

Anti-Stalker Legislation: A Legislative Attempt to Surmount the Inadequacies of Protective Orders

LOWELL T. WOODS, JR.*

As always, the curtains on the windows of Ann Kotel's apartment in Greenlawn, New York, were drawn tightly on the night of June 2, 1990, and cardboard covered the spaces the curtains missed. A pair of scissors lay carefully positioned on the kitchen table. A chair leaned against the front door.

Kotel, a 52 year-old Long Island schoolteacher, rarely left the apartment, except to go to and from work. Wherever she went, even within her own home, she carried a ball-peen hammer in a small blue tote bag. She told one friend that she slept with the hammer under her pillow. That night Kotel told a friend who had come to visit the same thing she had repeatedly told her family and the police: Her ex-boyfriend, Kenneth Maher, was going to find her and kill her. In fact, as Kotel and her friend spoke, Maher, then 43, was smoking a cigarette behind a tree in the yard. He wore black pants and a black shirt, scuba diving gloves, and a camouflage bandanna wrapped around his head. He had a sawed-off shotgun in his hand, a dagger in his belt, and 20 rounds of ammunition in his pockets.

Shortly after her friend left, Ann Kotel became one of the more than 1,320 women murdered in 1990 by husbands or boyfriends; one of the 1,980 Americans killed that year with a rifle or shotgun; and one of the unquantifiable number of women whose court orders of protection failed to protect them from future violence. The only thing that made Kotel different, perhaps, was how diligently she sought to protect herself — and how presciently she realized that the law enforcement system, though fully aware of her predicament, would not prevent her murder.¹

INTRODUCTION

As a result of several high-profile cases in which attackers terrorized and then killed their victims, there has been an outburst of legislative

* J.D. Candidate, 1994, Indiana University School of Law—Indianapolis; B.A., 1986, Indiana University.

1. Andy Court, *She Knew The System Would Fail Her*, AM. LAW., June 1992, at 110.

activity criminalizing behavior defined as stalking.² Since California passed the first anti-stalking bill in 1990³ as many as forty states have proposed legislation designed to protect celebrities and battered women and children who are subject to repeated harassment. At present, twenty-nine states have made stalking a crime.⁴ Stalking legislation also has been the focus of several bills recently considered by the United States Congress.⁵

There are two principal types of stalking. One type is considered domestic violence, which typically involves spurned spouses and lovers. The other type is known as erotomania, or "phantom-lover syndrome," in which the victim does not know or has only a passing acquaintance with the stalker.⁶ Although many of the well-publicized cases which helped generate awareness of stalking involved erotomania, the majority of stalking incidences are an outgrowth of domestic violence.⁷ Not surprisingly, advocates of anti-stalking legislation often cite statistical information concerning domestic violence committed by adult males.⁸ Nonetheless, females and minors also exhibit stalking behavior.⁹

Stalking victims have, in the past, sought relief through the use of protective orders.¹⁰ A majority of states have enacted protective or restraining order legislation,¹¹ primarily as a remedy for women subject

2. Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35.

3. CAL. PENAL CODE § 646.9 (West Supp. 1992). See also Gary Spencer, *State Tightens Penalties for Stalking*, N.Y. L.J., Aug. 20, 1992, at 1.

4. Chris Andrews, *Michigan Senate Approves Anti-Stalker Legislation*, GANNETT NEWS SERVICE, Dec. 4, 1992. See list of statutes accompanying note 91 *infra*.

5. S. 2922, 102d Cong., 2d Sess. (1992); S. 3271, 102d Cong., 2d Sess. (1992); H.R. 5876, 102d Cong., 2d Sess. (1992); H.R. 5960, 102 Cong., 2d Sess. (1992).

6. John Ward Anderson, *Virginia Targets Stalkers; Bills Would Outlaw Repeated, Fear-Inducing Harassment*, WASH. POST, Feb. 10, 1992, at D1.

7. 138 CONG. REC. S15,966 (daily ed. Oct. 1, 1992) (statement of Sen. Rockefeller).

8. According to the FBI's Uniform Crime Reports, in 1990 approximately thirty percent of female murder victims had been slain by their husbands or boyfriends. *Cooperative Agreement to Develop Model State Anti-Stalking Law*, U.S. NEWSWIRE, Dec. 23, 1992 [hereinafter *Cooperative Agreement*].

9. See, e.g., *First Woman Arrested Under Illinois' Anti-Stalking Law*, UNITED PRESS INT'L, Dec. 17, 1992; see also *Boy, 12, Accused as Stalker*, N.Y. TIMES, Dec. 17, 1992, at B21.

10. 138 CONG. REC., *supra* note 7, at S15,966.

11. State statutes that authorize protective orders include: ALA. CODE §§ 30-5-1 to -11 (1989); ALASKA STAT. §§ 25.35.010-.060 (1991); ARIZ. REV. STAT. ANN. §§ 13-3601 to -3602 (Supp. 1991); CAL. CIV. PROC. CODE §§ 540-553, 527.6 (1991); COLO. REV. STAT. §§ 14-4-101 to -105 (1989); CONN. GEN. STAT. ANN. §§ 46b-1 to -11, 46b-15 (West 1986 & Supp. 1991); DEL. CODE ANN. tit. 10, §§ 921, 950 (1975 & Supp. 1991); D.C. CODE ANN. §§ 16-1001 to -1006 (1989); FLA. STAT. ANN. § 741.30 (West Supp. 1992); GA. CODE ANN. §§ 19-13-1 to -22 (1991); HAW. REV. STAT. §§ 586-1 to -11 (1985); IDAHO CODE §§ 39-6301 to -6317 (Supp. 1991); ILL. ANN. STAT. ch. 40, para. 2311-1 to -3

to domestic violence.¹² Courts can direct an assailant to refrain from further abusive conduct through the use of a temporary or permanent protective order.¹³ However, the use of protective orders to prevent stalking behavior poses a number of problems. Apart from the uncertain effectiveness of protective orders, in many instances the reach of legislation providing this remedy is limited to certain types of abuse, certain persons, and certain forms of relief.¹⁴

Part I of this Note will explore the adequacy of protective order legislation in the context of preventing stalking-type behavior. After providing a brief overview of protective order enactments, the Note examines the advantages and problems inherent in this type of legislation. Part II of this Note will evaluate current anti-stalking legislation and its potential to meet the perceived inadequacies of protective orders. In addition, this Note considers criticisms of anti-stalking laws, and presents additional measures which might further the goals of anti-stalking legislation.

