

# UIC John Marshall Journal of Information Technology & Privacy Law

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Volume 13  
Issue 3 *Journal of Computer & Information Law*  
- Spring 1995

Article 3

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Spring 1995

## E-Mail Stalking: Is Adequate Legal Protection Available?, 13 J. Marshall J. Computer & Info. L. 405 (1995)

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### Recommended Citation

Eileen S. Ross, E-Mail Stalking: Is Adequate Legal Protection Available?, 13 J. Marshall J. Computer & Info. L. 405 (1995)

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## NOTE

# E-MAIL STALKING: IS ADEQUATE LEGAL PROTECTION AVAILABLE?

### I. INTRODUCTION

There is an inherent vulnerability in interacting with strangers via E-mail due to the absence of legal protection available to victims of E-mail stalking.<sup>1</sup> In the past two years, forty-eight states have enacted anti-stalking statutes that criminalize stalking.<sup>2</sup> However, only four

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1. See generally Cristina Carmody, *Stalking By Computer*, A.B.A. J., Sept. 1994, at 70 (acknowledging that people are using E-mail to communicate nasty and threatening messages); 140 Cong. Rec. E1796-01 (daily ed. Aug. 21, 1994) (recognizing E-mail stalking as a national problem); Sophronia S. Gregory, *Heartbreak in Cyberspace Having Too Many On-Line Affairs Gets a Computer Casanova Strung Up on an Electronic Bulletin Board*, TIME, July 19, 1994, at 58 (publicly embarrassing an E-mail abuser as a form of retaliation). A man began dating a few different women simultaneously via E-mail. *Id.* One woman who caught the computer casanova felt as if he had been cheating on her. *Id.* She retaliated by publicly exposing his actions on a network-wide electronic bulletin board. *Id.*

2. M. Katherine Boychuk, Comment, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 Nw. U. L. Rev. 769, n.1 (1994) (citing ALA. CODE §§ 13A-6-90-13A-6-94 (Supp. 1992); ALASKA STAT. § 11.41.260-11.41.270 (1993); ARK. CODE ANN. § 5-71-229 (Michie 1993); COLO. REV. STAT. ANN. § 18-9-111 (West 1992); CONN. GEN. STAT. §§ 53a-181(c), 53a-181(d) (1992); DEL. CODE ANN. TIT. 11, § 1312A (Supp. 1992); D.C. CODE ANN. § 22-504 (1993); FLA. STAT. ANN. § 784.048 (West 1992); GA. CODE ANN. §§ 16-5-90-16-5-93 (Michie Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1992); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1992); IND. CODE ANN. §§ 33-1-1-35-46-1 (West Supp. 1993); IOWA CODE § 708.11 (West Supp. 1993); KAN. STAT. ANN. §§ 95-96 (1992); KY. REV. STAT. ANN. § 508.140-50 (Michie/Bobbs-Merrill Supp. 1992); LA. REV. STAT. ANN. § 14:40.2 (West Supp. 1993); MD. ANN. CODE ART. 27, § 121B (Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 43 (West 1992); MICH. COMP. LAWS § 750.411h (Supp. 1993); MINN. STAT. § 609.749 (Supp. 1994); MISS. CODE ANN. § 97-3-107 (Supp. 1993); MO. REV. STAT. §§ 455.010-455.085 (1993); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. §§ 28-311.02-28-311.04 (Supp. 1992); NEV. REV. STAT. § 200 (1993); N.H. REV. STAT. ANN. 173:1-173:7 (1993); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. §§ 30-3A-1—30-3A-4 (Supp. 1993); N.Y. PENAL LAW § 240.25 (McKinney Supp. 1992); N.C. GEN. STAT. § 14.277.3 (1992); N.D. CENT. CODE § 12.1.17, 14-07.1 (Supp. 1993); OH. REV. CODE ANN. § 2903.211 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1993); OR. REV. STAT. § 133.310 (1993); PA. CONS. STAT. § 18:2709 (1993); R.I. GEN. LAWS §§ 11-59-1-11-59-3 (Supp. 1992); S.C. CODE ANN. § 16-3-1070 (Law Co-op Supp. 1992); S.D. CODIFIED LAWS ANN. §§ 22-19A-1-22-19A-6 (Supp. 1993); TENN. CODE ANN.

states, Michigan, Alaska, Oklahoma, and Wyoming, currently attempt to protect against the crime of E-mail stalking by identifying E-mail as a form of unconsented contact.<sup>3</sup>

The state of Michigan has come to the forefront in addressing this issue vis-a-vis the first E-mail stalking lawsuit.<sup>4</sup> This lawsuit involves a young woman, Jane,<sup>5</sup> who began a relationship with Andrew Archambeau ("Archambeau") via E-mail.<sup>6</sup> Having lost interest after five days,

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§ 39-17-315 (Supp. 1993); TEX. PENAL CODE ANN. § 42.07 (West Supp. 1993); UTAH CODE ANN. § 76-5-106.5 (Supp. 1992); VA. CODE ANN. § 18.2-60.3 (Supp. 1992); VT. STAT. ANN. tit. 13, 1061-1063 (1993); WASH. REV. CODE ANN. § 9A.46.110 (West Supp. 1993); W. VA. CODE § 61-2-9a (Supp. 1993); WIS. STAT. ANN. § 947.013 (West Supp. 1992); WYO. STAT. § 6-2-506 (Supp. 1993)).

3. Mich. Comp. Laws § 750.411h(1)(e)(vi) (Supp. 1993); *see also* Michigan Anti-Stalking Statute, *infra* note 59. Three other states include electronic communications in their anti-stalking statutes. Alaska and Oklahoma include it under the definition of "unconsented contact." ALASKA STAT. § 11.41.260-11.41.270 (1993); OKLA. ST. ANN. tit. 21, § 1173 (West Supp. 1994). Wyoming's stalking statute defines communication to include but not limited to verbal, electronic, mechanical, telegraphic, telephonic, or written communication. WYO. STAT. § 6-2-506 (Supp. 1993).

4. Thom Weidlich, *Is Stubborn E-mail Romeo a Stalker?*, NAT'L L.J., June 20, 1994, at A7.

5. Julia Prodis, *E-Mail Romance Leads to Stalking Charge When She Said No, Those Messages Kept Coming*, PHILADELPHIA INQUIRER, May 27, 1994, at A3 (reporting that the actual plaintiff requested to remain anonymous). This comment refers to the young woman as Jane.

6. Julia Prodis, *ACLU Weighs Electronic Stalking Case*, WASH. POST, June 6, 1994, at 17, 23; *Spurned E-mail Suitor Faces Stalking Charge*, TORONTO STAR, May 28, 1994, at A3 (defining E-mail as "a form of communicating over a computer by sending private electronic messages"). *See* Kirk Johnson, *On-Line Romance*, N.Y. TIMES, Mar. 26, 1994, § 1, at 21. According to sex researchers, psychologists, and computer buffs romantic relationships via E-mail are becoming more common. *Id.* Previously, romances either began or continued by way of E-mail between two people who work for the same company. *Id.* Now E-mail romances are no longer confined to the workplace because there are six national on-line services that allow the public to access E-mail from their own personal computers at home. *Id.* The six national on-line services include America On-Line, CompuServe, GEnie, eWorld, Prodigy, and Delphi. *See also* Ty Burr & Chris Nashawaty, *Worlds of Wander Feel Lost in the Ever-Expanding Universe of Computer Info Services? Here's a Traveler's Guide to the Major Points of Interactive Interest*, ENT. WKLY., Aug. 26, 1994, at 114. These services each offer things such as electronic bulletin boards and chat rooms which make it easy for E-mail users to meet and chat with people throughout the country. *Id.*

*See generally* Edward J. Naughton, *Is Cyberspace a Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 GEO. L.J. 409, 413 (1992). Computer bulletin boards allow users to post messages for all subscribers to read. *Id.* Some bulletin boards are divided into different sections based on a particular topic. *Id.* Within these sections there can be interactive conferences dealing with a particular topic. *Id.*

*Avodah Offit wrote a book called VIRTUAL LOVE*, in which the two main characters primarily communicated via E-mail. Rosemary L. Bray, *Please Mr. E-man*, N.Y. TIMES, Aug. 7, 1994, § 7, at 9 (book review). The author developed these characters and the text by way of their E-mail messages. *Id.* The Characters in the book consist of two professionals who express their inner feelings to each other quite openly via E-mail. Christopher Lehmann-

Jane requested that Archambeau discontinue further contact, but he persisted in pursuing the relationship.<sup>7</sup> Although the police reiterated Jane's request to halt and desist all contact, Archambeau sent approximately twenty more E-mail messages to Jane over a two month period.<sup>8</sup> Consequently, Jane filed charges against Archambeau for violation of the Michigan Anti-Stalking Statute.<sup>9</sup> This marks the first action pursuing a legal remedy for E-mail stalking, although not the first reported incident.<sup>10</sup> This proceeding is currently at trial in the 47th District Court of Michigan.<sup>11</sup>

Another incident presently receiving media attention involves a South Carolina woman, Laurie Powell, who was stalked via E-mail for the past two years by an unknown assailant.<sup>12</sup> Not only has the Stalker threatened Powell's life, but he has also threatened to rape her daughter.<sup>13</sup> Moreover, the stalker posted Powell's home address on E-mail for 25 million people to see.<sup>14</sup> Currently, the FBI, Secret Service, and the local District Attorney are working with Powell to find her E-mail stalker.<sup>15</sup>

These stories captured the attention of many people, including Con-

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Haupt, *Books of the Times; Plumbing the Recesses of Psyche and Cyberspace*, N.Y. TIMES, Apr. 14, 1994, at C22 (book review).

See generally *Walking the Walk Not Content to Talk the Talk*, Commentator Rush Limbaugh *Marries His E-mail Sweetheart*, PEOPLE MAG., June 13, 1994, at 70. Rush Limbaugh met his new wife on a computer bulletin board. *Id.* They began exchanging E-mail messages until they finally met, dated, and decided to get married. *Id.* The couple married on May 27, 1994. *Id.* Rush Limbaugh is not the only person to ever meet his mate via E-mail. Cynthia Sanz et al., *Where Love Has Gone Who Needs Singles Bars? In the '90s, Romance is Just a PC Away*, PEOPLE MAG., Feb. 21, 1994, at 40 (reporting numerous cases where folks have met their sweethearts via E-mail and married).

