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Protecting, Enforcing & Advancing Victims' Rights

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Anti-Stalking Statutes May Criminalize Implied Threats Without Running Afoul of Free Speech Protections: The National Consensus

I. What is Stalking?

The portrayal of stalking in popular culture typically takes one of two forms. In the first incarnation, stalking is portrayed as harmless and often humorous—think of the 1998 film *There's Something About Mary*, in which Cameron Diaz's character is pursued obsessively by at least four men, including a personal investigator hired by one of them to dig up information about her personal life. Alternatively, stalking is portrayed in an over-the-top fashion, with an overtly psychotic stalker getting plastic surgery to resemble a deceased spouse, tattooing the victim's name across his chest, or delivering swift and immediate death to anyone who comes between him and his victim.

In reality, of course, stalking may take a variety of forms and is anything but funny for the millions who experience it. Although the legal definition varies from state to state, stalking can be generally defined as a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear. Stalking has a significant impact on those who are being stalked. Studies find that about 30 percent of stalking cases result in physical violence against the victim.[1] Even when there is no overt physical violence, victims of stalking commonly experience physical harm, such as anxiety, post-traumatic stress disorder, and sleep disturbances.[2] Stalking generally does not take the "over the top" form seen in many made-for-television movies. It is more likely to take forms such as repeatedly following the victim too closely in her car and thereby causing the victim distress, or sending unwanted letters and presents to the victim, or the victim's family, friends, or co-workers, even after the stalker has been told to stop.

Over 3.4 million people are stalked every year.[3] Approximately 14 in every 1,000 people age 18 and older are stalked every year.[4] In response to the stalking epidemic, all states have enacted anti-stalking legislation.[5] Although the legal definition of stalking varies based on jurisdiction, one common element is to prohibit "threatening" words or conduct.[6] Many jurisdictions explicitly include "implied threats" as falling under the conduct prohibited or otherwise do not limit the prohibited conduct to overt threats.[7]

This article focuses on the "threat" requirement found in many anti-stalking statutes. Please know, however, that every state's stalking statute is unique,

INDEX

and there are numerous other issues that space constraints prevent discussion of here. Please contact NCVLI with any questions you may have about your jurisdiction's anti-stalking legislation.

II. Free Speech Challenges to Anti-Stalking Legislation

By prohibiting the stalker from making certain verbal or written communications with the victim, anti-stalking legislation can raise potential free speech concerns.

The First Amendment broadly proclaims that "Congress shall make no law . . . abridging the freedom of speech . . . ."[8] The First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.[9] Additionally, many states have adopted protections similar to those in the First Amendment under their state constitutions.

Because of the importance this country places on free speech, a special—more demanding—body of law has developed around laws that involve speech. When a statute implicates free speech, it must be narrowly tailored so that it is neither overbroad (meaning it reaches a substantial amount of protected speech) nor vague (meaning the average person would not understand what speech is prohibited).[10]

III. The Great Weight of Authority Agrees that Prohibiting Implied Threats Does Not Run Afoul of Constitutional Free Speech Protections

Although numerous defendants have argued that prohibiting "threats"—defined to include implied threats—raises overbreadth and vagueness concerns, with near-unanimity courts have found that an overt threat requirement is not required for an anti-stalking statute to pass Constitutional muster.

Using case-specific analysis based on the language of their statutes, courts find that prohibiting implied threats does not *per se* run afoul of free speech.[11] In one such case, the Georgia Supreme Court rejected defendant's argument that an overt threat was required to survive constitutional scrutiny, finding instead that the definition of "threat" was not unconstitutionally vague or overbroad because it was clearly defined and did not prohibit a substantial amount of protected speech.[12] An Alabama appellate court found that the use of "credible threat" in its stalking statute—defined to include implied threats—did not render the statute unconstitutional because the term was clearly defined.[13] Similarly, a California appellate court found that the use of "credible threat" in its anti-stalking statute—defined to include implied threats—was not vague or overbroad because it was sufficiently defined and because it was intended to prohibit conduct that presented a danger to society, and was thus outside First Amendment protection.[14]

