the state constitution. An amendment requires approval by two-thirds of each house of the General Assembly and a majority of those voting in a general election. See S.C. CONST. art. XVI, § 1 (providing for amendments to the state constitution).

Electronic ankle bracelets might be an alternative to denying bail not requiring a state constitutional amendment. For a discussion on the feasibility of requiring stalkers to wear electronic ankle bracelets that sound an alarm at the police station when the stalker comes within a specified distance from his victim, see Westen, *supra* note 3, at 122. But see, *Fatal Holdup Spurs Tracking Bracelet Debate*, THE STATE, Dec. 10, 1993, at 7A (reporting the failure of this device in a tracking program for juvenile pretrial detention).

245. *Schall v. Martin*, 467 U.S. 253, 271 (1984) (upholding the constitutionality of a New York juvenile pretrial detention program).

246. 481 U.S. 739.

247. *Id.* at 747.

The Court scrutinized the Federal Bail Reform Act of 1984 in *Salerno* upon a challenge to its constitutionality. The Court determined that the Act was regulatory in nature, not penal, because it provided several safeguards to ensure an arrestee due process of law. First, the Act carefully limited the circumstances under which detention could be sought to "the most serious of crimes . . . [:] crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders."<sup>248</sup> Second, "[t]he arrestee is entitled to a prompt detention hearing, . . . and the maximum length of pretrial detention is limited by the stringent time limitations of the Speedy Trial Act."<sup>249</sup> Third, the detainees are housed in facilities separate from those housing persons awaiting or serving sentences upon their convictions.<sup>250</sup> Finally, the Act requires a showing by clear and convincing evidence that the arrestee posed a threat to the community, and that showing must be articulated in writing in the court record.<sup>251</sup>

One statute that meets the *Salerno* test is the Illinois law denying bail in stalking and aggravated stalking offenses.<sup>252</sup> The Illinois law permits pretrial detention

when it is alleged that the defendant's admission to bail poses a real and present threat to the physical safety of the alleged victim of the offense, and denial of release on bail or personal recognizance is necessary to prevent fulfillment of the threat upon which the charge is based.<sup>253</sup>

The stalker is given prior notice of a petition filed for his detainment when the police have arrested and released him before its filing; he is not given prior notice when he remains in custody at the time the state filed its petition.<sup>254</sup> The hearing on the petition must be held immediately upon the offender's appearance before the court, or no later than five days if a continuance on the motion of the defendant is granted.<sup>255</sup> After the hearing, the court may deny bail only when clear and convincing evidence<sup>256</sup> satisfies the guidelines set out in the law.<sup>257</sup>

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248. *Id.* at 747; see 18 U.S.C. § 3142(f) (1988).

249. *Salerno*, 481 U.S. at 747.

250. *Id.* at 748; see 18 U.S.C. § 3142(i)(2).

251. *Salerno*, 481 U.S. at 750, 752.

252. 725 ILL. STAT. ANN. § 5/110-6.3 (West 1992).

253. *Id.* § 5/110-6.3(a).

254. *Id.* § 5/110-6.3(a)(1).

255. *Id.* § 5/110-6.3(a)(2).

256. *Id.* § 5/110-6.3(c)(2)(B).

257. The court may deny bail to the defendant when, after the hearing, it is determined that:

Opponents of the Illinois law criticize the fact that the law does not require the victim to attend the hearing, thereby denying the defendant his constitutional right to confront and examine the witness against him.<sup>258</sup> Instead, the court has the discretion to compel the victim to attend the trial upon the defense's request.<sup>259</sup> A court only will exercise its power when the defense requests her appearance for a purpose other than to impeach her credibility.<sup>260</sup> Additionally, "[i]n deciding whether to compel the appearance of a complaining witness, the court shall be considerate of the emotional and physical well-being of the witness."<sup>261</sup>

The Illinois legislature should be commended for recognizing stalking's impact on the victim.<sup>262</sup> That state's noble attempt to alleviate further suffering to the victim should be sustained because the United States Supreme Court held that the confrontation clause does not grant the right to confront a witness at a preliminary hearing.<sup>263</sup> However, "[a]ll jurisdictions grant the defense a right to cross-examine those witnesses presented by the prosecution at the preliminary hearing."<sup>264</sup> Therefore, South Carolina should model a pretrial detention program after the Illinois law.

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(1) the proof is evident or the presumption great that the defendant has committed the offense of stalking or aggravated stalking; and

(2) the defendant poses a real and present threat to the physical safety of the alleged victim of the offense; and

(3) the denial of release on bail or personal recognizance is necessary to prevent fulfillment of the threat upon which the charge is based; and

(4) the court finds that no condition or combination of conditions set forth in subsection (b) of Section 110-10 of this Code, including mental health treatment at a community mental health center, hospital, or facility of the Department of Mental Health and Developmental Disabilities, can reasonably assure the physical safety of the alleged victim of the offense.