7. Prodis, *supra* note 6, at 17, 23.

8. *Id.* On April 24th Archambeau wrote, "[t]his letter thing is the Least of the many things I could do to annoy you."

9. John Castine, *Courting Trouble*, DETROIT FREE PRESS, May 26, 1994, at 1A; see MICH. COMP. LAWS § 750.411h (1993).

10. State v. Archambeau, No. 2404-4039-SM (47th D. Mich. pending until Spring 1995); Telephone interview with Matthew Leitman, Attorney at Law, in Oakland County, Mich. (Jan 23, 1995) (stating that arguments for Archambeau's case were made for both sides on Jan. 23, 1995 and a decision will be rendered on Feb. 14, 1995); Weidlich, *supra* note 4, at A7 (according to Susan G. S. McGee, executive director of the Domestic Violence Project Inc. in Ann Arbor, MI); see Carmody, *supra* note 1 ("[p]eople have always been harassed by electronic mail, even seven or eight years ago," says Brock Meeks, who is a contributing editor for WIRED magazine); see Robert Davis, *Graphic 'Cyber-Threats' Land Student in Court*, USA TODAY, Feb. 10, 1995.

11. See *supra* note 10.

12. Mark Stuart Gill, *Terror On-Line*, VOGUE, Jan. 1995, at 162.

13. *Id.*

14. *Id.*

15. *Id.*

gressman Kweisi Mfume ("Mfume").<sup>16</sup> On August 21, 1994, in response to Jane's and other similar situations, Mfume introduced a federal bill called the Electronic Anti-Stalking Act.<sup>17</sup> Mfume's Act proposes to expand the Federal Telephone Harassing Statute<sup>18</sup> to include electronic communications.<sup>19</sup> Presently, the unamended version of the Federal Telephone Harassing Statute<sup>20</sup> prohibits only the use of a telephone "to annoy, abuse, threaten, or harass any person."<sup>21</sup>

Currently, federal laws and most state stalking statutes fail to provide an adequate solution to victims of E-mail stalking.<sup>22</sup> This comment evaluates the legal protection available to victims of E-mail stalking. First, this comment will discuss E-mail stalking in general and the Michigan Anti-Stalking Statute that specifies E-mail stalking as a type of "unconsented contact."<sup>23</sup> Second, this comment will show that the Michigan Anti-Stalking Statute will not survive a constitutional challenge, and thus fails to remedy the problem of E-mail stalking. Third, this comment will show that Mfume's proposed federal bill, the Electronic Anti-Stalking Act, is not a viable federal solution to E-mail stalking. Fourth, this comment will propose a Model State Anti-Stalking Statute that will survive a constitutional challenge and, will sufficiently deal with E-Mail Stalking. Finally, this comment will conclude that all states must update their anti-stalking statutes by including electronic communications as a type of "unconsented contact." To omit specific reference to this emerging form of communication would limit the scope of the states' anti-stalking statutes.

## II. BACKGROUND

### A. E-MAIL STALKING: AN INNOVATIVE WAY TO STALK VICTIMS

As technology becomes more available to ordinary citizens, E-mail is

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16. 140 Cong. Rec. E1796-01 (daily ed. Aug. 21, 1994) (statement of Rep. Mfume). Currently, Congressman Mfume is a House Democrat from Maryland and is head of the Congressional Black Caucus. Peter H. Lewis, *Persistent E-mail: Electronic Stalking or Innocent Courtship*, N.Y. TIMES, Sept. 16, 1995, at B3.

17. *Id.*; see also H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment); see *infra* note 151.

18. 47 U.S.C. § 223 (1989).

19. H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment).

20. 47 U.S.C. § 223 (1989); see also Federal Telephone Harassing Statute, *infra* note 149.

21. 140 Cong. Rec. E1796-01 (daily ed. Aug. 21, 1994) (statement of Rep. Mfume); see generally 47 U.S.C. § 223 (1989).

22. Dear Colleague letter from Congressman Kweisi Mfume to other Members of Congress, STOP ELECTRONIC HARASSMENT AND STALKING, (Aug. 1994) (on file with author).

23. MICH. COMP. LAWS § 750.411h(1)(e)(vi) (Supp. 1994).

rapidly becoming a more popular form of literate communication.<sup>24</sup> Unfortunately, stalkers have latched onto E-mail as an additional conduit for their predatory acts.<sup>25</sup> The term "stalking"<sup>26</sup> usually conjures up images of "harassing behavior that frightens or terrorizes the victim,"<sup>27</sup> however, there is no precise definition of what constitutes a stalker.<sup>28</sup> The crime<sup>29</sup> of stalking<sup>30</sup> does not focus on the stalker's actual attack of

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24. See generally Jordan Moss, *Letters Are Acts of Faith*, N.Y. TIMES, Aug. 28, 1994, § 7, at 27; Joel Garreau, *Bawdy Bytes: The Growing World of Cybersex*, WASH. POST, Nov. 29, 1993, at A1, A10 (quoting Mike Godwin of the Electronic Frontier Foundation as stating, "[n]ever in history have so many people on the fringe had such direct access to a mass medium").

25. Dear Colleague letter from Congressman Kweisi Mfume to other Members of Congress, *supra* note 22.

26. Ellen F. Sohn, *Anti-Stalking Statutes: Do They Actually Protect Victims?*, CRIM. L. BULL., May-June 1994, vol. 30 no. 3, at 205, n.7 (quoting WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1146 (9th ed. 1990) which defines stalking as "[pursuing] quarry or prey stealthily"). According to Webster's Dictionary, the word "stalking" connotes predatory behavior. *Id.*

27. See generally *id.* at 205. This behavior usually evokes the feeling of terror in the victims. *Id.* at 206. There are three different psychological categories a stalker might fit into the erotomaniac stalker, the former intimate stalker, and the sociopathic stalker. Sohn, *supra* note 26, at 206. The erotomaniac stalker stalks strangers. *Id.* A delusional erotomaniac stalker "believes his affections are reciprocated by his victim, and he seeks to 'continue' a relationship that he believes already exists." *Id.* A borderline erotomaniac tries to create a relationship with the victim, even though he knows that the victim does not share the same emotional feelings. *Id.* The former intimate stalker victimizes someone with whom he previously has had a relationship. Sohn, *supra* note 26, at 206. The sociopathic stalker stalks victims that fit a particular profile. *Id.* These types of stalkers are the most dangerous because they neither intend to make their presence known nor are motivated by any relationship, either real or imagined. *Id.* at 206, n.16 (containing a more detailed discussion on the behavior and psyche of stalkers). Kathleen G. McAnaney, Laura A. Curliss, & C. Elizabeth Abeyta-Price, Note, *From Imprudence to Crime: Antistalking Laws*, 68 NOTRE DAME L. REV. 819, 858-861 (1993). Kathleen Hagenian, assistant director of the Domestic Violence Project Inc., in Ann Arbor Mich. explains that this behavior is "the reminder that 'I'm still there, I'm always watching you, I'm not going to leave you alone.'" Cristina Carmody, *Deadly Mistakes*, A.B.A. J., Sept. 1994, vol. 80, at 68.

28. See Sohn, *supra* note 26, at 203, 204. See also Richard A. Lingg, Note, *Stopping Stalkers: A Critical Examination of Anti-Stalking Statutes*, 67 ST. JOHN'S L. REV. 347, 349 (1993). There is no clearly recognizable pattern of stalking or type of stalker. *Id.* Stalking occurs both where the victim knew the stalker intimately and also where the victim and stalker were complete strangers. *Id.* Usually, the only link between two different stalkers is that their actions are similar in the way they terrorize their victims. *Id.* at n.26 (citing Mike Tharp, *In the Mind of a Stalker*, U.S. NEWS & WORLD REP., Feb. 17, 1992, at 28 in which a study showed that there was no particular type of stalker but sometimes there are indicators).

29. Sohn, *supra* note 26, at 205, n.8 (citing 139 CONG. REC. S12,901-01 (daily ed. Oct. 4, 1993)). In a criminal context the term "stalking" describes a repeated pattern of behavior involving a particular victim. *Id.*

30. Kenneth R. Thomas, *How to Stop the Stalker: State Antistalking Laws*, CRIM. L. BULL., Mar.-Apr. 1994, vol. 29 no. 2, at 124.

the victim, but rather on the stalker's pursuit of the victim.<sup>31</sup> Kathleen Hagenian, a Michigan domestic violence expert, states that E-mail is another form of communication that "a sophisticated, intellectual, creative stalker will use."<sup>32</sup> In the Michigan lawsuit E-mail was the primary form of communication Archambeau used to stalk Jane.<sup>33</sup>

E-mail is a form of electronic communication that allows people to transfer messages from one computer to another instantaneously<sup>34</sup> over many networks.<sup>35</sup> These networks are commonly referred to as the Internet.<sup>36</sup> At present, censorship of the Internet is virtually impossible.<sup>37</sup>

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31. Sohn, *supra* note 26, at 205.

32. Carmody, *supra* note 1.

33. Prodis, *supra* note 5.

34. See Thomas A Stewart, *Managing in a Wired Company. When Network Technology Gets Into its System, an Organization Becomes a Different Animal. It is an Agile, Powerful creature but the Old Ways of Harnessing the Beast Won't Work. Here's What Will.*, FORTUNE, July 11, 1994, at 44 (describing that E-mail can be transferred from one computer to the next instantaneously).

35. Peter H. Lewis, *The Good, the Bad and the Truly Ugly Faces of Electronic Mail*, N.Y. TIMES, Sept. 6, 1994, at C7 (messages sent around the world are received instantaneously or in the worst case within a few hours). All of this activity occurs in "real-time." Brendan P. Kehoe, Zen and the Art of the Internet 3 (Feb. 2, 1992) (unpublished manuscript, on file with I.B.M.'s library). "Real-time" is analogous to the broadcasting description given when people in different locations are able to work together "live." Alan Deutschman & Rick Tetzeli, *Your Desktop in the Year 1996. Your Prosaic Office PC Will Evolve into a Zoomy Workstation. Among the Payoffs: Mind-boggling Access to Information from Around the World and New Ways to Pool Smarts With — And See — Your Colleagues*, FORTUNE, July 11, 1994, at 86.

