ARE MICHIGAN'S ANTI STALKING LAWS ARE OVERBOARD AND UNCONSTITUTIONAL; AGAINST THE FIRST AMENDMENT RIGHTS BASED ON "SPEECH" AND "ONLINE", "TRUE-THREATS", "RECKLESSNESS " "SUBJECTIVE MENTAL- STATE REQUIREMENT" STANDARDS OF THE THREATENING NATURE; SET BY COUNTERMAN V. COLORADO DECISION MADE BY U.S. SUPREME CT?

MICHIGAN SUPREME COURT NEEDS TO CLARIFY DIFFERENCE BETWEEN TERRORISTIC THREAT (MCL 750.543m) AND AGGRAVATED STALKING (MCL 750.411i) STATUES; BASED ON;

COUNTERMAN VS COLORADO WAS DECIDED AFTER A PERSON COMMITTING AN AGGRAVATED STALKING, CAUSING EMOTIONAL DISTRESS ON ANOTHER PERSON. (knowingly .....make[ing] any form of communication with another person....that would cause a reasonable... person to suffer serious emotional distress).

U.S. SUPREME COURT HELD THAT TO ESTABLISH THAT A STATEMENT IS A "TRUE-THREAT" AND DID HE HAD A SUBJECTIVE THINKING WHILE UNKNOWINGLY COMMITTING THE ALLEGED CHARGE MEANING "MENS REA" (GUILTY MIND).

THE COUNTERMAN COURT CONCLUDED THAT THE PROSECUTION "MUST SHOW THAT THE DEFENDANT CONSCIOUSLY DISREGARDED A SUBSTANTIAL RISK THAT HIS COMMUNICATIONS WOULD BE VIEWED AS THREATENING VIOLENCE."

MICHIGAN SUPREME COURT SHOULD APPLY COUNTERMAN STANDARDS FOR STALKING CHARGES.

Stalking requires:

1) a willful course of conduct involving repeated or continuing harassment of another.
2) that the harassment would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested
3) that the harassment actually cause the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

EACH OF THESE ELEMENTS REQUIRES THE EXISTENCE OF HARASSMENT.

THE STATUE (MCL 750.411i) DEFINES HARASSMENT AS;

'conduct directed toward a victim that this conduct includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

"INCLUDES, BUT IS NOT LIMITED TO" phrase indicates that the type of contacts that follows this phrase (repeated unconsented contacts) do not necessarily exhaust the types of contacts which may constitute harassment.

THEREFORE MEANING OF HARASSMENT IS UNCERTAIN THIS MAKES MICHIGAN'S AGGRAVATED STALKING STATUE IS "UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

THE STATUE FAILS TO EXPLAIN WHAT THESE PHRASES MEAN :

"CONSTITUTIONALLY PROTECTED ACTIVITY" A CONDUCT THAT SERVES A LEGITIMATE PURPOSE "

THEREFORE, BECAUSE IT IS UNCLEAR WHAT TYPES OF ACTIVITY OR CONDUCT ARE REMOVED FROM THE HARASSMENT DEFINITION WHICH IS VAGUE AND IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS

THAT THE STATUE IS OVERBOARD AND INFRINGES UPON CONDUCT PROTECTED BY FIRST AMENDMENT. THAT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT: (a) fails to define the offense with sufficient definiteness such that ordinary person could understand what conduct is prohibited; and
(b) fails to establish adequate enforcement standards such that police officers are likely to engage in " ARBITRARY " enforcement.

ALTHOUGH THIS STATUTE CRIMINALIZES CONDUCT AND NOT SPEECH, IT FRINGES UPON A SUBSTANTIAL AMOUNT OF CONDUCT WHICH LIES AT THE CORE OF THE FIRST AMENDMENT.

COUNTERMAN CASE HAS TO DO WITH CRIMINALIZING THE COMMUNICATION OF "TRUE THREATS" WITHOUT REQUIRING THE PROSECUTION TO ESTABLISH THE DEFENDANT INTENDED OR KNEW THAT HIS WORDS WOULD BE CONSTRUED AS A TRUE THREAT COULD HAVE A CHILLING EFFECT ON CONSTITUTIONALLY PROTECTED SPEECH BECAUSE A "SPEAKER'S FEAR OF MISTAKING WHETHER A STATEMENT IS A THREAT; HIS FEAR OF THE LEGAL SYSTEM GETTING THAT JUDGEMENT WRONG; HIS FEAR, IN ANY EVENT OF INCURRING LEGAL COSTS.....MAY LEAD HIM TO SWALLOW WORDS THAT ARE IN FACT NOT "TRUE-THREATS". THEREFORE, THE COURT HELD THAT TO CONVICT A DEFENDANT OF AN OFFENSE INVOLVING THE COMMUNICATION OF A "TRUE THREAT", " [t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

IN REMAND FROM THE U.S. SUPREME COURT TO COLORADO COURT OF APPEALS, MR. COUNTERMAN DID NOT ARGUE THAT THE COLORADO STALKING STATUE WAS UNCONSTITUTIONAL BECAUSE IT LACKED A "MENS REA" ELEMENT, ONLY "THAT THE SUPREME COURT'S MANDATE REQUIRES REVERSAL AND THAT THE CASE BE REMANDED FOR A NEW TRIAL.

CONSTITUTIONALLY PROTECTED CONDUCT;
NOWWITHSTANDING ANY PROVISION IN THIS CHAPTER A PROSECUTION AGENCY SHALL NOT PROSECUTE ANY PERSON OR SEIZE ANY PROPERTY FOR CONDUCT PRESUMPTIVELY PROTECTED BY THE FIRST AMENDMENT OF CONSTITUTION OF THE U.S. IN A MANNER THAT VIOLATES ANY CONSTITUTION PROVISION.

HERE ARE THE "VAGUE" JURY INSTRUCTIONS FOR AGGRAVATED STALKING AND TERRORISTIC THREATS, BASED ON COUNTERMAN V. COLORADO

"TRUE THREATS" , MENS REA REQUIRED IN THE THREAT CASES.

THE STATE MUST PROVE IN "TRUE-THREATS" CASES THAT THE DEFENDANT HAD SOME UNDERSTANDING OF THIS STATEMENTS THREATENING CHARACTER.

A "RECKLESSNESS" STANDARD IS ENOUGH.

MI JURY INSTRUCTIONS 21.4

DEFINITION OF THREAT

A THREAT FOR THE PURPOSE OF EXTORTION IS A WRITTEN OR SPOKEN STATEMENT OF AN INTENT TO INJURE ANOTHER PERSON OR THAT PERSON'S PROPERTY OR FAMILY. A THREAT DOES NOT HAVE TO BE STATED IN ANY PARTICULAR WORDS. IT CAN BE SAID IN GENERAL OR VAGUE TERMS, WITHOUT SAYING EXACTLY WHAT KIND OF INJURY IS BEING THREATENED. IT CAN BE ALSO BE MADE BY SUGGESTION. HOWEVER, A THREAT HAS TO BE DEFINITE ENOUGH TO BE UNDERSTOOD BY A PERSON OF ORDINARY INTELLIGENCE AS BEING A THREAT OF INJURY.

SEE LATEST DECISION BY MICHIGAN COURT OF APPEALS ON 10/27/25, PEOPLE V. MEHARG, 2025 MICH APP. LEXIS 173, BASED ON TERRORISTIC THREATS COMMUNICATIONS, VACATED BASED ON "TRUE THREATS" STANDARDS BY COUNTERMAN V COLORADO.

MI JI 38.4

MAKING A TERRORIST THREAT ELEMENTS;
MCL 750.543m

FIRST THAT THE DEFENDANT COMMUNICATED WITH [IDENTIFY RECIPIENT(S) OF COMMUNICATION] BY SPEECH, WRITING, GESTURE, OR "CONDUCT"

SECOND, THAT DURING THE COURSE OF THE COMMUNICATION, THE DEFENDANT THREATENED TO COMMIT AN ACT OF TERRORISM. A THREAT DOES NOT HAVE TO BE STATED IN ANY PARTICULAR TERMS BUT MUST EXPRESS A WARNING OF DANGER OR HARM FURTHER, IT MUST HAVE BEEN A "TRUE THREAT" AND NOT HAVE BEEN SOMETHING LIKE IDLE TALK, OR A STATEMENT MADE IN JEST OR A POLITICAL COMMENT. IT MUST HAVE BEEN MADE UNDER CIRCUMSTANCES WHERE A REASONABLE PERSON WOULD THINK THAT OTHERS MAY TAKE THE THREAT SERIOUSLY AS EXPRESSING ON INTENT TO INFLICT HARM OR DAMAGE. TO PROVE THAT THE DEFENDANT THREATENED TO COMMIT AN ACT OF TERRORISM, THE PROSECUTOR MUST PROVE;

A) that the defendant communicated that he/she would commit the felony crime of (violent felony)
MCL 750.543(a) ACT OF TERRORISM element of the use, attempted use, or threatened use of physical force against on individual, or of the use, attempted use, or threatened use of harmful Biological substance, explosive, chemical, incendiary device

B) that the defendant knew or his reason to know that committing the felony would be dangerous to human life, meaning that committing the felony would cause a substantial likelihood of death or serious injury or the felony involved a kidnapping

C) that, by committing the felony the defendant would intend to intimidate, frighten, or coerce a civilian population, or influence or affect the conduct of government or a unit of government through intimidation or coercion.

IT DOES NOT MATTER WHETHER THE DEFENDANT ACTUALLY COULD COMMIT THE FELONY OR ACTUALLY INTENDED TO COMMIT THE CONDUCT, BUT ONLY WHETHER THE DEFENDANT THREATENED TO COMMIT THE FELONY AS AN ACT OF "TERRORISM".

MI JI 17.25 STALKING

MCL 750.411i(b)

STALKING MEANS A WILLFUL COURSE OF CONDUCT INVOLVING REPEATED OR CONTINUING HARASSMENT OF ANOTHER INDIVIDUAL THAT WOULD CAUSE A REASONABLE PERSON TO FEEL;
terrorized, frightened, intimidated, threatened, harassed or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested

AT LEAST ONE ADT OF UNCONSENTED CONTACT

"CREDIBLE THREAT" MEANS A THREAT TO KILL ANOTHER INDIVIDUAL OF A THREAT TO INFLICT PHYSICAL INJURY UPON ANOTHER INDIVIDUAL THAT IS MADE IN ANY "MANNER OR IN ANY CONTEXT" THAT CAUSES THE INDIVIDUAL HEARING OR RECEIVING THE THREAT TO REASONABLY FEAR FOR HIS OR HER SAFETY OR THE SAFETY OF ANOTHER INDIVIDUAL.

IF THE BASIS FOR AGGRAVATED STALKING PRIOR CONVICTION, DO NOT READ THIS ELEMENT;

CREDIBLE THREAT IS DEFINED AT MCL 750.411i(1)(B) By this definition, a "credible threat" appears to meet the "TRUE-THREAT" standard of "Virginia v. Black, 538 US 343 (2003).

..was committed in violation of court order/a condition of (parole and probation)

...was committed in violation of a restraining order of which the defendant had actual notice.

...included the defendant making one or more credible threats against a person, a member of person's family or someone living in (her/his) household. A credible threat is a threat to kill or physically injure a person made in a manner or context that causes the person hearing or receiving it to reasonably fear for his or her safety or safety of another person(s)

YOU HAVE HEARD EVIDENCE THAT THE DEFENDANT CONTINUED TO MAKE REPEATED UNCONSENTED CONTACT WITH COMPLAINANT AFTER HE/SHE REQUESTED THE DEFENDANT TO DISCONTINUE " CONDUCT " OR SOME DIFFERENT FORM OF UNCONSENTED CONTACT AND REQUESTED THE DEFENDANT TO REFRAIN FROM ANY FURTHER UNCONSENTED CONTACT.

IF YOU BELIEVE THAT EVIDENCE, YOU MAY, BUT ARE REQUIRED TO, "INFER" THAT THE CONTINUED COURSE OF "CONDUCT" CAUSED COMPLAINANT TO FEEL TERRORIZED, FRIGHTENED, INTIMIDATED, THREATENED, HARASSED, OR MOLESTED. EVEN IF YOU MAKE THAT INFERENCE, REMEMBER THAT THE PROSECUTOR STILL BEARS THE BURDEN OF PROVING ALL OF THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

IN KVASNICKA DECISION BY MICHIGAN SUPREME COURT THE LANGUAGE OF MCL 750.543m AND DETERMINED THAT IT DOES NOT REQUIRE THE PROSECUTION TO PROVE THAT THE DEFENDANT ACTED RECKLESSLY OR CONSCIOUSLY DISREGARDED A SUBSTANTIAL RISK THAT THEIR COMMUNICATION WOULD BE VIEWED AS THREATENING VIOLENCE.

This "SUBJECTIVE" mental state is required by the First Amendment as per U.S. Supreme Court decision in Counterman v. Colorado .

MENS REA, RECKLESSNESS

THE COUNTERMAN STANDARD REQUIRES THE PROSECUTION TO SHOW A DEFENDANT'S "SUBJECTIVE INTENT" BY AT LEAST A STANDARD OF "RECKLESSNESS." CONSTITUTIONAL FREE SPEECH PROTECTIONS BY IMPOSING CRIMINAL LIABILITY WITHOUT PROOF " that DEFENDANT consciously disregarded a substantial risk that his communications would be viewed as threatening violence."

