IN THE SUPREME COURT OF FLORIDA

ROBERT K. KAHLES,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 84,748

PETITIONER'S BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PERSONS

I hereby certify the following is a complete list of all persons known to Petitioner's counsel who are interested, or may be interested, in the outcome of these proceedings:

1. Robert K. Kahles, Petitioner;

2. The Honorable Alan H. Schreiber, Public Defender, 17th Judicial Circuit, Broward County, Florida;

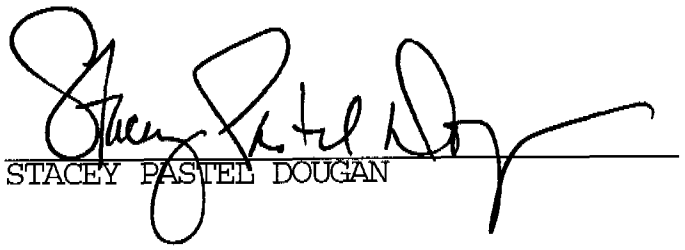
3. The Honorable Robert Butterworth, Attorney General for Florida;

4. The Honorable Zebedee Wright, County Court Judge, 17th Judicial Circuit, Broward County, Florida;

5. Stacey Pastel Dougan, Assistant Public Defender, 17th Judicial Circuit, Broward County, Florida, counsel for Petitioner;

6. Diane M. Cuddihy, Assistant Public Defender, 17th Judicial Circuit, Broward County, Florida;

7. Michael J. Neimand, Assistant Attorney General, counsel for Respondent.



STACEY PASTEL DOUGAN

QUESTIONS PRESENTED

I. WHETHER SECTION 784.084(2) OF THE FLORIDA STATUTES VIOLATES DUE PROCESS BECAUSE IT FAILS TO PLACE CITIZENS ON NOTICE OF PROSCRIBED CONDUCT AND IT FAILS TO PROVIDE MINIMAL GUIDELINES FOR ENFORCEMENT.

II. WHETHER SECTION 784.048(2) VIOLATES FREEDOM OF EXPRESSION BECAUSE IT FAILS TO DISTINGUISH BETWEEN PROTECTED AND UNPROTECTED CONDUCT OR SPEECH.

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STATEMENT OF THE CASE

Petitioner, Robert K. Kahles, was charged with one count of misdemeanor stalking in violation of section 784.048(2) of the Florida Statutes (Supp. 1992).[1] (R 38). The information charged that Petitioner willfully, maliciously, and repeatedly followed or harassed Michelle Grist. (R 38). Prior to trial he filed a Motion to Declare Florida's Misdemeanor Stalking Statute Unconstitutional.[2] (R 50-64). The trial court granted the motion, finding that the misdemeanor stalking statute is on its face both unconstitutionally vague and overbroad. (R 69-74). Specifically, the trial court concluded that the misdemeanor stalking statute violates both due process of law and the freedom of expression.

The state timely appealed to the Fourth District Court of Appeal the trial court's order. The district court reversed the trial court's ruling in State v. Kahles, 644 So. 2d 512 (Fla. 4th DCA 1994), relying upon the opinions in Pallas v. State, 636 So. 2d 1358 (Fla. 3d DCA 1994) and Bouters v. State, 634 So. 2d 246

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[1] Section 784.048(2) of the Florida Statutes (Supp. 1992) provides as follows:

> Any person who willfully, maliciously, and repeatedly follows or harasses another person commits the offense of stalking, a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

[2] Specifically, Defendant challenged section 784.048(2) of the Florida Statues. Inherent in the challenge were subsection (1)(a) (the definition of "harasses") and subsection (1)(b) (the definition of "course of conduct"). The other provision at issue is section 784.048(5), which permits a police officer to arrest without a warrant any person the officer believes violated section 784.048(2).

(Fla. 5th DCA), rev. granted, 640 So. 2d 1106 (Fla. 1994). The decisions in both Pallas and Bouters adjudicated only the felony provisions of Florida's Stalking Statute; neither addressed the constitutionality of the misdemeanor stalking statute.[3]

Because the misdemeanor stalking statute differs substantially from the felony statute addressed in Pallas and Bouters, Petitioner timely filed a Motion for Rehearing and/or Certification. The district court denied the Motion for Rehearing, but granted in part Petitioner's Motion for Certification, certifying as issues of great public importance the questions presented in this brief. Thereafter, Petitioner timely filed his Notice of Discretionary Review. On November 28, 1994, this Court entered an order postponing its decision on jurisdiction and setting a briefing schedule. Petitioner's brief on the merits follows.

SUMMARY OF THE ARGUMENT

The Florida Legislature created a new offense when it enacted the misdemeanor stalking statute. When legislatures create new crimes, they must take particular care to ensure that the statute satisfies the requirements of due process. Florida's misdemeanor stalking statute fails to place citizens on notice of the proscribed conduct because it does not provide a sufficiently

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[3] No district court has considered the constitutionality of Florida's misdemeanor stalking statute independently of the felony statute. Recently in Huffine v. State, 1994 WL 706166 (Fla. 2d DCA Dec. 21, 1994), the court followed the decision in Kahles, finding the misdemeanor statute constitutional based on the reasons set forth in Pallas and Bouters.

positive definition of what constitutes stalking. Its failure to define the elements of the offense is compounded by the absence of any specific intent requirement. The statute criminalizes behavior it has failed to define without requiring a defendant to possess any prohibited intent or purpose. Assuming arguendo that "willful," "malicious," and "repeated" constitute a general "bad" or "evil" intent, that generalized notion of criminality cannot withstand constitutional scrutiny. Because the misdemeanor provisions differ fundamentally from the felony provisions, the Fourth District Court's reliance on Bouters and Pallas is flawed. Neither of those decisions adjudicated the constitutionality of Florida's misdemeanor stalking statute.

The statute's failure to provide notice of the prohibited conduct combined with its express authorization permitting police officers to make warrantless arrests unquestionably violates due process. Officers need not witness the alleged criminal conduct before they can arrest a defendant for engaging in misdemeanor stalking. Because stalking is a highly contextualized crime and the statute does nothing to limit police officers' discretion, decisions to make arrests inevitably will be based upon subjective determinations, undoubtedly resulting in arbitrary and discriminatory enforcement.

The statute is also unconstitutionally overbroad. Without question, the statute implicates fundamental rights guaranteed to all citizens: specifically, the right to move about in public and the freedom of expression. Petitioner recognizes that the

legislature can regulate citizens' rights to expression, movement, and association under certain circumstances, but the First Amendment requires that any such legislation be as narrowly tailored as possible. Decisions and media reports already reveal that, regardless of what the legislature intended, stalking laws are being routinely applied to abortion protests. Given the conflict between this legislation and the rights of citizens to express themselves, the broadly worded provisions of Florida's Stalking Statute cannot withstand constitutional scrutiny.

ARGUMENT

I. THE FLORIDA LEGISLATURE CREATED A NEW OFFENSE WHEN IT ENACTED THE MISDEMEANOR STALKING STATUTE

Legislators began taking seriously the behavior of stalking in large part because of the continuous onslaught of reports concerning women whom, before they were murdered by a husband or boyfriend, police and prosecutors told nothing could be done until they were injured or dead.[4] Women who leave or attempt to leave abusive partners often face the greatest danger of violence.[5] The statutes were intended to address violence in domestic relationships that often leads to murder or injury, but where the actual behavior, described as "stalking," falls short

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[4] Melinda Beckwith, et al., Murderous Obsession, **Newsweek**, July 13, 1992; see also Tamar Lewin, New Laws Address Old Problem: The Terror of A Stalker's Threats, **NY Times**, Feb. 8, 1993, A1, col. 5.

