UIC Law Review

Volume 26 | Issue 4 Article 3

Summer 1993

# Illinois' Stalking Statute: Taking Unsteady Aim at Preventing Attacks, 26 J. Marshall L. Rev. 821 (1993)

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# ILLINOIS' STALKING STATUTE: TAKING UNSTEADY AIM AT PREVENTING ATTACKS

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## I. INTRODUCTION

Between 1990 and 1992, more than half of the states passed laws banning stalking.[1] They did so in response to highly publicized cases, most of which involved men who threatened, followed, and attacked women.[2] In Illinois, proponents of stalking legislation argued that current laws failed to cover this behavior.[3] Seeking to fill this perceived gap in the law, the Illinois General Assembly passed a stalking statute in 1992, hailed as the toughest in the nation.[4] Less

1. As of February 1, 1993, 31 states had enacted stalking statutes. LEXIS and WESTLAW search, all stacks library (Feb. 1, 1993); Tamar Lewin, *New Laws Address Old Problem: The Terror of a Stalker's Threats*, N.Y. TIMES, Feb. 8, 1993, at A1.

2. Lewin, *supra* note 1, at A1; Constance L. Hays, *If That Man Is Following Her, Connecticut Is Going To Follow Him*, N.Y. TIMES, June 5, 1992, at B1. When introducing Illinois' stalking legislation in the wake of the murders of the two Libertyville women, Representative Homer stated: "By passing [the bill], we can protect the victims before they are harmed." John Gorman, *Deaths Fuel Drive for Stalking Law*, CHI. TRIB., Nov. 12, 1991, § 2, at 1. During the floor debate, Senator Hawkinson discussed the legislature's intention that the bill allow the "intervention of the criminal justice system" to prevent attacks. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (June 22, 1992). When signing the stalking legislation, Governor Edgar stated that "[t]oo many times, law-enforcement officials have been forced to stand by, legally helpless, as stalkers threaten, harass or follow their targets." Steve Mitra, *Stalker Law Gives Police, Judges Added Power*, CHI. TRIB., July 13, 1992, § 2, at 1.

3. According to one of the bill's sponsors, Representative Thomas Homer (D-Canton), "The common thread among these cases . . . is that the victim had complained to the police . . . and the police response was almost universal in each case: 'our hands are tied.' There's no law in Illinois that makes a crime out of somebody verbally threatening and following you." H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992); *Police Need Help to Stop Stalkers*, CHI. TRIB., Nov. 18, 1991, § 1, at 18.

4. On July 12, 1992 Governor James Edgar signed H.R. 2677 and S.R. 1555, identical bills outlawing the offenses of "stalking" and "aggravated stalking." 720 ILCS 5/12-7.3 (1992) (not yet available in ILL. REV. STAT.) (stalking); 720 ILCS 5/12-7.4 (1992) (not yet available in ILL. REV. STAT.) (aggravated stalking); 725 ILCS 5/110-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-4 (1991)) (bailable offenses); 725 ILCS 5/110-6(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-6 (1991)) (grant, reduction, increase, or denial of bail); 730 ILCS 5/3-14-5 (1992) (ILL. REV. STAT. ch 38, para. 1003-14-5 (1991)) (mental health treatment); 750 ILCS 60/214 (1992) (ILL. REV. STAT. ch. 40, para. 2312-14 (1991)) (order of protection). According to a sponsor of the legislation, Representative Thomas Homer, the new Illinois stalking statute is "the toughest and most effective bill on stalking in the entire nation." H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992); Rick

than a year later, the General Assembly found this statute to be insufficient. As a result, the legislature extensively revised the stalking statute to broaden its coverage and extend the sentences of those imprisoned for stalking an additional ninety days.[5]

By expanding the statute's scope, the General Assembly has created constitutional problems for the statute. Section I of this article describes the Illinois stalking statute and its bail or pretrial detention provisions. Section II discusses the stalking problem as shown by both recent, highly publicized cases,[6] as well as older cases, highlighting the psychiatric problems involved in many stalking cases.[7] Section III discusses constitutional issues created by the statute's broad language.[8] Section IV presents possible solutions to the stalking problem. First, it reviews legal methods such as attempt,[9] assault,[10] intimidation,[11] the Illinois Domestic Violence Act,[12] and mental health codes,[13] and recognizes these as alternatives to control stalking. Second, it proposes an improved stalking statute.

## I. THE ILLINOIS STALKING STATUTE

### *A. The 1992 Stalking Statute*

On July 12, 1992, Illinois Governor James Edgar signed legislation outlawing stalking.[14] Under the 1992 statute, a person commits stalking by "transmitting" a threat to another person with the specific intention of placing her in reasonable apprehension of "death, bodily harm, sexual assault, confinement or restraint."[15] Although

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Pierson, *House Votes to Make Stalking a Felony*, CHI. TRIB., May 21, 1992, § 1, at 3.

5. P.A. 88-402 was signed by Governor Edgar on August 20, 1993.

6. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (1992).

7. Marie Rudden, et al., *Diagnosis and Clinical Course of Erotomanic and Other Delusional Patients*, 147 AM. J. PSYCHIATRY 625 (1990); Jonathan H. Segal, *Erotomania Revisited: From Kraepelin to DSM-III-R*, 146 AM. J. PSYCHIATRY 1261 (1989); AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-III-R) § 297.10, at 199-201 (3d ed. 1987).

8. *See infra* notes 134-230 and accompanying text.

9. 720 ILCS 5/8-4 (1992) (ILL. REV. STAT. ch 38, para. 8-4 (1991)).

10. *Id.* at 5/12-1 (1992) (ILL. REV. STAT. ch 38, para. 12-1 (1991)).

11. *Id.* at 5/12-6 (1992) (ILL. REV. STAT. ch. 38, para. 12-6 (1991)).

12. 725 ILCS 5/112A (1992) (ILL. REV. STAT. ch 38, para. 112A (1991)); 750 ILCS 60/101 (1992) (ILL. REV. STAT. ch. 40, para. 2311-1 (1991)).

13. *See infra* notes 279-85 and accompanying text.

14. 720 ILCS 5/12-7.3 (1992) (not available in ILL. REV. STAT.); *Id.* at 5/12-7.4 (1992) (not yet available in ILL. REV. STAT.).

15. 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.). The statute reads:

> A person commits stalking when he or she transmits to another person a threat with the intent to place that person in reasonable apprehension of death, bodily harm, sexual assault, confinement or restraint, and in fur-

the statute requires that the offender intend the threat to cause the victim to suffer a reasonable apprehension of harm, it does not require that such apprehension actually occur or specify what kinds of threats it covers. The 1992 statute also requires the offender to act "in furtherance" of the threat[16] by knowingly following the other person, or by placing the other person under surveillance on at least two separate occasions.[17]

The 1992 statute requires that the offender intentionally threaten the victim.[18] This intent element is difficult for the prosecution to prove because it prohibits both intentional conduct — transmitting a threat — as well as an intended result — that the victim suffer reasonable apprehension of harm.[19] Under Illinois law, if a statute prohibits conduct, the offender must have a "conscious objective or purpose" to engage in that conduct.[20] If a statute also prohibits an intended result, the offender must have a "conscious objective or purpose" to engage in the prohibited conduct, as well as a "conscious objective or purpose" to cause that result.[21] The 1992 stalking statute therefore requires the prosecution to first prove that the offender's conscious purpose was to transmit a threat. Second, it requires the prosecution to prove that the offender had a conscious purpose to cause the victim reasonable apprehension of a very particular result: "death, bodily harm, sexual assault, confinement or restraint."[22] This requirement, that the prosecution prove an additional intended consequence, resembles the burden in a specific intent offense,[23] a difficult burden for the

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therance of the threat knowingly does any one or more of the following acts on at least 2 separate occasions: (1) follows the person, other than within the residence of the defendant; (2) places the person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant . . . .

*Id.*

16. *Id.*

17. *Id.* at 5/12-7.3(a)(1)-(2) (1992) (not available in ILL. REV. STAT.).

18. *Id.* at 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.).

19. 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.).

20. "[A] person intends to accomplish a result or engage in conduct described by the statute when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (1992) (ILL. REV. STAT. ch. 38, para. 4-4 (1991)); ILLINOIS SUPREME COURT COMMITTEE ON PATTERNED JURY INSTRUCTIONS IN CIVIL CASES, ILLINOIS PATTERNED JURY INSTRUCTIONS - CRIMINAL, No. 5.01 (3d ed. 1992) [hereinafter IPI-CRIMINAL].

21. 720 ILCS 5/4-4 (1992) (ILL. REV. STAT. ch. 38, para. 4-4 (1991)); IPI - CRIMINAL, *supra* note 20, No. 5.01.

22. 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.).

23. Justice Traynor set out a test for distinguishing specific from general intent:

When the definition of a crime consists of only the description of the particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the prescribed

prosecution to prove.

The 1992 statute also requires the actions of following or surveilling be "in furtherance" of the threat.[24] This requirement resembles an element of the offense of attempt, which requires that acts be "in furtherance" of an evil intent or threat.[25] It assures a connection between the evil intent demonstrated by the threat and the actions taken by the offender. During the House debate the bill's sponsor, Representative Thomas Homer (D-Canton), described the required connection as a "continuous course of conduct."[26]

### *B. The 1993 Statute*

In 1993, the General Assembly extensively revised the stalking statute to make it easier for the prosecution to prove a stalking offense.[27] According to Representative Homer, the sponsor of the amendment,[28] its purpose was to "provide law enforcement and prosecutors with an additional tool to protect the victims of stalkers" by creating a new stalking offense which does not require a threat, and by lowering the statute's mental state from intent to knowledge.[29] The 1993 amendment eliminated the requirement that, in cases involving threats, the offender's actions be "in fur-

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act. This intention is deemed to be a general intent. When the definition refers to defendant's intent to do some further act or *achieve some additional consequence*, the crime is deemed to be one of a specific intent.

People v. Hood, 463 P.2d 370, 378 (Cal. 1969) (emphasis added).

24. 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.). According to Webster's, "furtherance" means acts which would help, forward, promote, or advance the threat. WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 744 (2d ed. 1979); *See* Maryland Casualty Co. v. Smith, 40 S.W.2d 913, 914 (Tex. Civ. App. 1931) (discussing failed suit to recover worker's compensation award for injuries not suffered "in furtherance" of employment duties).

25. See *infra* notes 236-55 and accompanying text for a discussion of attempt.

26. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992).

27. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3 and 5/12-7.4).

28. This bill was introduced as a "shell" bill, or a bill with no content upon its filing in the House. H.R. 1235, 88th Gen. Ass'y, 1st Sess. (Mar. 4, 1993). In the House Judiciary II Committee, the bill was amended to add a stalking offense which would have covered cases where the offender issues no threat. Rather, it merely required the offender to simply follow or surveil the victim with the intention of harassing them. P.A. 88-402 (1993).

29. P.A. 88-402 (1993) (proposing to amend 720 ILCS 5/12-7.3(a)(1) (not available in ILL. REV. STAT.)). During the second reading of the bill, Homer stated that:

> [T]he state's attorneys have come to me and expressed an interest in further refining the Bill, in order to give them even greater tools to . . . protect victims . . . against this . . . phenomenon known as stalking and to create a wider net for the victims of those . . . who commit this offense . . . . Amendment 5, which . . . redefines slightly the offenses of stalking and aggravated stalking in such a way, I believe, to perfect (as best we are able to) the

therance" of the threat.[30] It also broadened the statute's coverage to include threats which are not imminent.[31]

### *1. "Stalking" Defined*

The 1993 amendment creates two stalking offenses, one which involves a threat, and one which does not.[32] Both offenses consist of two elements. The first element is the same for both offenses: the offender must "knowingly and without lawful justification" follow the other person, or place the other person under surveillance on at least two separate occasions.[33]

Under the 1993 statute, the offender places another person under surveillance "by remaining present outside the person's school, place of employment, vehicle, other place occupied by the person, or residence, other than the residence of the defendant."[34] The statute fails to define "follows." According to Webster's, however, "follow" means "to go, proceed, or come after: move behind over the same path or course . . . to go after in pursuit or in an effort to overtake . . . ."[35] Even with the aid of some definition, the statute's prohibition encompasses a wide range of conduct.