36. Deutschman & Tetzeli, *supra* note 35, at 86. The Internet consists of about 25,000 computer networks. *Straight Talk About the Internet*, FORTUNE MAG., Mar. 7, 1994, at 92. These computer networks link both noncommercial networks such as government agencies, research labs, and universities and commercial networks such as Prodigy, Compuserve, and America Online. Steve Lohr, *Can E-Mail Cachet = jpmorgan@park.ave?*, N.Y. TIMES, June 6, 1994, at A1. The Internet "evolved from an R&D communications network created by the Defense Department in 1969 and designed to survive nuclear war." *Straight Talk About the Internet*, *supra* at 92. The Internet "enables computers of all kinds to share services and communicate directly, as if they were part of one giant, seamless, global computing machine." Philip Elmer-Dewitt, *Battle for the Soul of the Internet the World's Largest Computer Network, Once the Playground of Scientists, Hackers and Gearheads, Is Being Over-run By Lawyers, Merchants and Millions of New Users. Is There Room for Everyone?*, TIME, July 25, 1994, at 50. The Internet has no central computer; instead, each message you send bears an address code that lets any computer in the Net forward it toward its destination. *Id.*

*The Internet is made up of regional networks that inter-connect to form lines of electronic communication throughout the world. Kehoe, supra* note 35, at 3. Some regional networks include SuraNet, PrepNet, NearNet, and many others. *Id.* "The actual connections between the various networks take a variety of forms. The most prevalent for Internet links are *56k leased lines* (dedicated telephone lines carrying 56 kilobit-per-second connections) and *T1 links* (special phone lines with 1Mbps connections)." *Id.* The Internet also installed *T3 links* to act as backbones between major locations that generate a massive amount of traffic. *Id.* "These links are paid for by each institution to a local carrier (for

The result is that the Internet imposes no restrictions on messages. Thus, E-mail users can discuss any topic<sup>38</sup> and say anything when sending E-mail over the Internet.<sup>39</sup>

Accessing the Internet is complex for the typical user.<sup>40</sup> However, there are various commercial on-line services<sup>41</sup> available to the general public that are easier to use than the Internet.<sup>42</sup> Although on-line services<sup>43</sup> offer only limited access to the Internet,<sup>44</sup> they do offer an infinite

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example, Bell Atlantic owns PrepNet, the main provider in Pennsylvania). Also available are SLIP connections, which carry Internet traffic (packets) over high-speed modems." Kehoe, *supra* note 35, at 3.

For a computer to gain direct access to the Internet, it must be equipped with Transmission Control Protocol/Internet Protocol "TCP/IP" connection. Elmer-Dewitt, *supra* at 50. TCP/IP is defined as "[a] set of protocols, resulting from [Advanced Research Projects Agency's] efforts, used by the Internet to support services such as remote login (telnet), file transfer (FTP) and mail (SMTP)." Kehoe, *supra* note 35 at 61. The term Protocols is defined as "[a] formal description of message formats and the rules two computers must follow to exchange those messages. Protocols can describe low-level details of machine-to-machine interfaces . . . or high-level exchanges between allocation programs. . . ." *Id.*

37. Elmer-Dewitt, *supra* note 36, at 50. Censorship is impossible for purely technical reasons. *Id.* The Internet was "designed to work around censorship and blockage." *Id.* "If you try to cut something, it self-repairs." *Id.* Internet pioneer John Gilmore explained that "[t]he Net interprets censorship as damage and routes around it." Philip Elmer-Dewitt, *First Nation in Cyberspace Twenty Million Strong and Adding a Million New Users a Month, The Internet is Suddenly the Place to Be*, TIME, Dec. 6, 1993, at 62.

38. John Schwartz, *Crossing the On-Line*, WASH. POST, June 14, 1994, at C7 ("Relay Chat" on the Internet and the theme "rooms" in America Online and CompuServe allow live interaction).

39. Elmer-Dewitt, *supra* note 37, at 62.

40. Deutschman & Tetzeli, *supra* note 35, at 86. To gather information via the Internet is difficult. *Id.* For example, to check local weather on the Internet, a user must activate a search program called Archie. *Id.* Next the user must tell the program to look for any computers that have file names including the word "weather." *Id.* After retrieving the resulting list of files that appeared from that search, a user would then have to run a second search to see into those files, hoping to find a constantly updated file that contained regional weather data. Deutschman & Tetzeli, *supra* note 35, at 86.

41. Gregory, *supra* note 1, at 58 (various other smaller on-line services also exist such as "Well").

42. See Deutschman & Tetzeli, *supra* note 35, at 86. Barry Shein, the president of the World, an Internet access provider in Brookline, Massachusetts explains that "[t]he [Internet] network can feel like a maze. We need to create short paths between people and information, not these long, random walks in which you hope you'll bump into something." *Id.* These commercial services are more convenient for everyday PC users than the Internet. *Id.* For example, on America Online to find the weather forecast for a particular city, the user clicks an area marked weather. *Id.* Conversely, on the Internet the user must activate a couple of search programs and work through a number of files to find the weather. Deutschman & Tetzeli, *supra* note 35, at 86.

43. Burr & Nashawaty, *supra* note 6, for a general discussion of the different commercial on-line services available to the general public.

44. See *id.* (discussing each of the six commercial on-line services and the access each of them provide to the Internet with Delphi being the only commercial on-line service that



number of opportunities to write to friends and strangers via E-mail.<sup>45</sup>

The benefits of E-mail<sup>46</sup> include not only instant delivery, but also rapid response and an easy way to save correspondence.<sup>47</sup> Some people analogize E-mail to regular mail<sup>48</sup> or written telephone conversations.<sup>49</sup> The analogy to mail is more accurate because an E-mail message must be sent in its entirety, like a written letter.<sup>50</sup> The receiving computer stores the message in an electronic mailbox until the recipient signs on to the network.<sup>51</sup> The comparison to the telephone is less accurate because two or more users typically do not have the opportunity for simultaneous exchanges via E-mail.<sup>52</sup>

The recent outcry for legislation<sup>53</sup> on the problem<sup>54</sup> of stalking<sup>55</sup> accompanied by the emergence of E-mail as a growing form of communica-

offers full access to the Internet); cf. Gill, *supra* note 12, at 162 (stating that competition will force America On-Line, Prodigy, and CompuServe to offer its users complete Internet access).

45. Jordan Moss, *Letters Are Acts of Faith*, *supra* note 24, at 27. The commercial on-line services offer amenities such as message boards, chat rooms, news and magazine text, movie reviews and other resources. Burr & Nashawaty, *supra* note 6, at 114. A drawback however, is that only some of the on-line services offer access to the Internet. *Id.*

46. Lewis, *supra* note 35, at C7. E-mail is "useful even for people whose correspondents do not have computers. E-mail messages can be converted automatically into telegrams, telexes and fax messages." *Id.* Even though a person cannot send flowers or chocolates via E-mail, a person can E-mail a florist or chocolatier an order and "effect a speedy delivery." *Id.*

47. Jordan Moss, *Letters Are Acts of Faith*, *supra* note 24, at 27 (letter to the editor written by Jordan Moss from the Bronx).

48. Russell S. Burnside, Note, *The Electronic Communications Privacy Act of 1986: The Challenge of Applying Ambiguous Statutory Language to Intricate Telecommunication Technologies*, 13 *RUTGERS COMPUTER & TECH. L.J.* 451, 483 n.213 (1987).

49. Elmer-Dewitt, *supra* note 36, at 50 (this came from a box containing answers to "FAQS" which are Frequently Asked Questions).

50. See Naughton, *supra* note 6, at 409, 414.

51. See Burnside, *supra* note 48, 483 at n.213.

52. See Naughton, *supra* note 6, at 415.

53. Lingg, *supra* note 28, 352 at n.34 (citing Rosalind Resnick, *States Enact 'Stalking' Laws; California Takes Lead*, *NAT'L L.J.*, May 11, 1992, at 3). "Deborah P. Kelly, the chair of the American Bar Association's Committee on Victims, stated that 'within the last decade, legislators' attention to the plight of crime victims has been heightened.'" *Id.* Kelly also stated that, "Before, there wasn't anything illegal about stalking and yet people were being murdered." *Id.*

54. *Id.* at 350 n.22 (citing Sue Horton, *Secret Admirer: Stalking as a Hate Crime*, *L.A. WKLY.*, Sept. 18-24, 1992 (citing De Clerembaut's *Les Psychoses Passionelles*)). A French woman thought she was King George V of England's mistress and she would wait outside Buckingham palace for the King to show her signs of affection. *Id.*

55. See Robert P. Faulkner & Douglas H. Hsiao, *And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation*, 31 *HARV. J. ON LEGIS.* 1, 4 (1994). In the U.S. there are approximately 200,000 stalkers. *Id.* However, this number is only an estimate that derives from the cases that are reported each year nationwide. *Id.* at n.16.

tion creates a pressing need to implement regulations and restrictions to control people who stalk their victims via E-mail.<sup>56</sup>

### B. THE MICHIGAN ANTI-STALKING STATUTE

Michigan is one of four states<sup>57</sup> that criminalizes E-mail stalking.<sup>58</sup> Under the Michigan Anti-Stalking Statute,<sup>59</sup> to commit the crime of

56. 140 CONG. REC. E1796-01 (daily ed. Aug. 21, 1994) (statement of Rep. Mfume).

57. See *supra* note 3.

58. MICH. COMP. LAWS § 750.411h(e)(vi) (Supp. 1993).

59. MICH. COMP. LAWS § 750.411h (Supp. 1993). Michigan's stalking statute reads: Sec. 411h. (1) As used in this section:

(a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily require, medical or other professional treatment or counseling.

(c) "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause a reasonable individual to suffer emotional distress, and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

(d) "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.

(e) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

(i) Following or appearing within the sight of that individual.

(ii) Approaching or confronting that individual in a public place or on private property.

(iii) Appearing at the workplace or residence of that individual.

(iv) Entering onto or remaining on property owned, leased, or occupied by that individual.

(v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

(f) "Victim" means an individual who is the target of a willful course of conduct involving repeated or continuing harassment.

(2) An individual who engages in stalking is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$1,000.00, or both.

(3) The court may place an individual convicted of violating subsection (2) on probation for a term of not more than 5 years. If a term of probation is ordered, the court may, in addition to any other lawful condition of probation, order the defendant to do any of the following:

(a) Refrain from stalking any individual during the term of probation.

(b) Refrain from having any contact with the victim of the offense.