THEREFORE :

I AM ASKING MICHIGAN SUPREME COURT TO APPLY COUNTERMAN STANDARDS TRULY MEANT FOR AGGRAVATED STALKING CHARGES AND CHANGE THE JURY INSTRUCTIONS ACCORDINGLY INCLUDING ANY COMMUNICATIONS COMMITTED BY ACCUSED COVERED UNDER BRANDENBURG V. OHIO STANDARDS (CLEAR AND PRESENT/IMMINENT DANGER)

PLEASE SEE ATTACHED SAMPLE "TRUE THREATS" BRIEF APPLIED ON/BASED ON ; MR. URAZ'S COMMUNICATIONS BASED ON; AGGRAVATED STALKING, SOLICITATION TO MURDER CHARGES, JAILHOUSE INFORMANT AND UNDERCOVER POLICE ENTRAPMENT COMMUNICATIONS

RESPECTFULLY SUBMITTED

TUNC URAZ

Tunc Uraz

VERIFICATION;

I, TUNC URAZ, DO HEREBY SWEAR UNDER PENALTY OF PERJURY AND ATTEST TO THE FOREGOING STATEMENTS IN THIS LETTER; BEING TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF ON THIS: 14th DAY OF : January 2026

TUNC URAZ

Tunc Uraz

PROOF OF MAILING:

ON 1/14/26 MR. TUNC URAZ MAILED
THIS AMICUS CURIAE AND A LETTER TO CLERK AND ITS ATTACHMENTS TO MICHIGAN SUPREME COURT CLERK'S OFFICE WITH VIA MDOC EXPEDITED MAIL TO:

MICHIGAN SUPREME COURT
OFFICE OF THE CLERK
PO BOX 30052
LANSING, MI 48909

TUNC URAZ

Tunc Uraz

1)TRUE-THREATS

WAS DEFENDANT'S FIRST AMENDMENT RIGHTS VIOLATED SINCE "THE MENS REA REQUIRED TO PROSECUTE ; WHERE "ISOLATED UTTERANCES" PERCEIVED AS "TRUE-THREATS" BASED SOLEY ON THEIR CONTENT; THE EVIDENCE USED AGAINST DEFENDANT DURING TRIAL; THE WRITTEN NOTES EXCHANGED BETWEEN HIM AND THE JAILHOUSE INFORMANT AND MR. URAZ WAS PURPOSEFULLY CONTACTED BY UNDERCOVER POLICE FRANK MOBLEY AS A HITMAN ; SHOULD HAVE BEEN INADMISSIBLE PER "HEARSAY STATEMENTS PER SE RULE" MRE 803(2)(3).

ELEMENTS OF THE SOLICITATION TO MURDER

1) The solicitor "PURPOSEFULLY" to have someone killed
2) Tries to " ENGAGE" someone to the killing.

PEOPLE V VANDERLINDER, 192 MICH APP 447 (1992)

FACTS AND BACKGROUND:

DEFENDANT WAS CHARGED BASED ON :

> jailhouse video visit conversation with undercover police, (see transcript)
>notes exchanged between jailhouse informant and defendant, (Reginald G. Close)
>alleged conversation(s) defendant had with jailhouse informant (REGINALD G. Close)
>alleged conversation(s) defendant had with jailhouse informant (Charles M. Allen)
>alleged letter/e-mail message sent by defendant to complainant; from an allegedly created fake e-mail account
>alleged phone call to complainant from jail
>alleged fake social media website created by defendant with postings

FACTS:

ON 08/31/2016, DEFENDANT REMANDED HIMSELF VOLUNTARILY TO INGHAM COUNTY JAIL PER HIS RETAINED ATTORNEY'S ADVICE TO START HIS "PRESUMED" JAIL SENTENCE EARLY FROM HIS FIRST AGGRAVATED STALKING CHARGE (AGAINST HIS EX GIRLFRIEND ERIKA MELKE) WHERE DEFENDANT ACCEPTED PLEA DEAL OF MAXIMUM 6 MONTHS IN JAIL. HIS RETAINED ATTORNEY THEN CHRIS BERGSTROM TOLD DEFENDANT THAT MAXIMUM HE WOULD GET FROM A JUDGE IS 3 MONTHS SINCE DEFENDANT DID NOT HAVE ANY CRIMINAL HISTORY.

HOWEVER ON 09/01/2016 AFTER SPENDING ONE NIGHT IN A GENERAL POPULATION. DEFENDANT WAS MOVED TO A SOLITARY CONFINEMENT FOR ALLEGEDLY CALLING HIS EX-GIRLFRIEND FROM JAIL. THIS REQUEST WAS MADE BY A VINDICTIVE PROSECUTOR AT THAT TIME AND JUDGE SIGNED THE MOTION WITHOUT ANY DUE PROCESS GIVEN TO DEFENDANT OR CHECKING THE FACTS.

IN FACT DEFENDANT DID/COULD NOT HAD MADE THOSE ALLEGED PHONE CALL(S) :

FIRST CALL WAS PLACED ON 09/01/2016 TO JAIL COMMISSARY TO PLACE AN ORDER AND HIS ATTORNEY. (SEE JAIL PHONE LOG ATTACHED)

THE TIME FRAME FOR THE ALLEGED CALLS WERE 9:05PM AND 9:10PM (see attached). HOWEVER IF ONE LOOKS AT THE JAIL MOVEMENT RECORDS; DEFENDANT WAS BOOKED AT 8:00PM AND THEN TRANSFERRED TO HIS POD/CELL BY 8:44PM. AT JAIL ONE'S PHONE PRIVILEGES ARE TURNED ON 24 HOURS LATER; NOT IMMEDIATELY. (see attached movement records)

HOWEVER DEFENDANT'S VERY INEFFECTIVE TRIAL ATTORNEY JACOB A. PERRONE (P71915) DID NOT INVESTIGATE ANYTHING RIGHT BEFORE THE TRIAL ALTHOUGH HE HAD 11 MONTHS TO GET READY.

DEFENDANT WAS PLACED IN SOLITARY CONFINEMENT "PURPOSEFULLY" FOR SOMETHING HE DIDN'T DO; FOR 30 DAYS WITH ALL HIS PHONE PRIVILEGES WERE TAKEN NEXT 10 MONTHS, HE WAS NOT ALLOWED TO CALL HIS FAMILY OR HIS ATTORNEY.

(ANY SOLITARY CONFINEMENT OVER 15 DAYS IS CONSIDERED TORTURE PER UNITED NATIONS NELSON MANDELA HUMANE TREATMENT OF PRISONERS)

(see lawsuit filed by defendant in 2019)

URAZ V. INGHAM COUNTY JAIL
UNITED STATES DISTRICT WESTERN DISTRICT OF MI SOUTHERN DIV. case# 1:19-CV-2019 (2019)

IT WAS DEFENDANT'S FIRST TIME BEING IN JAIL HE HAD A VERY TRAUMATIC EXPERIENCE (see attached solitary confinement essays) see websites published his experiences

DEFENDANT LOST HIS RATIONAL THINKING BECAUSE OF BEING PLACED IN A SOLITARY CONFINEMENT (See effects of long term solitary confinement

INGHAM COUNTY JAIL INSTEAD OF BLOCKING DEFENDANT'S PHONE ACCESS, JAIL PUT THE DEFENDANT IN A SOLITARY CONFINMENT.

AFTER 30 DAYS OF SOLITARY CONFINEMENT:
DEFENDANT WAS PLACED WITH JAILHOUSE INFORMANTS (REGINALD G. CLOSE AND CHARLES M. ALLEN) "PURPOSEFULLY" IN THE SAME CELL FOR 7 DAYS AND THEN ANOTHER 30 DAYS IN THE SAME POST/DORM.

DURING 7 DAYS AND 30 DAYS FOLLOWING DEFENDANT WAS TRICKED INTO WRITE SOME SENTENCES IN A CONVERSATION FORM (see attached) BECAUSE HE WAS TOLD BY JAILHOUSE INFORMANT THAT CONVERSATIONS ARE BEING RECORDED BETWEEN INMATES WHICH WAS TAKEN BY A JAILHOUSE INFORMANT (UNDER THE DISGUISE OF BEING DISCARDED AND GIVEN TO HIS ATTORNEY BY HIM TO GET BETTER DEALS FOR HIS CHARGES. (SEE TRIAL TRANSCRIPTS 11/06/2017 PGS.

BOTH JAILHOUSE INFORMANTS GIVEN IMMUNITY FOR THEIR TESTIMONY AND THEIR TESTIMONY AND WHAT THEY REVEALED WERE ALL BASED ON LIES, MADE UP STORIES AND TAKEN OUT OF CONTEXT. (SEE ATTACHED IMMUNITY DOCUMENTS AND BRIEFS PROVIDED)

DEFENDANT WAS ALSO ACCUSED OF ALLEGEDLY SENDING COMPLAINANT MELKE AN E-MAIL MESSAGE FROM AN FAKE CREATED ACCOUNT, CHANGING HER PASSWORD FOR HER FACEBOOK ACCOUNT AND CREATING A FAKE INSTAGRAM ACCOUNT FROM AN EXPIRED IP ADDRESSES WHICH BELONG THE

COMPANY WHO MANAGED INTERNET SERVICES FOR THE SEPARATE APARTMENT COMPLEXES THAT DEFENDANT (EAST LANSING) AND COMPLAINANT (LANSING) LIVED AT THAT TIME (SPARTAN NET). BECAUSE THE SERVERS FOR IP ADDRESSES AND THE HEADQUARTERS OF THE COMPANY WAS IN EAST LANSING, EVERY IP ADDRESSES LOCATIONS WERE SHOWING IN EAST LANSING. IP ADDRESSES WERE ASSIGNED DAILY TO THE APARTMENTS/UNITS USING THEM DAILY HOWEVER THE MAC (MACHINE ACCESS CODES (MAC) ARE ASSIGNED INDIVIDUALLY TO THE DEVICE THAT ONE IS USING ANY GIVEN TIME. (see attached briefs about IP ADDRESSES and GPS tracking)

SPARTAN-NET HAD A "DYNAMIC" IP's (TEMPORARY) assigned to APARTMENT COMPLEX DEFENDANT ALLEGEDLY AT NOT A "STATIC" (PERMANENT) IP ADDRESES. AS THE TESTIMONY SHOWED THE IP ADDRESSES USED COULD HAVE BEEN BELONG TO ANY UNITS AT THAT ADDRESS

JOINDER OF UNRELATED CHARGES PER MCR 6.120 OF AGGRAVATED STALKING AND SOLICITATION TO MURDER CHARGES DURING TRIAL PREJUDICED DEFENDANT WHICH CREATED CONFUSION ON JURY TO SEPARATE THE ISSUES ; DEFENDANT'S FIFTH AMENDMENT RIGHTS WERE VIOLATED WHERE THE SAME EVIDENCE(S) WERE USED FOR BOTH CHARGES DURING TRIAL BASED ON "FALSITY OF INFERENCES"

2) TRUE-THREATS

ANALYSIS:

MICHIGAN SUPREME COURT NEED TO CLARIFY THAT; MICHIGAN LAW HAS NO "PER SE RULE" EXCLUDING A SELF-SERVING HEARSAY STATEMENT
HOLDING THAT "LIKE ANY OTHER HEARSAY STATEMENT, A DEFENDANT'S SELF-SERVING HEARSAY STATEMENT SHOULD NOT BE ADMISSIBLE IF IT SATISFIES A HEARSAY-RULE EXCEPTION IN THE MICHIGAN OF EVIDENCE (MRE)801, 802, 803

THE SELF-SERVING NATURE OF DEFENDANT'S HEARSAY STATEMENT(S) (NOTES/WRITINGS EXCHANGED BETWEEN DEFENDANT AND JAILHOUSE INFORMATION R. CLOSE) SHOULD HAVE BEEN INADMISSIBLE TO THE EVIDENCE USED AGAINST THE DEFENDANT. (THE NOTES EXCHANGED IN WRITING) DID RENDER THE STATEMENT AUTOMATICALLY ADMISSIBLE BECAUSE THE (THE NOTES) FIT WITHIN THE SCOPE OF " EXCITED UTTERANCE" EXCEPTION IN MRE 802(2)(3)

DEFENDANT'S MENTALLY IMPAIRED ATTORNEY SHOULD HAVE MOTIONED THE COURT BEFORE TRIAL NOT TO ADMIT THE NOTES EXCHANGED IN WRITING BETWEEN DEFENDANT AND JAILHOUSE INFORMANT R. CLOSE. THEY (NOTES) WERE HEARSAY IT SHOULD NOT HAVE BEEN ADMITTED IN EVIDENCE PER "AN EXCITED UTTERANCE" AS IN:

MRE 803 Hearsay exceptions; ability of declarant IMMATERIAL;

(1) A PRESENT SENSE AND IMPRESSION; A STATEMENT DESCRIBING OR EXPLAINING AN EVENT OR CONDITION MADE WHILE THE DECLARANT WAS PERCEIVING THE EVENT OR CONDITION, OR IMMEDIATELY THEREAFTER.

(2) EXCITED UTTERANCES : A statement relating to a "startling event or condition made while the declarant was under the stress of excitement caused by event or condition".