#### a. Stalking Which Requires a Threat

The first type of stalking offense under the 1993 statute requires transmission of a threat to cause bodily harm, sexual assault, confinement, or restraint.[36] This type of stalking offense has four problems. First, it fails to define several terms, such as "restraint" and "confinement."[37] These terms also appear undefined in the of-

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concept known as anti-stalking legislation. I would . . . move adoption of Amendment 5.

*Id.*

30. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(2) (1992) (not available in ILL. REV. STAT.)).

31. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(2) (not available in ILL. REV. STAT.)).

32. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1)-(2) (1992) (not available in ILL. REV. STAT.)).

33. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.)).

34. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(d) (1992) (not available in ILL. REV. STAT.)).

35. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 883 (3 ed. 1986).

36. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1) (1992) (not available in ILL. REV. STAT.)).

37. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.)). Some have argued that the statute's failure to define these terms, such as "following" and "surveillance," make the statute unconstitutionally vague. Charles Mount, *Lawyer for Man in Stalking Case Argues Law is Unconstitutional*, CHI. TRIB., June 2, 1993, § 2, at 2; *see infra* note 191 (discussing the constitutional problems).

fense of intimidation and in the Domestic Violence Act.[38] However, the Illinois Criminal Code contains an offense of "unlawful restraint," defined as the knowing detention of another person.[39] In addition, the statute fails to define "bodily harm." However, Illinois courts in construing the offense of battery have held that "bodily harm" means actual physical harm, and not, for instance, a light slap on the wrist or a bump in a crowd.[40]

Second, the statute fails to require a connection between the threat and the act of following or surveilling. Under the 1992 statute, acts had to be "in furtherance" of the threat, assuring a connection between them.[41] While amending the statute in 1993, the legislature removed this requirement, a deletion which allows the statute to cover threats made "at any time."[42] Consequently, the statute will now cover threats made before, during, or after the offender follows or surveils the other person. There is also no limit on the amount of time which can pass between the threat and these acts, or between the acts and the threat.

Third, the 1993 amendment expands the statute's coverage to threats of future harm.[43] Constitutional problems arise because the statute's scope now includes threats of harm which are not imminent.[44] Fourth, under this type of stalking offense, the threat need not be substantial or serious because it does not require the offender to cause the victim to fear any harm.[45]

### b. Stalking Absent a Threat

Under the second type of 1993 stalking offense, the offender need not threaten the victim. Rather, the offender must, by following or surveilling the victim, place him or her in reasonable apprehension of bodily harm, sexual assault, confinement, or restraint.[46]

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38. 720 ILCS 12-6(2) (1992) (ILL. REV. STAT. ch. 38, para. 12-62) (1991)); 725 ILCS 5/112A-3(6) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(6) (1991)); 750 ILCS 60/103 (1992) (ILL. REV. STAT. ch. 40, para. 2311-3 (1991)).

39. 720 ILCS 5/10-3(a) (1992) (ILL. REV. STAT. ch. 38, para. 10-3 (1991)).

40. JOHN DECKER, ILLINOIS CRIMINAL LAW 315 (1986).

41. 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.). During the House debate on the 1992 stalking statute, the bill's sponsor, Representative Homer stated that the threat and the acts of following or surveillance "must be part of a continuous course of conduct, and the facts must be related . . . ." H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992).

42. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1) (1992)) (not available in ILL. REV. STAT.).

43. *Id.*

44. See *infra* notes 151-66 and accompanying text for a discussion of the constitutional problems raised by expanding the coverage of the statute to include threats of future harm.

45. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1) (1992) (not available in ILL. REV. STAT.).

46. *Id.*

Also, under the 1993 amendment, the statute applies to fears of "immediate or future" harm.[47] This significantly broadens the statute's coverage to cases where there is no fear of imminent harm, creating constitutional problems.

c. "Reasonable Apprehension"

The reasonable apprehension requirement under the second type of stalking offense is also found in the Illinois assault statute. The assault statute employs an objective standard to determine whether the conduct in question would frighten a reasonable person.[48] Applying this standard to the second type of 1993 stalking offense, it is difficult to characterize or predict what kind of following or surveillance, in the absence of an accompanying threat, would frighten an objective reasonable person of bodily harm, sexual assault, confinement, or restraint.

Illinois courts have construed what type of conduct creates a reasonable apprehension of an assault. Words alone do not establish a reasonable apprehension of an assault.[49] However, when hostile conduct and threatening circumstances accompany the offender's words, a reasonable apprehension of an assault may be established.[50] For example, in *People v. Ferguson*,[51] the offender argued with a security guard who had prohibited him from driving his car into a parking lot. The offender, a large man, jumped out of his car, stood inches from the guard, and cursed him. The offender then got back in his car and pulled it up to the guard, who refused to move. Approaching the guard on foot again, the offender, now within striking distance, told the guard he would "kick his ass."[52] Such conduct, according to the First District Appellate Court, supported the trial court's finding that the offender had placed the guard in reasonable apprehension of receiving a battery.[53]

In another case, the Illinois appellate court found that an offender placed a victim who was confined to a wheelchair in reasonable apprehension of receiving a battery when the offender, standing over six feet tall and weighing over 240 pounds, approached and threatened the victim with physical harm.[54] Given these interpretations of "reasonable apprehension," it is uncertain whether mere following or surveillance can ever create a reason-

47. *Id.*
48. In Interest of *C.L.*, 534 N.E.2d 1330 (Ill. App. Ct. 1988).
49. People v. Ferguson, 537 N.E.2d 880, 882 (Ill. App. Ct. 1989).
50. *Id.*
51. *Id.*
52. *Id.* at 881.
53. *Id.* at 882.
54. People v. Rynberk, 415 N.E.2d 1087 (Ill. App. Ct. 1980).

able apprehension of bodily harm, sexual assault, confinement or restraint.

d. The Required Mental State

In addition to proof of a criminal act, modern criminal statutes generally require proof of the offender's mental state.[55] At common law, numerous confusing definitions of mental states prevailed.[56] Illinois became a leader of the modern trend when it adopted its Criminal Code of 1961, abandoning the confusing common law definitions in favor of the more lucid approach set forth by the Model Penal Code.[57] Under this approach, a mental state must accompany each criminal offense. The four mental states range in culpability and difficulty of proof from negligence to recklessness to knowledge and finally intent.[58]

The 1993 amendment to the stalking statute replaced the mental state of intent with knowledge to make the offense easier for prosecutors to prove.[59] Under Illinois law, proof of this mental state varies depending on whether the statute prohibits conduct, a harmful result, or both.[60] If the statute prohibits conduct, a person acts with knowledge when they are "consciously aware" of the nature of their actions.[61] If the statute prohibits a result, a person acts with knowledge when they are consciously aware that their conduct is "practically certain" to cause the prohibited result.[62] If a statute

55. WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK OF CRIMINAL LAW 191-93 (1972). Absolute liability offenses are an exception to the requirement that an act be accompanied by a mental state. 720 ILCS 5/4-3 (1992) (ILL. REV. STAT. ch. 38, para. 4-3 (1991)); People v. Grant, 427 N.E.2d 810, 814 n.2 (Ill. App. Ct. 1981).

56. DECKER, supra note 40, at 55; Timothy P. O'Neill, *Illinois' Latest Version of the Defense of Voluntary Intoxication: Is it Wise? Is it Constitutional?*, 39 DEPAUL L. REV. 15, 22-24 (1989).

57. MODEL PENAL CODE § 2.02(2) (1985); ILL. REV. STAT. ch. 38, para. 4-1 to 4-9 committee comments (1989); LAFAVE, *supra* note 55, 197-98; DECKER, *supra* note 40, at 55; O'Neill, *supra* note 56, at 24-29.

58. 720 ILCS 5/4-4 to 5/4-7 (1992) (ILL. REV. STAT. ch. 38, para. 4-4 to 4-7 (1991)); People v. Jones, 595 N.E.2d 1071 (Ill. 1992); *Grant*, 427 N.E.2d at 812-13.

59. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1992) (not available ILL. REV. STAT.). According to the bill's sponsor, Representative Homer, "this [amendment] lowers the mental state." H.R. 1235, 88th Gen. Ass'y, 1st Sess. (Apr. 20, 1993).

60. 720 ILCS 5/4-5 (ILL. REV. STAT. ch. 38, para. 4-5 (1991)); IPI-CRIMINAL, *supra* note 20, No. 5.01B committee note.

61. 720 ILCS 5/4-5(a) (1992) (ILL. REV. STAT. ch. 38, para. 4-5(a) (1991)). "A person . . . acts with knowledge of . . . the nature of attendant circumstances of his conduct when he is consciously aware that his conduct is of such nature or that such circumstances exist." IPI-CRIMINAL, *supra* note 20, No. 5.01B(1).

62. 720 ILCS 5/4-5(b) (1992) (ILL. REV. STAT. ch. 38, para. 4-5(b) (1991)); IPI-CRIMINAL, *supra* note 20, No. 5.01B(2). "When an offense is defined in terms of a particular result, a person is said to act knowingly when he is 'consciously aware' that his conduct is 'practically certain' to cause the result." People v. Herr, 409 N.E.2d 442, 445 (Ill. App. Ct. 1980). The court stated:

prohibits both conduct and a result, a person acts with knowledge when they are both "consciously aware" of the nature of their acts and consciously aware that their conduct is "practically certain" to cause the prohibited result.[63]

The 1993 amendment defines the first type of stalking in terms of prohibited conduct — a threat and either following or surveilling.[64] To prove this type of stalking, the prosecution must therefore show that the offender was "consciously aware" that he was following or surveilling the victim, and that the offender was consciously aware that he was threatening the victim. The second type of stalking under the 1993 amendment does not require a threat. It defines stalking in terms of both prohibited conduct (following or surveilling) and a prohibited result (the victim's reasonable apprehension of bodily harm, sexual assault, confinement, or restraint).[65] To prove this type of stalking, the prosecution must therefore prove that the offender was consciously aware that he was following or surveilling the victim, and that he was consciously aware that his conduct was "practically certain" to cause the victim to suffer reasonable apprehension of, for instance, bodily harm.

e. "Transmits" a Threat

The first type of stalking requires that the offender "transmits to another person a threat."[66] Although the statute does not define "transmits," in ordinary usage this word entails another's receiving something. According to Webster's, "transmits" means "to cause to go to another person or place; transfer . . . ."[67] The statute therefore requires that the prosecution prove the victim received the threat. The statute's legislative history reinforces this interpretation. During the 1992 floor debate, one of the statute's Senate sponsors, Sena-

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Awareness is the primary distinction between the mental states of knowledge and negligence . . . . Knowledge and intent involve an awareness of the harm which will result from the person's act, while negligence involves the failure to be aware of such results in a situation in which the person has a legal duty of awareness.

*Id.*

63. 720 ILCS 5/4-5 (1992) (ILL. REV. STAT. ch. 38, para. 4-5 (1991)); IPI-CRIMINAL, *supra* note 20, No. 5.01B, committee note.

64. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1) (1992) (not available in ILL. REV. STAT.)).

65. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.)).

66. P.A. 88-402 (1993); 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.).

67. According to Webster's, "transmit" means "to cause to go or to be conveyed to another person or place . . . to cause (as light or force) to pass or be conveyed through some space or medium . . . 2b: to send out (a signal) either by radio waves or over a wire line . . . television . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2429 (3d ed. 1986).

tor Carl Hawkinson (R-Galesburg), said: "This bill . . . deals with the problem . . . where a woman receives death threats or other threats and then, in furtherance of that threat, is followed . . . ."[68]

The First District Appellate Court opinion in *People v. Curran* also bolsters this interpretation. In *Curran*, the court interpreted a criminal statute which applies to a person who "knowingly transmits" gambling information.[69] Referring to ordinary usage, the *Curran* court held that "transmits" means "to convey to another person, to pass on from one person or place to another."[70] If this interpretation is correct, then the stalking statute requires that the victim receive the threat, making receipt an element of the offense.[71]

f. How Must the Threat Be Transmitted

The statute fails to specify what methods of transmitting threats it covers.[72] This could allow a prosecutor to argue that the statute covers threatening behavior, such as leaving a dead animal on the victim's doorstep.[73] Such an expansive interpretation would be contrary to the legislature's stated purpose which was a focus on verbal threats. This focus was highlighted by Representative Homer during the 1992 legislative debate when he explained that Illinois needed stalking legislation because "[t]here's no law in Illinois that makes a crime out of somebody verbally threatening and following you."[74]

In addition, construing threatening behavior as a threat under the statute would result in an internal contradiction. For example, following or surveilling another person could be considered threatening behavior. If such behavior is construed to constitute a threat under the statute, these acts would be both the threat as well as the separate acts which the statute requires. Consequently, the statute's two separate elements of a threat and acts would be meaning-

68. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (June 22, 1992).