(c) Be evaluated to determine the need for psychiatric, psychological, or social counseling and, if determined appropriate by the court, to receive psychiatric, psychological, or social counseling at his or her own expense.

stalking a person must "willfully"<sup>60</sup> initiate or continue "unconsented contact"<sup>61</sup> with the victim "that would cause a reasonable person . . . and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."<sup>62</sup> More specifically, the Michigan Anti-Stalking Statute proscribes contact by E-mail if the sender initiates or continues contact without the receiver's consent, or disregards the receiver's express desire for that person to avoid or discontinue contact.<sup>63</sup>

According to Susan G.S. McGee, Executive Director of the Domestic Violence Project Inc. in Ann Arbor, Michigan, the Michigan Anti-Stalking Statute includes electronic communications because several women testified that they were stalked via E-mail.<sup>64</sup> However, in the legislatures' haste to please constituents, Michigan's anti-stalking statute may pose a constitutionality problem.<sup>65</sup>

Archambeau sent Jane roughly twenty E-mail messages in a two month period.<sup>66</sup> It was not his only form of contact,<sup>67</sup> but E-mail was his main form of communication.<sup>68</sup> After repeatedly asking Archambeau to stop sending her E-mail, Jane filed a lawsuit against Archambeau under Michigan's anti-stalking statute.<sup>69</sup> Unfortunately, Jane's lawsuit lacks validity because Michigan's anti-stalking statute is unconstitutional and violates Archambeau's Fourteenth Amendment right to due process of law.

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(4) In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

(5) A criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for any contempt of court arising from the same conduct.

*Id.*

60. MICH. COMP. LAWS § 750.411h(1)(d) (Supp. 1993).

61. MICH. COMP. LAWS § 750.411h(1)(e) (Supp. 1993).

62. MICH. COMP. LAWS § 750.411h(1)(d) (Supp. 1993).

63. MICH. COMP. LAWS § 750.411h (Supp. 1993).

64. Weidlich, *supra* note 4, at A7.

65. See Sohn, *supra* note 26, at 238 (citing H.R. 2370, 103d Cong., 1st Sess. §1 (1993)). "Congress has recognized that many of the state statutes may not survive constitutional scrutiny and others are so narrowly drawn they are largely ineffective." *Id.* Congress directed the National Institute of Justice to develop a model anti-stalking statute that is constitutional and enforceable. Pub. L. No. 102-395, § 109(b) (1992).

66. Lewis, *supra* note 16, at B3.

67. *Id.* Archambeau also phoned, left messages on her answering machine, and secretly watched her leave work. *Id.*

68. *Id.*

69. Lewis, *supra* note 16, at B3; see also MICH. COMP. LAWS § 750.411h(1)(e)(vi) (Supp. 1993); see also *Sex Crimes: PC Police*, THE GUARDIAN, June 2, 1994, at 2.

## III. ANALYSIS

## A. ANALYZING THE CONSTITUTIONALITY OF CONVICTING AN E-MAIL STALKER UNDER MICHIGAN'S ANTI-STALKING STATUTE

A constitutional issue arises when analyzing the possibility of prosecuting an E-mail stalker under Michigan's anti-stalking statute.<sup>70</sup> The state statute must not infringe on the E-mail stalker's Fourteenth Amendment right to due process of the law.<sup>71</sup>

1. *The Michigan Anti-Stalking Statute is Unconstitutionally Vague*

Under the Fourteenth Amendment "[n]o [s]tate shall make or enforce any law which . . . deprive[s] any person of life, liberty, or property, without due process of law."<sup>72</sup> The Supreme Court stated in *Grayned v. City of Rockford*<sup>73</sup> that to guarantee due process of law a criminal statute must clearly define what conduct it prohibits, otherwise it is void for vagueness.<sup>74</sup>

A clearly defined statute is not vague for two reasons.<sup>75</sup> First, a clearly defined statute provides people of ordinary intelligence with notice of what conduct is unlawful.<sup>76</sup> Innocent people then have the opportunity to avoid partaking in unlawful activity.<sup>77</sup> Second, a clearly defined statute eliminates arbitrary and discriminatory enforcement.<sup>78</sup> Definite guidelines eliminate any opportunities for policemen, judges, and juries to subjectively apply the statute.<sup>79</sup> Thus, a criminal statute is void for vagueness if it either fails to give notice or allows for subjective application.<sup>80</sup>

Generally, a criminal statute properly notifies the public of what conduct is unlawful when it includes a specific intent requirement.<sup>81</sup> Specific intent crimes "involve . . . a particular criminal intent beyond

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70. See generally Nat'l Criminal Justice Ass'n, *Project to Develop a Model Anti-Stalking Code for States*, at 9 (1993).

71. *Id.* The Fifth Amendment applies to Congress and states in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

72. U.S. CONST. amend. XIV, § 1.

73. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

74. *Id.* at 108; *U.S. v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32 (1963) (holding there is a strong presumption that statutes are constitutional and burden is on challenging party to prove beyond a reasonable doubt its invalidity).

75. *Id.*

76. *Id.*; see also *People v Howell*, 238 N.W.2d 148, 149-50 (Mich. 1976).

77. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

78. *Id.*; *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 168-9 (1972).

79. *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972).

80. *Colautti v. Franklin*, 439 U.S. 379, 390 (1979); *U.S. v. Nat'l Dairy Prod. Corp.*, 372 U.S. 29 (1963); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

81. *Screws v. U.S.*, 325 U.S. 91, 101 (1945) (plurality opinion).

the act done," in contrast to general intent crimes that "involve . . . merely the intent to do the physical act."<sup>82</sup> The Supreme Court recognized in *Screws v. U.S.*<sup>83</sup> that a criminal statute including a specific intent requirement is not vague.<sup>84</sup> The Court reasoned that a specific intent requirement provides the fair warning necessary to avoid placing a person on trial for a crime that was not clearly defined.<sup>85</sup> Moreover, a statute that includes a requirement of *mens rea* gives fair warning or knowledge that an act violates the law.<sup>86</sup> However, a criminal statute that requires only the presence of a bad purpose or evil intent may not survive a vagueness challenge.<sup>87</sup> In contrast, statutes including a specific intent requirement notify the defendant that threats made with the intention of causing the victim to fear death or bodily harm constitute a crime.<sup>88</sup>

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82. *People v. Beaudin*, 339 N.W.2d 461, 463 (Mich. 1983):

Three of the four justices making up the majority concluded that the general intent-specific intent distinction is an unsatisfactory concept, but said that it was up to the Legislature to fashion reform.

*Id.* at n.6; *see also* *People v. Culp*, 310 N.W.2d 421, 423 (Mich.App. 1981):

[Michigan's] Supreme Court distinguished between general and specific intent, holding that: "When a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had."

*Id.* (quoting *Roberts v. People*, 19 Mich. 401, 414 (1870)).

83. *Screws v. U.S.*, 325 U.S. 91, 101 (1945) (plurality opinion).

84. *Id.*; *Woolfolk v. Commonwealth*, 447 S.E.2d 530, 536 (1994); *People v. Heilman*, 30 Cal.Rptr.2d 422, 428 (1994); *State v. Culmo*, 642 A.2d 90, 98 (1993); *City of Longmont v. Gomez*, 843 P.2d 1321, 1325 (1993).

85. *Screws v. U.S.*, 325 U.S. 91, 101 (1945).

86. *Id.* (reasoning that there is fair warning when a statute punishes an accused for a act knowingly done, with the purpose of doing what the statute prohibits); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) (citing as an example *U.S. v. U.S. Gypsum Co.*, 438 U.S. 422 (1978); *Papachristou v. Jacksonville*, 405 U.S. 156, 163 (1972)).

*Mens Rea* is defined as:

a guilty mind; the mental state accompanying a forbidden act . . . Criminal offenses are usually defined with reference to one of four recognized criminal states of mind that accompanies the actor's conduct: (1) intentionally; (2) knowingly; (3) recklessly; and (4) grossly [criminally] negligent. The *mens rea* may be *general*, i.e., a general intent to do the prohibited act, or *specific*, which means that a special mental element is required for a particular offense . . . .

Steven H. Gifis, *LAW DICTIONARY* 530 (3d ed. 1991).

87. *Screws v. U.S.*, 325 U.S. 91, 101 (1945) (plurality opinion).

88. *See* *U.S. v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978). The Supreme Court recognized that if a statute has a specific intent requirement "to do a prohibited act," it may avoid a vagueness challenge. *Id.* at 787 (citing *Screws v. U.S.*, 325 U.S. 91, 101-2 (1945)). . . . [W]here 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.

*Id.* (quoting *Screws v. U.S.*, 325 U.S. 91, 101-102 (1945)). *See generally* *Boychuk*, *supra* note 2, at 779, 795, n.160 (citing *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) and

Michigan's Anti-Stalking Statute is unconstitutionally vague because it fails to require that an E-mail stalker have a specific intent to cause the victim fear of death, or bodily harm.<sup>89</sup> Instead the Michigan Anti-Stalking Statute uses the term "willfully" which denotes, according to the Supreme Court, a general intent rather than a specific intent in a criminal statute.<sup>90</sup> The term "willful," in a criminal statute, generally means "an act done with a bad purpose."<sup>91</sup> The Michigan Anti-Stalking Statute provides that "it is a crime to 'willfully' initiate or continue contact with an individual without his consent if the conduct serves no legitimate purpose and causes emotional distress."<sup>92</sup> Under Michigan's criminal anti-stalking statute the term "willful" denotes a general intent rather than a specific intent, thus striking the validity of this statute on the basis of unconstitutional vagueness.<sup>93</sup>

Michigan's legislature purposely excluded a specific intent requirement to avoid potentially reducing the scope of the statute's application.<sup>94</sup> During legislation of Michigan's anti-stalking statute there were concerns that the exclusion of a specific intent, along with the inclusion of the term willful, would only serve to criminalize innocent behavior.<sup>95</sup> However, the majority of the Michigan legislature did not wish to "burden prosecutors" with the requirement of proving that the offender specifically intended to make the victim feel harassed.<sup>96</sup>

Moreover, Michigan's anti-stalking statute incorrectly focuses on the victim's emotions rather than the defendant's specific intentions.<sup>97</sup> This

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Papachristou v. City of Jacksonville, 405 U.S. 156, 163 (1972) holding laws unconstitutionally vague because of failure to include a specific intent requirement); U.S. v. Mussry, 726 F.2d 1448, 1455 (9th Cir. 1984).