(Smith-Hurd Supp. 1991); IND. CODE ANN. §§ 34-4-5.1-1 to -7 (Burns 1986 & Supp. 1991); IOWA CODE ANN. §§ 236.1-.18 (West 1985 & Supp. 1991); KAN. STAT. ANN. §§ 60-3101 to -3111 (Vernon 1990); KY. REV. STAT. ANN. §§ 403.715-.785 (Michie/Bobbs-Merrill 1984 & Supp. 1991); LA. REV. STAT. ANN. §§ 46:2131-:2142 (West 1982 & Supp. 1991); ME. REV. STAT. ANN. tit. 14, § 761-770 (West 1981 & Supp. 1987); MD. FAM. LAW CODE ANN. §§ 4-501 to -510 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 209A, §§ 1-9 (West Supp. 1991); MICH. COMP. LAWS ANN. § 600.2950 (West 1986); MINN. STAT. ANN. § 518B.01 (West Supp. 1991); MISS. CODE ANN. §§ 93-21-1 to -29 (Supp. 1991); MO. ANN. STAT. §§ 455.010-.230 (Vernon Supp. 1991); MONT. CODE ANN. §§ 40-4-121 to -125 (1991); NEB. REV. STAT. §§ 42-901 to -927 (1988); NEV. REV. STAT. § 33.017-.100 (1991); N.H. REV. STAT. ANN. §§ 173B:1-11a (Supp. 1991); N.J. STAT. ANN. §§ 2C:25-1 to :25:16 (West 1982 & Supp. 1991); N.M. STAT. ANN. § 40-13-1 (Michie 1989); N.Y. FAM. CT. ACT § 812 (McKinney 1983 & Supp. 1991); N.C. GEN. STAT. §§ 50B-1 to -8 (1989); N.D. CENT. CODE §§ 14-07.1-01 to -08 (1991); OHIO REV. CODE ANN. §§ 3113.31-32 (Anderson 1989); OKLA. STAT. ANN. tit. 22, §§ 60-60.7 (West Supp. 1991); OR. REV. STAT. §§ 107.700-.730 (1990); PA. STAT. ANN. tit. 23, §§ 6101-6117 (1991); R.I. GEN. LAWS §§ 8-8-1 to -3, 15-15-3 to -6 (Supp. 1991); S.C. CODE ANN. §§ 20-4-10 to -130 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. §§ 25-20-1 to -13 (1984 & Supp. 1991); TENN. CODE ANN. §§ 36-3-601 to -614 (1991); TEX. FAM. CODE ANN. §§ 71.01-.19 (West 1986); UTAH CODE ANN. §§ 30-6-1 to -10, 77-3-1 to -12 (1989); VT. STAT. ANN. tit. 15, §§ 1101-1109 (1989); VA. CODE ANN. §§ 16.1-253.1, 16.1-279.1 (Michie 1988); WASH. REV. CODE ANN. §§ 26.50.010-.090 (West 1986); W. VA. CODE §§ 48-2A-1 to -10 (1986); WIS. STAT. ANN. § 813.12 (West Supp. 1991); WYO. STAT. §§ 35-21-101 to -107 (1988). See also Elizabeth Topliffe, *Why Civil Protection Orders Are Effective Remedies For Domestic Violence But Mutual Protective Orders Are Not*, 67 Ind. L.J. 1039, 1040 (1992).

12. Janice L. Grau, *Restraining Order Legislation For Battered Women: A Reassessment*, 16 U.S. L. REV. 703, 703 (1982).

13. *Id.*

14. *Id.* at 704.

I. CIVIL PROTECTION ORDERS AS A REMEDY FOR STALKING BEHAVIOR

Barring the existence of anti-stalking legislation, a victim of repeated harassment or violence has limited options to prevent future instances of abuse. The victim may rely upon the police to respond to specific instances of threatening behavior by an assailant. If actual violence is involved, the victim can seek criminal charges for assault and battery. When prosecuted effectively, this remedy will incarcerate the abuser, preventing future instances of abuse.¹⁵ However, in many instances the abuser may not have committed an act that the law recognizes as criminal, and police response may occur only after the crime has escalated into a serious assault or homicide.¹⁶

As an alternative form of relief, an increasing number of victims of repeated abuse are seeking protection orders.¹⁷ If the restraining order fails to prevent further abuse, violation of the court-issued order may result in criminal and civil sanctions.¹⁸ However, even assuming that protective orders are a viable remedy for victims of repeated abuse, problems relating to access, procedures, and sanctions may make this remedy less effective than others.¹⁹

A. *Civil Protection Orders: How They Operate*

To obtain a protection order, a victim of repeated harassment must be statutorily eligible. The legislative definition of "abuse" and the statutorily-mandated relationship between the victim and defendant are examples of barriers to court access.²⁰

Jurisdictions vary in their definition of conduct that qualifies as abuse.²¹ Some require physical violence, while others require only threatened abuse.²² Fewer states permit protection orders in response to attempted physical abuse.²³ Some states expand the definition of abuse to incorporate forced sexual relations, violations of criminal statutes, or

15. Topliffe, *supra* note 11, at 1041.

16. *Cooperative Agreement*, *supra* note 8.

17. See, e.g., Adrian Walker, *Restraining Orders Are At Record High*, BOSTON GLOBE, Sept. 23, 1992, at Metro/Region 1 (indicating that Massachusetts courts issued a record 45,000 restraining orders, reflecting an increase in domestic violence and a heightened awareness of the legal tools victims can use to protect themselves).

18. Grau, *supra* note 12, at 704.

19. *Id.* at 705.

20. *Id.* at 706.

21. Topliffe, *supra* note 11, at 1043 (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 12-13 (1990)).

22. *Id.*

23. *Id.*

deliberate damage to personal property.²⁴ However, most definitions omit psychological abuse.²⁵

A victim's relationship with the defendant may further limit the availability of protective orders:

Depending upon the jurisdiction, restraining order legislation may apply to spouses, former spouses or unmarried persons. Some jurisdictions limit access to spouses only, but others permit access to spouses and former spouses. Most states also permit unmarried persons to bring actions. However, restrictions are made regarding the eligibility of unmarried persons. The state may require the parties to be adults, members of the opposite sex, or involved in a close relationship. The parties may also have to live together²⁶

In states where the relationship requirement is restrictive, the use of protective orders as a method to prevent domestic violence is severely limited.

Where civil protection orders are statutorily available to a victim, states can use them in conjunction with, or as an alternative to criminal charges.²⁷ Protective order legislation generally requires the filing of a petition to initiate proceedings, and frequently the petition must allege abuse.²⁸ Often, the petitioner must pay a filing fee. Some localities waive the fee completely, or will do so upon a showing of indigency, but most jurisdictions simply do not address this issue.²⁹ The petition and filing fee are characteristic of a victim-initiated civil proceeding, as opposed to a state-initiated criminal proceeding.³⁰

Filing a petition to obtain a court-issued restraining order is but the first step in obtaining protection. Subsequently, one must go through a lengthy legal process which ensures a delay in relief. Frequently, however, a victim needs immediate protection from an assailant.³¹ To avoid harassment and intimidation of the victim prior to issuance of a permanent order, most states authorize temporary restraining orders which may be obtained upon an *ex parte* showing that the victim is in danger of being harmed.³² This order gives the victim security while she

24. Grau, *supra* note 12, at 706.

25. *Id.*

26. *Id.* at 706-07.

27. Topliffe, *supra* note 11, at 1042.

28. Grau, *supra* note 12, at 709.

29. *Id.* at 710.