725 ILL. STAT. ANN. § 5/110-6.3(b)(1)-(4) (West 1992).

258. *Sonya Live*, *supra* note 25. See generally U.S. CONST. amend. VI (Confrontation Clause).

259. 725 ILL. STAT. ANN. § 5/110-6.3(c)(1)(A).

260. "Cross-examination of a complaining witness at the pretrial detention hearing for the purpose of impeaching the witness' credibility is insufficient reason to compel the presence of the witness." *Id.*

261. *Id.*

262. See generally Puente, *supra* note 10 (suggesting that stalking victims join a support group).

263. *Goldsby v. United States*, 160 U.S. 70 (1895).

264. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 14.4(c), at 677 (2d ed. 1992); see also FED. R. CRIM. P. 5.1(a) (providing that a defendant may cross-examine adverse witnesses at a preliminary examination).



### C. *Compulsory Mental Health Evaluation*

Many stalkers need psychiatric help, not mere incarceration upon their arrest. As stated, more than ninety percent of stalkers suffer from mental disorders.<sup>265</sup> Imprisonment provides temporary relief to a stalking victim, but is an artificial remedy and a quick-fix to the much deeper psychological problems of most stalkers. Therefore, a compulsory mental health evaluation should become an integral part of a stalker's sentence to determine if further counseling is needed.

Georgia recognizes this predicament. Georgia law provides that a judge may

[r]equire the defendant to undergo a mental health evaluation and, if it is determined by the court from the results of such evaluation that the defendant is in need of treatment or counseling, require the defendant to undergo mental health treatment or counseling by a court approved mental health professional, mental health facility, or facility of the Department of Human Resources.<sup>266</sup>

The statute provides further that the defendant must pay the cost of his treatment unless he is indigent.<sup>267</sup>

South Carolina sentencing judges have wide discretion to determine the appropriate punishment for convicted criminals.<sup>268</sup> However, because most South Carolina judges are probably not educated in psychology they cannot determine whether a stalker's actions are part of a mental disorder. A sentencing guideline that requires all defendants to undergo mental health evaluations would help determine which defendants need counseling to curtail their stalking behavior. Therefore, South Carolina should adopt the Georgia sentencing guideline, but require the mental health evaluation as part of the sentence. The guidelines also should provide that a judge can waive the evaluation upon a showing of good cause. A waiver recognizes that not all stalkers need counseling, and that this treatment may be unnecessarily costly to a defendant.<sup>269</sup>

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265. See Puente, *supra* note 10, at 9A.

266. GA. CODE ANN. § 42-8-35.3(2) (Michie Supp. 1993).

267. *Id.*

268. See *Bethea v. State*, 262 S.C. 255, 204 S.E.2d 12 (1974).

269. Cf. CAL. PENAL CODE § 646.9(g) (West Supp. 1994) (providing compulsory counseling for individuals who receive probation under the state's antistalking law). The court is given the discretion to exempt the counseling requirement upon a showing of good cause.

### D. Inclusion of Threats to Family Members

Another problem with the credible threat definition is that it excludes threats made to the victim's family members. The threat must cause a victim to fear only for her personal safety.<sup>270</sup> However, a stalker may believe that his victim would return his affection but for his victim's relationship with another or parental interference. Consequently, a stalker may harm someone seen as his competition.<sup>271</sup> Therefore, South Carolina's legislature should amend the antistalking law as follows to ensure protection to a victim's family members: "A credible threat" means a threat made with the intent and the apparent ability to carry out the threat so as to cause a reasonable person to reasonably fear for his safety, *or the safety of his family*, and must actually cause the person who is the target of the threat to reasonably fear for his safety, *or the safety of his family*.<sup>272</sup>

### E. A New, More Effective Temporary Restraining Order

The antistalking law provides no relief for victims of harassment without a credible threat of injury. Currently, stalking and harassment victims can obtain a TRO under the state Rules of Civil Procedure;<sup>273</sup> however, the process by which a TRO is obtained indicates that the rule is not designed to assist in stalking or harassment situations. Rather, the rule is designed to enjoin citizens from nuisance-type actions. For example, the rule provides that a TRO obtained *ex parte* expires in ten days unless the court grants a continuance, presumably, for up to ten additional days.<sup>274</sup> Subsequently the applicant may petition the court for a temporary injunction.<sup>275</sup> However, a judge will issue a temporary injunction on the premise that it will expire at the close of a proceeding for permanent relief, such as, a permanent injunction.<sup>276</sup> There is no permanent relief for a victim in a harassment situation. Therefore, it is unlikely that a court would issue a temporary injunction. Consequently, an *ex parte* TRO is effective for twenty days at most.