The fact that the statute requires that an individual must have acted with the intent of coercing another into his service goes a long way toward alleviating any vagueness problems. It is difficult to argue that a person did not have notice that certain conduct was illegal when the offense requires that the conduct be improper or wrongful and that the actor intend that the conduct have a coercive effect.

*Id.*

89. MICH. COMP. LAWS § 750.411h (Supp. 1993); see *People v Howell*, 238 N.W.2d 148, 150 (Mich. 1976) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972)); see generally *Faulkner & Hsiao*, *supra* note 55, at 11, 20-1 (arguing that Michigan's anti-stalking statute will be held unconstitutionally vague because it lacks a specific intent requirement).

90. *Screws v. U.S.*, 325 U.S. 91, 101 (1945).

91. *Id.*

92. *Faulkner & Hsiao*, *supra* note 55, at 28 (citing MICH. COMP. LAWS § 750.411h (Supp. 1993)). This article rephrases Michigan's anti-stalking statute concisely.

93. H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4).

94. *Id.*

95. *Id.*

96. *Id.*

97. See H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4). A minority of the Michigan legislature argued that the anti-stalking statute should define

statute provides that the defendant has committed the crime of E-mail stalking if his conduct causes the victim emotional distress.<sup>98</sup> Thus, Michigan's anti-stalking statute only requires that the victim *feel threatened* as opposed to requiring that the defendant actually make a threat of serious violence.<sup>99</sup>

Furthermore, Michigan's anti-stalking statute is unconstitutionally vague because it fails to require that an E-mail sender be put on notice that his contact was undesired by the receiver.<sup>100</sup> Michigan's anti-stalking statute prohibits E-mail as a form of contact if undesired by the receiver.<sup>101</sup> Thus, to charge the defendant with the crime of E-mail stalking, the victim only needs to receive unwanted E-mail from the defendant. Conceivably, an E-mail receiver can charge an E-mail sender with the crime of E-mail stalking for simply sending a few risqué messages if the receiver does not want or appreciate the messages.<sup>102</sup>

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stalking with regard to offender's specific intent, otherwise, the defense could confuse the issue by focusing on the reasonableness of the victims. *Id.* This could discourage victims from bringing stalking suits, like in criminal sexual conduct offenses, because there is a possibility of further harassment in the courtroom. *Id.* They also argued that this legislation "would criminalize behavior that could be not only ambiguous, but altogether innocent, such as accidentally appearing within the sight of the victim." *Id.*

The majority of the legislature responded that a specific intent requirement would "reduce the effectiveness of the legislation." H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4). First, they responded that a victim's reasonableness would be irrelevant. *Id.* The jury's duty is to decide whether the legal construct of a "reasonable person" would have felt harassed by the defendant's conduct. *Id.* Second, they responded that if they had to prove the defendant intended to harass the victim, then prosecutions would be very difficult. *Id.* Their argument was that "it would be relatively easy with this sort of offense for a deceptively normal-looking defendant to convince a jury that he or she had no malicious intent, but rather merely wanted to convince the victim of the depth and sincerity of his or her feelings." H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4). *But see* Boychuk, *supra* note 2, at 779 (noting that most states do not include a credible threat requirement in their stalking statutes because that makes the statutes harder to enforce).

98. MICH. COMP. LAWS § 750.411h(1)(c)(d) (Supp. 1993).

99. MICH. COMP. LAWS § 750.411h(1)(c)(d) (Supp. 1993).

100. *See also* Faulkner & Hsiao, *supra* note 55, at 11 (proposing that the definition of "unconsented contact" in Michigan's anti-stalking statute conceivably allows a person to be convicted for stalking even if he was unaware that his contact was undesired by the victim).

101. MICH. COMP. LAWS § 750.411h(1)(e)(vi) (Supp. 1993).

102. *See* Wasatch Area Voices Express (W.A.V.E.) (1994) (produced by a collective of students, staff, and faculty from Weber State University; members of the surrounding Ogden community; and some columnists from other parts of the world). A young man researching bulletin board systems found that when he signed on under his female friend's name that he was bombarded with obnoxious, highly suggestive messages especially from one male in particular. *Id.*

Mike Godwin from the Electronic Frontier Foundation expressed concern that even an E-mail user who "continue[s] to get junk mail from Hertz" could conceivably charge Hertz Rent-A-Car with the crime of E-mail stalking under Michigan's anti-stalking statute. Tele-

Under this provision the victim has the ability to charge the defendant with E-mail stalking even if the defendant did not know that his messages were unwanted. Accordingly, an E-mail sender fails to receive fair warning that his conduct violates the statute. Even if Michigan's anti-stalking statute included a specific intent requirement, it would still be void for vagueness because it lacks definite guidelines to limit the scope of the offense.<sup>103</sup>

A criminal statute must set clear guidelines to prevent arbitrary and discriminatory enforcement. However, Michigan's anti-stalking statute is unconstitutionally vague because it fails to provide clear guidelines regarding what constitutes "harassment."

[Michigan's statute defines harassment as] conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact, that would cause reasonable individual . . . and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.<sup>104</sup>

This statute appears to limit conduct only to repeated or continuing unconsented contact. However, the phrase "includes, but is not limited to" encompasses all conduct by any person that might rise to the level of harassment.<sup>105</sup> Thus, the statute is unconstitutionally vague because it lacks the limitations necessary for authorities to follow when enforcing the statute.<sup>106</sup>

Moreover, the phrase "that would cause" focuses attention on the result of conduct without notifying individuals of the particular conduct prohibited.<sup>107</sup> For example, in *City of Longmont v. Gomez*, Colorado defined harassment to include "any other conduct that in fact harasses."<sup>108</sup> This definition was struck down by Colorado's Supreme Court as unconstitutionally vague. That court explained that the phrase allowed authorities unfettered discretion without any limiting guidelines.<sup>109</sup> Thus, the definition of harassment under Michigan's anti-stalking statute is

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phone Interview with Mike Godwin, Electronic Frontier Foundation, in Boston, MA. (Sept. 14, 1994). "Normally, stalking has real people and real space." *Id.* E-mail stalking is "very rare" and it is unclear what an impact Jane's case will have on E-mail and the regulation of it. *Id.*; see generally H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4)

103. *City of Longmont v. Gomez*, 843 P.2d 1321, 1326 (Colo. 1993).

104. MICH. COMP. LAWS § 750.411h(1)(c) (Supp. 1993).

105. "There is no particular legislative concern defined by the statute; any and all conduct, by any person, is encompassed by the statutory scheme." *People v. McBurney*, 750 P.2d 916, 919 (Colo. 1988).

106. *People v. Norman*, 703 P.2d 1261, 1267 (Colo. 1985).

107. *City of Longmont v. Gomez*, 843 P.2d 1321, 1325 (Colo. 1993).

108. *Id.* at 1323.

109. *Id.* at 1325.



unconstitutionally vague because authorities lack specific guidelines to follow when enforcing the statute.

The definition of harassment under Michigan's anti-stalking statute also excludes any conduct that "serves a legitimate purpose."<sup>110</sup> The ambiguity of this phrase obfuscates the constitutional problems inherent in the statute without resolving them. Policemen, judges, and juries have no standard to follow in determining what conduct constitutes a legitimate purpose. The all encompassing definition of "harass" followed by the phrase "serves a legitimate purpose" impermissibly delegates legislative powers to the judiciary for subjective enforcement.<sup>111</sup> However, under the Constitution, only the legislature may define what constitutes an unlawful act.<sup>112</sup> Thus, the statute fails to provide clear guidelines for the public and law enforcement officers as to what conduct constitutes a legitimate purpose.

Finally, the Michigan Anti-Stalking Statute is unconstitutionally vague because it fails to provide clear guidelines regarding what constitutes emotional distress.<sup>113</sup> When a statute defines a term, that definition excludes any other interpretation of that term.<sup>114</sup> Michigan's anti-stalking statute defines emotional distress as significant mental suffering that "may, but does not necessarily require"<sup>115</sup> treatment or counseling.<sup>116</sup> The phrase "may, but does not necessarily require" fails to provide guidelines as to when a victim's suffering has risen to the level of emotional distress required by the statute. This definition is vague because it encompasses any emotional distress that the victim may feel, no matter how great or small.<sup>117</sup> Further, this definition of emotional distress neither puts the public on notice nor provides law enforcement officers with a clear gauge as to when an E-mail stalker's willful conduct has caused a victim emotional distress.<sup>118</sup>

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110. MICH. COMP. LAWS § 750.411h(1)(c) (Supp. 1993).

111. *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972).

112. *See* U.S. CONST. art. I, § 8.

113. *See also* Faulkner & Hsiao, *supra* note 55, at 11, 28.

114. *Colautti v. Franklin*, 439 U.S. 379, 393 (1979) (quoting 2A C. Sands, *Statutes and Statutory Construction* § 47.07 (4th ed. Supp. 1978) that as a rule, "[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated").

115. MICH. COMP. LAWS § 750.411h(1)(b) (Supp. 1993); *see supra* note 59.

116. *Id.*

117. H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4). The Michigan legislature argued that "some sort of definition of 'emotional distress'" was needed, otherwise it's anti-stalking statute "would be unacceptably vague . . ." *Id.* However, the opposing side argued that to "define emotional distress could be to inappropriately limit the manner in which stalking could be defined, and could lead to further focus on the victim and whether his or her distress was sufficient, rather than on the offender and whether his or her behavior was acceptable." *Id.*

118. *Id.*

Thus, the Michigan Anti-Stalking Statute will not survive a constitutional challenge of vagueness because it lacks a specific intent requirement and fails to specify what conduct constitutes a legitimate purpose to provide guidelines for authorities to follow when enforcing the statute. The foregoing reasons demonstrate that this statute could apply to situations far beyond what the Michigan legislature intended for its use.<sup>119</sup>

## 2. *The Michigan Anti-Stalking Statute Impermissibly Creates a Mandatory Rebuttable Presumption*

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."<sup>120</sup> The burden of persuasion is on the State to prove each element of a crime beyond a reasonable doubt.<sup>121</sup> Evidentiary presumptions that dissipate the State's burden of persuasion violate the Due Process Clause.<sup>122</sup>

Courts must follow several steps when classifying an evidentiary presumption to determine if it violates a defendant's right to due process of law.<sup>123</sup> First, the courts label the presumption as either mandatory or permissive.<sup>124</sup> Under a mandatory presumption, a jury must consider the presumed fact as true if the state proves certain predicate facts.<sup>125</sup> A mandatory presumption violates due process if the presumption relieves the State from its burden of persuasion on any element of a crime.<sup>126</sup> Under a permissive presumption, the State only suggests, rather than requires, that a jury draw a particular conclusion if the State proves certain predicate facts.<sup>127</sup> A permissive presumption does not violate due process because it does not alleviate the State of its burden to establish a

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119. H.R. 5472, 103d Leg., 1992 Mich. Sess. Law Serv. (proposed substitute H-4) (stating that this legislation criminalizes stalking so that helpless victims have an effective remedy to end their nightmares). Michigan makes stalking a misdemeanor punishable by imprisonment for up to one year, a fine of one-thousand dollars, or both. *Id.*

120. *In re Winship*, 397 U.S. 358, 364 (1970). Tennessee's Supreme Court defined due process of law as:

the true test, it seems to us, is whether 'fundamental fairness' and 'substantial justice' which, after all, are what is meant by 'due process of law,' under the Fourteenth Amendment, are absent or present.