[5] See, e.g., Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 **Mich. L. Rev.** 1 (1991); Angela Browne, **When Battered Women Kill** 110 (1987) (estimating that as many as 50% of abused women are followed, harassed, threatened, and attacked after leaving abuser).

of traditional definitions of assault or battery.[6] Too, the statutes evolved out of the recognition that restraining orders often do not succeed in thwarting an escalating pattern of violence.[7] California enacted the first stalking statute in 1990;[8] since then almost every other state has enacted similar legislation.[9]

Florida enacted its Stalking Statute in 1992. Modeled after the California law, it essentially defines stalking as following or harassing another person. Florida's statute is unique, however, because of the distinction it draws between misdemeanor and felony stalking. The felony statute mirrors many other state statutes, requiring that the prohibited acts be accompanied by a "credible threat with the intent to place [the target] in reasonable fear of death or bodily injury." § 784.048(3), Fla. Stat. (Supp. 1992). The misdemeanor provision, on the other hand, includes no intent requirement; thus any person who "willfully, maliciously, and repeatedly follows or harasses

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[6] See, e.g., Robert A. Guy, Jr. (Comment), The Nature and Constitutionality of Stalking Laws, 46 **Vand. L. Rev.** 991, 1000 (1993). This is true of Florida's law also. See Rep. Carol Hanson, Letter to the Editor, **Sun-Sentinel**, June 23, 1994, at 14A.

[7] See Steinfink v. Kadish, 638 So. 2d 79 (Fla. 3d DCA 1993).

[8] Cal. Penal Code § 649.9 (West 1990).

[9] Since 1990, at least forty-three states have enacted similar laws. See Robert P. Faulkner and Douglas P. Hsiao, And Where You Go I'll Follow: The Constitutionality of Anti-Stalking Laws and Proposed Model Legislation, 31 **Harv. J. on Legis.** 1 (1994).

another person" commits the offense of misdemeanor stalking. § 784.048(2), Fla. Stat. (Supp. 1992).

Acts of stalking may include following, placing under surveillance, or trailing a victim; loitering outside her home or work place; peeping through windows; persistent phoning (including anonymous and obscene calls); showering the victim with extravagant gifts; tearful pleas for reconciliation; writing notes and letters ranging from declarations of love to threats against her life; physical attacks and threats against the victim, her family, friends, or pets; threats or attempts of suicide; vandalism; murder and attempted murder.[10] Although these acts generally occur within the context of a domestic relationship, they can also involve "erotomanics" who may have no preexisting relationship with the victim.[11] Less frequently, the behavior is targeted toward celebrities or high profile figures.[12]

The variety of acts which may or may not constitute stalking combined with the differing types of relationships that exist

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[10] See, e.g., Thomas R. Haggard, The South Carolina Stalking Statute: A Study in Bad Drafting, 5 **Apr. S.C. Law.** 13 (Mar./Apr. 1994); K. Thomas, Anti-Stalking Statutes: Background and Constitutional Analysis, 2 **CRS Report for Congress** (September 26, 1992).

[11] See Susan Cullen Anderson, Anti-Stalking Laws: Will They Curb the Erotomanic's Obsessive Pursuit?, 17 **Law & Psychol. Rev.** 171 (1993).

[12] Some estimate that only 5% of stalking cases involve public figures, although those cases receive greater publicity. Moreover, perpetrators who stalk celebrities or other famous people are generally deemed less dangerous than are those who stalk intimate partners.

between alleged perpetrators and victims reveals only one concrete conclusion: stalking is a quintessentially contextualized crime. And although it would be impossible to draft legislation that covers precisely every conceivable type of stalking, the Florida Legislature created a broadly worded, fatally vague statute. The statute is at once both over-inclusive and under-inclusive. It is over-inclusive because it fails completely to provide a discernible standard of conduct by which citizens can measure their own conduct and steer clear of violating the law. The statute is under-inclusive because its emphasis on "bad" acts may allow perpetrators claiming that love or infatuation motivates their behavior to escape the statute's reach.[13] In attempting to articulate what it considered to constitute "stalking," the legislature included none of the acts described above; instead it enacted a statute that is unconstitutionally vague in all its applications.

II. THE MISDEMEANOR STALKING STATUTE IS FACIALLY UNCONSTITUTIONAL BECAUSE IT IS IMPERMISSIBLY VAGUE IN ALL ITS APPLICATIONS

A. The Statute Fails to Sufficiently Define the Newly Created Offense of Stalking

The Due Process Clauses of the United States and Florida Constitutions require a statute to (1) provide adequate notice to the public as to what conduct is proscribed, and (2) to set clear standards to limit law enforcement's discretion in effecting arrests to avoid arbitrary and discriminatory enforcement of the

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[13] See **Harv. J. on Legis.**, supra note 9, at 56-57.

law. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Linville v. State, 359 So. 2d 450, 451-52 (Fla. 1978). A law containing vague prohibitions which fail to meet either of these requirements violates due process. In Brown v. State, 629 So. 2d 841 (Fla. 1994), this Court recently struck down as facially vague and unconstitutional a statute because it failed to give a person of ordinary intelligence fair notice of what conduct was forbidden. Because section 893.13(1)(i) of the Florida Statutes criminalized the sale of narcotics within 200 feet of a "public housing facility" without defining that term, this Court concluded that the statute was impermissibly vague in all its applications. Id. at 843.

Petitioner has standing to launch a facial challenge against this statute because the statute supplies no ascertainable standards by which to determine what conduct is included and what conduct is excluded from its proscription. Coates v. Cincinnati, 402 U.S. 611, 614 (1971). As this Court's decision in Brown illustrates, and the Supreme Court has made clear, legislatures must exercise particular care when they create a new offense:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential due process of law.

Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)

(emphasis added). Moreover, "important elements cannot be left to conjecture, or be supplied by either the court or the jury"; rather they must be clearly defined within the statute. Id. at 392. At least one court has candidly admitted that the felony provision of the stalking statute is "poorly drafted." State v. Bossie, 1 Fla. L. Weekly Supp. 465 (Fla. 18th Cir. 1994). With respect to the misdemeanor provision, however, the statute is more than poorly drafted: it is unconstitutionally vague.

1. The Statute Contains No Specific Intent Requirement to Alleviate Concerns of Vagueness

In creating the offense of misdemeanor stalking, the legislature employed the words "willful," "malicious," and "repeated," but expressed no prohibited intent. See State v. Culmo, 642 A.2d 90, 93 n.4 (Conn. Super. Ct. 1993) (distinguishing Connecticut statute from Florida's misdemeanor stalking statute explicitly recognizing that Florida law contains no specific intent requirement). In Morisette v. United States, 342 U.S. 246, 262 (1952), the Supreme Court observed that where a crime well defined at common law has historically contained a specific intent requirement, courts should construe the statute as containing an "inherent" intent requirement regardless of whether Congress expressed it within the statutory language. See also Linehan v. State, 476 So. 2d 1262 (Fla. 1985). But "quite contrary inferences" are warranted where the legislature expresses no intent requirement in "creating an offense new to general law, for whose definition the courts have no guidance except the Act." Morisette, 342 U.S. at 262 (emphasis added).