3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A STATEMENT OF DECLARANT'S THEN EXISTING STATE OF MIND, EMOTION, SENSATION, OR PHYSICAL CONDITION (SUCH AS INTENT, PLAN, MOTIVE, DESIGN, MENTAL FEELING, PAIN, AND BODILY HEALTH), BUT INCLUDING A STATEMENT OF MEMORY OR BELIEF TO PROVE THE FACT REMEMBERED OR BELIEVED UNLESS IT RELATES TO THE EXECUTION, REVOCATION, IDENTIFICATION, OR TERMS OF DECLARANT'S WILL.

(24) Other exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that
(A) The statement is offered as evidence of a material fact
(B) the statement is more probative on the point for which it is offered than any other evidence that proponent can procure through reasonable efforts, and
(C) the general purposes of these rules and the interest of justice will be best served by admission of the statement into evidence. However, a statement MAY NOT BE ADMITTED UNDER THIS EXCEPTION UNLESS THE PROPONENT OF THE STATEMENT MAKES KNOWN TO ADVERSE PARTY, SUFFICIENTLY IN ADVANCE OF TRIAL OR HEARING TO PROVIDE THE ADVERSE PARTY WITH FAIR OPPORTUNITY TO PREPARE TO MEET IT, THE PROPONENTS INTENTION TO OFFER THE STATEMENT AND THE PARTICULARS OF IT, INCLUDING THE NAME AND THE ADDRESS OF THE DECLARANT.

THE SUPREME COURT OF UNITED STATES HELD THAT CRIMINAL LIABILITY FOR "TRUE-THREATS" WHICH ARE NOT PROTECTED BY THE FIRST AMENDMENT, REQUIRES A PROOF THAT THE DEFENDANT HAD SUBJECTIVE UNDERSTANDING OF THE THREATENING NATURE OF THE STATEMENTS FURTHER HELD THAT A MENTAL STATE OF RECKLESSNESS IS SUFFICIENT BECAUSE IT PROVIDES ENOUGH BREATHING SPACE FOR PROTECTED SPEECH WITHOUT SACRIFICING TO MANY OF THE BENEFITS OF ENFORCING LAWS PROHIBITING "TRUE- THREATS".

COUNTERMAN V COLORADO 2023 U.S. LEXIS 2788 (2023) SUPREME COURT OF UNITED STATES

FOR TRUE THREATS OF VIOLENCE THAT ARE OUTSIDE THE BOUNDS OF FIRST AMENDMENT PROTECTION.

THE FIRST AMENDMENT STILL REQUIRES PROOF THAT A DEFENDANT HAD SOME SUBJECTIVE UNDERSTANDING OF THE THREATENING NATURE OF HIS STATEMENTS, BUT A MENTAL STATE OF "RECKLESSNESS" IS SUFFICIENT BECAUSE IT "OFFERS" ENOUGH BREATHING SPACE FOR PROTECTED SPEECH, WITHOUT SACRIFICING TO MANY OF THE BENEFITS OF ENFORCING LAWS AGAINST 'TRUE THREATS'.

THE STATE MUST SHOW THAT THE DEFENDANT CONSCIOUSLY DISREGARDED A SUBSTANTIAL RISK THAT HIS COMMUNICATIONS WOULD BE VIEWED AS THREATENING VIOLENCE.

PETITIONER'S PROSECUTION IN ACCORDANCE WITH AN "OBJECTIVE STANDARD" WAS A VIOLATION OF THE FIRST AMENDMENT, BECAUSE THE STATE HAD TO SHOW ONLY THAT A REASONABLE PERSON WOULD UNDERSTAND HIS STATEMENTS AS THREATS, AND DID NOT HAVE TO SHOW ANY AWARENESS ON HIS PART THAT THE STATEMENTS COULD BE UNDERSTOOD THAT WAY.

COURTS ARE DIVIDED ABOUT ;
1) WHETHER THE FIRST AMENDMENT REQUIRES PROOF OF A DEFENDANT'S SUBJECTIVE MINDSET IN "TRUE-THREATS" CASES AND;
2) IF SO, WHAT "MENS REA" STANDARD IS SUFFICIENT

COUNTERMAN WAS PROSECUTED IN ACCORDANCE WITH AN "OBJECTIVE STANDARD". THE STATE HAD TO SHOW ONLY THAT A REASONABLE PERSON WOULD UNDERSTAND HIS STATEMENTS AS THREATS. IT DID NOT HAVE TO SHOW ANY AWARENESS ON HIS PART THAT THE STATEMENTS COULD BE UNDERSTOOD THAT WAY. FOR THE REASONS STATED, THAT IS VIOLATION OF THE FIRST AMENDMENT.

THE STATE MUST PROVE IN " TRUE-THREATS " CASES THAT THE DEFENDANT HAD SOME UNDERSTANDING OF THIS STATEMENTS THREATENING CHARACTER.
A "RECKLESSNESS" STANDARD IS ENOUGH.

WHETHER DEFENDANT INTENDED TO HARM ANYONE IS NOT AT ISSUE.

"TRUE-THREATS" "MENS REA" REQUIRED IN THE THREAT CASES.

3) TRUE-THREATS

THE COURT STATED THAT THE "TRUE" DISTINGUISHES TRUE THREATS FROM MERE "HYPERBOLE" OR OTHER STATEMENTS THAT DO NOT COMMUNICATE A GENUINE LIKELIHOOD OF VIOLENCE WILL ENSUE WHEN TAKEN IN CONTEXT, e.g., "I AM GOING TO KILL YOU FOR SHOWING UP LATE" WATTS V UNITED STATES 394 U.S. 15 (1969) (per curiam).

TRUE THREATS ARE SERIOUS EXPRESSIONS COMMUNICATING THAT THE SPEAKER MEANS TO "COMMIT AN ACT OF UNLAWFUL VIOLENCE"
(Virginia v Black 538 U.S. 343 (2003)).

THE SPEAKER'S AWARENESS AND INTENT THAT THEIR STATEMENT CONVEYS A THREATENING MESSAGE ARE NOT RELEVANT IN DETERMINING WHETHER A STATEMENT IS A THREAT, WHETHER A STATEMENT IS A THREAT DEPENDS ON "WHAT THE STATEMENT CONVEYS" TO THE PERSON ON THE RECEIVING END OF THE STATEMENT, NOT THE MENTAL STATE OF THE SPEAKER.

THE STANDARD AGAIN IS "RECKLESSNESS". IT OFFERS 'ENOUGH BREATHING SPACE FOR PROTECTED SPEECH" WITHOUT SACRIFICING TOO MANY OF THE BENEFITS OF ENFORCING LAWS AGAINST "TRUE-THREATS" ELONIS 575 US AT 748, 135 S.CT 2001, 192 LEd. 2d 1

THE OTHER "HISTORIC AND TRADITIONAL CATEGORIES" OF UNPROTECTED SPEECH ARE:
(1) INCITEMENT - STATEMENTS INTENDED TO RESULT IN "IMMINENT LAWLESS ACTION" AND LIKELY TO DO SO, BRANDENBURG V OHIO 395 U.S. 444 (1969)
2) DEFAMATION - FALSE STATEMENTS OF FACT CAUSING HARM TO ONE'S REPUTATION. GERTZ V ROBERT WELCH INC, 418 U.S. 323 (1974)
3) OBSCENITY - VALUELESS MATERIAL APPEALING "TO THE PRURIENT INTEREST" AND DESCRIBING "SEXUAL CONDUCT" IN "A PATENTLY OFFENSIVE WAY" MILLER V CALIFORNIA, 413 U.S. 15 (1973)

HOWEVER, THE COURT EXPLAINED THAT BECAUSE OF CHILLING EFFECT ON PROTECTED SPEECH, THE FIRST AMENDMENT MAY STILL IMPOSE A "SUBJECTIVE MENTAL- STATE REQUIREMENT" THAT WOULD HAVE THE EFFECT OF "SHIELDING" SOME TRUE THREATS FROM CRIMINAL LIABILITY. (Philadelphia newspapers Inc V HEPPS, 475 US 767 (1986). RESTRICTIONS ON SPEECH THAT HAVE THE POTENTIAL TO CAUSE SPEAKERS TO ENGAGE IN "SELF-CENSORSHIP" FOR FEAR OF INADVERTENTLY CROSSING OVER THE LINE TO PROHIBITED SPEECH OR OUT OF WORRY ABOUT THE EXPENSE OF BECOMING ENTANGLED IN THE LEGAL SYSTEM ARE FROWNED UPON BY THE SUPREME COURT. GERTZ..

THE COURT FURTHER EXPLAINED THAT IN ORDER TO PROTECT AGAINST SPEAKERS EXERCISING SELF-CENSORSHIP AND STEERING WELL CLEAR OF EVEN LAWFUL SPEECH APPROACHING THE "UNLAWFUL ZONE", THE REQUIREMENT OF A CULPABLE MENTAL STATE FOR IMPOSING CRIMINAL LIABILITY IS " AN IMPORTANT TOOL TO PREVENT " SUCH SELF-CENSORING BEHAVIOR. SPEISER V RANDALL, 357 U.S. 513 (1958). BUT THIS PROTECTION COMES AT COST: "IT WILL SHIELD SOME OTHERWISE PROSCRIBABLE (HERE, THREATENING) SPEECH BECAUSE THE STATE CANNOT PROVE WHAT THE DEFENDANT THOUGHT", ACCORDING TO THE COURT. SEE MISHKIN V NEW YORK 383 U.S. 502 (1966).

THIS "STRATEGIC PROTECTION" IS PART OF THE PRECEDENTIAL CASE LAW FOR CATEGORIES OF UNPROTECTED SPEECH. FOR EXAMPLE, SUPREME COURT HAS HELD THAT DEFAMATION HAS "NO

CONSTITUTIONAL" id., YET A PUBLIC FIGURE MUST PROVE THE SPEAKER ACTED WITH "KNOWLEDGE THAT [THE STATEMENT] WAS FALSE OR WITH RECKLESS DISREGARD OF WHETHER IT WAS FALSE OR NOT." (New York Times Co. V Sullivan, 376 U.S. 254 (1964)). THE SUPREME COURT HAS DETERMINED THAT THE FIRST AMENDMENT "REQUIRES THAT WE PROTECT SOME FALSEHOOD IN ORDER TO PROTECT SPEECH THAT MATTERS." GERTZ.

SIMILARLY, WITH "INCITEMENT", THE FIRST AMENDMENT PROHIBITS CIVIL OR CRIMINAL PUNISHMENT UNLESS THE SPEAKER'S WORDS ARE "INTENDED", NOT JUST LIKELY, TO PRODUCE IMMINENT LAWLESS ACTION. HESS V INDIANA, 414 U.S. 105 (1973)(per curiam). THIS MENS REA REQUIREMENT HELPS PREVENT A LAW FROM CHILLING " MERE ADVOCACY " OF ILLEGAL ACTS, WHICH IS PROTECTED FIRST AMENDMENT SPEECH. (Brandenburg)

PRESENT CASE COUNTERMAN V. COLORADO, THE COURT STATED THAT THE REASONING THAT APPLIES TO THE OTHER UNPROTECT CATEGORIES OF SPEECH ALSO FAVORS "REQUIRING SUBJECTIVE ELEMENT IN A TRUE -THREATS CASE".
THE COURT REJECTED A SOLELY OBJECTIVE STANDARD BASED ON HOW "REASONABLE OBSERVERS WOULD CONSTRUE A STATEMENT IN CONTEXT" BECAUSE IT WOULD "DISCOURAGE THE UNINHIBITED, ROBUST, AND WIDE-OPEN DEBATE THAT THE FIRST AMENDMENT IS INTENDED TO PROTECT". ROGERS V. UNITED STATES,422 U.S. 35 (1975).
THUS, THE COURT'S CONCERN FOR NOT CHILLING
"NON-THERATENING EXPRESSION" COMPELLED IT TO HOLD :
"THE STATE MUST PROVE IN TRUE IN TRUE-THREATS CASES THAT DEFENDANT HAD SOME UNDERSTANDING OF HIS STATEMENTS' THREATENING CHARACTER".

THE COURT THEN TURNED TO THE ISSUE OF WHICH TYPE OF SUBJECTIVE STANDARD SHOULD BE ADOPTED. IT CHOSE AT LEAST CULPABLE LEVEL OF MENS REA AND EASIEST TO PROVE, VIZ., RECKLESSNESS. IN THE CONTEXT OF THREATS, RECKLESSNESS MEANS SPEAKER IS AWARE "THAT OTHERS COULD REGARD HIS STATEMENTS AS" THREATENING VIOLENCE AND "DELIVERS THEM AWAY". (ELONIS).

THE COURT REASONED THAT RECKLESSNESS IS THE APPROPRIATE MENS REA BECAUSE SUCH DEFENDANTS " HAVE CONSCIOUSLY ACCEPTED A SUBSTANTIAL RISK OF INFLICTING SERIOUS HARM" AND RECKLESSNESS OFFERS SUFFICIENT "BREATHING SPACE" FOR PROTECTED SPEECH "WITHOUT SACRIFICING TOO MANY BENEFITS OF ENFORCING LAWS AGAINST TRUE-THREATS.

THE COURT CONCLUDED THAT COUNTERMAN V COLORADO CONVICTION VIOLATES THE FIRST AMENDMENT BECAUSE HE WAS PROSECUTED IN ACCORDANCE WITH AN OBJECTIVE STANDARD.

THE STATE ONLY HAD TO ESTABLISH THAT A REASONABLE PERSON WOULD UNDERSTAND HIS FACEBOOK STATEMENTS AS THREATS BUT DID NOT HAVE TO SHOW THAT HE HAD ANY AWARENESS THAT HIS STATEMENTS COULD BE UNDERSTOOD THAT WAY BY OTHERS.