Although the courts' analyses are dependent on the specific language of the respective anti-stalking statutes, two overarching themes emerge clearly from these cases. First, courts find that stalking behavior—even when it manifests itself in words—is not the sort of behavior intended to be protected by free speech laws: "[T]he goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, 'communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one's beliefs . . . .'"[15] When speech moves away from these values, and toward interference with another's Constitutional rights—such as the rights of privacy and to pursue happiness—it becomes abusive and moves into unprotected behavior: "While the right to free speech guarantees a powerful right to express oneself, it does not include the right to repeatedly invade another person's constitutional rights of privacy and the pursuit of happiness through the use of acts and threats that evidence a pattern of harassment designed to inflict substantial emotional distress."[16] As the Maine Supreme Court has eloquently stated: "Simply put, stalking another person is not constitutionally protected behavior."[17]

Second, courts cite to the right and the duty of states to protect their citizens from harassing and

dangerous behavior. For example, the Utah Court of Appeals has noted that speech restrictions imposed by virtue of its anti-stalking legislation were "justified by the state's compelling interest in protecting its citizens from threatening and harmful behavior."[18]

The Georgia Supreme Court similarly explained that:

> A state legislature is not constitutionally precluded from defining prohibited "harassing and intimidating" conduct more broadly than the making of "an overt threat of death or bodily harm" or the causing of substantial "emotional distress." To the contrary, our General Assembly is clearly authorized to enact statutes "intended to protect the citizens of Georgia from intimidation, violence, and *actual and implied* threats."[19]

As social science evidence makes clear, explicit threats do not always presage violence.[20] In order to fully protect their citizens, states recognize that they must be permitted to intervene even if the stalker does not make overt threats. As such, anti-stalking legislation is appropriately aimed at intervening in potentially violent situations before the violence occurs.

IV. The Exception: Oregon

In contrast to this great weight of authority, Oregon courts have found that punishing a stalker for making implied threats runs afoul of free speech protections. Facially, Oregon's anti-stalking statute has no overt threat requirement. In *State v. Rangel*, however, the Oregon Supreme Court read an unequivocal threat requirement into the law.[21] It held that in order to survive scrutiny under Oregon's Constitution,[22] the law must be aimed at prohibiting unwanted effects of speech—not the speech itself.[23] Additionally, the underlying communicative act must itself be unprotected.[24] To meet this requirement, the court held that a "proscribable threat" requirement must be read into the statute.[25] The court defined a "proscribable threat" as "a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts."[26] Recently, Oregon's appellate courts have determined that this same showing must be made to obtain relief for the violation of a stalking protective order—even though the defendant is already prohibited from making contact with the victim under the order, and even though the victim has already been required to make the *Rangel* showing in order to obtain the order.[27]

Oregon's case law is distinguishable from that of other states. Oregon courts have interpreted Oregon's constitutional speech protections extremely broadly, finding Oregon's free speech laws to be even more protective than the protections found in the First Amendment. Most states do not have such stringent free speech protections. NCVLI is fighting hard to change the law in Oregon so that victims of stalking in that state may experience the same protections that victims in other states enjoy.

V. Conclusion

Just because anti-stalking laws regulate speech, it does not follow that they violate free speech protections. To the contrary, the great majority of courts that have addressed this issue have concluded that prohibiting implied threats does not *per se* run afoul of free speech. If you are facing this issue in your jurisdiction, please contact NCVLI for resources and assistance.

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[1] *See* J. Reid Meloy, *Stalking and Violence*, *in Stalking and Psychosexual Obsession: Psychological Perspectives for Prevention, Policing, and Treatment* 106-07 (J. Boon and L. Sheridan, eds., 2002) (collecting ten studies, which had basal violence rates of approximately 21 to 76 percent); David V. James et al., *Stalking and Serious Violence*, 31 J. Am. Acad. Psychiatry Law 432, 435 (2003) (finding that "serious violence" resulted in 32 percent of stalking cases studied).

[2] Michele Pathe et al., *Management of Victims of Stalking*, 7 Adv. Psychiatr. Treat. 399, 401 (2001).

[3] Katrina Baum et al., U.S. Department of Justice,

Office of Justice Programs, *National Crime Victimization Survey: Stalking Victimization in the United States*, *1 (2009), available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svus.pdf.