Because the misdemeanor stalking statute creates a new offense for which there is no counter-part at common law, a specific intent requirement cannot be read into the statute. See id.

In Wyche v. State, 619 So. 2d 231 (Fla. 1993), this Court struck down as facially vague and overbroad a municipal ordinance prohibiting loitering for the purposes of prostitution. Although the ordinance at issue prohibited loitering "in a manner and under circumstances manifesting the purpose of engaging in acts of prostitution," this Court observed that the ordinance did not "require proof of unlawful intent as an element of the offense." Id. at 235 (emphasis added). This Court specifically declined to follow other state courts in construing similar statutes to include a specific intent requirement. Id. at 236.

Nonetheless, the legislature clearly intended not to include in the misdemeanor stalking statute a specific intent requirement. The legislature's inclusion of intent within the felony provision defeats any assertion that the legislature meant to include such a requirement in the misdemeanor provision. Moreover, most stalking statutes' misdemeanor provisions contain express intent requirements.[14] Therefore, it must be concluded that the Florida Legislature was aware of its choice to include within the misdemeanor provision a specific intent requirement when it enacted the statute.

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[14] See, e.g., Cal. Penal Code § 649.9(a) (West 1990); Conn. Gen. Stat. Ann. § 53a-181d (West Supp. 1993); Tenn. Code Ann. § 39-17.315 (1992); Va. Code Ann. § 18.2-60.3(A) (Michie Supp. 1993).

Assuming, as the state argued below, that "willfully" constitutes a specific intent requirement amounting to a "bad" or "evil" purpose, the vagueness of the statutory elements remain fatal to statute. An intent requirement broader than "bad purpose" is difficult to imagine. Criminalizing the intent to follow or harass another with a "bad" or "evil" purpose does nothing to narrow the statute because neither the statute nor any possible construction indicate what type of "bad" or "evil" purpose must be intended. Other state statutes' intent requirement focus upon what the defendant intends toward the victim; for example, to place her in fear for her safety.[15] But under the Florida statute, if a defendant merely intends to "follow" another person, that defendant can be arrested. Florida's statute renders completely immaterial as to what, if any, impact the defendant intends for the behavior to have upon the victim; it also renders immaterial the defendant's intent.

Consequently, the state cannot argue that the perpetrator's intent rather than the prohibited acts triggers the statute. Only where a statute clearly conveys what conduct or intent is criminal will an intent requirement alleviate concerns of vagueness. See Linville v. State, 359 So. 2d 450 (Fla. 1979) (finding unconstitutionally vague a statute that prohibited the intentional inhaling or possession of chemical substances due to failure to sufficiently define elements of offense). For example, in Woolfolk v. Commonwealth, 447 S.E.2d 530, 536 (Ga.

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[15] See Cal. Penal Code § 649.9 (West 1990).

1994), the Georgia Supreme Court found constitutional Georgia's stalking statute, reasoning that the statute's requirement that the defendant possess a specific intent in conjunction with more than one overt act provides sufficient notice to satisfy due process. Florida's misdemeanor statute contains no such language.

Moreover, as the trial court observed, people engaging in stalking behavior often claim that their love and affection for the victim motivates their actions. (R 28-29). Accordingly, even if a bad purpose were to suffice as a specific intent requirement, the statute would not reach the majority of stalking cases involving domestic partners. Although the legislature undoubtedly enacted the statute in response to the alarming number of stalking cases connected with domestic violence, such an interpretation of the statute would leave unaddressed the most dangerous cases.

Stalking almost always involves a quest for control or domination by the stalker over the victim.[16] By ignoring the dynamics of power and control within the context of these relationships, the statute fails to take into account that many who engage in stalking behavior do not view their motive as bad; rather they see it as an attempt to save a relationship or to "win" the affections of another. For example, in City of

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[16] See generally, 90 **Mich. L. Rev.** 1, supra note 5 (explaining "separation assault"); Woolfolk, 447 S.E.2d at 531 (defendant's conduct escalated when estranged wife began dating another man).

Cleveland v. Walters, 1994 WL 568300 (Oh. Ct. App. Oct. 13, 1994), a jury acquitted a man of stalking his ex-girlfriend because he claimed that his intention was to "win back her love."

Had the legislature defined the prohibited intent in terms of domination and control, the statute would be subject to a much more narrow application, rendering it constitutionally sound. Moreover, such an intent requirement would have addressed the under-inclusiveness that becomes problematic where defendants credibly claim that their acts were motivated by "love." "Possessiveness" or "jealousy," often asserted as defenses or excuses for a perpetrator's actions, would no longer suffice; rather, they would be probative of the defendant's intent to dominate or control the victim. Some commentators have suggested that this intent requirement be couched in terms of "intent to coerce," meaning an "intent to force another person to engage in conduct from which he or she has a legal right to abstain, or to abstain from conduct in which he or she has a legal right to engage, when the accused knows or has been informed that the person is unwilling to comply." **Harv. J. on Legis.**, supra note 9, at 53.

But the Florida Legislature simply chose not to include any intent requirement in the misdemeanor statute. A proposed intent requirement amounting to "bad" or "evil" intent cannot save this particular statute against a due process challenge because the neither that intent requirement nor the statutory elements places citizens on notice of what conduct or intent is criminal.

2. "Follows" is Not Statutorily Defined and Fails to Place Citizens on Notice of What Conduct is Proscribed

The Stalking Statute criminalizes the behavior of willfully, maliciously and repeatedly following another person without in any way qualifying or defining the act of following. Unlike harassment, the statute does not require that the following be directed at a specific person or that it cause the victim to experience substantial emotional distress. Neither does the statute grant a defendant the opportunity to show that his act of following serves a "legitimate" purpose. Finally, the legislature has not exempted from the statute's scope following that qualifies as "constitutionally protected activity." Instead, the mere act of following another if perceived to be done willfully, maliciously, or repeatedly will invoke the statute.

"The act of 'following,' in and of itself, can be quite neutral. One can follow someone coincidentally, or intentionally, but with benign intentions." State v. Culmo, 642 A.2d 90, 95 (Conn. Super. Ct. 1993). Moreover, because people have the right to move about freely in the community, a defendant's intention and purpose become dispositive in judging the legality of his behavior. Id. Yet, Florida's misdemeanor statute provides no indication of "how far, or how often, or in what context such a following is prohibited" before one can be convicted of this crime. Anti-Stalking Statutes, supra, at 9. In fact, the law fails to reveal whether a victim need be aware that she is being followed. Id. at 7 n.29; see also 46 **Vand. L.**

Rev., supra, at 1004. Unlike the felony provision, the misdemeanor statute prohibits following another person regardless of whether such following threatens another and regardless of the defendant's intent.