4) TRUE-THREATS

(opinion of Alito J.)
AS WITH BALANCE, SOMETHING IS LOST ON BOTH SIDES; THE RULE WE ADAPT TODAY IS NEITHER THE MOST SPEECH -PROTECTIVE NOR THE MOST SENSITIVE TO DANGERS OF TRUE-THREATS. BUT IN DECLINING ONE OF THOSE TWO ALTERNATIVE PATH'S SOMETHING MORE IMPORTANT IS GAINED; NOT "HAVING IT ALL ___ BECAUSE THAT IS IMPOSSIBLE ___ BUT HAVING MUCH OF WHAT IS IMPORTANT ON BOTH SIDES OF THE SCALE.

PROSECUTION OF STALKING RAISES FEWER FIRST AMENDMENT CONCERNS FOR A VARIETY OF REASONS.

STALKING CAN BE CARRIED OUT THROUGH SPEECH BUT NEED NOT TO BE WHICH REQUIRES LESS FIRST AMENDMENT SCRUTINY WHEN SPEECH IS SWEPT IN. RUMSFIELD V FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS INC 547 US 47 (2006).

THE MENS REA REQUIRED TO PROSECUTE " ISOLATED UTTERANCES" BASED SOLELY ON THEIR CONTENT.

THEREFORE DEFENDANT IS ASKING THIS HONORABLE COURT TO DISMISS AND SUPPRESS ANY EVIDENCE (ISOLATED UTTERANCES) USED TO CONVICT HIM IN JOINT CHARGES OF (AGGV. STALKING AND SOLICITATION TO MURDER CHARGES) BASED ON OBJECTIVE STANDARD OF RECKLESSNESS WHICH VIOLATED DEFENDANT'S FIRST AMENDMENT RIGHTS.

TRUE-THREATS" CASES AGGRAVATED STALKING CASE PRECEDENTS

BUCHANAN V CRISLER 922 N.W. 2d 886 (2018)
TM V MZ 326 MICH APP 227 (2018)
CNN V SEB 2023 MICH APP LEXIS 269 (2023)

IS MICHIGAN ANTI STALKING LAWS ARE OVERBOARD AND UNCONSTITUTIONAL; AGAINST THE FIRST AMENDMENT RIGHTS BASED ON ONLINE "TRUE-THREATS" STANDARDS SET BY LATEST DECISION MADE BY UNITED STATES SUPREME COURT?

OUTCOME :

WE THEREFORE GRANTED CERTIORARI ;
598 U.S. _____ (2023)

JUDGEMENT VACATED AND REMANDED; 7-2 DECISION, 1 CONCURRENCE IN JUDGEMENT, 1 DISSENT

(opinion of Alito J.)
AS WITH BALANCE, SOMETHING IS LOST ON BOTH SIDES; THE RULE WE ADAPT TODAY IS NEITHER THE MOST SPEECH -PROTECTIVE NOR THE MOST SENSITIVE TO DANGERS OF TRUE-THREATS. BUT IN DECLINING ONE OF THOSE TWO ALTERNATIVE PATH'S SOMETHING MORE IMPORTANT IS GAINED; NOT "HAVING IT ALL ___ BECAUSE THAT IS IMPOSSIBLE ___ BUT HAVING MUCH OF WHAT IS IMPORTANT ON

BOTH SIDES OF THE SCALE.

PROSECUTION OF STALKING RAISES FEWER FIRST AMENDMENT CONCERNS FOR A VARIETY OF REASONS.

STALKING CAN BE CARRIED OUT THROUGH SPEECH BUT NEED NOT TO BE WHICH REQUIRES LESS FIRST AMENDMENT SCRUTINY WHEN SPEECH IS SWEPT IN. RUMSFIELD V FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS INC 547 US 47 (2006).

THE MENS REA REQUIRED TO PROSECUTE " ISOLATED UTTERANCES" BASED SOLEY ON THEIR CONTENT.

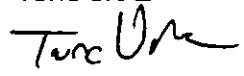
STALKING PROSECUTIONS THAT DO NOT RELY ON THE CONTENT OF COMMUNICATION WOULD RAISE EVEN FEVER FIRST AMENDMENT CONCERNS.

COUNTERMAN WAS PROSECUTED IN ACCORDANCE WITH AN OBJECTIVE STANDARD SEE SUPRA 3. THE STATE HAD TO SHOW ONLY THAT A REASONABLE PERSON WOULD UNDERSTAND HIS STATEMENTS AS THREATS. IT DID NOT HAVE TO SHOW ANY AWARENESS ON HIS PART THAT THE STATEMENTS COULD BE UNDERSTOOD THAT WAY, FOR THE REASONS STATED, THAT IS A VIOLATION OF THE FIRST AMENDMENT.

THEREFORE DEFENDANT IS ASKING THIS HONORABLE COURT TO REVERSE THE CHARGES OF SECOND AGGRAVATED STALKING BASED ON PROSECUTOR'S VINDICTIVENESS AND BASED ON AN ALLEGED, PHONE CALL FROM JAIL, ALLEGED E-MAIL MESSAGE/LETTER COMPLAINANT RECEIVED FROM AN EMAIL ACCOUNT BELONGS TO HER SINCE 2009(SHE SENT IT TO HERSELF) AND TRUE-THREAT STANDARDS EXPLAINED IN RECENT U.S. SUPREME COURT DECISION.

RESPECTFULLY SUBMITTED

TUNC URAZ



FOOTNOTES:
"TRUE-THREATS" CASES AGGRAVATED STALKING CASE PRECEDENTS

BUCHANAN V CRISLER 922 N.W. 2d 886 (2018)
TM V MZ 326 MICH APP 227 (2018)
CNN V SEB 2023 MICH APP LEXIS 269 (2023)

IS MICHIGAN ANTI STALKING LAWS ARE OVERBOARD AND UNCONSTITUTIONAL; AGAINST THE FIRST AMENDMENT RIGHTS BASED ON ONLINE "TRUE-THREATS" STANDARDS SET BY LATEST DECISION MADE BY UNITED STATES SUPREME COURT?

5) TRUE-THREATS

JDT V. DMT (IN RE DMT), 2025 MICH APP LEXIS 1392, 02/19/2025

BASED AGGRAVATED STALKING (MCLS 750.411i) AND PROBATION VIOLATION MCL 600.1715(1) WAS PREDICATED ON DEFENDANT'S CONSTITUTIONALLY PROTECTED SPEECH.

THREATENING/ INTIMIDATING BEHAVIOR TOWARD COMPLAINANT" (MELKE) SHE ARGUED THAT ALLEGED E-MAIL MESSAGE/ PHONE CALL FROM JAIL/ SOCIAL MEDIA POSTINGS CAUSED HER TO FEEL THREATENED AND INTIMIDATED, AND DEFENDANT'S SPEECH WAS NOT PROTECTED UNDER THE FIRST AMENDMENT BECAUSE THE LANGUAGE IN HIS ALLEGED ACTIONS CONSTITUTED FIGHTING WORDS.

DEFENDANT CONTENDS THAT THE TRIAL COURT VIOLATED HIS FIRST AMENDMENT RIGHTS BY FINDING HIM GUILTY OF AN AGGRAVATED STALKING BASED ON CONSTITUTIONALLY PROTECTED SPEECH. THIS SHOULD BE REVIEWED AS CIRCUIT COURT JUDGE'S UNFAIR JOINDER OF HIGHLY PREJUDICIAL CHARGES (AGGRAVATED STALKING AND SOLICITATION TO MURDER MCL 750.157(B)(2)) AND JURY INSTRUCTIONS REGARDING TO AGGRAVATED STALKING DETERMINING JURY'S DECISION FOR AN ABUSE OF DISCRETION. (People v. Breeding, 284 MICH APP 47) (2009). A COURT ABUSES ITS DISCRETION WHEN ITS DECISION FALLS OUTSIDE THE RANGE OF REASONABLE AND PRINCIPLED OUTCOMES OR IS "PREMISED ON AN ERROR OF LAW." (People v .Smith, Mich App NW 3rd (2024).

CONSTITUTIONAL QUESTIONS SHOULD REVIEWED DE NOVO. TM V. MZ (on remand) 326 Mich App 227:(2018).

THE FIRST AMENDMENT, APPLICABLE TO THE STATES THROUGH FOURTEENTH AMENDMENT PROVIDES THAT "CONGRESS SHALL MAKE NO LAW....ABRIDGING THE FREEDOM OF SPEECH."
VIRGINIA V. BLACK 538 U.S. 343 (2003) QUOTING U.S. CONST. AMEND. I, "PROTECTED SPEECH UNDER FIRST AMEND. INCLUDES EXPRESSIONS OR IDEAS THAT THE OVERWHELMING MAJORITY OF PEOPLE MIGHT FIND DISTASTEFUL OR DISCOMFORTING". (People v. Johnson 340 Mich App 531 (2022). "HOWEVER, THE RIGHT TO SPEAK FREELY IS NOT ABSOLUTE" (cleaned up), "STATES MAY RESTRICT CERTAIN CATEGORIES OF SPEECH THAT " BY THEIR VERY UTTERANCE INFLICT INJURY OR TEND TO INCITE AN IMMEDIATE BREACH OF THE PEACE, SUCH AS "FIGHTING WORDS" AND "TRUE THREATS". TT V. KL, 334 MICH APP 413 (2020) (cleaned up).

(A) TRUE-THREATS ANALYSIS FOR AGGRAVATED STALKING INSTEAD FOCUSING ON DEFENDANT'S SUBJECTIVE FEELINGS OF INTIMIDATION

THE TRIAL COURT ERRED IN FINDING THAT DEFENDANT'S; ALLEGED E-MAIL/MESSAGE, ALLEGED PHONE CALL FROM JAIL "I HOPE YOU ARE HAPPY", ALLEGED INSTAGRAM POSTINGS WERE "CONSTITUTIONAL FIGHTING WORDS", THE DEFENDANT'S LANGUAGE/ACTIONS MIGHT PROVOKE VIOLENCE IF DELIVERED INPERSON, THE FACT THAT IT WAS COMMUNICATION ALLEGED VIA E-MAIL/PHONE/SOCIAL MEDIA " FAR REMOVED FROM ANY POTENTIAL VIOLENCE -- RENDERS IT UNLIKELY TO PROVOKE A VIOLENT REACTION, THERE THE MEDIUM OF COMMUNICATION ALL FACTOR IN DETERMINING WHETHER THE SPEECH CONSTITUTES FIGHTING WORDS, AND THE TRIAL COURT ERRED BY DISREGARDING IT.

THE TRIAL COURT ERRED IN CONCLUDING THAT DEFENDANT'S SPEECH WAS NOT PROTECTED BY THE FIRST AMENDMENT BECAUSE IT WAS PERCEIVED AS/IN THREATENING IN NATURE. THE RIGHT TO FREE SPEECH DOES NOT EXTEND TO "TRUE THREATS " WHICH ARE DEFINED AS STATEMENTS IN WHICH "THE SPEAKER MEANS TO COMMUNICATE A SERIOUS EXPRESSION OF AN INTENT TO COMMIT AN ACT OF UNLAWFUL VIOLENCE TO PARTICULAR INDIVIDUAL OR GROUP OF INDIVIDUALS. (People v. Burkman, 513 Mich 300 (2024) quoting VIRGINIA V. BLACK 538 U.S. AT 539. "

"EXCLUDED FROM THIS CATEGORY ARE ;
JESTS, HYPERBOLE, OR OTHER STATEMENTS WHOSE CONTEXT INDICATES NO REAL POSSIBILITY THAT VIOLENCE WILL FOLLOW" BURKMAN, 513 MICH AT 329.

TO ESTABLISH A TRUE THREAT, "[T]HE STATE MUST SHOW THAT DEFENDANT CONSCIOUSLY DISREGARDED A SUBSTANTIAL RISK THAT HIS ALLEGED COMMUNICATIONS WOULD BE VIEWED AS THREATENING VIOLENCE", COUNTERMAN V. COLORADO 600 U.S. 66 (2023).

THE TRUE-THREAT EXCEPTION TO THE FIRST AMEND. ENCOMPASSES ONLY PHYSICAL THREATS AND OUR SUPREME COURT EXPLICITLY DECLINED TO EXTEND THE EXCEPTION TO ENCOMPASS "NON PHYSICAL THREATS". BURKMAN 513 MICH AT 331.

THE TRIAL COURT AND MI COURT OF APPEALS AND MI SUPREME COURT FAILED TO CONDUCT A TRUE-THREAT ANALYSIS, INSTEAD FOCUSING ON COMPLAINANT'S (MELKE) SUBJECTIVE FEELINGS OF INTIMIDATION. IN SUPPORT OF ITS FINDING THAT DEFENDANT'S ALLEGED ACTIONS WERE THREATENING AND, THUS NOT CONSTITUTIONALLY PROTECTED. (BETWEEN 08/27/2016 AND 08/31/2016, ALLEGED E-MAIL MESSAGE/ PHONE CALL FROM JAIL/ SOCIAL MEDIA POSTINGS BY DEFENDANT)

THE TRIAL COURT ERRED IN EXPLAINING ELEMENTS AND JURY INSTRUCTIONS ABOUT AGGRAVATED STALKING (MCLS 750.411i)
(see attached)

THE TRIAL COURT INSTEAD SHOULD HAVE ASSESSED WHETHER RESPONDENT INTENDED " TO COMMUNICATE A SERIOUS EXPRESSION OF AN INTENT TO COMMIT AN ACT OF UNLAWFUL VIOLENCE" AGAINST COMPLAINANT (MELKE) OR WHETHER THE PURPORTED "THREATS" WERE PHYSICAL. People v. Burkman, 15 NW 3d 216 (2024) MI SUPREME CT, quoting VIRGINIA V. BLACK 538 U.S 359.