[4] *Id.*

[5] California was the first state to enact anti-stalking legislation in 1990; by 1998, every state had adopted anti-stalking legislation. Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 Brandeis L.J. 513, 516 (2000).

[6] *See, e.g.*, Ala. Code § 13A-6-90; Ariz. Rev. Stat. § 13-2923; Ark. Code Ann. 5-71-229; Cal. Pen. Code § 646.9; Colo. Rev. Stat. § 18-9-602.

[7] *See, e.g.*, Ala. Code § 13A-6-90; Ariz. Rev. Stat. § 13-2923; Cal. Pen. Code § 646.9; Colo. Rev. Stat. § 18-9-602.

[8] U.S. Const. amend. I.

[9] *Gitlow v. New York*, 268 U.S. 652, 656 (1925).

[10] A statute is "overbroad" if it "prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). A statute is "vague" if it does not provide a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly[,]" or if it does not "provide explicit standards for those who apply [the laws]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

[11] *See, e.g., Culbreath v. State*, 667 So. 2d 156, 159-60 (Ala. Crim. App. 1995) (finding a "credible threat" requirement, defined to include implied threats, did not run afoul of free speech protections); *People v. Borrelli*, 77 Cal. App. 4th 703, 719-20 (Cal. Ct. App. 2000) (same); *Johnson v. State*, 449 S.E.2d 94, 96 (Ga. 1994) (refusing to interpret the state's anti-stalking statute as requiring an overt threat); *State v. Whitesell*, 13 P.3d 887, 900-03 (Kan. 2000) (finding that an anti-stalking statute that prohibited behavior that seriously "alarms, annoys, torments, or terrorizes" the victim without an overt threat requirement, to be neither vague nor overbroad); *Salt Lake City v. Lopez*, 935 P.2d 1259, 1265 (Utah Ct. App. 1997) (finding that an anti-stalking law that did not require overt threats was not unconstitutionally vague or overbroad).

[12] *Johnson*, 449 S.E.2d at 96.

[13] *Culbreath*, 667 So. 2d at 159-60.

[14] *Borrelli*, 77 Cal. App. 4th at 719-20.

[15] *Id.* at 715 (quoting *Shackelford v. Shirley*, 948 F.2d 935, 938 (2d Cir. 1991) (quoting Tribe, *American Constitutional Law* (2d ed. 1998) § 12-8, pp. 836-37).

[16] *Id.* at 716. *See also Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (noting that the First Amendment permits restrictions upon the content of speech when it is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality") (citing *R.A. V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)); *Whitesell*, 13 P.3d at 900-01 ("Despite our First Amendment rights, we are not free to harm others under the guise of free speech.").

[17] *State v. Elliott*, 987 A.2d 513, 520 (Me. 2010).

[18] *Lopez*, 935 P.2d at 1264. *See also Johnson*, 449 S.E.2d at 96 ("[O]ur General Assembly is clearly authorized to enact statutes 'intended to protect the citizens of Georgia from intimidation, violence, and *actual and implied* threats.'") (internal citation omitted); *Elliott*, 987 A.2d at 520 ("Because the State has a legitimate interest in protecting public safety by prohibiting defined types of behavior that infringe on the rights of another person, [defendant's] prohibited conduct toward [the victim] was not constitutionally protected.").

[19] *Johnson*, 449 S.E.2d at 96.

[20] Phillip J. Resnick, *Stalking Risk Assessment*, *in Stalking: Psychiatric Perspectives and Practical Approaches* 63 (Debra A. Pinals, ed., 2007) (noting that approximately 25-50 percent of stalkers who make threats become physically violent toward the victim, and "[i]n approximately 15% of cases . . . male and female stalkers were violent without prior threats").

[21] 977 P.2d 379 (Or. 1999).

[22] It is important to note that Oregon's state free speech law is extremely broad, providing that: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Or. Const. art. I, § 8.

[23] *Rangel*, 977 P.2d at 383.

[24] *Id.*

[25] *Id.* at 384.

[26] *Id.*

[27] *See State v. Ryan*, 239 P.3d 1016 (Or. Ct. App. 2010); *State v. Nguyen*, 243 P.3d 820 (Or. Ct. App. 2010).

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