Thanks to the passage of the antistalking law, Ann's family obtained a temporary injunction which expires at the close of their stalker's trial. However, victims of harassment falling short of stalking cannot avail

270. See S.C. CODE ANN. § 16-3-1070(A)(3) (Law. Co-op. Supp. 1993).

271. One stalker obsessed with Playboy Playmate Stacey Arthur gunned down Arthur's husband after she rejected him. Bradburn, *supra* note 134, at 284.

272. California amended its antistalking law to include threats to family members. See CAL. PENAL CODE § 646.9 (West Supp. 1994).

273. S.C. R. CIV. P. 65.

274. *Id.* 65(b) (allowing an extension "for a like period of time").

275. No provision in Rule 65 sets forth the duration of a temporary injunction.

276. DOBBS, *supra* note 138, § 1.3, at 10.

themselves of this remedy. Indeed, it may be difficult for a harassment victim to obtain an ex parte TRO because she must prove immediate and irreparable injury will result without the immediate issuance of the order.<sup>277</sup> This standard may be difficult to meet without a credible threat of injury to the victim. Also, obtaining a non-ex parte TRO might be even more difficult because often it is difficult to serve process on a stalker.

Not surprisingly, a review of South Carolina cases regarding permanent injunctions reveals that no appellate court has decided whether permanent injunctions can be issued to enjoin an individual from harassing his victim. In fact, it is possible that no South Carolina court ever has heard a petition of this nature. Thus, South Carolina must incorporate a different process whereby all victims can obtain injunctive relief from harassment.

Minnesota employs a TRO process worth emulating. The Minnesota harassment law addresses most of the inadequacies of a TRO, as discussed above.<sup>278</sup> In particular, it provides a TRO applicant with assistance in filing for the order. In addition, it permits the police to arrest a harasser who violates the order. However, it does not provide for emergency hours during which a victim can obtain a TRO. South Carolina should model a new restraining order provision after the Minnesota harassment law, but with the addition of procedures for emergency after-hours relief.

A Minnesota court will issue an ex parte TRO to harassment victims upon a finding of "reasonable grounds to believe that the [harasser]-respondent has engaged in harassment."<sup>279</sup> The court will issue a TRO upon a petition for a restraining order, which can last up to two years<sup>280</sup> and is effective until the hearing on the restraining order is held.<sup>281</sup> The victim-petitioner must accompany her petition with a sworn affidavit in which she alleges specific facts to show that the accused is harassing her. She also must state the specific facts and circumstances from which relief is sought.<sup>282</sup>

The Minnesota statute provides for an ex parte hearing on the restraining order only if the respondent cannot be served with notice of the hearing<sup>283</sup> and after the petitioner has mailed copies of the petition and TRO to the

277. *Id.*

278. *See supra* notes 134-46 and accompanying text.

279. MINN. STAT. § 609.748 (West 1994). The law defines "harassment" as including "repeated, intrusive, or unwanted acts, words, or gestures that are intended to adversely affect the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." *Id.* § 609.748(1)(a).

280. *Id.* § 609.748(5)(a)(3).

281. *Id.* § 609.748(4)(c).

282. *Id.* § 609.748(3)(a).

283. "[T]he petitioner [must] file[] an affidavit with the court stating that an attempt at personal service made by a sheriff was unsuccessful because the respondent is avoiding service by concealment or otherwise." *Id.* § 609.748(3)(b)(1).

respondent's residence, if known to her.<sup>284</sup> This hearing must be held within fourteen days of the TRO issuance, unless the court grants an extension.<sup>285</sup> A court will grant the restraining order enjoining the respondent from further harassment upon the same finding required for a TRO: the existence of "reasonable grounds to believe that the respondent has engaged in harassment."<sup>286</sup> Violation of a TRO or restraining order is a misdemeanor punishable by imprisonment for up to ninety days, a fine of up to \$700, or both.<sup>287</sup>

Finally, the Minnesota law permits police to arrest a harasser without a warrant when the police have probable cause to believe the harasser has violated the TRO.<sup>288</sup> This provision does not violate the Fourth Amendment's prohibition against the government conducting unreasonable searches and seizures.<sup>289</sup> The United States Supreme Court has held that the reasonableness requirement does not mean that a warrant must be obtained before making all arrests.<sup>290</sup>

The State should incorporate the new TRO system into the antistalking law, rather than alter the TRO available under the Rules of Civil Procedure. Issuing a TRO would give a harasser notice that his conduct is more than frowned upon. It would warn him that continuing his conduct would be punished and, perhaps, constitute the crime of stalking. Certainly the legislature considered such a pairing when it included increased penalties for those stalkers against whom there is a TRO outstanding.<sup>291</sup>

#### *F. Creation of Threat Management Teams*

Finally, city police departments should look into creating "Threat Management Teams" (TMT) like the one instituted in Los Angeles, California. The Los Angeles Police Department's (LAPD) Chief of Police created the TMT by special order in February 1992, in response to the increase in

284. *Id.* § 609.748(3)(b). If service can not be made directly on the respondent, the law allows for service by publication. *Id.*

285. MINN. STAT. § 609.748(4)(c) (West 1994).

286. *Id.* § 609.748(5)(a)(3). The court must also find that the petitioner properly filed her petition and properly served the respondent. *Id.* § 609.748(5)(a)(1)-(2).