As the court recognized in State v. Knodel, 1 Fla. L. Weekly Supp. 542 (Fla. Escambia Cty. Ct. Sept. 2, 1993), the term "follows" is unconstitutionally vague. The court reasoned that the legislature failed to set spatiotemporal boundaries to limit the statute's application, "and so one might, for example, question whether the statute prohibits 'following' another into the same area of town one, two or twenty four hours later." Id. at 543; see also Wallace v. State, No. 93-087 CF (Fla. 10th Cir. May 19, 1993).[17]

The district court erred in this case when it relied upon the decisions in Bouters and Pallas to conclude that the misdemeanor stalking statute is constitutional. As previously stated, neither of these statutes addressed the misdemeanor statute. More significantly, however, neither case considered whether "follows" is sufficiently defined within the statute to satisfy due process. In Pallas, the court explained that the defendant "committed acts of harassment and threats, but did not follow the victim." 636 So. 2d at 1359. Similarly, the district court's decision in Bouters did not mention the term "follows."

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[17] Confusion in the lower courts is itself evidence that the law is unconstitutionally vague. United States v. Cardiff, 344 U.S. 174 (1952). Compare Wallace v. State, 93-087 CF (Fla. May 19, 1993), with State v. Kahles, 644 So. 2d 512 (Fla. 4th DCA 1994).

Other statutes narrow the scope of their stalking statutes by either defining or qualifying the meaning of following[18] and/or explicitly requiring that the defendant act with the specific intent to place the victim in fear of death or serious bodily injury.[19]

Statutes like Florida's that do not provide any limiting definition for following create serious potential for abuse. For example, the Minnesota Stalking Statute does not define the meaning of "follows," which constitutes harassment under the statute.[20] In July 1993, four pro-choice activists in Minneapolis were arrested and charged under that statute for "following" a car caravan organized by abortion foes.[21] The prosecutor defended the charges, explaining that he did not "have to prove intent to harass on the part of the stalker, only that the behavior would cause a 'reasonable person' to feel 'oppressed, persecuted, or intimidated.'"[22]

Florida's misdemeanor statute does not even require the

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[18] See, e.g., § 39-17-315((a)(2)(A), Tenn Code Ann. (Supp. 1993); § 9A.46.110(1)(b), Wash. Rev. Code Ann. (West 1993).

[19] See, e.g., People v. Heilman, 30 Cal. Rptr. 2d 422 (Cal. Ct. App. 1994) (court upheld constitutionality of California's stalking statute requiring defendant to repeatedly follow victim and to communicate credible threat with specific intent to place victim in fear of death or great bodily injury).

[20] § 609.749(2)(2), Minn. Stat. Ann. (West 1994).

[21] Doug Grow, Abortion-Rights Supporters Find Options Limited in Court Defense, **Star Trib.** Oct. 17, 1993, 3B.

[22] Kurt Chandler, Four Abortion Rights Activists Charged Under Anti Stalking Law, **Star Trib.**, Aug. 26, 1993 at 1B.

state to prove that a reasonable person would be adversely affected by the defendant's following. The statute simply provides no standard against which citizens may measure their conduct. All one has to do to invoke the statute is willfully, maliciously, and repeatedly follow another person--period. It does not matter why the defendant is following another, who that person is, and whether the other person has any awareness of or reaction to the defendant's actions. The term "follows" is void on its face because it is "so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork." Pallas, 636 So. 2d at 1360. Without question, the combination of failing to provide notice to citizens as what specific "following" is proscribed and the ability of law enforcement to make arrests based upon the ill-defined statute violates due process. See Brown, 629 So. 2d at 843.

3. "Harasses" is Too Broadly Defined Within the Statute to Provide Notice of Prohibited Conduct

The misdemeanor stalking statute also subjects to criminal prosecution anyone who "willfully, maliciously, and repeatedly . . . harasses another person." The statute provides the following definition for "harasses":

> (a) "Harasses" means to engage in a course of conduct directed at a specific person that causes substantial emotional distress in such person and serves no legitimate purpose.
>
> (b) "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." Such constitutionally protected activity includes picketing or other organized protests.

§ 784.048(1)(a), (b), Fla. Stat. (Supp. 1992).

a. "Repeatedly" renders even more uncertain the meaning of harasses

In Pallas, the district court ruled that "willfully, maliciously, and repeatedly" modifies both the terms "follows" and "harasses." 636 So. 2d at 1360. However, because harassment is by definition a "series of acts," requiring the state to prove that a defendant repeatedly engaged in a series of acts has been deemed inconsistent with the legislative intent behind these statutes. See People v. Heilman, 30 Cal. Rptr. 2d 422 (Cal. Ct. App. 1994). In Commonwealth v. Kwiatkowski, 637 N.E.2d 854, 857 (Mass. 1994), the court held that "the uncertain meaning of repeated patterns of conduct or repeated series of acts presents its own unconstitutional vagueness." Consequently, the court concluded that portion of the definition of harassment lacked "any reasonably discernible unambiguous application," striking it down as unconstitutional. Id.

To construe "repeatedly" as not modifying "harasses" would require a re-writing of the statute. More importantly, absolutely nothing within the statute's text or legislative history reveals that the legislature intended for such a result. But, as the courts in Kwiatkowski and Heilman recognized, employing the word "repeatedly" to modify "harasses," which by definition requires a showing that a defendant engaged in a "pattern of conduct composed of a series of acts," renders the term harasses unconstitutionally vague.

Another problem with the legislature's use of the word

"repeatedly" is whether the Stalking Statute permits the state to introduce evidence of prior bad acts to show the defendant's motive or plan or to judge the victim's reaction to the defendant's conduct. Past abusive behavior may be determinative of whether a victim has suffered substantial emotional distress. See State v. David, 880 P.2d 1308 (Mo. 1994). The context of the relationship between the victim and the perpetrator becomes profoundly relevant. However, the word "repeatedly" does not indicate what behavior can be used to prove that element of the offense. Courts have already concluded that evidence of collateral offenses is relevant to prove intent in a stalking prosecution. People v. Payton, 161 Misc. 2d 170, 612 N.Y.S.2d 815 (1994); Morton v. State, 1994 WL 529354 (Ala. Cr. App. Sept. 30, 1994); Commonwealth v. Wotan, 1994 WL 706144 (Mass. App. Ct. Dec. 16, 1994). The legislature's failure to provide notice of what "repeatedly" means in the context of this statute violates due process.

b. "Course of conduct" provides no standard of conduct

The course of conduct defined in the statute includes no substantive description of what is proscribed. Its definition encompasses a "series of acts," without offering any notice whatsoever as to the types of acts the legislature envisioned when it drafted the statute. As this Court reiterated in Brown, statutes failing to "include sufficient guidelines to put those who will be affected on notice as to what will render them liable to criminal sanctions" violate due process of law. 629 So. 2d at

843.

As previously stated, stalking is by definition a contextualized crime. It depends upon the nature and history of the relationship between the perpetrator and the victim, the motivation underlying perpetrator's behavior, and the response a victim has to that behavior. The facts contained in City of Cleveland v. Walters, 1994 WL 568300 (Oh. Ct. App. Oct. 13, 1994), provide a striking example of how contextualized and subjective these cases can be.

In Walters, the victim had attempted to end a relationship with the defendant. For three solid weeks the defendant persistently attempted to contact the victim in person and by phone. Id. He followed her to her child's doctor appointment, leaving balloons outside her car and a note inside the car on the passenger seat. Id. The victim also claimed that the defendant followed her to a party; the defendant claimed that they "merely ran into each other." Id. The victim repeatedly called the police and changed her phone number in response to the defendant's actions. Id. But because the defendant claimed that he wanted to "win back" his ex-girlfriend's love, the jury acquitted him of stalking. Id.