30. *Id.*

31. *Id.*

32. Topliffe, *supra* note 11, at 1042. *See also* Grau, *supra* note 12, at 1042-43.

seeks a more permanent judicial remedy.³³ The duration of a temporary order is limited to a specified number of days, and a hearing may be required within a certain time frame.³⁴ In some situations, a victim may require immediate protection at a time when the court is not in session.³⁵ A limited number of states allow issuance of emergency orders.³⁶ Subject to the statutory provisions of the particular legislation, one may obtain these orders on weekends or when the court is not in session.³⁷

When obtaining a permanent protective order, a majority of states require that the victim show the allegations of abuse are supported by a preponderance of the evidence at a hearing on the petition.³⁸ A good cause finding that the defendant has committed or will commit the alleged abuse is the only requirement in some jurisdictions.³⁹

A permanent order can provide a variety of remedies.⁴⁰ The order may direct the assailant to stop harassing the victim at work or at home.⁴¹ Because protective order legislation is targeted at domestic situations, in many jurisdictions the permanent order also may include no-contact, child custody and visitation provisions, and mandatory counseling for the abuser.⁴²

Although called "permanent," a court will grant a protective order only for a limited duration.⁴³ Usually, the duration of a permanent order does not exceed one year, although certain jurisdictions will allow extensions.⁴⁴ Some statutes require that the defendant and appropriate law enforcement agencies be given notice of the order.⁴⁵ Once an individual has obtained a restraining order and the defendant has received a copy, the order's effectiveness in preventing repeated instances of abuse may depend upon police response to violations and the statutorily-imposed sanctions.⁴⁶

Some jurisdictions have statutorily-mandated law enforcement procedures that impose some punishment for violation of a protective order.⁴⁷

33. Topliffe, *supra* note 11, at 1042.

34. Grau, *supra* note 12, at 712.

35. *Id.*

36. *Id.*

37. *Id.*

38. Grau, *supra* note 12, at 712-13.

39. *Id.* at 713.

40. Topliffe, *supra* note 11, at 1043.

41. *Id.*

42. *Id.*

43. Grau, *supra* note 12, at 713.

44. *Id.* at 717.

45. *Id.* at 718.

46. *Id.* at 719.

47. *Id.* at 720.

Protection order legislation itself may decree sanctions for a direct violation of an order, such as subsequent attacks on the victim when the order directs the abuser to refrain from such conduct.⁴⁸ Violations may result in civil contempt, indirect criminal contempt, arrest, or misdemeanor charges.⁴⁹

Restraining order violations are punishable as civil contempt in most jurisdictions.⁵⁰ In order to obtain civil contempt sanctions after an assailant violates an existing order, the victim must file civil contempt charges and often must repeat the process necessary to obtain the protective order initially.⁵¹ The court may secure the defendant's presence by a warrant for arrest, notice of hearing or an order to show cause.⁵² If found guilty of civil contempt, the penalty may be imprisonment, a fine or both.⁵³

Immediate arrest may be the penalty for violation of a restraining order. Arrest may be the exclusive sanction, or it may be one of several available options.⁵⁴ Some states have placed a greater priority on arresting violators of restraining orders when those violators have committed additional offenses.⁵⁵ Some jurisdictions may require verification of the existence of the restraining order before police can affect an arrest.⁵⁶ States vary on the issue of whether a warrant is required to affect an arrest based upon probable cause where an assailant violates a restraining order.⁵⁷

States may classify the violation of a restraining order as a misdemeanor.⁵⁸ Typically, sanctions are imprisonment, a fine or both.⁵⁹ As this classification makes any violation a criminal offense, procedures generally governing arrest will apply.⁶⁰ This will permit arrest without a warrant if based upon probable cause, and therefore, abuse will not need to have transpired in the presence of an investigating police officer.⁶¹ Other statutes specify arrest procedures for violation of restraining orders.⁶²

48. *Id.*

49. *Id.*

50. *Id.*

51. Topliffe, *supra* note 11, at 1045.

52. Grau, *supra* note 12, at 721.

53. *Id.*

54. *Id.*

55. Walker, *supra* note 17, at Metro/Region 1.

56. Grau, *supra* note 12, at 721.

57. *Id.*

58. *Id.* at 722.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

The rise in the use of protective orders by victims of domestic violence evidences an extensive belief in their effectiveness. As the majority of abuse involving stalking behavior originates from domestic violence,⁶³ protective orders are an option for many victims. When available, protective orders can have many advantages as a means to terminate continuing abuse by an assailant.

B. The Advantages of Civil Protection Orders in Preventing Stalking Conduct

A victim of repeated violence who is eligible for a protective order may prefer this form of protection over criminal sanctions for several reasons. Protection order legislation often provides for temporary relief, which states may make immediately available.⁶⁴ In addition, courts may tailor the form of relief in a permanent order to meet the needs of the particular situation.⁶⁵ Moreover, because of the reduced standard of proof and absence of criminal procedural safeguards, a civil protection order is easier to obtain than a criminal conviction.⁶⁶

A primary advantage that protection order legislation affords is a victim's access to temporary protection in emergency situations⁶⁷ until a court issues a permanent order. In contrast, when victims seek criminal sanctions, their assailants are often released on bond, giving the defendant an opportunity to intimidate the victim into refusing to testify.⁶⁸ Additionally, the defendant has the opportunity to commit additional acts of violence. By allowing emergency ex parte orders, protection order legislation can give victims the security they need to pursue a permanent order or criminal charges.⁶⁹ Furthermore, it may take months for a

63. Ex-wives and ex-girlfriends constitute more than ninety percent of stalking victims. Bruce Rubenstein, *Stalker a Danger to Himself and Others; But He May Go Free*, ILL. LEGAL TIMES, June 1992, at 18.

64. Grau, *supra* note 12, at 710; Topliffe, *supra* note 11, at 1042.

65. Topliffe, *supra* note 11, at 1043.

66. Grau, *supra* note 12, at 712-13; Topliffe, *supra* note 11, at 1048.

67. Topliffe, *supra* note 11, at 1047 (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 2 (1990)).

68. *See id.*, wherein Topliffe notes: "This accounts for the large number of criminal domestic violence cases where the charges are dismissed, the victim refuses to testify, or the victim otherwise refuses to cooperate. 'In studies of courts operating under regular assault statutes, investigators have typically found that approximately 80% of all cases of domestic violence are dismissed by the court either at the victim's request or because the victim failed to appear in court.'" (quoting C. SCHWEBER & F. FEINMAN, CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF THE LEGALLY MANDATED CHANGE 33 (1985)).

69. *Id.* at 1048.

criminal case to come to trial, while victims may obtain protection orders without delay.⁷⁰

Another benefit of civil protection orders is that they empower victims of domestic violence to determine the type of remedy appropriate for their particular circumstances.⁷¹ In certain circumstances, victims may not wish to consider criminal sanctions. As one commentator noted: "Many women in domestic violence situations do not want their assailant jailed or criminally charged because he may be the only source of support for the victim or her family."⁷² In addition, many victims fear severe retaliation if they file criminal charges.⁷³

In contrast to a criminal proceeding, another advantage afforded by protective orders is that the burden of proof for a civil proceeding is lower.⁷⁴ Thus, even if the available evidence cannot sustain a criminal conviction, the victim may still be able to secure relief through a protective order. This can be crucial where the victim and the assailant are the only witnesses to the crime and there is little or no extrinsic evidence.⁷⁵ Also, a protective order can prevent an assailant from committing non-criminal acts, such as harassment.⁷⁶ Consequently, a civil protection order may be the only source of relief to victims unable or unwilling to bring criminal charges.