*Van Zandt v. State*, 402 S.W.2d 130, 135 (Tenn. 1966).

121. *Francis v. Franklin*, 471 U.S. 307, 309 (1985).

122. *See id.* at 314; *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979); *Sandstrom v. Montana*, 442 U.S. 510, 520-4 (1979); *Patterson v. New York*, 432 U.S. 197, 215 (1977).

123. *State v. Leverett*, 799 P.2d 119, 121 (Mont. 1990) (stating that the United States Supreme Court's analysis follows a step-by-step classification).

124. *Francis v. Franklin*, 471 U.S. 307, 313-14 (1985).

125. *Id.* at 313.

126. *Id.*; *Patterson v. New York*, 432 U.S. 197, 215 (1977).

127. *Francis v. Franklin*, 471 U.S. 307, 314 (1985).

rational relationship between the predicate and presumed fact.<sup>128</sup>

The standard for determining mandatory or permissive presumption rests on "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."<sup>129</sup> This "reasonable likelihood" standard "accommodates the concerns of finality and accuracy"<sup>130</sup> by focusing on how the jurors as a whole interpreted and applied the instruction.<sup>131</sup> Michigan's anti-stalking statute provides that:

In a prosecution for a violation of this section, evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue the same or a different form of unconsented contact, and to refrain from any further unconsented contact with the victim, shall give rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>132</sup>

Michigan's anti-stalking statute's use of the words "shall give rise to" creates a mandatory presumption.<sup>133</sup> This phrase is a command that allows the State to tell jurors that they *must* presume that an E-mail

128. *Id.*; *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979); *State v. Leverett*, 799 P.2d 119, 129 (1990).

129. *Boyde v. California*, 494 U.S. 370, 380 (1990); *see also O'neal v. Morris*, 3 F.3d 143, 145 (1993); *cf. Francis v. Franklin*, 471 U.S. 307, 315 (1985) (the Supreme Court previously set the standard on "what a reasonable juror could have understood the charge as meaning" as opposed to what the court declares as the meaning).

Determining such requires:

careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction . . . . The question, however, is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning . . . . The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts.

*Id.* (quoting *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979) ("state court 'is not the final authority on the interpretation which a jury could have given the instruction'").

130. *See id.* at 380.

131. *Id.* at 381.

132. MICH. COMP. LAWS § 750.411h(4) (Supp. 1993).

133. *Id.* The term shall is defined as "an auxiliary used in formal speech to express . . . determination, obligation, or necessity in the second and third persons . . . . *Shall* is now ordinarily replaced by *will* in all persons . . . ." WEBSTER'S NEW WORLD DICTIONARY 546 (1987). Similarly, Montana's Supreme Court ruled that an instruction that included the phrase "it shall be presumed" creates a mandatory presumption. *State v. Leverett*, 799 P.2d 119, 129 (1990). These two instructions can be compared even though Montana's statute deals with intoxication and Michigan's statute deals with stalking. The similarity exists in that both statutes include the term "shall." *See* MICH. COMP. LAWS § 750.411h(5) (Supp. 1993); MONT. CODE ANN. § 61-8-401 (1993) (Instruction No. 11).

receiver felt terrorized, frightened, intimidated, threatened, harassed, or molested, upon proof of repeated unconsented contact by an E-mail sender.<sup>134</sup> In Archambeau's case, to prove that Jane felt terrorized, frightened, intimidated, threatened, harassed, or molested the State need only show repeated unconsented contact by Archambeau. This "undermine[s] the factfinder's responsibility at trial" by alleviating the State's burden to prove beyond a reasonable doubt that the E-mail receiver felt terrorized, frightened, intimidated, threatened, harassed, or molested.<sup>135</sup>

Next, the court must determine if the mandatory presumption is conclusive or rebuttable.

A conclusive presumption removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption. A rebuttable presumption does not remove the presumed element from the case but nevertheless requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is unwarranted.<sup>136</sup>

Michigan's statute expressly states that the presumption is rebuttable. However, the fact that the statute explicitly states that the presumption is rebuttable does not rectify its infirmity. The Supreme Court has clearly stated in *Francis v. Franklin* that mandatory rebuttable presumptions are as unconstitutional as conclusive presumptions.<sup>137</sup> Here, the Michigan statute's mandatory rebuttable presumption requires the jury to presume that the E-mail receiver felt terrorized, frightened, intimidated, threatened, harassed, or molested if the State proved repeated unconsented contact by the E-mail sender.<sup>138</sup> This illogically and

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134. MICH. COMP. LAWS § 750.411h(4) (Supp. 1993); see *Francis v. Franklin*, 471 U.S. 307, 316 (1985) (analyzing that "the portion of the jury charge challenged in this case directs the jury to presume an essential element of the offense—intent to kill—upon proof of other elements of the offense—the act of slaying another").

135. *Francis v. Franklin*, 471 U.S. 307, 316 (1985) (quoting *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979)).

136. *Id.* at 314; *Sandstrom v. Montana*, 442 U.S. 510, 517-18 (1979).

137. *Id.* at 317. "A mandatory rebuttable presumption is perhaps less onerous from the defendant's perspective, but it is no less unconstitutional." *Id.* Precedent clearly establishes that "[s]uch shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause." *Francis v. Franklin*, 471 U.S. 307, 317 (1985) (quoting *Patterson v. New York*, 432 U.S. 197, 215 (1977)); see also *State v. Leverett*, 799 P.2d 119, 122 (1990) (stating that "the United States Supreme Court made clear in *Francis*, [that] a mandatory rebuttable presumption is generally just as unconstitutional as a conclusive presumption because it commonly shifts the burden of persuasion to the defendant.").

138. See *People v. Hickox*, 751 P.2d 645, 647 (Colo. App. 1987) (stating that instructions requiring the jury to presume the defendant was under the influence of alcohol if the predicate blood alcohol level was 0.10 percent created a mandatory rebuttable presumption of an essential element of the crime which impermissible shifting the State's burden of persuasion) (citing *Francis v. Franklin*, 471 U.S. 307, (1985)).

impermissibly shifts the burden of persuasion from the State to the defendant to disprove the victim's feelings. This places an unfair burden on the defendant to persuade the jury that the State's finding is unwarranted because such information is not readily available to him. Therefore, Michigan's mandatory rebuttable presumption violates the Due Process Clause and is unconstitutional.

If the Court finds that Michigan's statute creates a permissive presumption, it still violates due process because it raises a rebuttable presumption that is irrational.<sup>139</sup> The Due Process Clause prohibits a criminal statute from creating irrational presumptions.<sup>140</sup> The Supreme Court stated that a permissive presumption in a criminal statute is irrational if the presumed fact does not emanate from the proved fact.<sup>141</sup> Moreover, to determine whether there is a rational connection between the proved and presumed fact, the inference from one fact to the other must be commonplace rather than arbitrary.<sup>142</sup>

Michigan's anti-stalking statute provides that the defendant's continued unwanted contact shall be prima facie evidence that the victim felt terrorized, frightened, intimidated, threatened, harassed, or molested from this contact.<sup>143</sup> Under Michigan's statute a rebuttable presumption arises when a defendant continues contact with a victim who specifically requests that the defendant discontinue contact.<sup>144</sup> Too tenuous a connection exists between the proved fact of unconsented contact and the presumed fact that an E-mail receiver felt terrorized, frightened, intimidated, threatened, harassed, or molested.

An E-mail user frequently receives repeated, unconsented contact, but rarely does this contact cause anything more than mere annoyance and frustration.<sup>145</sup> For example, a young man, Bob, tells of his experience when he logged on E-mail under a female name.<sup>146</sup> He became frustrated and annoyed when numerous men persistently contacted him even after they were aware that their contact was undesired.<sup>147</sup> Another

139. See also Faulkner & Hsiao, *supra* note 55, at 40, 41.

140. *Leary v. U.S.*, 395 U.S. 6, 36 (1969); *Tot v. U.S.*, 319 U.S. 463, 467-68 (1943).

141. *Id.*

142. *Tot*, 319 U.S. at 467-68.

143. MICH. COMP. LAWS § 750.411h (Supp. 1993).

144. MICH. COMP. LAWS § 750.411h(5) (Supp. 1993).

145. See also Faulkner & Hsiao, *supra* note 55, at 41. There is an overwhelming probability that the defendant's continuation of unwanted contact will cause the victim mere annoyance and frustration. *Id.* However, if the vague term emotional distress means mere annoyance or frustration, then that would render the statute plainly vague. *Id.*

146. Wasatch Area Voices Express (W.A.V.E.), *supra* note 102 and accompanying text. The young man never reveals his name therefore this comment refers to him as Bob.

147. *Id.*

example includes solicitors who relentlessly send junk E-mail.<sup>148</sup> In situations such as these, the E-mail receiver may only feel annoyed or frustrated after the repeated unconsented contact. However, under Michigan's statute there is a rebuttable presumption that Bob and those solicited via E-mail felt terrorized, frightened, intimidated, threatened, harassed, or molested. Thus, Michigan's statute impermissible presumes a fact which is not a common result of the predicate fact.<sup>149</sup> Countless situations arise where an E-mail user receives unwanted E-mail, but only feels annoyed, mad, or frustrated.<sup>150</sup> To presume otherwise, as Michigan's anti-stalking statute does, violates the E-mail senders' constitutional right to due process of law.