Many would conclude that the defendant's "course of conduct" in Walters meets the typical definition of stalking. Perhaps because he claimed his intentions were benign and sent balloons rather than a threatening letter, the jury refrained from considering this type of conduct criminal. But the victim in

this case could not have made more clear her desire not to be "won back." Nonetheless, he was acquitted of stalking despite the obvious impact his behavior had on the victim.

The verdict in Walters is typical of a statute that fails to provide sufficient guidance as to the actual behavior or intent that constitutes stalking. Neither "course of conduct" nor "a series of acts" serves to explain to the public what specific or general acts are proscribed. Moreover, the statute does not place citizens on notice of what intent renders illegal otherwise innocent activities. In addition to protecting citizens' rights to due process, drafting a sufficiently defined statute would have served the political function of placing people on notice that violence against women and other victims of stalking is being taken seriously. The most significant way of sending that message would have been to define the crime of stalking in a manner that reflects the victims' lived experience, thereby providing notice to both victims and perpetrators. Instead the legislature drafted a law that does little to empower stalking victims and will be unconstitutionally applied to criminal defendants.

c. The statute fails to define the phrase "substantial emotional distress" and provides no standard of harm by which citizens may measure their conduct or speech

The misdemeanor stalking statute does not require that a defendant act with the intent to cause the victim to suffer substantial emotional distress; rather the statute provides that otherwise innocent conduct will become criminal if it has the effect of causing substantial emotional distress. Yet, the statute contains no limitation or definition of what constitutes substantial emotional distress. Without some sort of objective measurement of what type of response the prohibited behavior must create, the statute will be enforced in an arbitrary manner. The danger becomes even greater in the context of domestic relationships.

In State v. David, 880 P.2d 1308 (Mo. 1994), the court concluded that, despite the defendant's campaign of terror against the victim, her substantial emotional distress was caused by their "pre-existing strained relationship." The court's conclusion is troubling in light of the objective responses the victim exhibited toward the defendant's conduct. She left town for more than a week, did not go to school or work, recorded the defendant's telephone messages, and called the police. Id. But in this case, the prior acts of violence the defendant had committed against the victim became totally separated from his current conduct. The victim was essentially denied protection because her response could have been caused by the abuse within their prior relationship.

The absence of any statutory definition for substantial emotional distress contributes to the statute's vagueness. This becomes critical considering that criminal liability is predicated on a victim's substantial emotional distress regardless of the defendant's intent. The presence of substantial emotional distress in and of itself makes otherwise innocent behavior criminal under the statute. Accordingly, the state cannot argue that an intent requirement narrows the definitions within the statute. Not only are ordinary citizens unlikely to comprehend what constitutes substantial emotional distress; police officers too must make that distinction in determining whether probable cause exists for an arrest. This utter failure to place citizens on notice as to an element of the offense of stalking and failure to provide law enforcement with clear standards to govern enforcement violates due process. Grayned, 408 U.S. at 102; Linville, 359 So. 2d at 450.

The lack of definitions within the statute combined with the lack of any standard to determine harm leaves citizens to guess not only what conduct is prohibited, but what level of distress must be caused before the statute is invoked. Other states' stalking statutes include a reasonable person standard to determine harm or a requirement that the person's distress be "reasonable." [23]

Florida's Stalking Statute provides no guidance as to how

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[23] See, e.g., Cal. Penal Code § 646.9(d); Tenn. Code Ann. § 39-17.315 (1992); Va. Code Ann. § 18.2-60.3(A) (Michie Supp. 1993).

citizens, police or courts must measure substantial emotional distress. The law does not reveal whether it criminalizes street harassment[24] of women by strangers. If so, the statute should employ a reasonable woman standard. On the other hand, a battered woman standard[25] should be employed where the victim of stalking behavior is a victim of domestic violence. Nevertheless, neither the statute nor the legislative history reveal what, if any, standard the legislature intended to apply in determining the existence of substantial emotional distress.

d. The phrase "no legitimate purpose" injects into the statute more uncertainty and subjectivity

At the same time it requires that the series of acts constituting harassment evidence a "continuity of purpose," the Legislature attempted to narrow the statute's scope by requiring that the conduct serve "no legitimate purpose."[26] The statute's silence as to what purpose a defendant's acts must accompany combined with its failure to identify what intent is criminal renders it unconstitutionally vague. The legislature simply cannot ensure that a statute will survive constitutional scrutiny by attempting to exclude a "legitimate" purpose from the statute's scope without identifying what serves as an

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[24] See generally, Cynthia Grant Bowman, Street Harassment and the Informal Ghettoization of Women, 106 **Harv. L. Rev.** 517 (1993).

[25] See Rogers v. State, 616 So. 2d 1098, 1099 (Fla. 1st DCA 1993) (recognizing scientific community has generally accepted theory underlying battered woman's syndrome).

[26] § 784.048(1)(a), Fla. Stat. (Supp. 1992).

illegitimate purpose. Rather than limiting the statute's reach, this language injects more uncertainty into the statutory prohibitions.

The district court in Bouters declared in a one paragraph decision that the language "no legitimate purpose" is "superfluous, hence, harmless." 634 So. 2d at 247. The court's reasoning directly contravenes this Court's recognition that courts must not presume that the legislature intended statutory language to have no meaning unless that is the only possible construction. Florida Police Benevolent Assn' v. Dept. of Agric. and Consumer Servs., 574 So. 2d 120, 122 (Fla. 1991). There can be no question that the legislature intended for this language to have a significant meaning. It employed the phrase to limit the statute's scope. But the legislature failed to provide any indication of what constitutes a legitimate versus an illegitimate purpose.

Reported stalking decisions illustrate that perpetrators almost always claim that their purpose is legitimate. In Walters, the defendant claimed his purpose was to "win back" his ex-girlfriend's love, despite her clearly expressed wishes not to have contact with him. 1994 WL 568300 at 1. Another defendant claimed that he sought "closure" of his relationship with the victim. State v. Knight, 1994 WL 19938 (Del. Super. Ct. Jan. 19, 1994). In People v. Krawiec, 634 N.E.2d 1173 (Ill. Ct. App. 1994), the defendant claimed that he was gathering evidence for divorce proceedings when he barged into his estranged wife's

bedroom with a video camera. Similarly, in Woolfolk, the defendant argued that his actions were motivated by his desire to "monitor" his children's environment to prepare for a custody hearing. 447 S.E.2d at 533. Finally, a professor charged with stalking a former student argued that he was simply trying to "dissuade" her from dating someone else. **Harv. J. on Legis.**, supra note 9, at 9 (citation omitted).

The fundamental problem, of course, is that in each of these cases, someone must determine whether the perpetrator's asserted purpose is indeed "legitimate." The contextualized nature of these cases becomes more problematic in light of certain observations courts have made. For example, the court in Knight summarily rejected the defendant's claimed desire for "closure" because he and the victim had no pre-existing relationship--any relationship "existed in the fantasy world of the defendant." 1994 WL 19938 at 2. Yet, the court in Walters found exceptionally relevant the last date on which the defendant and victim engaged in sexual relations. 1994 WL 568300 at 1. There can be no question that the factors to consider change dramatically in the context of an intimate relationship. Had the facts in Knight involved a defendant claiming that he wanted to reconcile with his wife of fifteen years, the outcome might have been completely different. Reconciling a marriage may be more likely deemed "legitimate" regardless of a defendant's intent or actions. Such a value judgment presents grave dangers considering the violence women often face in attempting to

separate from an abusive partner.