Civil protection orders have some advantages over criminal proceedings and may be the only option available to prevent future acts of violence in certain situations. Nonetheless, considering the need to prevent intimidation and violence connected with stalking conduct, protective orders fail to meet the needs of these victims.

C. Disadvantages of Civil Protection Orders in Preventing Stalking Conduct

While civil protection orders may be a viable remedy for domestic violence in many circumstances, when considering the broad spectrum of abusive conduct accompanying stalking behavior, protective order legislation is often not accessible or is simply inadequate to protect

70. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

71. *Id.* at 1048.

72. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

73. *Id.* (citing C. SCHWEBER & F. FEINMAN, CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF THE LEGALLY MANDATED CHANGE 33 (1985)).

74. Grau, *supra* note 12, at 712-13; Topliffe, *supra* note 11, at 1048.

75. Topliffe, *supra* note 11, at 1048.

76. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 3 (1990)).

victims. Many stalking victims are prevented access to protective orders by statutory qualifications. Procedural requirements may also bar access to protective orders. Furthermore, even when victims can obtain protective orders, enforcement of the orders and sanctions for violations are often insufficient to deter future abuse.

Because protective order legislation is targeted at domestic violence, an entire class of victims is statutorily precluded from this source of relief. As stated above, many jurisdictions limit access through the statutory requirement of a relationship between the victim and the assailant.⁷⁷ Consequently, stalking victims who do not know or have only an informal acquaintance with the perpetrator are often outside the reach of protective order legislation. Stalking victims who are not eligible for protection orders are frequently told that nothing can be done until they are physically harmed or a suspect has committed a criminal act. By that time, a serious assault or homicide may have occurred.⁷⁸

Even where the statutorily-required relationship exists or is not required, a state may still deny the victim a protective order if the abuse is psychological in nature,⁷⁹ or fails to meet the statutory definition of abuse.⁸⁰ A perpetrator might therefore limit his or her conduct so as not to exceed the statutory threshold, instead subjecting a victim to continued harassment which may lead to a final act of serious violence. Some have advanced that restraining orders effectively reduce harassment and verbal abuse, but do not reduce physical violence which the orders were designed to prevent.⁸¹

Although a victim may be within the statutory reach of protective order legislation, procedural requirements can still limit access. Victims may be dissuaded by the filing fee or lack of special assistance to understand the complexities of the legal steps involved in obtaining an order.⁸²

77. Grau, *supra* note 12, at 706-07.

78. Louise Palmer, *Maine Woman Stalked For Eight Years*, STATES NEWS SERVICE, Sept. 29, 1992.

79. Grau, *supra* note 12, at 706.

80. *Id.*

81. *Id.* at 726.

82. Topliffe, *supra* note 11, at 1044-45 ("To get an order, a woman must pay filing fees or complete extensive forms requesting a fee waiver. She must also pay to have her batterer served. Then she must share her personal stories with strangers, including her own counsel, prosecutors, court clerks, and judges. Finally, she must appear at a hearing and testify against the batterer. If the batterer violates the order, she often has to go through the same process in order to file civil contempt charges. Many women give up in frustration with the whole system." (citing D. MARTIN, BATTERED WIVES 107-109 (1976))).

Once a victim obtains a protective order, often it is not effectively enforced.⁸³ Jurisdictions vary on their response to violations, but three disturbing patterns are apparent: frequently the police will not respond until after violence has occurred; courts often have discretion whether to hold the assailant in contempt when an order is violated; and finally, there may be no formal guidelines for dealing with violations.⁸⁴ When enforcement is ambiguous and ineffective, an assailant may continue his or her abusive conduct without fear of legal sanctions.

Even if a protective order is available and enforcement is consistent, there remains the question of whether the type of individual who commits stalking behavior will be deterred.

The world is all too full of aggressive, impulsive individuals who are willing to take risks in order to vent their temper or get their way. They are often poorly educated and lack solid judgment and planning skills. Many are convicted criminals who have outgrown their fear of jail and have no interest in protecting their reputations or arrest histories. Some are mentally disturbed, and others have grown so depressed or bitter that they simply don't care anymore. These types of individuals are not impressed by the risk of short-term incarceration, although for some of them, genuinely harsh sanctions such as lengthy prison sentences may have deterrent value. For most, though, a short-term arrest will have virtually no effect on curbing future domestic violence, just as a short-term arrest has relatively little effect at preventing their participation in drug offenses, robberies, burglaries, and other crimes.⁸⁵

The motivation of an assailant willing to stalk and terrorize a victim over a prolonged period suggests that even the maximum sanctions available for violation of a protection order may be an insufficient deterrent. Moreover, "ninety percent of all stalkers suffer from at least one kind of mental disorder, including different forms of obsession and

83. *Id.* at 1046 (citing D. MARTIN, *BATTERED WIVES* 107-09 (1976)).

84. *Id.* (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT* 49 (1990)) ("Despite the widespread belief that the effectiveness of civil protection orders depends largely on their enforceability, few of the courts we studied have developed guidelines or procedures for punishing violators. As a result, there remains a great deal of confusion with regard to arrest authority and appropriate sanctions for protection order violations.") (quoting P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, *CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT* 2 (1990)).

85. David B. Mitchell, *Contemporary Police Practices In Domestic Violence Cases: Arresting The Abuser: Is It Enough?*, 83 J. CRIM. L. & CRIMINOLOGY 241, 243 (1992).

delusion.”⁸⁶ Thus, many perpetrators of stalking behavior simply will not be dissuaded from committing additional acts of abuse by the threat of a civil contempt or misdemeanor charge.

D. Civil Protection Order Legislation is Insufficient to Deter Stalking Conduct

States formulated civil protection orders in response to the rising incidence of domestic violence. The statutory structure of civil protection order legislation demonstrates that states developed these laws as a means to protect individuals who are, or were, previously involved in a relationship with their abuser. In domestic abuse cases, civil protection orders may have a sufficient deterrent value in some circumstances,⁸⁷ but are simply inadequate to prevent abuse in many other situations.

Beyond the problems of access and enforcement of protective order legislation, many stalking victims have complained that even with protective orders their assailants continue to harass and threaten them.⁸⁸ While existing laws against trespassing and harassment are helpful in supplementing protective orders, they frequently are insufficient to completely protect potential victims until it is too late.⁸⁹ Clearly, other options are needed to protect stalking victims from perpetual intimidation and violence. Anti-stalking enactments have been the legislative response to the perceived inadequacies of protective orders. These new laws purportedly offer relief that complement civil protection legislation.

II. ANTI-STALKING LEGISLATION AS A MEANS TO MEET THE INADEQUACIES OF CIVIL PROTECTION ORDERS

In 1990, California became the first state to enact anti-stalking legislation.⁹⁰ This law served as a model for subsequent legislation. Many

86. Palmer, *supra* note 78 (quoting Sen. Bill Cohen).

87. “[S]pousal assault, unlike almost any other type of violent crime, cuts across the broad spectrum of society. Not only do some career criminals and other reckless persons abuse their spouses, but so do some well-educated, successful, and normally law-abiding individuals. For the educated, successful, and law-abiding group of offenders, a short-term arrest coupled with all of its ramifications may be an immensely powerful deterrent. These abusers have much at stake and could be seriously injured by a permanent record of arrest or conviction. Employment potential, eligibility for membership [in] social organizations, political viability, and general social reputation are all threatened by arrest.” Mitchell, *supra* note 85, at 244.