THE RECORD WOULD NOT HAVE SUPPORTED SUCH A FINDING. ALTHOUGH DEFENDANT'S ALLEGED ACTIONS (E-MAIL MESSAGE/ PHONE CALL FROM JAIL/ SOCIAL MEDIA POSTINGS) WOULD BE PERCEIVED AS OFFENSIVE AND INAPPROPRIATE, THEY DID NOT EXPRESS AN INTENT TO COMMIT AN ACT UNLAWFUL THREATS, PHYSICAL VIOLENCE, AGGRAVATED STALKING ETC...)

ACCORDING TO DEFENDANT'S WORDS/ACTIONS DID NOT FALL WITHIN THE TRUE-THREAT EXCEPTION TO THE FIRST AMENDMENT.

6) TRUE-THREATS

B) FIGHTING WORDS

THE TRIAL COURT ALSO ERRED IN FINDING THAT DEFENDANT'S ALLEGED ACTIONS (E-MAIL MESSAGE/ PHONE CALL FROM JAIL/ SOCIAL MEDIA POSTINGS) CONSTITUTED "FIGHTING WORDS" AGGRAVATED STALKING WORDS ARE "PERSONALLY ABUSIVE EPITHETS WHICH, WHEN ADDRESSED TO THE ORDINARY CITIZEN, ARE, AS A MATTER OF COMMON KNOWLEDGE, INHERENTLY LIKELY TO PROVOKE VIOLENT REACTION. (TM 326 MICH APP AT 238)(cleaned up)

"SPEECH MADE OVER THE INTERNET/ FAR REMOVED FROM ANY POTENTIAL VIOLENCE"
IS NOT "INHERENTLY LIKELY TO PROVOKE A VIOLENT REACTION". TM V MZ, 326 MICH APP 227 (2018).

THE TRIAL COURT COULD HAVE REASONED:

IF DEFENDANT WERE TO APPROACH COMPLAINANT (MELKE) AND SAY; F....YOU, CALLED HER NAMES AND OTHER THREATENING THINGS THAT HE SAID, HE WOULD HAVE VERY LIKELY THAT PROVOKED A VIOLENT REACTION.

THE FACT THAT DEFENDANT HIDES BEHIND A COMPUTER/PHONE TO MAKE THESE THREATS AND FIGHTING WORDS DOESN'T EXCUSE THEM OR MAKE THEM ANY DIFFERENT.

MICHIGAN SUPREME COURT, APPEALS COURT AND TRIAL COURT SHOULD HAVE DISAGREED. ALTHOUGH DEFENDANT'S LANGUAGE MIGHT PROVOKE VIOLENCE IF DELIVERED INPERSON, THE FACT THAT IT WAS COMMUNICATED VIA ALLEGED
(E-MAIL MESSAGE/ PHONE CALL FROM JAIL/ SOCIAL MEDIA POSTINGS)-- FAR REMOVED FROM ANY POTENTIAL VIOLENCE"; RENDERS IT UNLIKELY TO PROVOKE A VIOLENT REACTION.

HERE THE MEDIUM OF COMMUNICATION IS A CRITICAL FACTOR IN DETERMINING WHETHER THE SPEECH CONSTITUTES FIGHTING WORDS (AGGRAVATED STALKING). THEREFORE TRIAL COURT, MICHIGAN COURT OF APPEALS AND MI SUPREME COURT ERRED BY DISREGARDING IT.

(C) INSULTS, EPITHETS, AND PERSONAL ABUSE

DURING TRIAL PROSECUTION CONTENDED THAT DEFENDANT'S SPEECH -- WHICH CONSISTED OF INSULTS, EPITHETS, AND PERSONAL ABUSE WAS NOT PROTECTED BECAUSE IT LACKED EXPRESSIVE PURPOSE AND WAS MEANT SOLELY TO CAUSE HARM. THAT ARGUMENT IS UNPERSUASIVE. THE RECORD CONTAINS NO EVIDENCE THAT DEFENDANT'S SPEECH INFLICTED HARM ON COMPLAINANT (MELKE) BY [ITS] VERY UTTERANCE.
(TT V. KL, 334 MICH APP 413) (2020).

ADDITIONALLY DEFENDANT'S ALLEGED ACTIONS EMAILS/TEXT MESSAGES/ PHONE CALL/ SOCIAL MEDIA POSTINGS (MRE 404(b) Past bad acts) EXPRESSED GRIEVANCES, INCLUDING ALLEGATIONS THAT COMPLAINANT MELKE BETRAYED HIM.

THESE STATEMENTS DEMONSTRATE AN EXPRESSIVE PURPOSE BEYOND MERE HARASSMENT.

SPEECH WITH EXPRESSIVE CONTENT, EVEN IF OFFENSIVE, DOES NOT FELL WITHIN THE NARROW CATEGORIES OF HISTORICALLY UNPROTECTED SPEECH. (COUNTERMAN 600 US AT 73-74) ACCORDINGLY DEFENDANT'S SPEECH IS PROTECTED UNDER FIRST AMENDMENT.

BECAUSE DEFENDANT'S SPEECH DOES NOT FELL WITHIN ANY EXCEPTION TO THE FIRST AMENDMENT. IT WAS CONSTITUTIONALLY PROTECTED.

THE TRIAL COURT, MICHIGAN COURT OF APPEALS AND SUPREME COURT ABUSED THEIR THEIR DISCRETION IN FINDING DEFENDANT GUILTY AND NOT OVER TURNING/REMANDING HIS CASE OF JOINDER OF AGGRAVATED STALKING AND SOLICITATION TO MURDER CHARGES BASED ON CONSTITUTIONALLY PROTECTED SPEECH.

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THE JUDICIALLY CREATED ENTRAPMENT DEFENSE MAYBE UNCONSTITUTIONAL, AND THEN REFERRING THAT UNANSWERED QUESTION TO THE LEGISLATURE

SOLICITATION TO MURDER CHARGES BASED ON ENTRAPMENT AND CONSTITUTIONALLY PROTECTED SPEECH.

PEOPLE V. JOHNSON 466 MICH 491 (2002)

HN3

WHEN EXAMINING GOVERNMENTAL ACTIVITY WOULD IMPERMISSIBLY INDUCE CRIMINAL CONDUCT, SEVERAL FACTORS ARE CONSIDERED:

1) WHETHER THERE EXISTED

IN NEWBY 2024 MICH APP LEXIS 10535 02/2025

"INDUCEMENT THEORY" ENTRAPMENT

"reprehensible conduct"

U.S. V ROGERS 118 F3D 466 (SIXTH CIR. CT. OF APPEAL 07/1997

HN11
A DEFENDANT WHOSE DEFENSE SOUNDS IN INDUCEMENT IS.....LIMITED TO THE DEFENSE OF ENTRAPMENT

HN12 ROGERS WITHDRAWAL FROM A CONSPIRACY CONSTITUTES "AN AFFIRMATIVE DEFENSE WHAT MUST BE PROVEN BY THE DEFENDANT.

ONCE CONSPIRACY HAS BEEN ESTABLISHED, IT IS PRESUMED TO CONTINUE UNTIL THERE IS AN AFFIRMATIVE SHOWING THAT IS HAS BEEN

"ABANDONED "

MICHIGAN SUPREME COURT DECISION KVASNICKA
750.543m TERRORISTS THREATS AND 750.411i AGGRAVATED STALKING ARE FACIALLY UNCONSTITUTIONAL

Are Stalking Laws Unconstitutionally Vague or Overbroad?, 88 Nw. U.L. Rev. 769

WINTER, 1994

Reporter

88 Nw. U.L. Rev. 769 *

Length: 16321 words

Author: M. Katherine Boychuk

Text

[*769]

After years of enduring physical abuse, a woman leaves her husband. He becomes obsessed with getting her to come back to him. He follows her to and from work, waits for her outside her home, and threatens her with physical harm and death unless she returns to him. She believes that he will carry out his threats and fears for her life.

A woman, obsessed with a television personality, repeatedly lurks around his house, peers into his windows, and follows him to work in her car.

A private detective is hired to find out what business a certain person is engaged in. In order to gather the information she needs, the detective trails the person on a daily basis. The person senses that she is being followed and is alarmed by the constant presence of the detective.

I. Introduction

Is it constitutionally permissible for a state to criminally punish the acts of the estranged husband, the obsessed fan, or the private detective? Under some of the recently enacted stalking laws, all three would be guilty of the crime of stalking. But can a state constitutionally outlaw all these acts?

Forty-eight states and the District of Columbia now have laws that make it a crime to stalk another person - that is, to follow and harass that person. [1] These stalking laws, however, are susceptible to constitu **[*770]** tional attacks on the grounds of vagueness and overbreadth. This Comment examines these challenges. Because no court in a reported decision has ruled on the constitutionality of the stalking laws, this Comment analogizes to other laws having similar elements and purposes - statutes prohibiting telephone harassment, general harassment, disorderly

conduct, and loitering. All four types of laws have been attacked successfully on vagueness and overbreadth grounds.

Whether stalking laws will survive constitutional challenges on **[*771]** vagueness and overbreadth grounds is a close question, highly dependent on the particular law being challenged. While many of the stalking laws are carefully drafted to avoid constitutional difficulties, others are poorly drafted and show no mindfulness of likely challenges. [2] Courts' interpretations of earlier, analogous laws established constitutional boundaries around some of the elements of the stalking laws. A court faced with a challenge to a stalking law should look to these established boundaries to decide the constitutionality of the stalking laws. [3]

This Comment examines vagueness and overbreadth attacks to the stalking laws. First, Part II briefly explains the doctrines of vagueness and overbreadth. Next, Part III examines and classifies the forty-nine statutes at issue. Part IV then analyzes the provisions of the laws that are most susceptible to constitutional attack, basing its analysis on courts' past treatment of similar laws - telephone harassment statutes, general harassment statutes, disorderly conduct statutes, and loitering statutes. Finally, Part V concludes that courts will uphold only those stalking laws that contain certain key elements - specific criminal intent, communication of a threat, and an objective standard against which to measure the victim's reaction.

II. The Void-for-Vagueness and Overbreadth Doctrines

A. Introduction

This Part provides a brief sketch of the doctrines of vagueness and overbreadth, two of the primary constitutional bases for challenging the stalking laws. [4] These doctrines are closely related and are often used to strike down criminal laws. [5] In short, the vagueness doctrine requires that a statute give fair notice of forbidden behavior. [6] Overbreadth doctrine requires that a statute not be written so broadly as to infringe on constitutionally protected activities. [7] **[*772]**

One of the difficulties in analyzing stalking laws on vagueness and overbreadth grounds is that there are few clear guidelines explaining how to apply the doctrines to criminal statutes. [8] Many decisions striking down laws for vagueness or overbreadth do so with little or no analysis, [9] and the vagueness and overbreadth discussions are often so inextricably intertwined that the basis for the court's holding is unclear. [10] In sum, few rules emerge from the cases.

B. Vagueness

The Due Process Clause of the Fourteenth Amendment requires that a criminal statute clearly define the offense so that people will be on notice regarding what activities are prohibited and so that police and other law enforcement personnel will not enforce the law in an arbitrary or discriminatory manner. [11] The Supreme Court has held that the latter aspect of the doctrine is more important; a legislature must provide minimal guidelines governing law enforcement procedures to deter police officers, prosecutors, and juries from pursuing their personal predilections. [12]

In Papachristou v. City of Jacksonville, [13] the Supreme Court applied the first prong of the vagueness doctrine - the notice requirement - to hold a vagrancy law void. The law made acts including "loafing" and "wandering or strolling about from place to place" criminal. [14] The Court reasoned that such activities are part of everyday life and that the statute cast too large a net to put someone on notice as to what conduct was prohibited. [15]

The Court again applied the vagueness doctrine in Kolender v. Lawson. [16] A California law required a loiterer to give "credible and reliable" identification to a police officer who had reasonable suspicion of criminal activity. [17] The Court held the law void for vagueness, reasoning that because the statute contained no standard for determining what credible **[*773]** and reliable identification was, it vested complete discretion in the hands of the police to determine whether the suspect had satisfied the statute and could be allowed to go on his way. [18] Because the statute encouraged arbitrary enforcement, the Court concluded that it was unconstitutionally vague.

In sum, the vagueness doctrine protects citizens against ambiguous criminal laws. It requires legislatures to define criminal behavior sufficiently to put a potential offender on notice that her conduct is prohibited, and it removes police discretion to enforce the law in an arbitrary way.

C. Overbreadth

An overbroad statute is designed to hinder or prohibit activities that are not constitutionally protected, but also includes within its scope activities protected by the Constitution. 19 Some confusion exists about whether overbreadth challenges extend beyond the First Amendment to cases challenging statutes that infringe on other fundamental rights. 20 Although the Supreme Court has stated that "we have not recognized an "overbreadth' doctrine outside the limited context of the First Amendment," 21 the cases do not support this assertion. 22

For example, in Aptheker v. Secretary of State, 23 the Supreme Court struck down as unconstitutionally overbroad a section of the Subversive Activities Control Act that made it unlawful for a member of the Communist Party to apply for or use a passport. The Court held the Act overbroad on its face because it infringed the right to travel; it prohibited a member of the Communist party from traveling abroad for legitimate purposes as well as for illegitimate purposes.