287. *Id.* § 609.748(8)(2).

288. *Id.* § 609.748(6)(b).

289. The United States Supreme Court in *United States v. Watson*, 423 U.S. 411 (1976), stated that the common law permitted warrantless arrests in two cases: 1) when a police officer has reasonable grounds to believe that an individual has committed a felony; and 2) when a misdemeanor is committed in the presence of a police officer. *Id.* at 418.

290. *See id.* at 411 (providing that police are not required to obtain a warrant before arresting a person in a public place, even though there was enough time and opportunity to obtain one).

291. S.C. CODE ANN. § 16-3-1070(c) (Law. Co-op. Supp. 1993).

celebrity stalking in the 1980s. "[T]he primary mission of [the TMT] is to manage cases — both criminal and noncriminal — wherein individuals have demonstrated an abnormal fixation and generated an identifiable, long-term pattern of unsolicited acts of visitation and/or telephonic or written correspondence in an annoying or threatening manner towards a specific person."<sup>292</sup>

The TMT reviews all stalking-like cases brought to its attention to determine whether it will handle the case. An interview with each alleged victim assists in making this determination. The team distributes a pamphlet outlining security recommendations at each interview, regardless of whether it accepts the case.<sup>293</sup> Upon acceptance of a case, the TMT's responsibilities include: the continued investigation of the case; the filing of any necessary crime reports; the assisting in the procurement of any TROs or stalking warrants; the identifying and locating of alleged stalkers who have kept their identity hidden; the interviewing and surveillance of alleged stalkers; and the procurement of psychological assistance for stalkers, when necessary.<sup>294</sup>

South Carolina law enforcement should initiate such measures in each city police station. A TMT could be composed of one or two officers in each city who are trained to recognize stalking behavior and its implications. Indeed, the antistalking law is ineffective without the support of police officers who are adequately trained to address this crime.

## X. CONCLUSION

It is distressing that stalking has become so common that all fifty states have been forced to recognize it as a crime and to take measures to address it. It is more distressing, however, that some states may see the repeal of their stalking law because of their haste in adopting legislation "so broad as to be unconstitutional."<sup>295</sup> Senator William Cohen, R-Maine, recognized this problem and introduced a bill mandating that the National Institute of Justice (NIJ) work with the United States Attorney General to evaluate existing and proposed antistalking laws and develop model legislation for the states. The

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292. Lane, *supra* note 5, at 27.

293. The security recommendations include residence security measures suggesting that victims trim shrubbery and install porch lights at a height which would discourage removal. Office security measures suggest removing the victim's name from any reserved parking areas, and refusing to accept any package unless the victim personally ordered the item. Personal security measures suggest utilizing a private mail box service to receive all personal mail and destroying discarded mail. Finally, vehicle security measures include equipping the gas tank with a locking gas cap and visually checking the front and rear passenger compartments before entering the vehicle. *Security Recommendations*, Los Angeles Police Department, Threat Management Unit.

294. Telephone interview with Detective Greg Boles, LAPD Threat Management United Detective Headquarters Division of Los Angeles, California, Sept. 7, 1993.

295. Puente, *supra* note 10.

bill passed as an amendment to the Commerce Justice Appropriations Bill<sup>296</sup> in October 1992. The NIJ completed its report on stalking and in October 1993 sent copies to all state Attorneys General. The report includes model antistalking legislation that "encourages legislators to make stalking a felony offense; to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime; and to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers."<sup>297</sup>

Like any other crime, the criminalization of stalking will not make it go away. Society will not see a decrease in stalker-related violence until states institute comprehensive antistalking laws that focus both on the plight of the victim and that of the stalker. South Carolina has taken the first step toward helping victims like Ann but has yet to fully stand up to stalkers. Until a more comprehensive law is passed, Ann and others like her will continue to live with the knowledge that their ordeal is far from over.

*Christine Olle Sloan*

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296. Pub. L. No. 102-395, 106 Stat. 1842 (1992).

297. United States Dep't of Justice & Nat'l Inst. of Justice, Project to Develop a Model Antistalking Code for States 43 (1993). This author supports the recommendations in the report as they are similar to those made in this note. She will lobby for their passage in the 1995 South Carolina legislative session.