88. Anderson, *supra* note 6, at D1 (“One stalking victim, who testified to lawmakers, complained that she and her three children have been stalked by her former husband for more than six years. The victim stated that she had been beaten, abducted, raped and shot at by the man, who repeatedly has violated court orders to stay away from her family.”); *see also* Court, *supra* note 1, at 110; Palmer, *supra* note 78; Kolarik, *supra* note 2, at 35.

89. *Cooperative Agreement*, *supra* note 8 (citing Charles B. DeWitt, Director, National Institute of Justice).

90. CAL. PENAL CODE § 646.9 (West Supp. 1992).

states have followed California's lead in criminalizing stalking behavior.⁹¹ Prior to the current legislation, individuals who were stalked and sought protection often faced an unsympathetic judicial system that traditionally classified such violence as a domestic matter.⁹² Anti-stalking statutes are a legislative attempt to afford victims protection from certain types of conduct that were previously not criminal or were inadequately deterred.

A. *Anti-Stalking Laws: How They Operate*

In contrast to a violation of a restraining order, committing acts categorized as stalking in an anti-stalking statute is a criminal act, which can result in a state-initiated proceeding against the perpetrator. In order for a victim to file charges, the abuser's actions must fall within the statutory definition of stalking conduct.

The statutory definition of stalking varies among the states. California, the first state to enact such legislation, describes a stalker as "any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury."⁹³ The California law additionally defines "harasses" and "course of conduct" to refine the breadth of the legislation.⁹⁴ Although the California law

91. Andrews, *supra* note 4. State statutes which criminalize stalking include: ALA. CODE § 13A-6-90 (Supp. 1993); CAL. PENAL CODE § 646.9 (West Supp. 1992); 1992 COL. REV. STAT. § 18-9-111 (1993); CONN. GEN. STAT. ANN. §§ 53a-181c to 53a-181d (West Supp. 1993); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. § 16-5-90 (Michie Supp. 1993); HAW. REV. STAT. § 711.1106.5 (Michie Supp. 1993); 1992 IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993); IND. CODE ANN. § 35-45-10-5 (West Supp. 1993); 1992 IOWA CODE ANN. § 708.11 (West Supp. 1993); 1993 Kan. Sess. Laws 291; KY. REV. STAT. ANN. §§ 508.130 to -.150 (Baldwin 1992); 1992 LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993); MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993); MISS. CODE ANN. § 97-3-107 (Supp. 1993); NEB. REV. STAT. § 28-311.02 (Supp. 1993); N.C. GEN. STAT. § 14.277.3 (Supp. 1992); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. §§ 30-3A-1 to -2 (Michie Supp. 1993); OHIO REV. CODE ANN. §§ 2903.21.1 to .5 (Anderson 1993); OKLA. STAT. tit. 21, § 1173 (West Supp. 1993); R.I. GEN. LAWS §§ 11-59-1 to -2 (Michie Supp. 1993); 1992 S.C. ACTS § 16-3-1070; S.D. CODIFIED LAWS ANN. § 22-19A-1 to -6 (Supp. 1993); TENN. CODE ANN. § 39-17-315 (Supp. 1993); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1992); VT. STAT. ANN. tit. 13, § 1061-3 (Supp. 1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (Michie Supp. 1993); WYO. STAT. § 6-2-506 (Michie Supp. 1993).

92. Palmer, *supra* note 78 (quoting Sen. Biden).

93. CAL. PENAL CODE § 646.9 (West Supp. 1992).

94. *Id.* The relevant portion of the statute is as follows:

(d) For the purposes of this section, "harasses" means a knowing and willful

has served as an example for subsequent legislation, many states have broadened or narrowed the reach of their respective statutes through legislative definitions and statutory structure.

States have extended the reach of their statutes beyond California's version by various means. Some jurisdictions have done this by eliminating the requirement of intent to place the victim in fear of death or great bodily injury.⁹⁵ Legislation has also been broadened by expanding the classification of potential abuse beyond death or great bodily injury.⁹⁶ A few states have gone so far as to eliminate both intent and the requirement that the victim be placed in fear of harm.⁹⁷ Most states that mandate the victim be placed in fear of harm use an objective standard of reasonableness, but some jurisdictions additionally impose a subjective test.⁹⁸ A related requirement is that the threat be credible.⁹⁹

The breadth of anti-stalking legislation has been limited in some jurisdictions by narrowing the definition of stalking conduct. While mandating intent to place the victim in serious bodily harm or injury is a typical provision,¹⁰⁰ some states further require that the victim be placed in "imminent fear" of the proscribed abuse.¹⁰¹ This imposes a greater burden on a victim wishing to file criminal charges against an assailant who employs a low level of intimidation. One of the more limited laws, passed by West Virginia, also requires the victim to have formerly resided or cohabitated with the perpetrator.¹⁰²

All jurisdictions require repeated conduct by a perpetrator in order to qualify as stalking. Generally, there must be some "course of conduct" involving a pattern of behavior composed of two or more separate

course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. "Course of Conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

95. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993) (no intent required).

96. *E.g.*, *id.* (includes harassment that would cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested).

97. In Idaho, a stalker is defined as any person who willfully, maliciously and repeatedly follows or harasses another person or a member of the other person's immediate family. IDAHO CODE § 18-7905 (Supp. 1992).

98. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993) (requires a victim to actually feel terrorized, frightened, intimidated, threatened, harassed, or molested).

99. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

100. *E.g.*, *id.*

101. *E.g.*, MASS. GEN. L. ch. 265, § 43 (West Supp. 1992).

102. W. VA. CODE § 61-2-9a (Michie Supp. 1993).

noncontinuous acts evidencing a continuity of purpose.¹⁰³ This demands a deliberate plan or relationship between the acts, not just unconnected coincidental encounters.

The type of conduct that an abuser must commit may be defined generally or specifically. The majority of states focus on the victim being placed in fear of death or serious bodily injury in conjunction with conduct generalized as following or harassing.¹⁰⁴ Some states specifically describe the type of behavior and where it must occur.¹⁰⁵ A few jurisdictions are very expansive in their descriptions, including such acts as: appearing within the sight of the victim; making contact by telephone; making contact by mail; and placing an object on property owned by the victim.¹⁰⁶ While reaching a wide variety of conduct, the majority of statutes still require that the victim be placed in fear of serious harm.¹⁰⁷

Most statutes are designed to work in tandem with restraining order legislation. Some anti-stalking enactments simply state that when an assailant violates a restraining order or injunction that prohibits the conduct defined as stalking, states will punish the violation as stalking.¹⁰⁸ A more recent trend is to impose enhanced sanctions for stalking conduct when committed in violation of a protective order.¹⁰⁹ This may upgrade the classification of the offense, increasing the jail term or fine if a state obtains a conviction.¹¹⁰

Many jurisdictions have provided for an additional offense within their legislation typically called "aggravated stalking."¹¹¹ Generally, a

103. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

104. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

105. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

The relevant portion of the statute is as follows:

(a) A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in furtherance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions:

(1) follows the person, other than within the residence of the defendant;

(2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant.

106. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

107. *E.g.*, *id.*

108. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

109. Some anti-stalking statutes which provide for enhanced sanctions for stalking when committed in violation of a restraining order include: FLA. STAT. ch. 208, § 784.048 (1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993); MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

110. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

111. Some examples of statutes that provide for an aggravated stalking offense are

person commits aggravated stalking when he or she does certain specified acts in conjunction with committing the crime of stalking.¹¹² For example, Illinois' statute requires one of the following: causing bodily harm to the victim; confining or restraining the victim; or violating a restraining order, order of protection, or an injunction.¹¹³ Some states expand the offense to cover subsequent stalking in the face of a prior conviction, or in violation of a condition of probation, pretrial release, or release on bond pending appeal.¹¹⁴ At least one state with a low threshold definition of stalking imposes an aggravated charge when a credible threat with the intent to place the victim in reasonable fear of death or bodily injury occurs.¹¹⁵ An aggravated stalking violation can substantially increase the classification of the crime and result in severe sanctions, including increased prison terms and large fines.¹¹⁶

Some states exempt certain conduct from their anti-stalking legislation to avoid criminalizing legal behavior and invoking constitutional scrutiny.¹¹⁷ Several statutes exempt activity that is constitutionally protected.¹¹⁸ A few states exclude specific activity, such as picketing occurring at the workplace.¹¹⁹

Some anti-stalking statutes alter the standard procedure for arrest. The Florida statute allows any law enforcement officer to arrest, without warrant, any person he or she has probable cause to believe committed a stalking offense.¹²⁰

Pre-trial detention may also be a subject of stalking legislation. Illinois provides for the denial of bail to an individual charged with stalking or aggravated stalking in certain situations.¹²¹ This provision allows a hearing to determine whether bail should be denied when it is alleged that the defendant's admission to bail poses a real and present threat to the safety of the alleged victim, and denial of release on bail is necessary to prevent fulfillment of the threat upon which the charge is based.¹²² A controversial section of this provision provides that during the hearing, the defendant may not make a motion to suppress evidence

as follows: FLA. STAT. ANN. § 784.048 (West Supp. 1993); ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

112. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

113. *Id.*

114. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

115. FLA. STAT. ANN. § 784.048 (West Supp. 1993).

116. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

117. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

118. *E.g.*, *id.*

119. *E.g.*, ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

120. FLA. STAT. ANN. § 784.048 (West Supp. 1993).

121. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

122. *Id.*

or a confession, even in the face of evidence that the proof may have been obtained as the result of an unlawful search and seizure or through improper interrogation.¹²³ Any denial of bail must be supported by clear and convincing evidence,¹²⁴ a lower standard than beyond a reasonable doubt. A denial of bail will leave the defendant incarcerated pending trial for the stalking offense.¹²⁵ The defendant must be brought to trial within ninety days after the date on which the order for detention was ordered.¹²⁶

The effort necessary to obtain a conviction for stalking varies according to the structure of the legislation. As a criminal charge, the ultimate finding against a defendant must be beyond a reasonable doubt. In states where specific intent is required, it will obviously be more difficult to convict an assailant.¹²⁷ The ability to obtain a conviction may also be limited by the statutory designation of abuse that the victim must be put in fear of. Where the victim must be placed in fear of bodily injury or death,¹²⁸ a low level of intimidation may fail to convince a jury that the perpetrator intended to commit actual violence. Conversely, where a victim is only required to be terrorized, intimidated, threatened, harassed, or molested, even moderate conduct by an assailant may support a guilty verdict.¹²⁹

States requiring that the victim be put in reasonable fear of the proscribed conduct normally employ an objective standard.¹³⁰ However, in one state that additionally requires a subjective test, evidence that the defendant repeatedly engaged in unconsented conduct after being requested to cease such conduct gives rise to a rebuttable presumption that the continuation of conduct caused the victim to be in actual fear of the statutorily-prohibited abuse.¹³¹

If a court convicts an assailant of stalking, the punishment will vary by jurisdiction. A first time stalking offense is a misdemeanor in many states.¹³² A misdemeanor conviction for stalking is typically punishable by imprisonment for not more than one year or a fine of not more than \$1,000.¹³³ An exception is Illinois, which treats a first time offense as a class four felony with fines up to \$10,000 and a jail term up to

123. *Id.*

124. *Id.*

125. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

126. *Id.*

127. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

128. *E.g.*, *id.*

129. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

130. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

131. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

132. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

133. *E.g.*, *id.*

three years.¹³⁴ At least one state raises the classification from a misdemeanor to a felony when the crime involves a victim under the age of sixteen.¹³⁵

States vary even more on the issue of punishment of second offenses. Generally, in the states that do not classify a subsequent offense as aggravated stalking, they nonetheless impose an enhanced sanction.¹³⁶ Most of these states upgrade the offense to a felony,¹³⁷ and may impose a mandatory jail term upon conviction.¹³⁸ A prison sentence for a second conviction normally will not exceed five years incarceration;¹³⁹ however, one state allows the possibility of a ten year prison sentence.¹⁴⁰

Aggravated stalking, like a conviction for a second offense, results in greater sanctions. Normally, an aggravated stalking conviction is a felony imposing a longer prison term or a larger fine.¹⁴¹ Some states increase the classification when the prohibited conduct is repeated. For example, Illinois makes an aggravated charge a "class three" felony, but a subsequent aggravated offense is designated as a "class two" felony.¹⁴²

A few states provide additional remedies under their anti-stalking legislation. States give some courts discretion to order an individual who was convicted, as a condition of parol, to receive psychiatric, psychological, or social counseling at his or her expense.¹⁴³ At least one jurisdiction grants authority to issue permanent anti-stalking orders as a condition of parol when the conviction was for an aggravated charge.¹⁴⁴

The rapid nationwide growth of anti-stalking legislation would appear to indicate a widespread belief in its potential effectiveness. Nonetheless, there are many critics who voice concerns regarding the constitutionality and effectiveness of these statutes.

B. Criticisms of Anti-Stalking Legislation

The speed at which legislatures are enacting anti-stalking legislation has prompted many civil libertarians¹⁴⁵ and criminal defense attorneys¹⁴⁶

134. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

135. CONN. GEN. STAT. ANN. §§ 53a-181c to 53a-181d (West Supp. 1993).

136. *E.g.*, MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

137. *E.g.*, IDAHO CODE § 18-7905 (Michie Supp. 1992).

138. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

139. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

140. MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

141. *E.g.*, FLA. STAT. ANN. § 784.048 (West Supp. 1993).

142. ILL. ANN STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

143. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

144. *Id.*

145. "It is always troubling for civil libertarians to see laws enacted in the fog and

to question the legitimacy of some of the particular statutes that have been passed. These critics cite possible constitutional problems resulting from overbroad legislation and vague statutory terminology.¹⁴⁷ There is additional concern that some legislation which incorporates revised arrest and pretrial detention provisions will be susceptible to abuse by vindictive ex-spouses or lovers.¹⁴⁸ Conversely, some commentators have focused criticism on statutory language that is too narrow to protect stalking victims effectively.¹⁴⁹ Some also have suggested that stalking perpetrators need psychological counseling, not incarceration.¹⁵⁰ The national scope of these concerns is reflected in bills pending before the United States Congress, which seek to develop a model state law on stalking that addresses how to protect a victim without violating the accused's constitutional rights.¹⁵¹

Courts may strike down a law as being overbroad or void for vagueness.¹⁵² "Generally, the Supreme Court has struck down laws that are vague to the point that it is difficult to discern objectively the difference between an individual who is acting legally and one who is acting illegally."¹⁵³ A law may be overbroad if it sweeps within its ambit a substantial amount of constitutionally protected activity.¹⁵⁴ Where the reach of a statute is unclear or overbroad, individuals such as insurance investigators or reporters could technically fall within the definitional scope of stalking conduct.