In sum, overbreadth doctrine prohibits criminal laws from sweeping so broadly that they encompass constitutionally protected activity. While a law might be designed to prohibit only criminal conduct, it cannot survive an overbreadth challenge if it substantially infringes a protected right. **[*774]**

III. The Statutes

A great deal of variety exists among the forty-nine stalking laws; they defy easy classification. This Comment categorizes the laws by comparing them to the California stalking law. The California law is a good point of reference for two reasons: first, it was the nation's first stalking law and served as a model for other states; 24 second, it is one of the most complete stalking laws and, therefore, likely to be upheld as constitutional. 25 This Part first describes the elements and definitions of the California stalking law. It then identifies the elements common to many stalking laws that are likely to be subject to constitutional challenges.

A. The California Law

In California, the crime of stalking has three elements: First, an offender must willfully, maliciously, and repeatedly follow or harass another person (the "act requirement"). 26 Second, the offender must make a credible threat (the "threat requirement"). 27 Finally, the offender must intend to place the other person in reasonable fear of death or great bodily injury (the "intent requirement"). 28

The California law defines several significant terms, the most important of which are "harasses" and "credible threat." "Harasses" means "a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes the person, and which serves no legitimate purpose." 29 The threat that the offender conveys must be a "credible threat"; that is, one made with the intent and the apparent ability to carry out the threat so as to cause the other person to reasonably fear for his or her safety. The threat must be against the life of, or to cause great bodily injury to, the other person. 30 **[*775]**

The California law's requirements of an act, a threat, and a specific criminal intent, in addition to its definitions of key terms, make it one of the nation's most complete and well-drafted stalking laws. As Part V will show, the California law's completeness makes it more likely to withstand vagueness and overbreadth challenges than laws lacking similar requirements and definitions.

B. The Elements of Stalking

The three parts of the California law - the act requirement, the threat requirement, and the intent requirement - establish the basic elements of stalking. Based on these three elements, other states' stalking laws can be categorized into three main groups: first, those that (like California) require an act, a threat, and criminal intent; 31 second, those that require either an act or a threat, plus intent; 32 finally, those that require an act and intent. 33 In addition to variation in the elements they **[*776]** require, stalking laws differ in their definitions of those elements. This

subpart compares the elements and definitions of other states' laws with California's and raises potential constitutional challenges to these provisions.

1. The Act Requirement. - The states designate many different acts as stalking, ranging from defined behaviors (such as "harassing" another person [34]) to broad undefined actions (such as "engaging in conduct" [35]). The act requirement is susceptible to a vagueness challenge if the offending conduct is not adequately defined because people might not be on notice that their conduct constitutes a crime. [36] Furthermore, an act requirement is susceptible to an overbreadth challenge on the ground that it infringes a fundamental freedom, such as the freedom of movement. [37]

Most states imitate California in designating the "following" of another person as an element of stalking. [38] Other states prohibit similar acts, such as pursuing, [39] approaching, [40] lying in wait for, [41] or placing under surveillance [42] another person. The Kentucky and Minnesota laws simply make it a crime to "stalk" another person, without defining the behavior. [43] **[*777]**

In addition to following, California and many other states also define the "harassing" of another person as an element of stalking. [44] West Virginia's and Kansas's laws are more stringent than most; they require that the offender both follow and harass the other person. [45]

Most states that depart from the California law prohibit broader categories of behavior than following or harassing. For example, many states do not designate any particular acts as constituting an element of stalking, but merely prohibit "conduct" or a "course of conduct." [46] Several laws prohibit behaviors that are similar to the behavior defined by a tort concept of assault, namely, causing another person reasonable apprehension of immediate bodily harm. [47] For example, Illinois prohibits the placing of another person in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint. [48] Similarly, Nevada prohibits persons from engaging in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, or harassed and that actually causes a victim to feel terrorized, frightened, intimidated, or harassed. [49] Other states forbid the acts of "appearing ... for no legitimate purpose in proximity to the residence, **[*778]** place of employment, or other place where another person is found" [50] and "being in the presence of another without legal purpose." [51]

2. The Threat Requirement. - The California law's second requirement is the communication of a credible threat to the other person. [52] A credible threat is "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 or her safety or the safety of his or her immediate family. The threat must be against the life of, or a threat to cause great bodily injury to, a person." [53]

The threat requirement is a major point of departure for the stalking laws that are not patterned on California's law. Only a few other laws require the communication of a threat as an element of stalking. [54] The other laws fall into two categories: those that have a threat requirement as an alternative to another act and those that have no threat requirement at all.

In the first group, an offender who conveys a threat need not perform any other act for his behavior to constitute stalking. For example, Delaware's law provides that "any person who willfully, maliciously, and repeatedly follows or harasses another person or who repeatedly makes a credible threat with the intent to place that person in reasonable fear of death or serious physical injury is guilty of the crime of stalking." [55] A few laws include threatening among the behaviors that can constitute stalking. For example, Montana's stalking law provides that "a person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly: following **[*779]** the stalked person; or harassing, threatening, or intimidating the stalked person." [56]

The laws that do not require the communication of a threat constitute the largest group of the stalking laws. Connecticut's law, for example, does not require a threat: "A person is guilty of stalking ... when, with intent to cause another person to fear for his physical safety, he wilfully and

repeatedly follows or lies in wait for such other person and causes such other person to reasonably fear for his physical safety." [57]

Because it helps to remove innocent and constitutionally protected activity from the scope of the statute, a threat requirement might salvage an otherwise vague or overbroad law. [58] Because a person who threatens another with death or great bodily injury knows that such speech constitutes a crime, vagueness problems are mitigated. [59] Despite the saving features of the threat requirement, most states do not include it in their stalking laws because it makes the statute much more difficult to enforce. Several states removed the threat requirement from their stalking laws as they were originally enacted. [60] Georgia's legislature even mandated that its stalking law "shall not be construed to require that an overt threat of death or bodily injury has been made." [61]

3. The Intent Requirement. - Stalking laws require various types of criminal intent. The laws fall into two broad groups: those that require only general intent (a requirement that the offender's actions be **[*780]** voluntary) and those that also require specific intent (a special mental element that goes beyond that required with respect to the offender's actions). [62]

Stalking laws that require only general intent usually do so by adding words like "willfully," "maliciously," "knowingly," and "intentionally" to the act requirement. Such words remove inadvertent and involuntary behavior from the scope of the statute. Idaho's stalking law is an example of a law requiring only general intent: "Any person who wilfully, maliciously, and repeatedly follows or harasses another person or a member of that person's immediate family is guilty of the crime of stalking ...." [63] Under this law, a person who unintentionally follows another person cannot be prosecuted for stalking.

In contrast, a stalking law with a specific intent requirement requires that the offender have an additional culpable mental state. The specific intent requirements are of two general types. The first, the California model, requires the same type of intent as does assault: [64] "the intent to place the other person in reasonable fear of death or great bodily injury." [65] The second type of specific intent requires that the offender intend a particular effect on another person, usually the intent to annoy, alarm, harass, or cause emotional distress to that person. Texas's stalking law illustrates that type of specific intent: "A person commits an **[*781]** offense if, with intent to harass, annoy, alarm, abuse, torment, or embarrass another, he ... engages in conduct directed specifically toward another person, including following that person, that is reasonably likely to harass, annoy, alarm, abuse, torment, or embarrass that person ...." [66]

A specific intent requirement can ameliorate vagueness problems. If an actor has a specific intent to bring about a particular effect, he can be presumed to be on notice that his actions to effect that intent constitute a crime. However, a general intent does not alleviate vagueness problems. An "intent to follow" does nothing but exclude involuntary activities from the statute's scope. It means only that a person who is inadvertently following another person cannot be charged with stalking. Thus, whether an intent requirement remedies constitutional defects depends on the type of intent that the statute specifies. [67]

4. The Definitions of the Acts. - The ways in which stalking laws define the offending conduct - or fail to define the conduct - are likely to be the focus of vagueness challenges. This section describes the definitions of "harassment" and "following," the two acts most commonly prohibited by the stalking laws. The definitions of harassment and following arguably violate the vagueness doctrine because they do not clearly define the offending conduct.

(a) Harassment. - Many laws designate harassment as an element of stalking. [68] Some of these laws provide a definition of harass **[*782]** ment; [69] others do not. [70] Of those laws that define harassment, several states adopt the California definition:

"Harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes 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. [71]

The California law's definition contains three provisions that will figure prominently in a vagueness challenge: "annoys, alarms, harasses, or terrorizes," "serves no legitimate purpose," and "cause a reasonable person to suffer substantial emotional distress." Constitutional challenges will likely

focus on the vagueness of the first two phrases. The third phrase, however,helps to alleviate vagueness.

A few states provide a list of specific behaviors that constitute harassment. For example, Colorado's stalking law provides that a person harasses another person if he, among other things, "strikes, shoves, kicks, or otherwise touches a person ... or directs obscene language or makes an obscene gesture to or at another person." [72] Other states employ portions of the California definition of harass. [73] **[*783]**

Some laws make no attempt to define "harass." [74] With no definition at all, these states' statutes are highly susceptible to vagueness challenges.

(b) Following. - Although following is an element of stalking in many states, the majority of laws do not define following; only two states provide a definition. Vermont's law defines following as "maintaining over a period of time a visual or physical proximity to another person in such manner as would cause a reasonable person to have a fear of unlawful sexual conduct, unlawful restraint, bodily injury, or death." [75] The lack of a definition of following makes most stalking laws vulnerable to vagueness challenges.

In sum, each of the four key aspects of stalking laws may pose constitutional problems. The remainder of this Comment more closely analyzes possible vagueness and overbreadth challenges to the stalking laws. [76]

IV. Analysis of Constitutionally Suspect Provisions

This Part analyzes the specific provisions of the stalking laws that are likely to be attacked on vagueness and overbreadth grounds - the definition of harassment, the intent requirement, and the provisions defining the criminal conduct. These provisions resemble the elements of similar laws - general harassment laws, telephone harassment laws, disorderly conduct laws, and loitering laws - that have been challenged in the courts. Courts' past treatment of such similar laws informs the analysis of the constitutionality of stalking laws. **[*784]**

A. The Harassment Definition

Based on the challenges brought against similar laws, the definition of "harass" is a constitutionally problematic provision of the stalking laws. Even the most carefully drafted and complete laws - those based on the California statute - are susceptible to attack due to the vagueness of the term "harass."

Harassment is a key element of almost every state's stalking law. [77] In most cases, harassment alone can satisfy the act requirement. [78] There may be, however, constitutional problems with the definition of harassment.

Once again, the California statute serves as a model:

"Harasses" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or terrorizes 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." [79]

The first two italicized phrases - "annoys, alarms, harasses, or terrorizes" and "serves no legitimate purpose" - present various vagueness and overbreadth problems. [80] The last italicized phrase, which exempts constitutionally protected behavior, attempts to solve the overbreadth objections and save the statute from being struck down entirely. [81]

1. Annoys, Alarms, or Harasses. -

(a) The debate over sufficiency. - Defining "harassment" as conduct which "annoys, alarms, or harasses" another raises a serious vagueness objection. The point of the vagueness doctrine is to ensure that "a penal statute defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage

arbitrary ... enforcement." 82 It is doubtful that ordinary people could agree on what constitutes annoying, alarming, or harassing behavior. 83 It is also questionable that defining "harassment" as conduct that "harasses" another person is sufficiently **[*785]** definite to withstand a vagueness challenge. Such circularity might be a statute's downfall.

In Coates v. City of Cincinnati, 84 the Supreme Court considered a provision that resembles the stalking laws' definition of harassment as conduct that alarms, annoys, or harasses another. 85 In Coates, the Court struck down a municipal ordinance making it a crime for people to congregate on the sidewalks and "conduct themselves in a manner annoying to persons passing by." 86 The Court reasoned that the ordinance was void for vagueness not because its standard of conduct was vague, but because "no standard of conduct is specified at all." 87 The Court stated that "conduct that annoys some people does not annoy others." 88 Justice White, in dissent, countered that

any man of average comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say that these and many other kinds of conduct are not within the foreseeable reach of the law. 89

The debate over whether "annoying conduct" is sufficiently specific is hardly settled. 90 The disagreement is displayed most prominently in state courts' disparate treatment of telephone harassment statutes, general harassment statutes, and disorderly conduct laws.

The same act required by the stalking laws - annoying, alarming, or harassing another - is also commonly required by telephone and general harassment laws. 91 Challenges to the language of these statutes have met with varying degrees of success. While for the most part the statutes have been upheld, this is due more to the presence of other statutory elements or to the courts' own construction of those terms rather than to the precision of the terms themselves. 92 The following examination of cases that evaluate the "annoy, alarm, or harass" language illustrates the imprecision of those terms.