Thus, the outcome of the analysis concerning what "purpose" a defendant possesses is inextricably tied to the relationship he has with the victim. Notions of "romance" can also become inexplicably confused with determining whether a defendant has engaged in stalking. In Pallas, the defendant argued that "if an overzealous suitor repeatedly telephoned an unusually sensitive individual in hopes of establishing a romantic relationship, the suitor could be charged under this statute." 636 So. 2d at 1158. The district court dismissed the defendant's "erroneous interpretation of the statute," explaining that the conduct must be "willful, malicious, and repeated"; in addition, it must serve "no legitimate purpose." Id.

The clear implication of the court's rationale is that under the statute, asking for a "date" by definition serves a legitimate purpose. Furthermore, the court was apparently satisfied that such a request would simply not qualify as "willful, malicious, and repeated." And any woman who experienced substantial emotional distress in response to such conduct would surely be repudiated as "unusually sensitive." While the district court was obviously satisfied with its analysis, it leaves intact a statute that permits police officers to determine whether a particular defendant is acting with a legitimate purpose. To suggest that "asking for a date," regardless of the means employed and the effect on the victim, could never fall within the purview of the statute cannot be what

the legislature intended.

This Court struck down an ordinance in Wyche that was much more specific than the misdemeanor stalking statute. 619 So. 2d at 233 n.2. Despite the ordinance's explicit requirement that defendants engage in explicitly prohibited acts manifesting the purpose of engaging in prostitution, this Court concluded that it was not enough. Too much was left to officers' discretion. Id. at 237. Under the misdemeanor stalking statute, no purpose is even articulated; the only qualification is that defendant's purpose must not be legitimate.

Attempts to include within a statutory proscription only conduct that is "without any lawful purpose or object," may be a trap for innocent acts. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). Likewise, the danger of the phrase "serves no legitimate purpose" is revealed in courts' concerns that such a subjective standard leads to arbitrary and discriminatory enforcement of the law. See, e.g., City of Everett v. Moore, 683 P.2d 617, 620 (Wash. Ct. App. 1984); People v. Norman, 703 P.2d 1261 (Colo. 1985); People v. Gomez, 843 P.2d 1321 (Colo. 1993). This Court has also recognized the danger of such a subjective standard. In Hermanson v. State, 604 So. 2d 775 (Fla. 1992), the state prosecuted parents' reliance on spiritual healing, claiming that they were not "legitimately" practicing their religion. This Court struck down the child abuse statute under which they were prosecuted, reasoning that the statute violated due process because it failed to "clearly

indicate when . . . conduct becomes criminal." Id. at 782.

The misdemeanor stalking statute provides no standards for what constitutes legitimate purpose. Nor does the statute reveal who determines whether a legitimate purpose is demonstrated. It is patently unconstitutional to allow police officers to have the discretion to make such subjective decisions like whether a defendant's purpose is legitimate. To allow law enforcement to make that determination expressly invites arbitrary and discriminatory application of the statute. Because the statute suffers from vague, unintelligible definitions, the injection of a subjective standard to determine legitimacy of purpose renders the statute unequivocally unconstitutional. See Wyche, 619 So. 2d at 231.

e. The "constitutionally protected activity" exemption creates greater vagueness problems

The legislature also attempted to limit the scope of the misdemeanor stalking statute by exempting constitutionally protected activity from the definition of harassment.[27] Instead of eliminating vagueness problems, this statutory language exacerbates them. Professor Lawrence Tribe has characterized such maneuvers as "simply exchanging overbreadth for vagueness," explaining:

> The risk of introducing vagueness when attempting to [judicially] reconstruct statutes reveals a structural relationship of general importance in the interplay of overbreadth and vagueness. This relationship is most sharply focused in a hypothetical statute: "It shall be a crime to say anything in public unless the speech

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[27] § 784.048(1)(b), Fla. Stat. (Supp. 1992).

> is protected by the first and fourteenth amendments." This statute is guaranteed not to be overbroad since, by its terms, it literally forbids nothing that the Constitution protects. The statute is nonetheless patently vague . . . .

Lawrence H. Tribe, **American Constitutional Law** §12-29, at 1031 (2d ed. 1988).

Without question, asking police officers to discern what is and is not constitutionally protected activity is tantamount to expecting them to be constitutional scholars. Moreover, citizens too must understand the intricacies of constitutional law to determine whether their conduct is protected. Such a statute cannot withstand constitutional scrutiny. The legislature had no choice but to offer a substantive description of the behavior it sought to proscribe; it cannot rely on a broadly worded constitutionally protected activity exemption to sanitize the entire statute of its considerable constitutional defects.

B. The Warrantless Arrest Provision Combined With The Statute's Vagueness Leads Inevitably To Arbitrary And Discriminatory Enforcement

The Supreme Court has recognized that more important than the notice requirement of due process is its requirement that a statute establish minimal guidelines to govern law enforcement to avoid discriminatory and arbitrary application. Kolendar v. Lawson, 461 U.S. 352, 358 (1983). The misdemeanor stalking statute provides that any law enforcement officer may arrest without a warrant any person whom the officer has probable cause to believe has engaged in stalking.[28] Commentators have

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[28] § 784.048(5), Fla. Stat. (Supp. 1992).

described the impact of this statutory provision:

> [T]he Florida statute authorizes the police officer to make a warrantless arrest of someone who vexatiously follows a prochoice rally down the street on two separate occasions (remember: misdemeanor stalking in Florida does not require a threat). Moreover, as in the case of an obscenity statute, the Florida law requires the police officer to make a determination as to whether constitutionally protected speech is involved. This extremely delicate constitutional analysis is compounded by the fact that the officer need not have witnessed the . . . following or harassing conduct; he may rely instead on a third-party description of the conduct and then make the constitutional determination . . . . this defect can only be cured through a more narrow redefinition of the substantive crime, or, perhaps, by enumerating specific dangerous instances in which a warrantless arrest is permissible.

Harv. J. on Legis., supra note 9, at 32.

The Stalking Statute serves as a striking example of the statutes with which the Supreme Court was concerned in loitering cases. See, e.g., Papachristou, 405 U.S. at 156; Kolendar, 461 U.S. at 352. Unlike the ordinance this Court struck down in Wyche, the Stalking Statute provides no circumstances to guide law enforcement and leaves too much to individual officer's discretion. Cf. State v. Ecker, 311 So. 2d 104 (Fla.), cert. denied, 423 U.S. 1019 (1975) (upholding loitering statute because it specifically delineated circumstances under which arrest may be made).

The inherent vagueness of the Stalking Statute and the warrantless arrest provision leave it wide open to arbitrary and discriminatory enforcement, violating the fundamental constitutional guarantees of due process. Probable cause is based upon unconstitutionally vague and broad elements. Thus, an

officer's own opinion concerning whether a defendant has acted "willfully," "maliciously," and "repeatedly," and has caused to another person "substantial emotional distress" (regardless of the defendant's intent), and whether the defendant's actions were accompanied by an undefined "legitimate purpose" governs whether that officer will make a warrantless arrest. "Probable cause" leading to arrest based upon such undefined elements cannot be consistent with due process. Grayned, 408 U.S. at 109.