69. People v. Curran, 286 N.E.2d 594, 596 (Ill. App. Ct. 1972).

70. *Id.*

71. The Illinois intimidation statute includes the requirement that the offender "communicates to . . . another" a threat. 720 ILCS 5/12-6 (1992) (ILL. REV. STAT. ch. 38, para. 12-6 (1991)). This has been held to be an element of the offense which requires proof that the victim received the threat. People v. Smalley, 357 N.E.2d 93, 95 (Ill. App. Ct. 1976). The element of intent, for example, must be alleged in the charging instrument. People v. White, 330 N.E.2d 521 (Ill. App. Ct. 1975) (published abstract only); *see* DECKER, *supra* note 40, at 330 (discussing the element of receipt of threat).

72. P.A. 88-402 (1993); 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.).

73. A 1993 amendment rejected by the General Assembly include a provision which specified that threats could be "oral or written." H.R. 1235, 88th Gen. Ass'y, 1st Sess. (Apr. 1, 1993).

74. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992).

less since the acts could serve as both elements.[75]

### 2. *Affirmative Defenses*

Because the statute potentially encompasses such a wide range of behavior, its drafters included affirmative defenses. A person whose actions are covered by these provisions would still be subject to arrest and detention under the statute, but he or she would be allowed to attempt to justify their behavior. The first such defense was added to the statute in 1993, arguably narrowing its coverage and curing a possible defect. It provides that the statute only applies to following or surveilling done "without lawful justification."[76] Courts have construed similar clauses in other Illinois statutes as allowing the defendant to raise the affirmative defenses contained in Article 7 of the Criminal Code, such as compulsion, necessity, and entrapment.[77]

Another provision exempts from the statute's coverage constitutionally protected conduct. This conduct includes "picketing occurring at the workplace that is otherwise lawful and arises out of a bona fide labor dispute, or any exercise of the right of free speech or assembly that is otherwise lawful."[78]

### 3. *Penalties*

Penalties for an offender's first stalking conviction range from probation to a term of three years in the penitentiary, a term which could be increased to five years upon a second conviction.[79] An of-

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75. Courts will not construe a statute's words or phrases as meaningless, or as "surplusage." People v. Frieberg, 589 N.E.2d 508, 519 (Ill. 1992).

76. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1992) (not available in ILL. REV. STAT.)).

77. Many Illinois statutes contain similar clauses. They include: 720 ILCS 5/10-3 (ILL. REV. STAT. ch. 38, para. 10-3 (1991)) (unlawful restraint); 720 ILCS 5/10-4 (ILL. REV. STAT. ch. 38, para. 10-4 (1991)) (forcible detention); 720 ILCS 5/12-1 (1992) (ILL. REV. STAT. ch. 38, para. 12-1 (1991)) (assault); 720 ILCS 5/12-3 (ILL. REV. STAT. ch. 38, para. 12-3 (1991)) (battery); 720 ILCS 5/12-6 (ILL. REV. STAT. ch. 38, para. 12-6 (1991)) (intimidation); 720 ILCS 5/19-1 (ILL. REV. STAT. ch. 38, para. 19-1 (1991)) (burglary). The clause has been interpreted to describe "circumstances wherein conduct will be justified," as set forth in Article 7, "or [as] otherwise authorized." People v. Hubble, 401 N.E.2d 1282, 1285 (Ill. App. Ct. 1980). 720 ILCS 5/7-14 (1992) (ILL. REV. STAT. ch. 38, para. 7-14 (1991)). For a discussion in the context of assault, see DECKER, *supra* note 40, at 318. The clause is to be included in the jury instruction when an affirmative defense is raised. IPI-CRIMINAL, *supra* note 20, No. 11.01 (citing People v. Worsham, 326 N.E.2d 134 (Ill. App. Ct. 1975)).

78. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(c) (1992) (not available in ILL. REV. STAT.)).

79. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(b) (1992) (not available in ILL. REV. STAT.)); 730 ILCS 5/5-8-1(a)(6) (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(6) (1991)); *Id.* at 5/5-8-1(a)(7) (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(7) (1991)).

fender can be convicted of aggravated stalking if he confines the victim, causes her bodily harm, or violates a court's protective order.[80] An offender convicted of aggravated stalking can be sentenced to probation or to a term of imprisonment in the penitentiary of up to five years upon a first conviction, and up to seven years upon a second.[81]

The limited usefulness of imprisonment as a remedy for stalking was highlighted in May 1993, when two of the first offenders convicted of stalking were released from prison and were re-arrested when they began to again stalk their victims.[82] Within the month, the General Assembly attempted to remedy this problem by amending the statute. Under this amendment, offenders sentenced to prison for stalking or aggravated stalking receive ninety fewer days of "meritorious" good conduct credit, or are released on parole ninety days later than offenders sentenced for many other offenses.[83]

While the effectiveness of the increase prison measure seems doubtful, a provision in the 1992 statute may, if used, prove more helpful in preventing attacks. Under this provision, if an offender is sentenced to a term of imprisonment for stalking, the court may order that prison authorities consider requiring the offender to undergo mental health treatment as a condition of parole.[84]

### *4. Pretrial Detention Provisions*

The bail provisions of Illinois' stalking statute aim at protecting the alleged victims of stalkers from violent attacks by the accused while the case is pending.[85] They allow the court to detain the accused if the prosecution has proved two factors by clear and convincing evidence at a hearing. First, the release of the accused must "pose a real and present threat" to the physical safety of the victim.

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80. A person commits aggravated stalking by committing stalking and confining or restraining the victim, causing the victim bodily harm, or violating a protective order or injunction under the Illinois Domestic Violence Act. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.4(a) (1992) (not available in ILL. REV. STAT.)).

81. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.4(b) (1992)) (not available in ILL. REV. STAT.); 730 ILCS 5-8-1(a)(5) (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(5) (1991)); *Id.* at 5/5-8-1(a)(6) (1992) (ILL. REV. STAT. ch. 38, para. 1005-8-1(a)(6) (1991)).

82. James Hill, *O'Malley: Get Tough on Stalkers*, CHI. TRIB., May 17, 1993, § 2, at 4; Scott Fornek, *Two Stalkers Charged Again*, CHI. SUN TIMES, May 17, 1993, § 1, at 3.

83. P.A. 88-402 (1993) (amending 730 ILCS 5/3-6-3(a)(3) (1992) (ILL. REV. STAT. ch. 38, para. 1003-6-3(a)(3) (1991)). H.R. 1235, 88th Gen. Ass'y, 1st Sess. (May 21, 1993) (statement by Senator Hawkinson).

84. 730 ILCS 5/3-14-5 (1992) (not available in ILL. REV. STAT.).

85. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992); Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 35.

Second, the accused's detention must "prevent fulfillment" of the threat upon which the charge is based.[86] Because the second type of stalking involves no threat, persons charged with that offense are presumably not subject to pretrial detention.

To initiate a detention hearing, the prosecution must file a verified petition alleging the two factors — that the accused poses "a real and present threat" to the victim and that his detention is needed to "prevent fulfillment" of the threat.[87] The petition must be filed at the accused's first appearance before a judge or, if the accused is released, within twenty-one days after his arrest.[88] The hearing must be held immediately, unless the accused or the prosecution seek a continuance for "good cause."[89] A continuance for the accused may last up to five days, during which the accused remains in custody.[90] The prosecution is allowed a continuance of up to three days.[91] The accused may not be detained if the prosecution seeks this continuance unless he is found to have previously violated an order of protection, or has been previously convicted of committing one of a list of enumerated offenses involving bodily harm against the alleged victim in the pending case.[92]

The statute's evidentiary exceptions have attracted vocal opposition from defense advocates who question both their fairness and their constitutionality.[93] The prosecution need not call witnesses at the hearing. Instead the prosecution may present evidence by reading into the record "reliable information" such as the contents of police reports.[94] A prosecution case for detention based entirely on hearsay evidence might not, however, constitute clear and convincing evidence.[95] Reports and any other statements which the prosecution relies upon must be provided to the accused before the hearing. If the accused testifies at the hearing, the transcript of his testimony may not be used by the prosecution at trial in its case-in-chief. It may be used, however, as impeachment against the accused if he testifies at trial, or in a perjury prosecution.[96] Although the

86. 725 ILCS 5/110-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-4 (1991)); *Id.* at 5/110-6.3(a),(c)(2)(A)-(B) (1992) (not available in ILL. REV. STAT.).

87. 725 ILCS 5/110-6.3(a) (1992) (not available in ILL. REV. STAT.).

88. *Id.* at 5/110-6.3(a)(1) (1992) (not available in ILL. REV. STAT.).

89. *Id.* at 5/110-6.3(a)(2) (1992) (not available in ILL. REV. STAT.).

90. *Id.*

91. *Id.*

92. 725 ILCS 5/110-6.3(a)(2) (1992) (not available in ILL. REV. STAT.).

93. Kolarik, *supra* note 85, at 35.

94. 725 ILCS 5/110-6.3(c)(1)(A) (1992) (not available in ILL. REV. STAT.).

95. "It may well be that hearsay alone will rarely, if ever, satisfy the clear and convincing standard." United States v. Hazzard, 598 F. Supp. 1442, 1453 (N.D. Ill. 1984); "A final order of pretrial detention shall not be based solely on hearsay." FLA. R. CRIM. P. 3.132(c)(1).

96. 725 ILCS 5/110-6.3(c)(1)A) (1992) (not available in ILL. REV. STAT.); UNIF. PRETRIAL DETENTION ACT § 8, 11, 61 U.L.A. (1989).

accused has the right to present witnesses at the hearing, he may compel the appearance of the alleged victim only if approved by the court after it states, on the record, reasons why "the ends of justice so require."[97]

The statute explicitly provides that the rules of evidence do not apply at detention hearings.[98] This is contrary to suggestions of the American Bar Association (ABA) Standards and the Uniform Pretrial Detention Act, which both recommend that the rules of evidence for criminal trials apply at such hearings.[99] In addition, the accused may not move to suppress illegally obtained evidence at the hearing or present evidence that any statements he is alleged to have made were involuntary, or the result of police abuse.[100] By allowing admission of such evidence, the statute encourages abuses, because even illegally obtained evidence could be used to detain the accused for long periods of time before trial. Florida avoids encouraging such abuses by barring the use of illegally obtained evidence in detention hearings.[101]

If the court rules to detain the accused, it must summarize its reasons for doing so.[102] Such a ruling may be appealed by the accused.[103] Once detained, the accused must be brought to trial within 90 days or released on bond. This time period does not include periods resulting from defense continuances.[104]

## II. THE STALKING PROBLEM

The Illinois stalking statute protects two distinct interests. The first, and the one which has gained the most attention, is society's interest in protecting persons from attacks, or actual physical danger. The second is society's interest in protecting persons from fear and harassment. Both interests were discussed during the statute's legislative debate, a debate which included many references to recent well publicized stalking cases.[105] Less attention has been given to older cases described in psychiatric literature which highlight the

97. 725 ILCS 5/110-6.3(c)(1)(A) (1992) (not available in ILL. REV. STAT.).

98. *Id.*

99. ABA STANDARDS FOR CRIMINAL JUSTICE 10-5.10(c) (2d ed. 1985) (discussing the procedures governing preventive detention hearings: judicial orders for detention and appellate review); UNIF. PRETRIAL DETENTION ACT § 8 (1989).