In State v. Sanderson, 93 the Oregon Court of Appeals struck down a **[*786]** general harassment law that was very similar to current stalking laws. 94 The court stated that the law provided no basis for distinguishing between antisocial conduct, which was meant to be prohibited, and socially tolerable conduct, which was not. 95 The court gave as an example of the second type of conduct people who consistently appear late for appointments - they "engage in a course of conduct which alarms or seriously annoys others for no legitimate purpose." 96 Because this type of behavior clearly was not intended to be outlawed, but was also within the statute's reach, the court deemed the "alarms or seriously annoys" language to be unconstitutionally vague. 97

The Washington Court of Appeals found a similar general harassment statute to be overbroad as well as vague. 98 In City of Everett v. Moore, the court held that the ordinance could be applied to constitutionally protected speech:

A discussion of any political, social, economic, philosophic or religious topic might well vex, irritate or bother the listener. In addition, the public is constantly being put on alert about the disastrous effects of everything from vitamin deficiencies in the blood to nuclear obliteration... And such alarms are often legitimate." 99

The court struck down the ordinance because "the people of Everett must not live in the continual fear that something they say to another might bother the listener to the point of invoking the ordinance." 100

In contrast, other courts have upheld the "annoy, alarm, or harass" language in the face of vagueness and overbreadth challenges. In Kinney v. State, 101 an Indiana court held that a telephone harassment statute containing the words "harass, annoy, and alarm" was not unconstitutionally vague. 102 The court's decision was based on stare decisis; a case **[*787]** decided twenty-five years earlier had upheld a disorderly conduct statute containing the words "offensive, disorderly, annoying and interfering." 103 The court construed the standard as not depending on each complainant's sensitivity and individual reaction, but rather on the reaction of a

reasonable person. [104] According to the court, using a reasonable person standard gives the words "harass, alarm, and annoy" an ascertainable meaning. [105]

Finally, the Alabama Court of Criminal Appeals upheld a telephone harassment statute against an overbreadth challenge in Donley v. City of Mountain Brook. [106] In Donley, the court held that constitutionally protected conduct did not come within the scope of the harassment statute because the statute contained an explicit exception for legitimate business communications. [107] Because constitutionally protected conduct was specifically removed from the reach of the statute, it was not overbroad.

The foregoing cases illustrate the imprecision of the "annoy, alarm, or harass" language. Four different courts reached four different conclusions about the language - void for vagueness, void for overbreadth, not void for vagueness, and not void for overbreadth. These cases illustrate less a problem with the language than with the vagueness and overbreadth doctrines themselves. The doctrines do not provide sufficiently clear standards that a court can apply with any degree of certainty or predictability. [108] Nevertheless, state criminal laws must be shaped around vagueness and overbreadth concerns. Therefore, the discussion now turns to suggesting methods to improve the odds that the "annoy, alarm, or harass" language will survive scrutiny.

(b) Suggestions for improvement. - The first concern with such language is that it infringes on legitimate activities. This problem can be remedied in one of two ways: (1) by requiring the communication of a credible threat along with the harassing behavior, [109] or (2) by specifically excepting protected activities from the scope of the statute. The first of these remedies protects the statute against a vagueness attack by **[*788]** removing any doubt as to what kind of annoying, alarming, or harassing behavior is prohibited. It makes clear, for example, that communicating an alarming weather report is not within the statute because it is not accompanied by a credible threat. The first remedy also repels an overbreadth attack because communication of a credible threat is not constitutionally protected; the "credible threat" definition resembles the elements of criminal assault. [110]

The second remedy, providing an exception for constitutionally protected activities, might also save a statute from an overbreadth attack. Such a provision specifically removes protected conduct from the sweep of "alarming, annoying, or harassing" behavior. Of course, it requires a court to determine whether an offender's conduct is constitutionally protected. Furthermore, it does not mitigate the vagueness of the law as well as the credible threat remedy because it does not provide specific guidelines that narrow the scope of the offending behavior.

The second concern with the "annoy, alarm, or harass" language is that application of the statute depends on each victim's subjective reaction to a certain behavior. As the Supreme Court observed in Coates, "Conduct that annoys some people does not annoy others." [111] One remedy for this is to provide, either judicially or legislatively, an objective standard by which to judge harassment. Under an objective standard, the reasonable person standard, rather than the victim's state of mind, determines whether an offender's conduct is harassing.

Many of the stalking laws address both objections to "annoy, alarm, harass, or terrorize" adequately. First, they require that a credible threat be communicated along with the harassing behavior. [112] Second, most exclude constitutionally protected activity from the definition of harassment. [113] Third, many statutes require that the harassing behavior "be **[*789]** such as would cause a reasonable person to suffer substantial emotional distress." [114] This "reasonable person" requirement takes harassment out of the realm of the subjective, providing an objective standard against which to measure potentially harassing conduct. [115] In sum, the stalking laws that require a credible threat along with harassing conduct, exempt constitutionally protected activity, and define harassment in relation to an objective standard are the most likely - despite courts' unpredictable past treatment of "annoy, alarm, or harass" - to survive vagueness and overbreadth attacks.

2. Serves No Legitimate Purpose. - The California definition of harassment requires that the offending conduct "serve no legitimate purpose." [116] This specification is constitutionally suspect on vagueness grounds. It goes directly to the more important aspect of vagueness doctrine - "the requirement that a legislature establish minimal guidelines to **[*790]** govern law enforcement." [117] A standard as vague as "serves no legitimate purpose" gives law enforcement officers a great deal of discretion in deciding whether certain behavior falls within the statute's scope. The

cases evaluating loitering laws address the constitutionality of statutes that criminalize behavior that serves no legitimate purpose. [118]

In Papachristou v. City of Jacksonville, [119] the Supreme Court struck down as unconstitutionally vague a loitering law that contained a provision similar to the "without legitimate purpose" provision of state stalking laws. The Court held that a municipal ordinance making "wandering or strolling around from place to place without any lawful purpose or object" [120] a crime "encouraged arbitrary and erratic arrests and convictions." [121] The Court feared that "the qualification "without any lawful purpose or object' may be a trap for innocent acts." [122]

The Court's concern over the "without any lawful purpose" language contributed to its overall objection that the ordinance gave the Jacksonville police unfettered discretion over its enforcement. The loitering law allowed a police officer to arrest a person on suspicion of future criminality, rather than on probable cause. [123] It required those people implicated by its imprecise terms to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts. Because the ordinance provided no standards to govern the exercise of the police's discretion, the Court held that it permitted and encouraged arbitrary and discriminatory enforcement. [124]

A California court of appeals followed the Supreme Court's reasoning in In re Frank O. [125] That case involved a juvenile loitering law that allowed officers to detain and question persons under age eighteen found in public places after 10:00 p.m. to find out why they were out in public. The court held that the law provided no standards of enforcement: "What will qualify as a satisfactory explanation is left to the unfettered discretion of each individual police officer. Frank O.'s explanation he was "just walking through' was not satisfactory to the arresting officer in this case. To another officer, it may have been acceptable." [126]

Together, Papachristou and Frank O. demonstrate the danger of criminal laws that permit arrest based on a police officer's determination **[*791]** that a person is acting without a legitimate purpose. Such a standard is no standard at all; the arresting officer has complete discretion to decide whether that person's behavior is legitimate.

Thus, the provision in most stalking laws that the offending behavior serve no legitimate purpose may be unconstitutionally vague. It leaves too much discretion in the hands of the police to decide whether a person's behavior is legitimate. But stalking laws that contain such a provision are not as vulnerable to being struck down as were the loitering statutes in Papachristou and Frank O. The major difference between the two types of laws is that the loitering statutes permit arrest solely on the basis of a person's answers to questions posed by police (or the failure to answer such questions). [127] The California-model stalking laws, however, require much more than just "conduct without legitimate purpose" to justify an arrest. They also require the act of following or harassing, an intent to do harm, and the communication of a credible threat. Unlike the loitering laws, then, a person cannot be arrested under a stalking law solely because a police officer believes that person's behavior to be without legal purpose. The police officer's discretion to make an arrest is governed not only by her determination that the suspect's behavior serves no legitimate purpose, but also by the other mandatory elements - intent and a credible threat.

Still, it is possible that courts would strike down a stalking law because of the vagueness of the "serves no legitimate purpose" provision. One remedy is for the state legislature simply to strike that phrase from the statute. The phrase adds little to the California-model laws. First, constitutionally protected activity is already explicitly exempted. Second, the credible threat requirement ensures that the offender's conduct is not legitimate; it is a separate crime to put someone in fear of death or great bodily harm. In short, because the phrase "serves no legitimate purpose" is potentially problematic and adds nothing to the California-model statutes, it should be stricken.

3. Constitutionally Protected Activity. - Most of the stalking laws' definitions of harassment contain an exemption for constitutionally protected activity. [128] In addition to being an attempt to remedy the vague **[*792]** ness of "annoy, alarm, or harass" within a stalking law, [129] these provisions are also attempts to save a law from being struck down entirely if a court decides it is overbroad.

A clause that severs unconstitutional applications from the scope of the statute assists a court in limiting rather than eliminating the law being challenged. Even where no explicit severability clause

is contained in the statute, the court can assume that the state legislature, to the extent that it meant to prohibit any constitutionally protected conduct at all, did not intend to enact an all-or-nothing package. [130]

For example, in Brockett v. Spokane Arcades, Inc., [131] the Supreme Court was persuaded to invalidate an obscenity statute only partially because it contained a clause severing materials exciting only "normal" lust from its scope. [132] The Court held that the statute's overbreadth was not so incurable as to taint all possible applications of the statute. [133] Similarly, in Donley v. City of Mountain Brook, [134] an Alabama court held that an explicit exception for legitimate business communications within the scope of a telephone harassment statute saved the statute from being struck down. [135]

The exemptions for constitutionally protected activity in the stalking laws explicitly sever legitimate activity from the statutes' reach. Therefore, even if a court decides that a particular application of a stalking law infringes constitutionally protected behavior, that court need not strike down the entire stalking law as a result. It should sever from the statute the particular application at issue.

B. The "Following" Provision

A provision in stalking laws that "following" another person constitutes an element of the offense presents both vagueness and overbreadth problems. [136] The laws that do not define the act of following arguably **[*793]** violate both prongs of the vagueness doctrine: [137] they do not sufficiently define the offending behavior so as to put people on notice as to what conduct is prohibited, and they allow for arbitrary and discriminatory enforcement; following someone is whatever a police officer says it is. The vagueness challenge to the "following" language is a serious one. It has no analog in cases dealing with similar laws. Consequently, it is difficult to predict whether a court will invalidate a stalking law because of the vagueness of the term.

The analysis is more straightforward on the overbreadth side. The heart of the overbreadth objection to "following" is that it infringes the constitutionally protected freedom of movement. [138] "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." [139] In Aptheker v. Secretary of State, the Supreme Court "assimilated 'freedom of movement' into the class of 'preferred' individual liberties entitled to stringent judicial protection." [140] Since then, freedom of movement has been used to strike down vagrancy and loitering laws. For example, in Papachristou v. City of Jacksonville, [141] the Court invalidated on vagueness grounds a city ordinance making it a crime to wander or stroll about from place to place without any lawful purpose or object. [142] The Court intimated that the freedom to move about is an important and protected liberty:

> Walking and strolling are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. [143]

Further, in Kolender v. Lawson, [144] the Supreme Court suggested that California's loitering statute unconstitutionally impinged upon citizens' freedom of movement: "In addition, the statute implicates consideration of the constitutional right to freedom of movement." [145] Thus, **[*794]** the Court implicitly acknowledged that a criminal law that infringed on one's right to move in public might be overbroad. [146]

Stalking laws are arguably overbroad in the same way that vagrancy and loitering laws are - both classes of statutes restrict one's freedom to move about indiscriminately in public places. One certainly can imagine situations in which a person's legitimate movements could fall under some definition of "following." For example, neighbors who are employed by the same company might find themselves "following" each other to work. Because such protected activities fall within the sweep of the definition of "following," the laws are overbroad.

However, before a criminal law can be voided on its face for overbreadth, it must substantially inhibit protected activities. [147] In Broadrick v. Oklahoma, [148] the Supreme Court, in upholding a state law forbidding all civil service employees from engaging in various political activities, made this substantiality requirement specific: when a statute regulates "conduct" as

opposed to "pure speech," its "overbreadth ... must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 149

A narrowly drafted statute that reflects a close nexus between the means chosen by the legislature and the permissible ends of government is not overbroad on its face simply because one can imagine occasional applications that go beyond constitutional bounds. Accordingly, the Court has not struck down on their face trespass, breach of the peace, or other ordinary criminal laws that might impinge on protected activities in a few instances, but have a great many legitimate targets. 150

When the same reasoning is applied to the stalking laws, it is clear that they will survive any overbreadth challenge brought on the grounds that they deter freedom of movement. Judged in relation to the statutes' "plainly legitimate sweep," 151 stalking laws hardly deter freedom of movement substantially. One's freedom of movement is deterred by a stalking law only if one also intends to harass and threaten another person. 152 Since intent to put another person in fear of death or great bodily **[*795]** harm, combined with an act pursuant to that intent, is already illegal, 153 it makes little sense to say that stalking laws' restrictions on freedom of movement deter a substantial amount of protected behavior. In short, they are narrowly tailored.

In addition, the stalking laws serve an important and legitimate governmental objective. They are a legislative response to the need for "strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation" 154 and are an attempt to provide meaningful relief for victims of a particularly troubling form of harassment. 155 Therefore, they are within the permissible ends of government.

Even if stalking laws infringe upon some protected activity, the effect is not substantial and the legitimate interest is strong. Consequently, stalking laws are not constitutionally overbroad for restricting freedom of movement.