As this Court explained in Wyche, the police cannot be left with the "unguided task of differentiating between constitutionally protected street encounters and acts reflecting the state of mind needed to make an arrest." 619 So. 2d at 237. This is especially true where, as here, the statute does not reflect the state of mind needed to make an arrest. The law's failure to clearly delineate what conduct is criminal "impermissibly delegates basic policy matters to police[officers], judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Grayned, 408 U.S. at 108-09. This type of standardless discretion undoubtedly violates due process. Id.; Connally, 269 U.S. at 391.

III
THE STALKING STATUTE IMPLICATES PROTECTED EXPRESSION AND IS UNCONSTITUTIONALLY OVERBROAD

The overbreadth doctrine is separate and distinct from the vagueness doctrine. Where citizens cannot determine from a statute's text whether a vague law proscribes constitutionally protected expression, the law may have a significant chilling effect and may invite selective enforcement. Thus, an overbreadth challenge is triggered where a law is "susceptible of application to conduct protected by the First Amendment." Southeastern Fisheries Assn' Inc. v. Department of Nat. Resources, 453 So. 2d 1351, 1353 (Fla. 1984) (citations omitted).

Both the Florida[29] and the Federal[30] Constitutions protect freedom of expression, which includes "conduct intended to communicate" as well as the freedom of movement. See, e.g., Wyche, 619 So. 2d at 234 (citations omitted); Kolendar, 461 U.S. 352, 358 (statute requiring loiterers to produce "credible and reliable" identification infringed upon freedom of movement).

In Spears v. State, 337 So. 2d 977, 980 (Fla. 1976), this Court articulated the danger of failing to delineate between protected and nonprotected expression:

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising [the] right of free speech. If this possibility were the only evil of overbroad statues, it might suffice to review convictions on a case by case basis. But the mere existence of statutes and ordinances purporting to criminalize protected expression operates as a

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[29] Art. I, § 4, Fla. Const.

[30] U.S. Const., amend. I

> deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

Consequently, where a law threatens to violate freedom of expression, the state must prove not only that the law is directed toward a "legitimate public purpose," but that the legislature has drawn the law as "narrowly as possible." Wyche, 619 So. 2d at 234; Firestone v. News-Press Pub. Co., 538 So. 2d 457, 459 (Fla. 1989). In other words, a statute purporting to regulate unprotected conduct cannot sweep so broadly that it also prohibits constitutionally protected conduct. Wyche, 619 So. 2d at 234.

A defendant may challenge on First Amendment grounds a statute capable of being constitutionally applied, but where the law in its present form "would tend to suppress constitutionally protected activity." Gooding v. Wilson, 405 U.S. 518, 521 (1972) (citation omitted). The Supreme Court has permitted facial challenges to statutes that seek to regulate "only spoken words," or that might burden "innocent associations," or that might create prior restraints on speech based upon "delegated standardless discretionary power" provided to local functionaries. Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973) (citations omitted). The Court has also countenanced facial challenges where a statute "threatens others not before the court-those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially

invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985); see also Wyche, 619 So. 2d at 235.

A. The Misdemeanor Stalking Statute By Definition Infringes Upon the Freedom of Movement and Expression

"By its title and its terms, the stalking statute implicates the right to move about freely in public." State v. Culmo, 642 A.2d 90, 95 (Conn. Super. Ct. 1993).[31] While Petitioner agrees that the state has a compelling interest in protecting its citizenry against stalking behavior, the statute as drafted is simply too broad to withstand constitutional scrutiny. Because the misdemeanor statute contains no credible threat requirement, the statute is not limited to criminalizing communication and expression unprotected by the First Amendment. In addition, no specific intent requirement operates to limit the scope of the statute. See Smith v. California, 361 U.S. 147 (1960) (scienter requirement essential where criminal law has potential to infringe upon constitutionally protected activity).

The misdemeanor stalking statute provides that "anyone who willfully, maliciously, and repeatedly follows . . . another person" commits the offense of stalking. There can be no question a law cannot criminalize all such following without running afoul of the First Amendment. Following is not by

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[31] Although the court in Culmo concluded that the defendant lacked standing to challenge Connecticut's stalking statute on First Amendment grounds, that statute contains specific intent and threat requirements and does not criminalize the act of harassment. The court did note, however, that Florida's misdemeanor statute could indeed be applied to newspaper reporters and to private detectives. Id. at 93 n.4.

definition criminal behavior, but rather encompasses the freedom of movement. Consequently, the legislature had to narrowly restrict and define the specific type of following it sought to proscribe. As this Court emphasized in Wyche, all citizens enjoy the right to saunter down sidewalks and move about in public. 619 So. 2d at 237. Yet, the constitutionally protected activity exemption does not qualify the term follows. Consequently, the statute simply prohibits the willful, malicious, and repeated following of another person. This provision is patently unconstitutional under the First Amendment.

Following and approaching others lies at the heart of First Amendment activity targeted toward distributing and gathering information. **Harv. J. on Legis.**, supra note 9, at 21 (footnotes omitted). Moreover, this type of activity has become increasingly associated with abortion clinic protest tactics. In Madsen v. Women's Health Ctr., Inc., 114 S. Ct. 2516, 2529 (1994), the Supreme Court explained that the state court's injunction was aimed at preventing "clinic patients and staff from being 'stalked' or 'shadowed' by [protesters] as they approached the clinic."

Abortion clinic protests have become alarmingly violent all over the country, but particularly in Florida. Accordingly, it is not surprising that abortion rights activists have looked to stalking laws as a promising defense against abortion clinic terrorism. See Dana S. Gershon (Comment), Stalking Statutes: A New Vehicle to Curb the New Violence of the Radical Anti-Abortion

Movement, 26 **Colum. Hum. Rts. L. Rev.** 215, 222 (1994). But in Operation Rescue v. Women's Health Ctr., Inc., 626 So. 2d 664 (Fla. 1993), aff'd in part, Madsen v. Women's Health Ctr., 114 S.Ct. 2516 (1994), this Court recognized the necessity of drafting as narrowly as possible an injunction that would infringe upon protesters' asserted First Amendment rights. This Court in Operation Rescue had before it a highly detailed injunction that specifically set forth the dangers the trial court sought to avert and the behavior it sought to enjoin.

Although courts must apply a higher standard of review to content-neutral injunctions than to generally applicable statutes, any law sanctioning potentially constitutionally protected activity requires "precision of regulation." Madsen, 114 S. Ct. at 2525. There is no comparison between the injunction at issue in that case and the Stalking Statute, which has been, and will continue to be applied in the abortion protest context. The state cannot defend the misdemeanor stalking statute on the grounds that it functions as a precise regulation: criminalizing following or harassment is simply too broad.

As mentioned earlier, pro-choice activists were arrested and under Minnesota's stalking statute in July 1993, because they were "following" a car caravan of abortion opponents. The women's "purpose" was to act as legal observers for a pro-choice organization. The executive director for Planned Parenthood opined that the prosecution of the pro-choice activists amounted to an "incorrect" application of the statute, but that the

statute had previously been "correctly" applied the arrest of an abortion foe.[32] Because the Florida Legislature did not exempt from the scope of the misdemeanor stalking statute following that is "constitutionally protected," the Florida law is subject to the same type of unconstitutional enforcement.