Michigan's anti-stalking statute will not survive a constitutional challenge in an E-mail stalking lawsuit because it is unconstitutionally vague and violates the E-mail stalker's right to due process. However, E-mail stalking is a growing problem in today's society; victims like Jane need a viable legal remedy. Michigan and most states fail to provide these victims with a sufficient state remedy. However, Congressman Mfume has proposed a federal bill to remedy E-mail stalking.

#### B. CONGRESSMAN MFUME'S PROPOSED ELECTRONIC ANTI-STALKING ACT: AN INADEQUATE REMEDY TO E-MAIL STALKING

On Aug. 21, 1994 Congressman Mfume proposed the Electronic Anti-Stalking Act<sup>151</sup> which would amend the Federal Telephone Harass-

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148. Mike Godwin of the Electronic Frontier Foundation stated that "normally stalking has real people and real space. E-mail is only one part of it. For example, if I continue to get junk mail from Hertz [Rent-A-Car], then the[y're] stalking me [under Michigan's statute]." Telephone Interview with Mike Godwin, Electronic Frontier Foundation, in Boston, MA. (Sept. 14, 1994).

149. *Tot v. U.S.*, 319 U.S. 463, 467-68 (1943).

[W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

*Id.*

150. See David Plotnikoff, *Why Men Are Hogging the Digital Highway. The Promise that Cyberspace Would Be a Brave New World of Sexual Equality Isn't Panning Out.*, TORONTO STAR, Aug. 21, 1994, at E4 (stating that cyberspace is populated by cyber-stalkers and perverts and that harassment is a threat to every on-line citizen regardless of gender, and ranges from offensive E-mail, that may be unintentional because E-mail lacks tools to convey such irony or sarcasm, to on-line stalking that carries over into real life and there is no pat definition of what separates harassment from just plain rudeness); Paula Span, *The On-Line Mystique*, WASHINGTON POST, Feb. 27, 1994, at 11, 24 ("[w]omen can be publicly propositioned or stalked by E-mail suitors who hurl abuse when they get rejected . . . You don't have to sit still for such annoyances . . . [many] on-line systems have some sort of recourse, [such as] hosts or monitors who chastise offenders, or policies that can toss a persistent harasser off the net").

151. H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment). The proposed Electronic Anti-Stalking Statute reads:

ing Statute<sup>152</sup> to include electronic communications.<sup>153</sup> The proposed Electronic Anti-Stalking Act<sup>154</sup> expands the meaning of "telephone" to include any communications "by means of computer modem or any other two-way wire or radio telecommunications device."<sup>155</sup> Currently, the Federal Telephone Harassing Statute<sup>156</sup> only prohibits using telephones "to annoy, abuse, threaten, or harass any person."<sup>157</sup>

First, expanding the meaning of telephone to include E-mail fails to provide an adequate remedy for E-mail stalking<sup>158</sup> because communicating over a telephone is different than communicating via E-mail.<sup>159</sup> The impact of the defendant's words differs when the victim hears them over a telephone from when the victim reads them in an E-mail message.<sup>160</sup>

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To amend section 223 of the Communications Act of 1934 to prevent the harassment by computer modem or other electronic device.

Section 1. Short Title

This Act may be cited as the "Electronic Anti-Stalking Act of 1994."

Section 2. Amendment

Section 223(a) of the Communications Act of 1934 (47 U.S.C. 223(a)) is amended by adding at the end thereof the following new sentence: "For purposes of subparagraphs (B),(C), and (D), the terms 'telephone' and 'telephone call' include communications by means of computer modem or any other two-way wire or radio telecommunications device."

*Id.*

152. 47 U.S.C. § 223 (1989). This statute states in relevant part:

§ 223. Obscene or harassing telephone calls within the United States

(a) Prohibited general purposes

Whoever

(1) within the United States by means of telephone

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section, shall be fined not more than \$50,000 or imprisoned not more than six months, or both.

*Id.*

153. 140 Cong. Rec. E1796-01 (daily ed. Aug. 21, 1994) (statement of Rep. Mfume).

154. H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment).

155. *Id.*

156. 47 U.S.C. § 223 (1989).

157. 140 Cong. Rec. E1796-01 (daily ed. Aug. 21, 1994) (statement of Rep. Mfume). See *supra* note 152.

158. See Lewis, *supra* note 16, at B18.

159. *Can We Talk? Can We Ever*, FORTUNE MAG., July 11, 1994, at 54 (E-mail is a form of speech or conversation without the gestures). The differences between E-mail and speaking with someone in person, is similar to the differences between E-mail and talking to someone over the telephone.

160. *Id.*

Over the telephone the victim hears the defendant's words and deduces the defendant's meaning from the inflection, hesitation, and tone of the words spoken.<sup>161</sup> In contrast, E-mail consists of words without inflection, hesitation, or tone.<sup>162</sup> Thus, when the victim reads an E-mail message, the reader may interpret the words differently from what the writer intends.<sup>163</sup> For example, where the E-mail sender intends an innocent construction of the words, the reader may feel threatened or harassed by them.<sup>164</sup>

Furthermore, a telephone conversation allows the parties the opportunity to talk conversationally.<sup>165</sup> Conversely, E-mail does not allow simultaneous discussion.<sup>166</sup> E-mail is like "written speech"<sup>167</sup> and the victim does not have to be on the computer to receive the message.<sup>168</sup>

Second, expanding the meaning of telephone to include E-mail is too inclusive to provide for a specific delineation of what constitutes E-mail stalking. For example, it may allow messages known as flames<sup>169</sup> to spawn unnecessary lawsuits under the Electronic Anti-Stalking Act.<sup>170</sup> Flames are negative E-mail messages that contain "colorful phrases and terms."<sup>171</sup> A user usually sends these flames once with the intent to annoy and harass the receiving E-mail user.<sup>172</sup> Under the Electronic Anti-Stalking Act,<sup>173</sup> a defendant who innocently sends one anonymous E-

161. *Id.* (discussing the differences between speaking in person verses communicating via E-mail). E-mail is a form of speech or conversation without gestures. *Id.* "No smiles to take the edge off tough statements, nods to say, 'Yes, I get it,' or raised eyebrows to warn the other fellow away from dangerous ground." *Can We Talk? Can We Ever*, *supra* note 159, at 54. Similarly, a conversation on a telephone allows the listener to hear the persons voice inflections, his hesitations, and his tone of voice. *Id.*

162. *Id.*

163. *Id.*

164. *Can We Talk? Can We Ever*, *supra* note 159, at 54 (" . . . jokes are misread as insults . . .").

165. *Id.*

166. Naughton, *supra* note 6, at 414.

167. Philip Elmer-Dewitt, *Bards of the Internet. If E-mail Represents the Renaissance of Prose, Why is So Much of It So Awful?*, *TIME*, July 4, 1994, at 66.

168. Naughton, *supra* note 6, at 414. If the receiver is not on the computer when the message is sent then an electronic mailbox holds the message until the receiver logs on to the network. *Id.* Some people say that E-mail is more analogous to the U.S. postal mail than a telephone call. *Id.* However, "[c]omputer networks do not fit neatly into any traditional category of communication." *Id.*

169. See generally Peter H. Lewis, *Personal Computers; Newcomers to Internet Need Combat Training*, N.Y. *TIME*s, May 3, 1994, at C8 (defining a "flame" as a nasty E-mail message sent from one E-mail user to another).

170. H.R. 5015, 103d Cong., 2d Sess. § 223 (1994) (proposed amendment).

171. Lewis, *supra* note 169, at C8.

172. *Id.* (giving the general impression that a flame was usually anonymous and with the intent to annoy and harass the newcomer).

173. H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment).



mail message with the intent to annoy or harass someone, such as a user sending a flame,<sup>174</sup> could be charged with a federal crime.<sup>175</sup>

Further, Mfume unreasonably lumps together an anti-stalking statute with a harassment statute.<sup>176</sup> In most states, stalking is a felony that imposes serious penalties upon an infringer.<sup>177</sup> In contrast, harassment implies mere annoyances rather than threats.<sup>178</sup> Consequently, harassment is less ominous than stalking and the penalties are less severe.<sup>179</sup>

Congressman Mfume's proposed federal bill called the Electronic Anti-Stalking Act is an insufficient remedy to E-mail stalking.<sup>180</sup> If the Federal Telephone Harassing Statute<sup>181</sup> includes E-mail, then the federal courts potentially could be flooded with frivolous lawsuits.<sup>182</sup> Inno-

174. See *Sex Crimes: PC Police*, *supra* at 69, at 2 (explaining that if laws treat electronic stalking the same as physical telephonic or postal stalking, ". . . there could soon be laws against the online habit of posting messages full of personal invective, known as flaming"). *cf.* Elmer-Dewitt, *supra* note 36, at 50, 51. Mediums such as electronic bulletin boards are available via E-mail which allow people to put up ads for free. *Id.* For example, a law firm solicited customers for its immigration law services through electronic bulletin boards. *Id.* The firm devised a program that would put its ad on almost every computer bulletin board on the Net, about 5,500 in all. *Id.* The ad was seen by millions over and over again which made Internet users mad, and thus, spawned many angry E-mail messages called flames. Elmer-Dewitt, *supra* note 36, at 51. The firm received thousands of flames from people, some anonymous, who intended to annoy, threaten, or harass the couple. *Id.* For example, a 16 year old boy threatened to burn the "crappy couples" law firm to the ground. *Id.*; see generally Naughton, *supra* note 6 and accompanying text for a general discussion of electronic bulletin boards.

175. See H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment). See also 47 U.S.C. § 223(a)(1)(B) (the Federal Telephone Harassing Statute makes one anonymous call with the intent to annoy someone a crime).

176. See H.R. 5015, 103d Cong., 2d Sess. §223 (1994) (proposed amendment).

177. See note 2 and accompanying text.

178. ALA. CODE § 13A-11-8 (1994); ARIZ. REV. STAT. ANN. § 13-2921 (Supp. 1994); CAL. CIV. PRO. CODE § 527.6 (West 1994); IND. CODE ANN. § 35-45-10-2 (West Supp. 1994); N.M. STAT. ANN. § 30-3A-2 (Michie 1993); OR. REV. STAT. § 166.065 (1994); WASH. REV. CODE ANN. § 10.14.020 (West 1990).