100. 725 ILCS 5/110-6.3(c)(1)(B) (1992) (not available in ILL. REV. STAT.).

101. Florida's pretrial detention statute bars admission of illegally obtained evidence: "[E]vidence secured in violation of the United States Constitution or the Constitution of the State of Florida shall not be admissible." FLA. R. CRIM. P. 3.132(c)(1).

102. 725 ILCS 5/110-6.3(e)(1) (1992) (not available in ILL. REV. STAT.).

103. *Id.* at 5/110-6.3(g) (1992) (not available in ILL. REV. STAT.).

104. *Id.* at 5/110-6.3(f) (1992) (not available in ILL. REV. STAT.).

105. *See infra* notes 115-25 and accompanying text (discussing recent publicized cases).

fact that many stalking incidents are not simple criminal cases, but are instead manifestations of psychiatric problems involving paranoid delusions.[106] Also, contrary to the impressions created by most popular writings on the subject, stalking is not a new problem. Psychiatric studies have documented cases at least as far back as 1918.[107] Nor are most stalkers men, according to psychiatric studies. Male stalkers are, however, more likely to come into contact with the criminal justice system.[108]

### *A. Protecting Persons from Attacks*

The Illinois stalking statute was primarily enacted to protect persons from attacks. In this regard, the statute developed in much the same fashion as a similar statute in California. In 1990, California passed the nation's first stalking statute in the wake of a series of highly publicized attacks against women, sometimes fatal, by persons who had threatened and followed them. Some of these incidents arose out of domestic violence cases when women were attacked by their ex-husbands or former boyfriends, despite having obtained restraining orders from the courts. In other cases, obsessed fans followed, harassed, and sometimes attacked celebrities. The murder of actress Rebecca Schaeffer was the most notorious of these cases.[109]

State Senator Edward Royce (R-Fullerton) sponsored California's legislation. According to Royce, now a Congressman from California's 39th District, existing laws failed to protect potential stalking victims and forced law enforcement officers "to wait for the crime (before they could) step in."[110] Through the statute, Royce sought to allow and encourage law enforcement officers to step in "earlier in the game" to prevent stalking attacks.[111]

To do this, the California statute targeted the specific actions of offenders in notorious cases. It criminalized the repeated following

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106. *See infra* notes 126-33 and accompanying text (dicussing the psychiatric problems often associated with stalkers).

107. Segal, *supra* note 7, at 1261.

108. *Id.* at 1265; *see* Taylor et al., *Erotomania in Males, Am. J. Psychiatry*, 13 PSYCHOL. MED. 645-50 (1983).

109. In 1989, five Orange County women were murdered after having obtained temporary restraining orders against their attackers. Obsessed fans victimized other actresses besides Schaeffer; Theresa Saldana was brutally attacked and Sharon Gless was stalked. *California Law Targets Obsessed Fans, Vengeful Lovers*, STATE LEGISLATURES, Oct. 1991, at 7; *Proposal Would Make It a Crime to "Stalk" Victim*, 103 L.A. DAILY J. 118, June 13, 1990, § 1, at 1; *In the Mind of a Stalker*, 112 U.S. NEWS & WORLD REP., Feb. 17, 1992, at 28-30.

110. *Proposal Would Make It a Crime to "Stalk" Victim, supra* note 109, at 1. Royce was elected to Congress in November of 1992 and took office in January of 1993. He promptly introduced legislation making stalking a federal crime. H.R. 740, 95th Cong., 1st Sess. (1993).

111. *Proposal Would Make It a Crime to "Stalk" Victim, supra* note 109, at 1.

or harassing of another person, and the intentional frightening of that person by making a "credible" threat to cause that person great bodily harm.[112] The statute also required that the offender's actions cause the victim to reasonably fear for his or her safety.[113]

The Illinois effort to pass stalking legislation mirrored California's experience. It too focused on preventing violent attacks.[114] State Representative Thomas Homer (D-Canton), the original sponsor of the Illinois stalking statute, introduced the legislation the week after the widely publicized murders of two Libertyville women — killed within 48 hours of each other — one by her ex-husband, the other by her former boyfriend.[115] Homer highlighted the statute's focus on dangerous offenders when he introduced it, stating his hope that it would "protect victims before they are harmed."[116]

Echoing the comments of California's Senator Royce, Representative Homer argued, during the 1992 House debate on the statute, that violent attacks by stalkers showed that law enforcement officers had to "wait until something actually happens before [they] can do anything."[117] Senator Carl Hawkinson (R-Galesburg) described the statute's purpose in the same terms during the Senate debate, stating that the bill allows the "intervention of the criminal justice system" to prevent attacks.[118]

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112. CAL. PENAL CODE § 646.9 (West Supp. 1993).

113. *Id.* California's stalking statute has proved to be the model for many states' statutes. It provides that:

> (a) Any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury or to place that person in reasonable fear of the death or great bodily injury of his or her immediate family is guilty of the crime of stalking. . . .
>
> (e) 'Harasses' means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress, to the person. 'Course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . .
>
> (f) '[A] credible threat' means a threat made with the intent and the apparent ability to carry out the threat as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family. The threat must be against the life of, or a threat to cause great bodily injury to, a person as defined in Section 12022.7.

*Id.*

114. *See supra* notes 2-3 (discussing Illinois stalking legislation as a response to prevent violent attacks).

115. Gorman, *supra* note 2, at 1.

116. *Id.*

117. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992).

118. H.R. 2677, 88th Gen. Ass'y, 1st Sess. (June 22, 1992).

Two cases, widely discussed while the stalking statute was working its way through the legislature, illustrate the types of attacks which the statute was intended to prevent. Representative Homer cited the highly publicized Prudhomme case when he introduced the stalking statute.[119] Shirley Prudhomme had moved to Illinois from Louisiana after divorcing Claude. Still fearing him, she obtained a protective order from a court, swearing that Claude had beaten her, brandished a gun at her, and threatened her.[120] One week later, police officers caught Claude in Shirley's apartment. They found bullets in his suitcase and a gun, apparently belonging to him, under the bed. According to the police, Prudhomme was not charged with violating the protective order because he had not been served with notice of the order. No other charges were filed, and Prudhomme was put on a train to Louisiana. Within three months, he returned, murdered his wife, and committed suicide.[121]

In another case, a young woman and her boyfriend were harassed by Ken Kopecky, who had become obsessed with the woman. Kopecky had repeatedly threatened both of the victims before the night he lay in wait outside the boyfriend's home and shot the couple to death as they approached.[122]

### *B. Protecting Persons from Fear and Harassment*

Not all stalking cases involve attempts by the offender to physically harm the victim. In some cases, the offender may neither intend nor attempt to harm the victim, but may intentionally frighten or harass them. In other cases, law enforcement officers may not succeed in gathering sufficient evidence to prove that the offender intended or attempted to harm the victim. Nonetheless, in such cases, the victim may suffer fear or harassment. In passing stalking legislation, the General Assembly also sought to address this problem. For example, during the Senate debate on the 1992 statute, Senator Beverly Fawell (R-Glen Ellyn) described the case of a young girl from the Senator's district who was "molested repeatedly by a joker who finally got some probation but who keeps stalking the child, comes around the house constantly, has the child in complete terror. I think . . . it's high time . . . we go after these people who take it upon themselves to go out and annoy and hurt

119. Gorman, *supra* note 2, at 1.

120. In a statement made to her daughter, Prudhomme said he would shoot Shirley. John Gorman, *Lake County Woman Feared for Her Life*, CHI. TRIB., Nov. 12, 1991, § 2, at 1.

121. Gorman, *supra* note 120, at 1; Gorman, *supra* note 2, at 1.

122. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992) (floor debate); Art Barnum, *DuPage County Murders Dropped Dramatically in '92*, CHI. TRIB., Jan. 4, 1993, § 2, at 5.

other people . . . ."[123] Even though law enforcement officers might not have been able to present proof that the offender had taken steps to harm the victim, the offender's conduct most likely caused the victim to reasonably fear for her safety.

Representative Homer described a similar situation during the House debate on the 1992 statute. A university student from Homer's district had been repeatedly threatened and followed by her ex-boyfriend. When the girl's mother brought the offender's behavior to the attention of the state's attorney, she was told that under current law the state's attorney could do nothing until the ex-boyfriend actually injured her daughter.[124] As in the case described by Senator Fawell, the offender's conduct caused the victim to reasonably fear for her safety even though there may not have been sufficient proof to establish that the offender had taken steps to harm the victim.

Connecticut's legislature passed stalking legislation in response to a similar incident. In that case, a teenage girl was terrified by a man she did not know who repeatedly followed her in his car as she walked to school. He sometimes invited her to join him, and would wait for her in his car until she left school. He also parked his car in front of her house day and night. The man never threatened the girl, and demonstrated no intent and took no overt steps to harm her. Nonetheless, the offender's conduct caused the victim to reasonably fear for her safety.[125]

### *C. Stalking and Mental Illness*

The Ralph Nau case was also in the news while the stalking statute was pending.[126] That case illustrates how some stalking incidents are the product of an offender's mental disorder. As a young man in the early nineteen-eighties, Nau sent bizarre, threatening letters to Olivia Newton-John, Cher, and Sheena Easton. At one point, Nau was sending three to five letters a day. In 1980, Nau moved to Los Angeles to be near the celebrities with whom he was obsessed. In 1983, and again in 1984, Nau traveled to Australia, where he unsuccessfully tried to stalk Olivia Newton-John. Nau suffered from delusions that an evil being named Maria had bewitched Newton-John and Cher to prevent them from responding to Nau, and that Maria had replaced Newton-John with an evil imposter.[127]

123. H.R. 2677, 88th Gen. Ass'y, 1st Sess. (June 22, 1992).
124. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992) (house debate).
125. Hays, *supra* note 2, at B1.
126. Bruce Rubenstein, *The Stalker*, CHICAGO, Feb. 1992, at 70.
127. *Id.* at 95.

Late in 1984, Nau came to live with his mother, step-father Kenneth Gerkin, and Kenneth's autistic son, Denny, on a farm in Antioch, Illinois. Family members recalled Nau's bizarre behavior. For example, he told one relative that her teeth were cursed, he sometimes would utter unprovoked screams, and one night he allegedly slept inside a gutted calf. On the evening of August eighth, Nau appeared in the family room, sweaty and disheveled, and told his family that Denny had been crying, but that when Nau went to Denny's room, he was gone. Later that night Nau told an investigator that he had dreamed that Denny's deceased mother wanted her son to join her. This statement lead to a lengthy interrogation of Nau, during which he told investigators that he had buried his dog by a tree in a cornfield. Based on this statement, investigators found Denny's body. The next day, Nau described how he had dressed Denny and taken him outside, where "he wasn't human any more . . . ." When the "animal" cried and tried to get away, Nau killed it with an axe and buried it.[128]

Nau was found mentally unfit for trial and not likely to ever regain fitness. He was then civilly committed to the Department of Mental Health as a danger to himself or others, a status which allows Nau to petition every six months for release. At the time the original stalking statute was pending in 1992, Nau was committed to the secure facility in Chester, Illinois.[129]

Nau's case was not an isolated psychiatric problem, but an extreme example of a paranoid delusion called erotomania.[130] Similar cases have been documented as far back as 1918, when a 53-year old Frenchwoman became obsessed with the notion that King George V of England was in love with her. This woman made several trips to England, where she would wait outside the palace, watching for a glimpse of the King.[131] The Diagnostic Manual of the American Psychiatric Association (DSM-III-R) describes erotomania as follows:

> The central theme of an erotic delusion is that one is loved by another. The delusion usually concerns idealized romantic love and spiritual union rather than sexual attraction. The person about whom this conviction is held is usually of higher status, such as a famous person or a superior at work, and may even be a complete stranger. Efforts to contact the object of the delusion, through telephone calls, letters, gifts, visits, and *even surveillance and stalking* are common, though occasionally the person keeps the delusion secret.[132]

128. *Id.* at 96.

129. *Id.* at 97.