C. The Intent Requirement

Whether a stalking law requires a specific criminal intent is a key consideration in determining that law's constitutionality. 156 Based on courts' treatment of telephone harassment and general harassment laws, it seems likely that only those stalking laws requiring a specific intent will survive. 157 A specific intent requirement goes both to vagueness and to overbreadth challenges; it "mitigates overbreadth concerns because it narrows the scope of criminal proscriptions and it overcomes statutory vagueness because it clarifies the nature of prohibited conduct." 158 The Supreme Court has held that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 159

The Supreme Court has upheld statutes containing an intent requirement when, without that requirement, the statute would have been **[*796]** unconstitutionally vague. 160 An intent requirement saves an otherwise vague statute because it provides the notice that is the essence of the vagueness doctrine.That is, if an offender intends to engage in prohibited conduct, there will be no danger of prosecuting him without his being on notice that his conduct was prohibited.

Courts' analyses of harassment statutes provide illustrations of the constitutional effect of an intent requirement. Generally, courts look more favorably on laws that specify offenders' specific intent because this narrows the scope of the statute. 161 Nevertheless, an intent requirement will not always save a vague statute, and not every intent requirement is adequate.

Many stalking laws require that the offender act with the specific intent to create a particular effect, usually to annoy, alarm, or harass another person. 162 Arguably, such laws are no less vague than those without an intent requirement. If "alarm, annoy, or harass" is vague, then a statute requiring "an intent to alarm, annoy, or harass" is no better. 163 In these circumstances, the intent requirement makes the statute no more definite; an individual is still not on notice of what constitutes the offending behavior.

Like the stalking laws, many harassment statutes require that the offender intend to alarm, annoy, or harass another person. 164 Courts have treated such laws inconsistently. In People v. McBurney, 165 the Colorado Supreme Court upheld a statute that made it unlawful for any

person to telephone another "with intent to harass, annoy, or alarm." [166] The court held that the specific intent requirement rendered the statute not unconstitutionally vague: "Where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law." [167] Simi **[*797]** larly, in State v. Hagen, [168] the Arizona Court of Appeals held that a statute that made it unlawful for any person to telephone another "with intent to terrify, intimidate, threaten, harass, annoy or offend" was not overbroad. [169] The court reasoned that the specific intent requirement excluded conduct protected by the First Amendment. [170] In contrast, the Oregon Supreme Court in State v. Blair [171] struck down as unconstitutionally vague a harassment statute which required that an offender act with "intent to harass, annoy or alarm another person." [172] The court concluded that "specification of the element of intent does nothing to define what someone who wishes to harass, annoy or alarm another may not do in pursuit of that disagreeable aim. True enough, his intent makes his defense of lack of fair notice less appealing, but it does not meet it." [173] Finally, in State v. Anonymous, [174] the Connecticut Superior Court held that a nearly identical statute was overbroad. [175] That court concluded that the inclusion of an intent requirement - that one intend to alarm or annoy someone - did not alleviate the inhibiting effect on freedom of expression. [176]

Again, four courts reached four different conclusions regarding the constitutional effect of an "intent to harass" requirement: it alleviates vagueness; it alleviates overbreadth; it does not alleviate vagueness; it does not alleviate overbreadth. Thus, no clear rule emerges from the harassment cases that establishes whether an "intent to harass" can save a stalking law from a vagueness or an overbreadth attack.

According to one Supreme Court decision, however, an otherwise vague statute apparently can be saved by requiring an intent to harass. In Colten v. Kentucky, [177] the Court upheld against a vagueness challenge a disorderly conduct statute which criminalized the refusal to disperse with the intent of causing inconvenience, annoyance, or alarm. [178] With no analysis, the Court agreed with the lower court that the statute was not vague because "citizens who desire to obey the statute will have no difficulty in understanding it." [179] Implicitly, then, the Court has af **[*798]** firmed that an intent to annoy or to alarm defines ordinary behavior sufficiently to repel a vagueness attack.

The better stalking laws require a different type of specific intent, namely, the intent to place another person in reasonable fear of death or great bodily harm. [180] Such intent, coupled with an unlawful act, constitutes criminal assault in many states. [181] Because the adequacy of this state of mind is well established, its presence in a stalking law helps to mitigate vagueness. That is, because it is an independent crime to perform an act with the intention to place another person in reasonable fear of death or great bodily harm, people should be on notice that such behavior constitutes an offense.

The remainder of the stalking laws do not contain any specific intent requirements, but only require that the offender act willfully, maliciously, or intentionally. [182] Such words do little to alleviate vagueness. If "following" is vague, then "willfully and maliciously following" is also vague.

In sum, a specific intent requirement can save a stalking law from a vagueness or overbreadth attack. The laws that employ the same intent requirement as assault are constitutionally sound because they incorporate the elements of criminal assault. Those that require an intent to harass or annoy may or may not be struck down. It is likely that courts will divide over this question, just as they have with respect to the same provision in harassment laws. The stalking laws with no specific intent requirement, however, are the most likely to be held void for vagueness.

V. Application of Analysis to Specific Stalking Laws [183]

A well-drafted stalking law will track the constitutional boundaries that courts have developed in the context of analogous laws. It will in **[*799]** clude specific intent and credible threat requirements. And it will define the offending behavior as specifically as possible so as to limit deterrence of protected activity. This Part uses the guidelines examined in Part IV to analyze four representative stalking laws.

California. [184] This state's law and the laws that copy it [185] are the most likely to survive vagueness and overbreadth challenges. In general, the California law's provisions are narrowly

drafted around the constitutional boundaries set by the Supreme Court and by lower federal and **[*800]** state courts that have interpreted similar laws. 186

The California law would likely withstand both prongs of a vagueness challenge. First, by including an intent requirement, the law avoids the danger that a person may be prosecuted under it even though she did not know that her conduct was prohibited. California's intent requirement is the soundest type - requiring intent to put another person in fear of death or great bodily harm. Because it requires the same intent as is specified in assault laws, it is undoubtedly constitutionally sound. Second, the California law avoids the problem of arbitrary and discriminatory enforcement. The law requires that a threat be communicated; this means that a police officer cannot make an arrest based on his own subjective determination of what annoying, alarming, or harassing conduct is. Furthermore, the law's requirement that the harassing conduct be such as would cause a reasonable person severe emotional distress properly measures harassment against an objective standard.

The California law should also survive overbreadth challenges. The law does not infringe freedom of movement because the restrictions do not implicate a substantial amount of legitimate behavior. The prohibition against following someone applies only if threats and a criminal intent accompany the following. The major problem with the California law is that it does not define "following." A challenge alleging that "following" is too vague might be successful. Such a challenge would need to be brought on the facts of a particular case, in which the defendant would have to argue that the statute did not notify him that his proximity to the complainant qualified as following her.

If a state court decides that "following," left undefined, is unconstitutionally vague, the entire stalking law need not be struck down. The state court, as the authoritative interpreter of state law, can supply a clarifying and narrowing construction of "following." Alternatively, the state legislature can amend the statute and define "following" as, for example, coming within a designated number of feet or yards of the other person. 187 In short, the California law's single constitutional infirmity - its failure to define "following" - need not spell death for the entire statute.

Delaware. 188 The Delaware law is based on the California model, except that it requires either following or harassing another or making a credible threat to another person. Thus, one can be prosecuted for fol **[*801]** lowing or harassing another person even if no threat is made. The saving features of the threat requirement, therefore, do not apply to the Delaware law. It is more susceptible to a vagueness challenge on the grounds that absent the requirement of a threat, it is less clear what harassing behavior is.

Virginia. 189 In contrast to the California law, Virginia's law is poorly drafted. First, its required act - "conduct" - is nowhere defined. The lack of any definition renders the statute vague; people are not on notice of what specific behavior is prohibited. The fact that the Virginia statute does not require that the offender possess a specific criminal intent compounds the vagueness.

The result is that the Virginia law reaches conduct such as telephoning someone to tell him that a tornado is headed toward his home. This is "conduct," the intent is to cause emotional distress, and the news places the person in reasonable fear of death or great bodily harm. Since this clearly constitutional activity falls within the scope of the statute, the law is too loosely drafted and would likely be held void for vagueness.

Ohio. 190 Ohio's stalking law is problematic for several reasons. First, like Virginia's law, it does not define the act requirement with any particularity - it simply prohibits a "pattern of conduct." 191 This definition is vague; it does not put people on notice regarding the specific behavior that constitutes a crime. Second, it does not contain a specific intent requirement that could alleviate the vagueness of its act requirement. Finally, it does not have an objective standard against which to measure the reaction of the victim. Because "mental distress" is not defined in relation to a reasonable person's reaction, a person can be prosecuted under this law if a victim is particularly sensitive. Consequently, it leaves it to the discretion of the police and the complainant to decide whether a "pattern of conduct" and "mental distress" have occurred. As a result, the Ohio law is unconstitutionally vague.

Under the Ohio law, a person who knowingly causes mental distress to another person can be guilty of stalking. The behavior of a private detective certainly is covered by this law. A private detective's job is to gather information by following a person. If that person is aware of the detective, he may suffer mental distress. Because the statute covers the private detective's lawful activity as well as many other legitimate activi **[*802]** ties, it is not narrowly tailored to achieving its goal and is therefore overbroad.

The examination of the four representative stalking laws shows that despite the confusion in the areas of vagueness and overbreadth, a state legislature can enact a constitutionally sound stalking law. Of course, given the unpredictability and inconsistency in the law, no guarantee exists that a court will uphold any of these laws. Still, there is a great deal of difference between the California law, which obviously was drafted with possible constitutional challenges in mind, and the Ohio law, which suffers from constitutional infirmities. When evaluating stalking laws, courts should adopt an approach sensitive to the legislature's attempt to shape the law in accord with existing constitutional standards. If this is done, the narrowly drawn stalking laws will survive, while the poorly drafted ones will be struck down.

VI. Conclusion

The success or failure of a vagueness or overbreadth challenge to a stalking law will depend on the elements of the particular law at issue. The laws drafted around previously articulated constitutional boundaries are the most likely to survive scrutiny. Such laws include requirements of criminal intent, communication of a threat, and an objective standard against which to measure a potential offender's conduct. Laws that do not include these provisions are much more susceptible to invalidation on the grounds of vagueness and overbreadth. Because many state legislatures drafted their stalking laws around previously determined constitutional boundaries and included all three of the elements, many of the stalking laws will survive.

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Footnotes

1 California enacted the nation's first stalking law in 1990. Cal. Penal Code 646.9 (West 1992 & Supp. 1993). Since then, forty-seven other states and the District of Columbia have passed stalking legislation. Ala. Code 13A-6-90 to -94 (Supp. 1993); Act of May 27, 1993, ch. 40, 1, 1993 Alaska Sess. Laws 40 (to be codified at Alaska Stat. 11.41.260, 11.41.270); Act of Mar. 8, 1993, Act No. 379, 1-3, Act No. 388, 1-3, 1993 Ark. Acts 379, 388; Colo. Rev. Stat. 18-9-111 (1986 & Supp. 1992); Conn. Gen. Stat. Ann. 53-a-181c to -181d (West Supp. 1993); Del. Code Ann. tit. 11, 1312A (Supp. 1992); Anti-Stalking Temporary Amendment Act of 1992, L. No. 9-269, 2-3, 1992 D.C. Stat. 9-269 (to be codified at D.C. Code Ann. 22-504); Fla. Stat. Ann. 784.048 (West Supp. 1993); Ga. Code Ann. 16-5-90 to -93 (Michie Supp. 1993); Haw. Rev. Stat. 711-1106.5 (Supp. 1992); Idaho Code 18-7905 (Supp. 1993); Ill. Comp. Stat. ch. 720, 5/12-7.3 to -7.4 (1992), as amended by Act of Aug. 20, 1993, Pub. Act No. 88-402, 5, 1993 Ill. Legis. Serv. 88-402 (West); Act of May 6, 1993, Pub. L. No. 242-1993, 4, 1993 Ind. Legis. Serv. 242 (West) (to be codified at Ind. Code 35-45-10-1 to -5); Iowa Code Ann. 708.11 (West Supp. 1993); Act of May 17, 1993, ch. 291, 95, 1993 Kan. Sess. Laws 291; Ky. Rev. Stat. Ann. 508.140-508.150 (Michie/Bobbs-Merrill Supp. 1992); La. Rev. Stat. Ann. 14:40.2 (West Supp. 1993), as amended by Act of May 26, 1993, Act No. 125, 1993 La. Sess. Law Serv. 125 (West); Me. Rev. Stat. Ann. tit. 17-A, 506-A (West Supp. 1992), as amended by Act of July 13, 1993, ch. 475, 4-5, 1993 Me. Legis. Serv. 475 (West); Act of May 11, 1993, chs. 205, 206, 1, 1993 Md. Laws 205, 206 (to be codified at Md. Ann. Code art. 27, 121B); Mass. Ann. Laws ch. 265, 43 (Law. Co-op. 1993); Mich. Comp. Laws Ann. 750.411h-750.411i (West Supp. 1993); Act of May 17, 1993, ch. 326, 22, 1993 Minn. Sess. Law Serv. 326 (West) (to be codified at Minn. Stat. 609.749); Act of May 14, 1992, ch. 532, 1, 1993 Miss. Laws 532; Act of June 29, 1993, H.B. 194, A, 1993 Mo. Legis. Serv. 194 (Vernon) (to be codified at Mo. Rev. Stat. 455.010-