179. See *supra* note 178.

180. See generally, Lewis, *supra* note 16, at B18 (quoting Eugene Volokh, acting professor at the U.C.L.A. Law School, stating that Mfume's Act may not be viable because "on its face, the call doesn't have to be made with the intent to threaten and abuse.") For example, Volokh stated that suppose "[s]ay I call up . . . Congressman . . . Mfume and I say, 'This is a ridiculous law, and I just want to tell you I think you are a jerk, . . .' [i]f you read the statute broadly then that's a Federal felony and raises First Amendment issues." *Id.*

181. 47 U.S.C. § 223.

182. See generally *U.S. v. Lampley*, 573 F.2d 783 (3d Cir. 1978) (held that the Federal Telephone Harassing Statute was did not violate the First Amendment as unconstitutionally vague); see generally *Can We Talk? Can We Ever*, *supra* note 159, at 54 (E-mail releases people's inhibitions, and they feel like they can write/say anything they want); Elmer-Dewitt, *supra* note 37, at 62 (the Internet is not regulated or restricted, anybody can start a discussion on any topic and say anything, however, some family oriented commer-

cent but expressive E-mail messages, such as flames, could spurn lawsuits that amount to a federal crime because the reader may have interpreted the words differently from what the writer intended.<sup>183</sup> The federal government created the Federal Telephone Harassing Statute<sup>184</sup> specifically to deal with communications over the telephone,<sup>185</sup> not E-mail stalking. Forty-eight states and the District of Columbia have enacted statutes dealing specifically with stalking.<sup>186</sup> The correct remedy for E-mail stalking is to specify electronic communications as a form of contact under each states' anti-stalking statutes.

### C. A MODEL ANTI-STALKING STATUTE AND ANALYSIS OF THE MODEL ANTI-STALKING STATUTE

Many of the states' anti-stalking statutes will not survive a constitutional challenge for the same reasons that Michigan's anti-stalking statute fails under such a challenge.<sup>187</sup> This Model Anti-Stalking Statute provides an adequate remedy to E-mail stalking by alleviating the vagueness problems that exist in state anti-stalking statutes. Each state should consider this Model as a guide to implementing a constitutional anti-stalking statute that will provide a remedy for E-mail stalking victims.<sup>188</sup>

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cial services do censor offensive messages). See *supra* note 37, and accompanying text for a general discussion of why censorship of the Internet is impossible.

183. *Can We Talk? Can We Ever*, *supra* note 159, at 54.

184. 47 U.S.C. § 223.

185. *U.S. v. Lampley*, 573 F.2d 783 (3d Cir. 1978). "[I]n enacting [section] 223 the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." *Id.* at 787 (citing H.R. No. 1109, Interstate and Foreign Commerce Committee, U.S. Code Cong. & Admin. News 1915 (1968); *U.S. v. Darsey*, 342 F. Supp. 311 (E.D. Pa. 1972)).

186. See *supra* note 2 and accompanying text.

187. See *Faulkner & Hsiao*, *supra* note 55 (arguing that most states' anti-stalking statutes and specifically Michigan's anti-stalking statute will not survive a constitutional challenge); *Boychuk*, *supra* note 2 (most stalking statutes will not pass constitutional muster unless they contain specific key elements such as specific criminal intent). See also *Lingg*, *supra* note 28 (explaining the effectiveness of certain states' stalking statutes); *Karen A. Brooks*, Current Public Law and Policy Issues, *The New Stalking Laws: Are They Adequate to End Violence*, 14 *HAMLIN J. PUB. L. & POL'Y* 259 (1993) (describing what stalking statutes must include to survive a constitutional challenge). *But see Laurie Salame*, Note, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 *SUFFOLK U. L. REV.* 67 (1993) (concluding that most state stalking statutes will not be held unconstitutionally vague); *Dawn A. Morville*, Recent Development, *Stalking Laws: Are They Solutions for More Problems?*, 71 *WASH. U. L.Q.* 921 (1993) (state stalking statutes will survive a constitutional challenge).

188. Alternatives other than a legal remedy may exist to circumvent E-mail stalking for those victims who wish to pursue a non-legal remedy. *Jerry Michalski*, *Community, Part II*, July 15, 1993, available in *WESTLAW*, Paper-SMJ, CD File 275, at 1. Several companies

## MODEL STATE ANTI-STALKING STATUTE

Section 1. A person commits the crime of stalking if that person:

- A) intends to engage in a course of conduct directed at the victim, or an immediate family member, that would cause a reasonable person to fear death or bodily harm; and
- (B) knows or should know that a particular course of conduct would cause a reasonable person to fear death or bodily harm; and
- (C) actually causes the victim, or an immediate family member, to fear death or bodily harm.

Section 2. Definitions

- (A) "Course of conduct" means a series of two or more acts that communicate threats directed at a specific person.
- (B) "Communicate" means communicating with another through implied conduct or by verbal, written, or electronic means.
- (C) "Immediate family" members include a spouse, child and sibling or any individual that has resided in the household for at least one year.<sup>189</sup>

Such a model state anti-stalking statute eliminates the constitutional problems apparent in Michigan's anti-stalking statute.<sup>190</sup> First,

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provide software tools a user can program to sort or eliminate E-mail messages from a certain address. Richard A. Shaffer, *Beam Me A Letter*, June 20, 1994, available in WESTLAW, Paper-SMJ, MI File 47. The technical terms used to describe these software tools are "rules" or "views." E-mail interview with Richard Baldwin, MicroSoft Account Manager (Oct. 21, 1994) Different companies have different names for their version of "rules" or "views" such as bozo filter and WinRules. *Id.* "Rules" or "views" allow a user to block messages that "come from unsolicited senders or contain unwanted content." Ilene K. Gotts, *For the Information Highway Truly to Become Super, Federal Regulators May Have to Overhaul the Present System and Design a More Comprehensive Structure*, NAT'L L.J., June 13, 1994, at B6, 7. However, there are already workshops that show people how to circumvent these new software tools. Pamela Sebastian, *Business Bulletin*, N.Y. TIMES, July 28, 1994, at A1. See also Michael Schrage, *E-mail Stamps, Software Filters Could Help Keep Cyberspace Clean*, WASH. POST, Apr. 22, 1994, at G3 (presenting the idea of E-mail stamps to charge people for each E-mail message they send). *But see* Bill Howard, *Free E-mail Can Be Costly*, Sept. 13, 1994, available in WESTLAW, Paper-SMJ, CD File 275, at 107 (Bozo filters are crude and fail to eliminate traffic because all these filters do is put the mail in limbo and because access to the Internet is free, people clog the Internet with useless information, and thus, suggesting that people be charged to use the Internet and to send E-mail); David Churbuck, *Bozo Filters (screening software for electronic mail)*, Jan. 7, 1991, available in WESTLAW, Paper-SMJ, MI File 47, at 286 (advocating bozo filters where each E-mail message received that is from someone you do not want to hear from or that is of no interest to you enters your electronic mailbox, the filter recognizes the sender's name and automatically deletes the message); *Daily life On the Net: Net Vignettes*, Dec. 31, 1993, available in WESTLAW, Comp-Asap, CD File 275, at 1 (advocating the use of software filters).

189. Nat'l Criminal Justice Ass'n, *Project to Develop a Model Anti-Stalking Code for States*, at 43 (1993).

190. See generally *id.* at 9 (1993). The NIJ's model statute prohibits an alleged stalker from "engaging in a 'course of conduct' that would cause a reasonable person fear." *Id.* at 44. The NIJ's model anti-stalking statute differs from most state anti-stalking statutes

the Model statute includes a specific intent requirement that the Michigan Anti-Stalking Statute lacks. Specifically, section (1)(A) requires that an E-mail stalker intend to cause the victim fear of death or bodily harm. Second, the Model statute does not include a blanket prohibition on unwanted E-mail messages regardless of whether the defendant had knowledge that these messages were unwanted.<sup>191</sup> Specifically, section (1)(B) of the model statute, unlike the Michigan statute, requires that the defendant have knowledge that his actions caused the victim fear of physical harm. Third, this Model eliminates the term emotional distress, therefore, placing the focus on the defendant's intent rather than on the victim's emotions. Acts that induce mere annoyance or emotional distress are punishable under harassment statutes.<sup>192</sup> Harassment statutes are not felonies and carry less severe penalties than the crime of stalking. Specifically, section (1)(C) requires that the victim actually fear a high level of physical harm as opposed to Michigan's anti-stalking statute, which only requires that the defendant suffer emotional distress. Finally, this Model, like Michigan's, but unlike most states' anti-stalking statute, includes electronic communications as a form of contact. The inclusion of electronic communications in all state anti-stalking statutes is imperative as E-mail becomes a more ordinary form of personal communication.

#### IV. CONCLUSION

Jane's lawsuit against Archambeau is still in the preliminary stages.<sup>193</sup> However, the pending outcome of this lawsuit will not only notify state legislatures that the problem of E-mail stalking exists but that current state anti-stalking statutes fail to provide victims with a legal remedy. The number of people using E-mail for personal use is growing exponentially, and thus, all federal and state anti-stalking statutes must include electronic communication as a form of contact. Otherwise, the anti-stalking law will not be comprehensive.

Currently, Michigan, Alaska, Oklahoma, and Wyoming attempt to solve the problem of E-mail stalking by including electronic communications as a form of contact in their anti-stalking statutes.<sup>194</sup>

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because it refrains from enumerating specific types of actions that define "stalking." *Id.* Such specific acts include following, non-consensual communication, harassing, and trespassing. Nat'l Criminal Justice Ass'n, *supra* at 43-44. The commentary to the model statute explain that some courts have ruled that if a statute includes a list of specific acts, then the list is exclusive. *Id.* Yet most states' stalking statutes proscribe specific acts. *Id.* at 44.

191. See generally MICH. COMP. LAWS § 750.411h (Supp. 1993).

192. Nat'l Criminal Justice Ass'n, *Project to Develop a Model Anti-Stalking Code for States*, at 48 (1993); see note 178.

193. See note 10 and accompanying text.

194. See *supra* note 3.

However, these statutes may not survive a constitutional challenge. Furthermore, Congressman Mfume's proposed Electronic Anti-Stalking Act is an insufficient federal remedy to E-mail stalking because it fails to account for the differences between harassment and stalking. Each state needs to recognize that E-mail is a new form of literate communication. Thus, as the anti-stalking laws stand now, creative stalkers can stalk their victims via E-mail without violating most states' anti-stalking statutes. However, the Model Anti-Stalking Statute will provide a comprehensive remedy to victims of E-mail stalking and correct the inadequacies of past legislation.

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