130. *Id.* at 70.

131. Segal, *supra* note 7, at 10.

132. AM. PSYCHIATRIC ASSOC., *supra* note 7, at 199-200 (emphasis added).

According to the DSM-III-R and a psychiatric study, while most persons suffering from this disorder are women, most of those who come in contact with the criminal justice system are men: "Some people with this disorder, particularly males, come into conflict with the law in their efforts to pursue the object of their delusion, or in a misguided effort to 'rescue' him or her from some imagined danger."[133]

## III. CONSTITUTIONAL ISSUES CONCERNING THE STALKING STATUTE

The Illinois stalking statute's broad language creates potential constitutional issues, possibly punishing innnocent conduct and shifting the burden of proof from the prosecution to the accused. While these problems are present in the 1992 statute, they are more pronounced in the 1993 version. The following analysis will therefore focus more directly on that version. The 1993 statute also applies to threats which are not imminent, and to conduct which does not cause fear of imminent harm, raising First Amendment problems. These issues could be resolved by amending the statute.

### *A. Innocent Conduct*

There are two types of stalking under Illinois' 1993 statute. Type one essentially prohibits two or more acts of knowing following or surveilling combined with a threat. Type two prohibits knowing following or surveilling which causes the victim to fear various types of attack.[134] The statute also applies to threats of future harm and fear of future harm.[135] Both types of offense aim at knowingly following or surveilling. Some have contended that the terms are unconstitutionally vague.[136] Taken at their common meaning, however, these terms are clear. They simply cover too much conduct. This broad coverage could violate the Due Process Clause of the Fourteenth Amendment by covering acts which could be innocent as well as criminal.[137] For example, in *People v. Sanchez*,[138] a Michigan appellate court struck down a Detroit ordinance which punished "wrongful following" as an overbroad exercise of the police power because the statute could have applied to

133. *Id.*; Taylor, *supra* note 108, at 645-50. For a general discussion of symptoms, see Rudden, *supra* note 7, at 5.

134. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a) (1),(2) (1992) (available in ILL. REV. STAT.)).

135. *Id.*

136. Kolander v. Lawson, 461 U.S. 352 (1983); Mount, *supra* note 37, at 2.

137. U.S. CONST. amend. XIV, § 1.

138. 171 N.W.2d 452 (Mich. Ct. App. 1969).

innocent as well as guilty conduct.[139] The court reasoned that the ordinance could apply to a person who followed another innocently or by coincidence, but with no evil intention.[140] Prohibiting conduct such as following — "going over the same path behind the complainant" — also amounted to a presumption of evil intent from possible innocent acts.[141] This effectively shifted the burden of proof to the accused to prove his acts innocent.[142]

The second type of stalking, which requires knowing following or surveilling but no threat, differs little from the ordinance struck down in *Sanchez* and seems likely to meet the same fate. It too violates the Due Process Clause by covering innocent conduct. It also effectively presumes a criminal purpose in conduct which on its face could be innocent, shifting the burden to the accused to justify his actions.[143]

The first type of stalking offense differs from the *Sanchez* ordinance by requiring a threat.[144] This additional element could be construed as narrowing the offense to conduct which could not be innocent.[145] Such a construction depends, however, upon an interpretation of the statute as requiring a close enough connection between the threat and the alleged acts of following or surveilling to assure that they are not innocent, but are an extension of the offender's evil intention manifested in the threat. Such a construction would ignore the statute's legislative history. In 1993, the legislature eliminated the language in the statute requiring a connection between the threat and acts, striking the requirement that the acts be "in furtherance" of the threat.[146] This requirement was not replaced with any language indicating that a connection is re-

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139. *Id.* at 453.

140. *Id.* at 454. The court stated that the ordiance:

> [I]ncludes innocent coincidence as well as intentional and malicious conduct. A person who only thinks he is being followed may feel as harassed or molested as a person who is actually being followed, or a person may pursue another with evil intent without the person being pursued ever knowing it. Justice prohibits the imposition of criminal sanctions in the first instance for the imagined injury, but it may require criminal sanctions in the second . . . .

*Id.*

141. *Id.*

142. *Sanchez*, 171 N.W.2d at 454.

143. The second type of stalking offense resembles a mandatory rebuttable presumption that "following" indicates guilt. In much the same way, provisions of the Domestic Violence Act unconstitutionally attempt to shift the burden by presuming that following or surveilling causes. *See infra* notes 272 through 275 and accompanying text.

144. *Sanchez*, 171 N.W.2d at 453 n.1; P.A. 88-402 (1993) (amending 720 ILCS 12-7.3(a)(2) (1992) (not available in ILL. REV. STAT.)).

145. People v. Anderson, 591 N.E.2d 461, 468 (Ill. 1992).

146. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3 (1992) (not available in ILL. REV. STAT.)).

quired. The 1993 statute would therefore apparently apply to conduct unrelated to the threat, possibly covering innocent conduct.

The potential problem of the statute covering innocent conduct was made worse by the 1993 amendment to the statute which replaced the mental state of intent with knowledge.[147] This mental state may not be sufficient to assure that innocent conduct is not punished.[148] This was illustrated in *People v. Tolliver*,[149] where the Illinois Supreme Court construed a statute which included the mental state of knowledge and which potentially covered innocent conduct. The court was confronted with a statute which made it a felony to knowingly possess an incomplete automobile title. Noting the numerous situations where a person could knowingly possess an incomplete title for innocent reasons, the court found that "such innocent but knowing conduct, which is wholly devoid of criminal or devious intent, should not render a person guilty of a felony."[150] The same reasoning should apply to conduct covered by the stalking statute, whether it be "surveilling" another person by watching them on a public street or at a political protest, or "following" another person by walking behind them down the street or into a church or political meeting.

### *B. Protected Conduct*

The 1993 statute applies to threats of future action which do not frighten the victim, and to conduct which, without a threat, creates fear of future harm.[151] By punishing speech and conduct which does not create a substantial or imminent danger the statute could discourage protected speech and invite abuse, raising the possibility that it is overbroad in violation of the First Amendment.

A statute which needlessly prohibits a significant amount of protected speech is overbroad because it can discourage free expression in violation of the First and Fourteenth Amendments.[152] Such a statute "strikes at the heart of the political process by silencing those who in furtherance of their political goals may advocate use of unlawful means."[153] The government interest in limiting such threats is outweighed "by the public interest in giving legitimate

147. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3 (1992) (not available in ILL. REV. STAT.)).

148. Morrissette v. United States, 342 U.S. 246 (1951).

149. 589 N.E.2d 527 (Ill. 1992).

150. *Id.* at 529.

151. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1),(2) (1992) (not available in ILL. REV. STAT.)).

152. Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); People v. Anderson, 591 N.E.2d 461, 466 (Ill. 1992).

153. People v. Holder, 451 N.E.2d 831, 836 (Ill. 1983) (Goldenhersh, J., dissenting); *Broadrick*, 413 U.S. at 611-12; *Anderson*, 591 N.E.2d at 466.

political discussion a wide berth."[154] In order to assure that free expression is given a "wide berth," the Supreme Court held, in *Brandenburg v. Ohio*, that a person may be punished for advocating lawless behavior only when "such advocacy is directed to inciting or producing *imminent* lawless action and is *likely to incite or produce such action.*"[155]

Not all statutes which prohibit speech are overbroad. For instance, the Illinois hazing statute applies to speech, but has been held not to be overbroad because it covers only speech which causes substantial harm — a physical injury.[156] Not all statutes which limit threats are overbroad. The government has a legitimate interest in protecting individuals from threats which coerce or frighten them.[157] In these instances, however, statutes prohibit speech which is tied to actual harm or imminent lawlessness.

A statute may not, however, prohibit speech if imminent lawlessness is absent. For instance, in *Brandenburg*, the Court struck down an Ohio statute which made it a crime to advocate violence as a means to achieve political reform, finding that that statute prohibited speech which posed no danger of imminent lawlessness.[158]

A statute may not prohibit speech which consists of insubstantial threats.[159] A statute cannot, for instance, prohibit "threats not reasonably likely to induce a belief that they will be carried out."[160] This was the problem with Montana's intimidation statute which is essentially identical to the Illinois intimidation statute. To remedy this defect, Montana's statute was judicially limited to apply only to threats "reasonably likely to induce a belief that they will be carried out."[161] Illinois' intimidation statute was also held to be unconstitutionally overbroad because it applied to threats which had no reasonable tendency to coerce.[162] This ruling occurred before any of the Illinois appellate courts or the Illinois Supreme Court had an opportunity to construe the statute in a manner to narrow its reach.[163] The Illinois Supreme Court cured this defect in the intimidation statute by limiting it to threats which involve a "reasonable

154. *Holder*, 451 N.E.2d at 836 (Goldenhersh, J., dissenting).

155. 395 U.S. 444, 447 (1968) (emphasis added).

156. *Anderson*, 591 N.E.2d at 466.

157. *Holder*, 451 N.E.2d at 834 (quoting Landry v. Daley, 280 F. Supp. 938 (N.D. Ill. 1969), *rev'd on other grounds*, Boyle v. Landry, 401 U.S. 77 (1971)); United States *ex rel.* Holder v. Circuit Court, 624 F. Supp. 68, 70 (N.D. Ill. 1985).

158. *Brandenburg*, 395 U.S. at 444.

159. *Holder*, 624 F. Supp. at 70-71.

160. *Id.* at 70 (quoting Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983)).

161. Wurth v. Risley, 719 F.2d 1438 (9th Cir. 1983) (discussed in Holder v. Circuit Court, 624 F. Supp. 68, 71).

162. *Landry*, 280 F. Supp. at 961; *Holder*, 624 F. Supp. at 70.

163. *Landry*, 280 F. Supp. at 961; *Holder*, 624 F. Supp. at 70.

tendency to coerce."[164]

The 1993 stalking statute, however, specifically applies to speech which poses no danger of imminent lawlessness and to speech which consists only of insubstantial threats. The first type of stalking offense covers following or surveilling joined with a threat of "immediate or future" harm in violation of *Brandenburg*'s imminence requirement.[165] The offense fails to require that the victim suffer a reasonable apprehension of attack.[166] It thus suffers from the same defect as had the intimidation statute before it was cured by judicial interpretation, because it applies to insubstantial threats such as unsuccessful attempts to frighten another person, or threats which the victim does not take seriously. While the second stalking offense requires that the victim suffer reasonable apprehension, it too ignores the requirements of *Brandenburg*, and specifically applies to apprehension of future harm. By expanding the statute to cover threats and conduct which pose no imminent threat of lawlessness and by covering insubstantial threats, the 1993 amendment could allow the statute to discourage protected speech, raising the possibility that it is overbroad in violation of the First Amendment.

### *C. Pretrial Detention*

The bail provisions of Illinois' stalking statute are aimed at protecting the alleged victims of stalkers from violent attacks by the accused while the case is pending.[167] They allow the court to detain the accused if the prosecution has proved two factors by clear and convincing evidence at a hearing. The first factor is that release of the accused would "pose a real and present threat" to the physical safety of the victim. The second is that the accused's detention is needed to "prevent fulfillment" of the threat upon which the charge is based.[168]

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164. People v. Gallo, 297 N.E.2d 569, 574 (Ill. 1973) (discussed in United States *ex rel.* Holder v. Circuit Court, 624 F. Supp. 68, 70 (N.D. Ill., W.D. 1985)).

165. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1) (1992) (not available in ILL. REV. STAT.)).

166. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(2)). In this respect, the Illinois offense differs from the statutes of many other states. States whose stalking statutes include the reasonable apprehension requirement include: Alabama, ALA. CODE § 13A-6-92 (1992); California, CAL. PENAL CODE § 646.9 (West Supp. 1993); Connecticut, Conn. GEN. STAT. § 539-181(c)(d) (Supp. 1993); Delaware, DEL. CODE ANN. § 1312A(b)(3) (1992); North Carolina, N.C. GEN. STAT. § 14-277.3(a)(1) (1992); Oklahoma, OKLA. STAT. ANN. tit. 21, § 1173(E) (Supp. 1993); Rhode Island, R.I. GEN. LAWS § 11-59-2 (1992).