In fact, the Stalking Statute has already been used to prosecute abortion activists in Florida. A man was initially arrested on a stalking charge after an administrator of a women's health center complained that he had followed her, taken a picture of her, and tried to obstruct her view while she was driving.[33] He was arrested again for violating his probation by demonstrating at the clinic where the victim worked. In addition, a Florida judge issued a restraining order based in part on the Stalking Statute to keep abortion protesters away from a clinic in Melbourne.[34]

Petitioner agrees that the state has a compelling interest in averting the escalating violence associated with abortion clinic protests. Furthermore, the state might argue that the legislature never intended for the statute to apply to political protests. Nevertheless, this statute has been and will continue to be applied in the context of abortion clinic protests.

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[32] Doug Grow, Abortion-Rights Supporters Find Options Limited in Court Defense, **Star Trib.**, Oct. 17, 1993, at 3B.

[33] Associated Press, Abortion Stalker is Arrested Again, **Miami Herald**, Dec. 23, 1993, at 5B.

[34] Maria Puente, Clinic Protesters Under Pressure from Stalking Laws, **USA Today**, May 10, 1993, at 2A.

Because the statute is susceptible to application to a substantial amount of constitutionally protected activity, the state bears the burden of proving that the legislation was as narrowly drawn as possible. See NAACP v. Button, 371 U.S. 415 (1963). There is simply no way to meet that burden given the breadth of this statute. More significantly, there is no way to avoid the danger that police officers will enforce the statute in an arbitrary and discriminatory manner. The statute gives them far too much authority.

B. The Statute's Exclusion of Constitutionally Protected Activity Does Not Sufficiently Narrow Its Reach

Although the statute excludes from its application "constitutionally protected activity [that] includes picketing or other organized protests,"[35] it is impermissibly overbroad because it "deters constitutionally protected conduct while purporting to criminalize [only] nonprotected activities." Northern Va. Chapter, ACLU v. City of Alexandria, 747 F. Supp. 324, 326 (E.D. Va. 1990). Where the legislature seeks to avoid the statute's application to constitutional activity, it must narrowly and expressly define the conduct it seeks to prohibit. See Button, 371 U.S. at 433. The legislature's failure to sufficiently define the elements of the offense results in the banning of First Amendment activity and impermissibly leaves the statute subject to "open-ended interpretation." Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 576 (1987). In

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[35] Fla. Stat. § 784.048(1)(b).

other words, the Stalking Statute in no way evinces a "considered legislative judgment that a particular mode of expression has to give was to other compelling needs of society." Broadrick, 413 U.S. at 611-12; see also Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974) (striking down statute having "broader sweep" than definition of "fighting words").

Any assertion that the misdemeanor stalking statute is clearly defined to exclude constitutional conduct is without merit. First, the term "following" is not subject to the exclusion of constitutionally protected activity. Thus, the statute is easily susceptible to constitutionally protected conduct. Cf. Wyche, 619 So. 2d at 234 (freedom of expression includes freedom of movement). Accord Northern Va. Chapter, ACLU, 747 F. Supp. 324, 325 n.2.

Secondly, the statutory definition of stalking does not exclude all protected conduct and speech. The definitions of "harasses" and "course of conduct" are what must place citizens on notice of proscribed conduct. Not only does the statute fail to delineate between protected and unprotected conduct, it may also operate to punish speech. "Absent evidence that . . . speech is independently proscribable (i.e., 'fighting words' or 'threats'), or so infused with violence as to be indistinguishable from a threat of physical harm," it cannot be broadly criminalized under this statute. Madsen, 114 S. Ct. at 2528.

Once again, abortion clinic protests illustrate the

impossibility of knowing what the statute proscribes. If an anti-choice protester follows a doctor, sends the doctor hate mail, taunts the doctor's children, stands outside the doctor's home, and tries to prevent the doctor's entrance into a clinic, has that person engaged in stalking or protected expression? Or what about an anti-choice protester arrested for engaging in a course of conduct that included making threatening hand gestures toward two victims, pointing and saying "bang, bang" the day after a Dr. David Gun was slain in Pensacola?[36] One commentator has suggested that "Wanted" posters are not protected by the First Amendment and should be criminalized under stalking laws. **Colum. Hum. Rts. L. Rev.**, supra, at 225 n.49. The extent to which any of these activities are protected by the First Amendment is anything but clear.

Stalking legislation was passed to fill the gap within domestic violence laws. It was envisioned as a way to allow police officers to arrest perpetrators for engaging in threatening behavior that does not rise to the level of assault or battery, but that might otherwise escalate into deadly violence. Similarly, stalking laws are now considered a method of intervention in the context of abortion clinic violence. Where behavior falls short of traditional definitions of assault or battery, abortion rights advocates hope that the laws will intervene before more violence erupts.

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[36] Associated Press, Abortion Stalker is Arrested Again, **Miami Herald**, Dec. 23, 1993, at 5B.

While this Court recognized in Operation Rescue that the state has compelling interests in averting abortion clinic violence, the misdemeanor stalking statute confers upon law enforcement authorities the responsibility of determining whether protest tactics are indeed constitutionally protected activity. A cursory review of the history of the Operation Rescue case illustrates how courts have struggled with deciding the breadth of First Amendment protection that is due to protesters. E.g., Madsen, 114 S. Ct. at 2516; Cheffer v. McGregor, 6 F.3d 705 (11th Cir. 1993) (finding same injunction at issue in Operation Rescue tantamount to content-based criminal statute). The legislature cannot expect police officers to conduct the type of constitutional analyses the courts have applied in these cases. The statute is without question "susceptible to application to protected expression" and is therefore overbroad on its face. See Gooding, 405 U.S. 518 (1972).

The law can and should address the escalating violence and terrorism associated with abortion clinic protests. A woman's right to terminate her pregnancy is secured by both the federal and state constitutions. But the stalking law cannot be used as the appropriate vehicle to stymie this violence. Many activities in which abortion protesters engage are unequivocally protected by the First Amendment. The misdemeanor statute comes nowhere near delineating specifically between the type of behavior, speech and intent that are not protected as opposed to that which is protected.

The statute's overbreadth cannot be cured by adopting a narrowing construction, and this Court cannot rewrite the statute itself. State v. Globe Communications Corp., 19 Fla. L. Weekly S645, S646 (Fla. Dec. 8, 1994). Because "no readily apparent construction suggests itself as a vehicle for rehabilitating" the misdemeanor stalking statute, Petitioner has standing to challenge it. Gooding, 405 U.S. at 521. The statute's scope is not limited to conduct, expression, or speech unprotected by the First Amendment. Because the statute is devoid of intelligible definitions, it is unconstitutionally vague and violates due process. This vagueness renders the statute substantially overbroad, threatening protected speech and conduct and therefore violates the First Amendment.

CONCLUSION

For the reasons set forth, Petitioner respectfully requests this Court to reverse the judgment of the Fourth District Court of Appeal, and to declare unconstitutionally vague and overbroad Florida's misdemeanor stalking statute.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief was mailed to Assistant Attorney General Michael J. Neimand, Department of Legal Affairs, Post Office Box 013241, Miami, Florida, 33101, this 4th day of January, 1995.

Stacey Pastel Dougan