If a court finds a statute is unconstitutional, anyone previously convicted under the legislation will be released.¹⁵⁵ Some legislators have

frenzy of recent high-publicity cases." Kolarik, *supra* note 2, at 35 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

146. One defense attorney called the Illinois stalking statute the outcome of a "legislative frenzy." *Id.* at 36 (quoting Lake County, Ill., Public Defender Joseph V. Collina).

147. *See id.* at 36. *See also* Rosalind Resnick, *States Enact "Stalking" Laws; California Takes Lead*, NAT'L L.J., May 11, 1992, at 3. *See also* Spencer, *supra* note 3, at 1.

148. Kolarik, *supra* note 2, at 36. *See also* Curtis Lawrence, *First Stalking Trial Results In Acquittal*, CHI. TRIB., Dec. 19, 1992, at 5.

149. *See generally* Palmer, *supra* note 78.

150. *See* Kolarik, *supra* note 2, at 36.

151. Louise Palmer, *Cohen's Anti-stalking Bill Passes Senate*, STATES NEWS SERVICE, Sept. 16, 1992. Bills recently presented to the United States Congress include: S. 2922, 102d Cong., 2d Sess. (1992); S. 3271, 102d Cong., 2d Sess. (1992); H.R. 5876, 102d Cong., 2d Sess. (1992); H.R. 5960, 102d Cong., 2d Sess. (1992).

152. Kolarik, *supra* note 2, at 36. *See also* Palmer, *supra* note 151.

153. Kolarik, *supra* note 2, at 36 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

154. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

155. "The problem with some of these statutes, and with Florida's in particular,

attempted to address this problem by specifically exempting constitutionally protected activity,¹⁵⁶ but the actual determination of whether the activity is protected may still subject an accused to the judicial system.

Certain statutes have particular provisions that raise other constitutional considerations. Many have criticized stalking legislation that permits an arrest without a warrant.¹⁵⁷ The Illinois statute, which provides for the denial of bail in some circumstances,¹⁵⁸ is particularly suspect.¹⁵⁹ Evidence rules do not apply at the bail hearing and evidence may be based upon "reliable information."¹⁶⁰ Supporters of the bond provision have countered that the burden of proof remains with the state.¹⁶¹

Anti-stalking legislation may be susceptible to abuse by vindictive ex-spouses or lovers.¹⁶² Some critics claim that the law favors the person who presses charges.¹⁶³ It can be difficult for a defendant to disprove allegations of stalking because frequently there are no witnesses.¹⁶⁴ When a state allows a conviction based entirely upon the victim's word, it may raise constitutional questions which could ultimately result in the statute's invalidity.¹⁶⁵

is that they will not pass constitutional muster. I think the Florida Legislature was well-intentioned, but, unfortunately for the victims, by writing a statute which is unconstitutional, they are ensuring that any stalker convicted under the statute will ultimately go free." Resnick, *supra* note 147, at 3 (quoting Jeffrey S. Weiner, president of the National Association of Criminal Defense Lawyers).

156. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

157. "Usually, probable cause and a warrant are required, unless a crime is occurring in the presence of a police officer or there are other exigent circumstances." Kolarik, *supra* note 2, at 36 (quoting Jonathan Turley, a professor at George Washington University National Law Center).

158. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

159. In a recent case, an alleged stalker spent 132 days in jail based on allegations by his ex-wife. The case eventually went before a jury and the defendant was acquitted. Lawrence, *supra* note 148, at 5.

160. ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993). A public defender has stated that the bail provisions violate the Eighth Amendment, which prohibits excessive bail. "The law also has a provision where a defendant may not challenge . . . involuntary statements or illegally obtained evidence until trial. That is why we have the exclusionary rule, which was made to discourage pretrial incarceration based on tainted evidence." Kolarik, *supra* note 2, at 36 (quoting Lake County, Ill. Public Defender Joseph V. Collina).

161. "The burden of proof is upon the state. The test of the new law will be at trial and the gathering of collaborating witnesses to convict someone of stalking." Kolarik, *supra* note 2, at 36 (quoting Cook County State's Attorney Jack O'Malley).

162. *Id.* See also Lawrence, *supra* note 148, at 5.

163. Jennifer Lenhart, *Cops Beginning To Get Handle On Stalking Law*, CHI. TRIB., Nov. 30, 1992, at 1 (citing attorney Richard B. Harty).

164. "It's pretty hard to defend yourself against some phone calls that were allegedly made, or someone saying they saw you in a parking lot." *Id.* (quoting attorney Richard B. Harty).

165. See Resnick, *supra* note 147, at 3.

In contrast to questions of constitutionality, some critics have directed complaints at statutes which they claim are too narrow to protect the victim adequately.¹⁶⁶ In states that require "imminent" fear of death or serious bodily injury, statutory protection may be unavailable until it is too late.¹⁶⁷ Some jurisdictions' statutory definitions of stalking may leave an entire class of victims out of the scope of the legislation.¹⁶⁸

There has also been some debate about whether incarceration is the proper penalty for stalkers. Some have argued that when stalkers are released from prison, they are more angry than when they entered.¹⁶⁹ These critics suggest that people who stalk need psychological help, not jail.¹⁷⁰

Concerns regarding the effectiveness and constitutionality of various anti-stalking statutes have led the United States Congress to consider several bills that seek to evaluate existing legislation.¹⁷¹ Congress' eventual goal is to develop a model state law that would protect the victim while not infringing upon the accused's constitutional rights.¹⁷² Although there are many unanswered questions concerning the validity and efficiency of anti-stalking legislation, advocates still proclaim that the advantages outweigh the potential problems.

C. The Advantages of Anti-Stalking Legislation in Supplementing Civil Protection Orders

Although largely untested, anti-stalking legislation is widely supported by prosecutors,¹⁷³ organizations concerned with domestic violence,¹⁷⁴ and the police.¹⁷⁵ Stalking statutes are a means to stop abusive and violent behavior that was previously not criminal or was inadequately deterred

166. See Palmer, *supra* note 78.

167. *E.g.*, MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993).

168. *E.g.*, W. VA. CODE § 61-2-9a (Supp. 1992) (requires the victim to have formerly resided with the perpetrator).

169. Kolarik, *supra* note 2, at 36 (quoting Joseph V. Collina, Lake County, Ill. Public Defender).

170. *Id.*

171. For a list of some of the bills recently considered by the United States Congress, see *supra* note 151.

172. See generally Palmer, *supra* note 78.

173. See Kolarik, *supra* note 2, at 36.

174. See Anderson, *supra* note 6, at D1.

175. "The stalking law is supported nationally by police chiefs and police associations. It doesn't give police more power in making judgment calls on who is a stalker or not, but it does allow us to bring an alleged stalker into the station to see if there is enough evidence for charges instead of doing nothing. It is a deterrent and lets people know that threats are taken seriously." Kolarik, *supra* note 2, at 36 (quoting Elmhurst, Ill., Police Chief John Milner).

through the use of civil protection orders. Anti-stalking laws normally complement civil protection order legislation by working in conjunction with existing restraining orders and providing other options for stalking victims. Most stalking statutes largely meet the inadequacies inherent in civil protection order legislation.