167. H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992) (house debate); Kolarik, *supra* note 85, at 35.

168. 725 ILCS 5/110-4(a) (ILL. REV. STAT. ch. 38, para. 110-4(a) (1991)); *Id.* at 5/110-6.3(a), (c)(2)(A)-(B) (1992) (not available in ILL. REV. STAT.).

The validity of the statute's bail provisions are questionable. Paragraph 110-4 of the Criminal Code, as amended by the statute, classifies some persons charged with stalking as nonbailable.[169] This section almost certainly violates section 9 of article I of the Illinois Constitution.[170] The statute poses other constitutional problems in granting courts the discretionary power to deny bail before trial in apparent conflict with the the Illinois Constitution.[171] In addition, the bail provisions may violate the Illinois' separation of powers doctrine.[172]

### *1. Is Stalking a Bailable Offense?*

Section 9, article I of the Illinois Constitution provides that persons charged with probationable offenses such as stalking are "bailable," or enjoy a qualified right to bail.[173] Despite this, paragraph 110-4 of the statute classifies some persons accused of stalking as nonbailable. It does so in cases where the court determines that the release of the accused would "pose a real and present threat" to the physical safety of the victim, and the accused's detention is needed to "prevent fulfillment" of the threat upon which the charge is based.[174]

In *People ex rel. Hemingway v. Elrod*, the Illinois Supreme Court was presented with a similar conflict between paragraph 110-4 and section 9 of article I.[175] In 1972, section 9 provided that all persons charged with an offense "were bailable . . . except for capi-

169. *Id.* at 5/110-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-4(a) (1991)).

170. ILL. CONST. art. I, § 9. During a hearing of the Senate Judiciary Committee, Senator John Cullerton (D-Chicago) "noted that Article I, § 9, of the Illinois Constitution of 1970 provides for the availability of bail to all defendants accused of capital cases and offenses carrying a mandatory minimum term of imprisonment. Stalking would not carry such a term." David Heckelman, *'Stalking' Legislation Draws Fire Over Bail Provisions*, CHI. D. LAW BULLETIN, June 2, 1992, § 1, at 1.

171. 725 ILCS 5/110-6.3 (1992) (not available in ILL. REV. STAT.).

172. ILL. CONST. art. I, § 1; People v. Williams, 577 N.E.2d 762 (Ill. 1991).

173. ILL. CONST. art. I, § 9 provides:

> All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offense; *offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person.* The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.

*Id.* (emphasis added).

174. 725 ILCS 5/110-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-4(a) (Ill. 1991)).

175. People *ex rel.* Hemingway v. Elrod, 322 N.E.2d 837, 839 (Ill. 1975).

tal cases."[176] The constitutional provision was implemented in paragraph 110-4, which defined bailable offenses as all offenses except those for which "death is a possible punishment for the offense charged."[177] That year, the United States Supreme Court, in *Furman v. Georgia*, declared the imposition of the death penalty to be unconstitutional.[178] As no capital offenses remained, persons charged under all Illinois offenses, including what had formerly been capital murder, became bailable under section 9. In what was most likely an attempt to counter this development, the Illinois General Assembly amended paragraph 110-4 to provide that persons were nonbailable if "the offense charged is murder, aggravated kidnapping or treason." As section 9 remained unchanged, a conflict existed between that section of the constitution and paragraph 110-4.[179]

During the period of this conflict, petitioner Hemingway was charged with murder and found not to be bailable by the trial court. The Illinois Supreme Court granted Hemingway's petition for leave to file a writ of habeas corpus. Petitioner contended that he was bailable under section 9 because he was not charged with an offense for which the death penalty could be imposed. The prosecution countered by arguing that, under the amended paragraph 110-4, petitioner was not bailable.[180] This argument was rejected by the court which found that, "[t]o the extent that section 110-4 . . . attempts to render nonbailable offenses other than those for which the death penalty may be imposed, we hold the same to be invalid and contrary to the provisions of section 9 of the 1970 Constitution."[181]

Since *Hemingway* was decided, section 9 was twice amended by referendum to expand the class of persons who were nonbailable.[182] This class now includes persons charged with offenses for which life

176. *Id.*

177. *Id.*

178. *Id.*; Furman v. Georgia, 408 U.S. 238 (1972). In 1972, the United States Supreme Court found the Illinois death penalty statute unconstitutional. Moore v. Illinois, 408 U.S. 786 (1972).

179. *Hemingway*, 322 N.E.2d at 840-43.

180. *Id.*

181. *Id.* at 840.

182. In 1982, the General Assembly approved Senate Joint Resolution 36, a proposal to amend the state constitution to add offenses which could be punished by a life term of imprisonment to the class of nonbailable offenses. This was approved by the voters. S.H.A. CONST. art. 1, § 9 historical notes (1993). In 1986, a similar proposal expanded this class to include all offenses which, upon conviction, carried a mandatory prison sentence. This too was approved by the voters. S.J.Res. 22, 82d Gen. Ass'y, 1st Sess. (1986); S.H.A. CONST. art. 1, § 9 historical notes (1993). For a discussion of the 1986 amendment, see Caroline N. Offenbach, Note, *Preventive Detention: Illinois Takes a Tentative Step Towards a Safer Community*, 21 J. MARSHALL L. REV. 389, 390-93 (1988).

imprisonment is a penalty upon conviction and all non-probationable offenses.[183] Probationable offenses remain bailable. Paragraph 110-4, as amended by the stalking statute, is contrary to section 9 because it classifies certain persons charged with stalking as nonbailable even though they are charged with a probationable offense. Following the reasoning of *Hemingway*, the legislature's attempt to render nonbailable such persons would be invalid and contrary to section 9. Persons charged with stalking would therefore be bailable, as was the petitioner in *Hemingway*.

### 2. *The Courts Inherent Power to Deny Bail*

Although the court found the petitioner in *Hemingway* to be bailable, it held that his right to bail was not absolute, but qualified by the courts' inherent "power to manage the conduct of proceedings before them . . . to preserve the orderly process of criminal procedure."[184] The petitioner was therefore not automatically granted bail, but was remanded to the trial court for further proceedings in accordance with the high court's instructions.[185]

These instructions specifically excluded "pretrial preventive detention as a means of protecting the public from potential harm."[186] Instead, the court adopted the ABA Standards Relating to Pretrial Release which include conditions which may be placed upon those admitted to bail and provisions for the revocation of bail if the defendant violates the court's conditions or threatens to do so.[187]

The court also suggested that "keeping the accused in custody pending trial to prevent interference with witnesses or jurors or to prevent the fulfillment of a threat has been approved."[188] The sponsors of the stalking statute incorporated this language into the provision allowing courts to deny bail when "necessary to prevent fulfillment of the threat" which was the basis of the stalking charge. In the view of the sponsors of the stalking statute, the use of this language from *Hemingway* allowed courts under the stalking statute to deny bail to those accused of stalking before trial under the courts' inherent authority, without creating a conflict with section 9.[189] Nonetheless, during debate, the Senate sponsor

183. ILL. CONST. art. I, § 9.
184. *Hemingway*, 322 N.E.2d at 840.
185. *Id.* at 840, 843.
186. *Id.* at 841.
187. *Id.* at 841-43.
188. *Id.* at 840.
189. According to Senator Carl Hawkinson, "the authority for this pretrial detention in no way attempts to expand upon the constitutional amendment. The authority is drawn from the Illinois Supreme Court precedent in the Elrod case . . . ." H.R. 2677, 87th Gen. Ass'y, 2d Sess. (June 22, 1992).

referred to these provisions as "pretrial detention."[190]

This expansive interpretation of the passage from *Hemingway* is questionable. A close reading of the case and the authority upon which it is based undermines the sponsors' interpretation and bolsters a contrary view: That the courts possess an inherent power to deny bail not before, but during trial. First, the passage in *Hemingway* is dicta because the court did not rely upon it in its decision, instead remanding the cause for bail proceedings in accordance with the ABA Standards.[191] In addition, the expansive interpretation of the phrase is undermined by the language preceding it which discusses the courts' inherent "power to manage the conduct of *proceedings before them* . . . to preserve the orderly process of criminal procedure."[192] This supports the view that the courts have power over denial or revocation of bail during, but not before trial.

Most significant, a close reading of the cases upon which the phrase in *Hemingway* was based reveals that they did not support denial of bond before trial, but only during or after trial. In *Carbo v. United States*, bail was denied after conviction while in *Fernandez v. United States*, bail was revoked during trial.[193] In *Fernandez*, the defendants' bail was revoked during trial because of a series of actions by the defendants while the trial was in progress. These included alleged threats against a government witness when the witness identified the defendants during the trial, alleged tampering with another government witness, and interruptions of the court proceedings.[194] Relying on *United States v. Rice*,[195] Justice Harlan agreed with the lower court's denial of bail, finding it within the court's "inherent powers to manage the conduct of proceedings before them, *to revoke bail during the course of a criminal trial*, when such action is appropriate to the orderly progress of the trial and the fair administration of justice."[196]

In *Carbo*, the defendant sought bail during the appeal of his case after having been convicted of racketeering and extortion. During trial, the defendant's bail had been revoked after the government's witness had been threatened by telephone more than two-hundred times and severely beaten.[197] In upholding the denial of bail, Justice Douglas also followed *Rice*, and relied upon and the court's inherent power to provide for the "orderly progress of crimi-

190. *Id.*

191. *Hemingway*, 322 N.E.2d at 840-43.

192. *Id.* at 840 (emphasis added).

193. Carbo v. United States, 82 S. Ct. 662 (1962); Fernandez v. United States, 81 S. Ct. 642 (1961).

194. *Fernandez*, 81 S. Ct. at 644.

195. *Id.* at 644; United States v. Rice, 192 F. 720 (S.D.N.Y. 1911).

196. *Fernandez*, 81 S. Ct. at 644 (emphasis added).

197. *Carbo*, 82 S. Ct at 664.

nal prosecution," finding that "keeping a defendant in custody *during the trial* 'to render fruitless' any attempt to interfere with witnesses or jurors may, in the extreme or unusual case, justify the denial of bail."[198]

In *Rice*, the case upon which *Carbo* and *Fernandez* were based, the federal Circuit Court for the Southern District of New York held that, although those accused of non-capital offenses had a right to bail before trial, this right did not exist during the actual trial.[199] Statutes then in effect provided that, "upon all arrests," persons charged with capital offenses "may" be admitted to bail, while those charged with other offenses "shall" be admitted to bail.[200] Finding the statutes silent on the right to bail during trial, the court turned to *Hudson v. Parker*, a United States Supreme Court opinion which applied a common law interpretation to the existing statutes.[201] According to the Supreme Court in *Hudson*, American bail laws protected the accused from imprisonment or punishment "after arrest and before trial" until "finally adjudged guilty."[202] The *Rice* court found that the Supreme Court's use of the phrase "and before trial" would have been meaningless and unnecessary if the Court had intended to apply the right to bail after trial had commenced. The right to bail, the *Rice* court concluded, did not apply once trial had commenced.[203]

The court supported this conclusion with a reference to the historical development of the bail laws. At one time, no right to bail existed. By the time the federal bail act was passed in 1789, however, the accused was entitled to bail before, but not during trial. The court also analogized its power to deny bail during trial to its discretionary power to sequester the jury in the custody of the Marshall during the trial to protect it from improper influences, reasoning that the defendant could likewise "be placed in actual custody to render fruitless his attempts, if any, to interfere with or influence jurors." Both forms of custody were "necessary steps in the due administration of justice."[204]

These cases demonstrate that the courts' inherent power to deny bail is aimed at "the conduct of proceedings before them," and applies during or after trial, but not before trial.[205] Thus the lan-

198. *Id.* at 668 (quoting United States v. Rice, 192 F. 720 (S.D.N.Y. 1911) (emphasis added).

199. *Rice*, 192 F. 720.

200. *Id.* at 720-21.

201. *Id.* at 720-21 (referring to Hudson v. Parker, 156 U.S. 277, 285 (1895)).

202. *Id.*

203. *Id.* at 721.

204. *Rice*, 192 F. at 721-22.

205. *Id.* at 721.

guage in *Hemingway* is a slim and inadequate reed on which to rest the validity of the stalking statute's bail provisions.

### 3. *Inherent Judicial Power or Pretrial Detention?*

If section 9 denies Illinois courts the inherent power to deny bail before trial, then the remainder of the stalking statute's bail provisions are unconstitutional. Even assuming that Illinois courts possess such a power, the stalking statute's bail provisions stretch a reasonable interpretation of such a power. They too closely resemble pretrial detention, which in Illinois is limited to non-probationable offenses.

Stalking statute proponents cited *Hemingway* to support the statute's bail provisions. Yet, *Hemingway* discussed denying bail only in the context of preventing fulfillment of threats against witnesses or jurors in order to protect proceedings.[206] The cases cited to support this proposition all dealt with the denial of bail during or after trial in order to protect the criminal justice process from threats and acts which took place during the process.[207] The statute, however, allows the denial of bail based on alleged threats which form the substance of the offense.[208] Such threats occur not only before the start of the trial, but before the filing of charges and the commencement of the criminal justice process. The statute's bail provisions are aimed less at preventing disturbances of the criminal justice process than at preventing predicted attacks. The denial of bail under these provisions is not based on the courts' inherent power to protect the criminal justice process; it is preventive detention, and must meet the requirements of section 9.

Pretrial detention has only recently gained widespread use in the United States.[209] Under pretrial detention, the accused is not admitted to bail for the explicit purpose of protecting others from future attacks.[210] The first pretrial detention statute was enacted by Congress in 1970 to apply in the District of Columbia. Rarely used, the District of Columbia's statute was not widely followed until the Bail Reform Act of 1984 authorized pretrial detention in fed-

206. People *ex rel.* Hemingway, 322 N.E.2d 837, 840 (1975).

207. *See infra* notes 193-205 and accompanying text (discussing attempt).

208. 725 ILCS 5/110-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-4 (1991)); *Id.* at 5/110-6.3 (1992) (not available in ILL. REV. STAT.).

209. Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510, 512-21 (1986); Michael W. Youtt, Note, *The Effect of Salerno v. United States on the Use of State Preventive Detention Legislation: A New Definition of Due Process*, 22 GA. L. REV. 805 (1987).

210. United States v. Salerno, 481 U.S. 739, 755-68 (1987) (Marshall, J. and Stevens J., dissenting); Alschuler, *supra* note 209, at 527-30.

eral courts nationwide.[211]

Pretrial detention was a controversial concept from its inception.[212] Opponents had argued that it eroded the presumption of innocence by incarcerating the accused before trial, that it violated the Eighth Amendment's prohibition against excessive bail, and that it violated substantive due process by depriving persons of liberty not for acts which they had committed, but based upon their predicted future dangerousness.[213] These arguments were rejected by the United States Supreme Court in 1987, when it denied a challenge to the Bail Reform Act of 1984 and upheld pretrial detention in *Salerno v. Cafaro*.[214]

In *Salerno*, the Court dismissed arguments based on the Eighth Amendment, noting, somewhat disingenuously, that while the Amendment barred excessive bail, "it says nothing about whether bail shall be available at all."[215] The Court also rejected arguments that pretrial detention violated substantive and procedural guarantees under the Due Process Clause of the Fifth Amendment.[216] The petitioner claimed that pretrial detention violated substantive due process because it amounted to punishment before trial. In rejecting this contention, the Court found that pretrial detention served a regulatory, and not a punitive purpose by protecting society from dangerous arrestees.[217] In the Court's view, this regulatory purpose was reasonably executed by the federal statute because the individual's liberty interest was outweighed by the government's "compelling interest" in preventing crime, an interest which was heightened because detention applied only to arrestees charged with "extremely serious" offenses, and only then after the government had demonstrated that the accused posed a danger to society.[218]

According to the court, the federal pretrial detention scheme provided adequate safeguards to meet the requirements of procedural due process. In support of this finding, the Court cited the federal statute's requirements that counsel represent the accused at the hearing; that at the hearing the accused had a right to testify in their own behalf, to proffer evidence, and cross-examine witnesses;

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211. Alschuler, *supra* note 209, at 512-17; *Salerno*, 481 U.S. at 739, Youtt, *supra* note 209, at 805.

212. *Salerno*, 481 U.S. at 739; Alschuler, *supra* note 209 at 511-12.

213. *Salerno*, 481 U.S. at 755-68; Alschuler, *supra* note 209, at 527-30.

214. 481 U.S. 739.

215. *Id.* at 752.

216. *Id.* at 742-52. The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of . . . liberty . . . without due process of law." U.S. CONST. amend. V, cl. 4.

217. *Salerno*, 481 U.S. at 746-47.

218. *Id.* at 749-50.

that the detention decision would be made by a judicial officer; that the court had to base its decision on statutory factors supported by clear and convincing evidence; and that the accused could appeal a detention decision.[219]

The Illinois preventive detention statute closely follows the federal statute at issue in *Salerno*, employing many of its due process guarantees and copying many of its provisions.[220] According to one of the its sponsors, the stalking statute's bail provisions were copied from the Illinois preventive detention statute.[221] The two Illinois statutes differ only in the class of persons which they aim to protect from the accused. Under the Illinois preventive detention statute, persons charged with non-probationable offenses can be detained if the court finds that they "present a threat to the physical safety of any person or persons."[222] Before they can be detained under the Illinois stalking statute, persons charged with stalking must be found by the court to "pose a real and present threat" to an alleged victim's physical safety. The court also must find that the accused's detention is necessary to prevent fulfillment of the threat which was the basis of the stalking charge.[223] The remaining provisions of these two statutes are virtually identical.[224]

The stalking statute's bail provisions clearly resemble pretrial detention more closely than an exercise of the courts' inherent power to safeguard judicial proceedings. They apply to conduct occurring before the start of proceedings, and employ the same procedures as the Illinois pretrial detention statute. Their purpose seems directed not at safeguarding the judicial process, but, like pretrial detention, at preventing predicted crime. This supports the view that the statute's bail provisions are a pretrial detention scheme in conflict with section 9.

In addition, if courts can use their inherent power to detain persons under the stalking statute, then the legislature can apply the same justification to other offenses where an offender has threatened the alleged victim. The legislature could pass a statute

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219. *Id.* at 751-52.

220. *Compare* 725 ILCS 5/110-6.1 (ILL. REV. STAT. ch. 38, para. 110-6.1 (1991)) *and* 18 U.S.C. § 3141 et seq.

221. According to Representative Homer, "The purpose of the provision dealing with the pre-release bail hearing, that language is modeled after language that's already in the statute pertaining to those charged with murder and Class X felonies or, rather, those non-probationable offenses." H.R. 2677, 87th Gen. Ass'y, 2d Sess. (May 20, 1992) (debate transcript).

222. 725 ILCS 5/110-6.1 (1992) (ILL. REV. STAT. ch. 38, para. 110-6.1 (1991)).

223. *Id.* at 5/110-6.1(a) (1992) (ILL. REV. STAT. ch. 38, para. 110-6.1 (1991)); *Id.* at 110-6.3(a) (not available in ILL. REV. STAT.).

224. *Compare* 725 ILCS 5/110-6.1 (1992) (ILL. REV. STAT. ch. 38, para. 110-6.1) (1991) (the Illinois pretrial detention statute) *with* 725 ILCS 110-6.3 (1992) (not available in ILL. REV. STAT.) (the stalking statute's bail provisions).

allowing courts to detain persons charged with assault or aggravated assault. Such an expansion of nonbailable offenses would render section 9 meaningless. There would have been no need for amendments to the Illinois Constitution in 1982 and 1986 which expanded the class of nonbailable offenses.[225]

*4. The Separation of Powers*

Even if the courts find that the stalking statute's bail provisions do not violate section 9 of article I of the Illinois Constitution, they must still be found not to conflict with the courts' rules and rulings or they risk running afoul of the Illinois separation of powers doctrine. Under this doctrine, legislation is unconstitutional if it intrudes upon the judicial branch's inherent power over the administration of justice.[226]

The stalking statute's bail provisions might, however, conflict with the Illinois Supreme Court's ruling in *Hemingway*.[227] In that case, the supreme court suggested that courts possessed an inherent power to deny bail to maintain orderly judicial proceedings. The court rejected pretrial detention and briefly alluded to the denial of bail in the context of *Carbo* and *Fernandez*, where bail was denied during or after trial because of the accused's extreme actions during judicial proceedings, such as the intimidation of witnesses.[228] The court then adopted several ABA Standards to guide lower courts in making bail decisions. These included, for example, the use of restrictive conditions barring the accused from approaching or communicating with the alleged victim, and sanctions to be used against the accused if they violate conditions set by the court.[229] This approach conflicts with the stalking statute's bail provisions, which do not focus on conditions of release and sanctions for their violation, but on the outright denial of bail on a much broader scale. This raises the possibility that the statute's bail provisions are an unlawful encroachment upon the inherent authority of the courts in vio-

225. *Supra* note 182. In 1982, the General Assembly approved Senate Joint Resolution 36, a proposal to amend the state constitution to add offenses which could be punished by a life term of imprisonment to the class of nonbailable offenses. This was approved by the voters. S.H.A. CONST., art. 1, § 9 historical notes (1993). In 1986, a similar proposal expanded this class to include all offenses which, upon conviction, carried a mandatory prison sentence. This too was approved by the voters. S.J.RES. 22, 82d Gen. Ass'y, 1st Sess. (1986); S.H.A. CONST. art. 1, § 9, historical notes (1993). For a discussion of the second amendment, see Offenbach, *supra* note 182, at 389.

226. ILL. CONST. art. I, § 1; People v. Williams, 577 N.E.2d 762 (Ill. 1991).

227. People *ex rel* Hemingway v. Elrod, 322 N.E.2d 837, 840.

228. *Id.*

229. *Id.* at 841-43 (citing ABA Standards for Criminal Justice, *supra* note 99, at 10-5.5 to 5.8).

lation of the separation of powers doctrine.[230]

## IV. SOLUTIONS

### *A. Alterative Methods to Control Stalking*

Other legal methods, to at least some degree, protect victims from the fear and danger caused by stalkers, sometimes with greater effectiveness than the statute. These include the offenses of attempt,[231] assault,[232] and intimidation;[233] the Illinois Domestic Violence Act;[234] and portions of the Mental Health Code which permits the courts to civilly commit stalkers for mental health treatment if the court finds that the stalker is both dangerous and suffering from a mental disease or defect.[235]

#### *1. Attempt*

The law of attempt resembles the stalking statute in many respects. It too covers acts of following and surveilling if those acts are done in furtherance of a crime.[236] Neither offense is primarily intended to punish a completed act. Their primary purpose is to prevent the commission of an offense by allowing law enforcement officers to intervene when the offender has acted to demonstrate that he poses a danger of completing the offense.[237] Attempt, however, covers conduct not reached by the stalking statute, which is limited to following or surveilling. Attempt, for instance, covers cases where the offender lies in wait, and situations where the offender, intending to attack, silently stalks a victim who is unaware of the offender's acts.

Professor LaFave defines assault as a two-part offense, consisting of "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation."[238] Recognizing that offenders may find a virtually infinite number of ways to take action toward committing an offense, the law of attempt leaves the determination of

230. *Williams*, 577 N.E.2d at 763-65.

231. 720 ILCS 5/8-4 (1992) (ILL. REV. STAT. ch. 38, para. 8.4 (1991)).

232. *Id.* at 5/12-1 (1992) (ILL. REV. STAT. ch. 38, para. 12-1 (1991)).

233. *Id.* at 5/12-6 (1992) (ILL. REV. STAT. ch. 38, para. 12-6 (1991)).

234. 725 ILCS 5/112A (1992) (ILL. REV. STAT. ch. 38, para. 112A (1991)); 750 ILCS 60/101 et seq. (1992) (ILL. REV. STAT. ch. 40, para. 2311-1 et seq. (1991)).

235. *See infra* notes 279-85 and accompanying text.