One of the primary advantages that anti-stalking legislation affords is that it criminalizes conduct that previously was not illegal. Protective order legislation normally does not extend to psychological abuse,¹⁷⁶ and often does not cover threats of future violence.¹⁷⁷ Some protective order legislation requires the commission of actual violence before a victim is statutorily eligible for such an order.¹⁷⁸ In contrast, anti-stalking legislation allows police action in the face of threats or psychological abuse that place victims in fear for their life or of bodily harm.¹⁷⁹

Even when abusive conduct is within the scope of protective order legislation, a state may often deny a victim's access to it because some statutes require a relationship between the victim and the alleged stalker.¹⁸⁰ These restrictions eliminate protection to an entire class of victims. By comparison, states formulated most anti-stalking legislation to reach both victims of domestic violence and those who have no prior relationship with their attacker.¹⁸¹

Anti-stalking statutes eliminate other barriers present in protective order legislation, such as filing requirements to obtain a restraining order or to bring a civil contempt charge.¹⁸² As a criminal charge, the process is state-initiated and therefore the victim's burden is substantially reduced.

The inconsistent enforcement of civil protection order violations presumably will not be a characteristic of anti-stalking legislation. Because stalking is a criminal violation, police employ standard arrest procedures rather than the more uncertain actions that can be taken when a civil order is violated.¹⁸³ In addition, some statutes allow arrest without a warrant, which results in the immediate detention of an assailant when probable cause is present.¹⁸⁴ When the jurisdiction provides for the refusal of bail in appropriate circumstances,¹⁸⁵ it denies the assailant the op-

176. Grau, *supra* note 12, at 706.

177. Topliffe, *supra* note 11, at 1043 (citing P. FINN & S. COLSON, U.S. DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 12-13 (1990)).

178. *Id.*

179. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

180. Grau, *supra* note 12, at 706-07.

181. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

182. Topliffe, *supra* note 11, at 1044.

183. *See* text accompanying note 84 *supra*.

184. *E.g.*, FLA. STAT. ANN. § 784.048 (West Supp. 1993).

185. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

portunity to commit acts of violence or intimidation prior to his or her trial.

Sanctions found in stalking legislation are generally more severe than the penalties for civil protection order violations. Most statutes allow imprisonment of up to one year for stalking.¹⁸⁶ Subsequent offenses or an aggravated charge substantially increase the penalties.¹⁸⁷ These sanctions should provide the deterrence lacking in protective order legislation to prevent acts of violence and intimidation in many situations. Where the deterrence is insufficient, stalking legislation has the potential to remove the threat of future violence by placing the assailant in prison. Although no law will be sufficient to deter all individuals from committing acts of violence, anti-stalking legislation goes much further than protective orders in terms of preventing violence or removing the threat if abuse has occurred.

D. Additional Methods to Increase the Effectiveness of Anti-Stalking Legislation

Some states recently have experimented with other means to increase the effectiveness of anti-stalking legislation and domestic violence legislation in general. There are also additional measures that could be taken to secure the protection of stalking victims.

At least one state is employing technology to facilitate its anti-stalking legislation. Colorado is experimenting with an electronic system that sets off an alarm when a stalker approaches his or her victim.¹⁸⁸ The system requires known offenders to wear an electronic ankle bracelet.¹⁸⁹ If the stalker approaches, an alarm sounds on a receiver near the victim and sends a simultaneous signal to a communication center, which in turn alerts police.¹⁹⁰ The victim also has a "panic button" on the receiver if the assailant disconnects the bracelet before approaching.¹⁹¹

Some additional measures taken to combat domestic violence would also be beneficial to stalking victims. Massachusetts has funded a computerized system to track assailants who violate protective orders.¹⁹² In addition, Massachusetts' domestic violence program includes court confiscation of weapons from alleged abusers, and requires that victims of

186. *E.g.*, CAL. PENAL CODE § 646.9 (West Supp. 1992).

187. *E.g.*, ILL. ANN. STAT. ch. 720, para. 5/12-7.3 to 5/12-7.4 (Smith-Hurd 1993).

188. *Technology Takes Aim At Stalkers*, CHI. TRIB., Sept. 20, 1992, at 4.

189. *Id.*

190. *Id.*

191. *Id.*

192. Kolarik, *supra* note 2, at 36.

crime be notified that they can file criminal complaints as well as request restraining orders.¹⁹³

Another method that might enhance the protection of stalking victims would be to alter the common law rules governing the privilege of self-defense. These rules are often restrictive with regard to when an individual may use a weapon in self-defense.¹⁹⁴ Normally, states require an "imminent" threat, and defenders may not use a weapon unless he or she reasonably fears death, great bodily harm, or a forcible felony from an attacker.¹⁹⁵ These rules have considerable validity for governing encounters with strangers,¹⁹⁶ but one may question whether it makes sense to apply them in the same way to situations involving stalkers. Often victims will intimately know their assailants, and will have far less uncertainty about the probable behavior of the attacker.¹⁹⁷ Where the victim does not know, or only has a casual acquaintance with the attacker, repeated stalking conduct indicates great potential for violence in many situations. Perhaps states should lower the standard of self-defense in situations where the attacker is a demonstrated stalker.

A few states incorporate additional remedies to increase the effectiveness of stalking legislation, such as mandating psychological counseling for convicted stalkers.¹⁹⁸ These additional alternatives could further enhance the effectiveness of anti-stalking statutes in protecting victims of repeated abuse.

III. CONCLUSION

Prior to anti-stalking legislation, few options were available to victims of repeated abuse. States have employed civil protective orders as a means to eliminate stalking-type behavior, but this remedy was developed primarily as a means to address domestic violence. As a result, states denied many victims access to this form of protection. Even where civil protection orders were available, problems of enforcement and deterrence often made this remedy an ineffective option to many victims.

Anti-stalking statutes have been the legislative answer to the deficiencies of protection orders. States created this legislation to provide a viable option to stalking victims, who formerly had no effective protection through existing laws. Anti-stalking legislation reaches conduct that was previously either non-criminal or ineffectively deterred.

193. Walker, *supra* note 17, at 1.

194. Daniel D. Polsby, *Suppressing Domestic Violence With Law Reforms*, 83 J. CRIM. L. & CRIMINOLOGY 250, 252 (1992).

195. *Id.*

196. *Id.*

197. *Id.* at 253.

198. *E.g.*, MICH. COMP. LAWS ANN. §§ 750.411h to 750.411ii (West Supp. 1993).

While largely untested, the rapid growth in anti-stalking legislation indicates a widespread belief in its potential to reduce the incidents of violence connected with stalking behavior. Nonetheless, this new legislation has been subject to concerns about its constitutionality and effectiveness. As a result, the real impact of stalking legislation may ultimately be determined in the courtroom.