236. LAFAVE & SCOTT, *supra* note 55, at 436-38; MODEL PENAL CODE § 5.01(2) (1985).

237. LAFAVE & SCOTT, *supra* note 55, at 423, 426; 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW 22-23 (1986).

238. LAFAVE & SCOTT, *supra* note 55, at 423.

which acts warrant the law's application to the courts, who make this determination on a case-by-case basis.[239] This allows the courts to balance society's need for protection against the individual's right to liberty, drawing a line between what might be mere preparation or an inconclusive act, and an act which identifies the offender as dangerous and likely to commit an offense.[240]

Classifying what acts warrant the law's intervention has proved most difficult. The approach taken by the Model Penal Code has gained wide influence. Under this approach, a sufficient act is one which constitutes "a substantial step in the course of conduct planned to culminate in [the offender's] commission of a crime."[241] Examples of acts which may be considered a substantial step under the Model Penal Code include following, watching the place where a crime is planned, or lying in wait for a victim.[242] To qualify as a substantial step, an act must be "strongly corroborative" of the offender's criminal intent.[243] This approach allows the offender's conduct to be assessed in light of his particular intent or statements.[244]

Under Illinois law, attempt includes the concept of a substantial step.[245] In *People v. Terrell*, the Illinois Supreme Court adopted the Model Penal Code approach to determining whether the offender's acts constitute a substantial step.[246] In *Terrell*, the police found the offender crouched in the weeds 20 or 30 feet from a gas station at 6:15 in the morning. As an officer opened his car door, the offender, who was carrying a gun, ran to a fence, climbed it, and tried to flee. A few minutes later, the offender was found hiding in nearby weeds. He had removed his shirt; in his pocket the officers found a knotted, black nylon stocking. Although he claimed to have been going to the gas station to buy cigarettes, the offender had no money on his person. The gun was found inches from the fence the offender had just climbed. Other officers arriving on the scene moments later saw a second man climb the fence and run away. He too was soon stopped and found to be carrying another

239. LAFAVE & SCOTT, *supra* note 237, at 30-31; "It would be an almost impossible task to compile a definitive list of acts which, if performed, constitute a substantial step toward the commission of every crime." People v. Terrell, 459 N.E.2d 1337, 1340 (Ill. 1984).

240. LAFAVE & SCOTT, *supra* note 237, at 18, 23, 31-38; *Terrell*, 459 N.E.2d at 1344.

241. MODEL PENAL CODE § 5.01(1)(c) (1985).

242. *Id.* § 501(2).

243. *Id.*

244. *Id.* § 5.01 comment (1985); LAFAVE & SCOTT, *supra* note 55, at 436-37.

245. Illinois' attempt statute covers a person who takes a "substantial step towards the commission of the offense." 720 ILCS 5/8-4(a) (1992) (ILL. REV. STAT. ch. 38, para. 8-4(a) (1989)).

246. *Terrell*, 459 N.E.2d at 1337.

knotted, black nylon stocking.[247]

The Court inferred the offender's intent, finding it incredible to believe that he had any intent other than to commit an armed robbery of the service station.[248] Applying the Model Penal Code approach, the Court found many of the offender's acts matched those set forth by the Code: He was found reconnoitering and lying in wait at the gas station in possession of materials to be employed in the commission of the crime. The presence of these factors was "highly corroborative" of the offender's intent to rob the station, supporting the finding that the offender had taken a substantial step towards the commission of an offense.[249]

*Terrell* illustrates how attempt covers any method which an offender uses to harm his victim, while the stalking statute is limited to following or surveilling. For example, in the Kopecky case, the offender' actions would commonly be assumed to constitute stalking. However, because Kopecky did not follow or surveil his victims, but lay in wait for them, his conduct might not be covered by the stalking statute.[250] This might be true of the Prudhomme case as well. Despite the fact that Claude Prudhomme had threatened to kill Shirley, illegally entered her residence where he could have killed her, and possessed the weapon needed to carry out the threat, his behavior might not have been covered by the stalking statute because he neither followed her nor placed her under surveillance. Under the law of attempt, however, behavior like Kopecky's and Claude Prudhomme's[251] — "lying in wait,"[252] and "unlawful entry of a structure . . . in which it is contemplated that the crime will be committed" — could be covered as substantial steps towards the commission of a crime.[253]

The Illinois stalking statute also differs from attempt because under the stalking statute, the victim must be aware of the offender's conduct, either by receiving a threat, or by suffering a reasonable apprehension of attack.[254] As a result, an attempted attack of which the victim is unaware is not covered by the stalking statute. "Stalking" commonly refers to behavior of which the victim is unaware. Webster's, for instance, defines stalking as a hunter surreptitiously following his victim in order to attack by surprise,

247. *Id.* at 1339.

248. *Id.* at 1340.

249. *Id.* at 1341-42.

250. By contrast, Connecticut's stalking statute covers persons who repeatedly follow or lie in wait for another. CONN. GEN. STAT. § 530-181d (1993).

251. Gorman, *supra* note 2, at 1; Gorman, *supra* note 120, at 1.

252. MODEL PENAL CODE § 5.01(2)(a) (1985).

253. *Id.* § 5.01(2)(d).

254. P.A. 88-402 (1993) (amending 720 ILCS 5/12-7.3(a)(1)-(2) (1992) (not available in ILL. REV. STAT.).

before his victim may flee or raise a defense.[255] For example, A could silently stalk B in an attempt to attack him, and unknown to B, make significant preparations and take significant steps towards completing the attack, as did the offenders in *Terrell*. Such conduct would not be covered by the stalking statute because the offender issued no threat and caused B no reasonable apprehension of attack. Attempt, however, could cover such conduct because it encompasses conduct of which the victim is unaware.

The stalking statute's focus on particular actions limits its coverage. It thus does not apply when the victim is unaware of the offender's conduct, or when the offender takes action other than following or surveilling. Attempt does not suffer from such limitations, and will therefore apply in some situations when the stalking statute does not.

### 2. *Assault*

The Illinois assault statute is aimed at conduct which "places another in reasonable apprehension of receiving a battery."[256] Like attempt, assault is not limited to particular kinds of conduct such as following or surveillance. In addition, because battery under Illinois law encompasses "physical contact of an insulting or provoking nature," assault includes fear of such contact.[257] Assault therefore covers fear of contact less serious than that required by the second type of stalking offense, which requires fear of bodily harm, restraint, confinement or sexual assault. Assault may therefore cover some situations not covered by the stalking statute involving fear of less serious harm, such as offensive touching, or conduct other than following or surveillance.

### 3. *Intimidation*

The Illinois intimidation statute prohibits threats to inflict physical harm or to subject any person to physical confinement or restraint, or "to commit any criminal offense."[258] Intimidation differs from stalking in that it covers threats which are not accompanied by any conduct, such as following or surveilling, and does not require that the victim suffer a reasonable apprehension of attack. Because of First Amendment concerns however, court decisions

255. "To walk cautiously or furtively . . . to pursue quarry or prey stealthily or undercover . . . ." WEBSTER'S NEW UNABRIDGED DICTIONARY 1770 (2d ed. 1979). "Stalking" is given as a synonym for secrecy by Roget's Thesauraus, along with "stealth, stealthiness, surreptitiousness, covertness . . . ." ROGET'S INTERNATIONAL THESAURUS § 612.4, 400 (3d ed. 1962).

256. 720 ILCS 5/12-1 (1992) (ILL. REV. STAT. ch. 38, para. 12-1 (1991)).

257. *Id.* at 5/12-3 (1992) (ILL. REV. STAT. ch. 38, para. 12-3 (1991)).

258. *Id.* at 5/12-6 (1992) (ILL. REV. STAT. ch. 38, para. 12-6 (1991)).

have imposed a similar requirement — that the threat be likely to coerce.[259]

*4. The Domestic Violence Act and Protective Orders*

The conduct which the Illinois stalking statute targets, following and surveilling, and the definitions which the statute adopted to define this conduct, were derived from part of the Illinois Domestic Violence Act (the Act) and parallel provisions in the Criminal Code which allow the victims of domestic abuse to obtain court orders, similar to an injunction, to protect them from an offender's "harassment."[260]

Protective orders generally are available only to shield one family or household member from another.[261] In 1992, the definition of family members was expanded to encompass persons who had been involved in a dating or an engagement relationship.[262] To obtain a protective order, a victim must file a petition in court alleging that he or she has been abused.[263] The types of abuse covered by the Act include physical abuse, as well as harassment.[264] Under the Act, harassment is defined as "knowing conduct which is not necessary to accomplish a purpose which is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner."[265] This definition resembles the offense of assault. Assault, however, requires that the victim not just suffer "emotional distress," but fear actual, offensive touching.[266]

Victims obtain a protective order through a civil court proceeding where they must prove, by a preponderance of the evidence, that the offender has caused them to suffer emotional distress, and

259. United States *ex rel.* Holder v. Circuit Court, 624 F. Supp. 68, 70 (N.D. Ill. 1985).

260. 725 ILCS 5/112A-3(4) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(4) (1991)); 750 ILCS 60/103(6) (1992) (ILL. REV. STAT. ch. 40, para. 2311-36 (1991)).

261. 725 ILCS 5/112A-4 (ILL. REV. STAT. ch. 38, para. 112A-4 (1991)); 750 ILCS 60/201 (1992) (ILL. REV. STAT. ch. 40, para. 2312-1 (1991)).

262. 725 ILCS 5/112A-3 (3) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3 (1991)); P.A. 87-1186 (1993).

263. 725 ILCS 5/112A-2 (1992) (ILL. REV. STAT. ch. 38, para. 112A-2 (1991)); 750 ILCS 60/202 (1992) (ILL. REV. STAT. ch. 40, para. 2312-2 (1991)).

264. 725 ILCS 5/112A-3(1), (4) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(1), (4) (1991)); 750 ILCS 60/103(1) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(1) (1991)).

265. 725 ILCS 5/112A-3(4) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(4) (1991)); 750 ILCS 60/103(7) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(7) (1991)).

266. 720 ILCS 5/12-1 (1992) (ILL. REV. STAT. ch. 38, para. 12-1 (1991)). To commit assault, the offender must cause another person reasonable apprehension of either "receiving bodily harm" or "physical contact of an insulting or provoking nature." IPI-CRIMINAL, *supra* note 20, No. 11.01; DECKER, *supra* note 40, 314-16.

that they have therefore been harassed.[267] In proving harassment, victims are aided by a provision in the Act which specifies that certain conduct is presumed to cause emotional distress unless the alleged abuser rebuts the presumption by a preponderance of the evidence.[268]

These presumptions became, with minor changes, the conduct prohibited under the stalking statute. They include repeated following,[269] and "keeping petitioner under surveillance by remaining present outside his or her home, school, place of employment, vehicle, other place occupied by the petitioner or by peering in petitioner's windows."[270] A court can thus find that an offender was harassing the victim by, for instance, following or surveilling them, and may issue an order prohibiting future harassment.[271]

An offender who violates such a court order by harassing the victim is subject to arrest and criminal prosecution.[272] According to the Act, following or surveilling would presumptively cause emotional distress and constitute harassment in violation of the order, shifting the burden to the accused to prove the contrary.[273] In criminal trials, however, the prosecution must prove each element beyond a reasonable doubt, a burden which is undermined by statutory presumptions that certain conduct causes certain re-

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267. 725 ILCS 5/112A-2 (1992) (ILL. REV. STAT. ch. 38, para. 112A-2 (1991)) (filing for an order of protection) and 750 ILCS 60/202 (1992) (ILL. REV. STAT. ch. 40, para. 2312-2 (1991)); 725 ILCS 5/112A-12 (1992) (ILL. REV. STAT. ch. 38, para. 112A-12 (1991)) (hearings) and 750 ILCS 60/212 (1992) (ILL. REV. STAT. ch. 40, para. 2312-12 (1991)); 725 ILCS 5/112A-6 (1992) (ILL. REV. STAT. ch. 38, para. 112A-6 (1991)) (civil procedure rules and burden of proof) and 750 ILCS 60/205 (1992) (ILL. REV. STAT. ch. 40, para. 2312-5 (1991)); 720 ILCS 5/112A-14(a) (1992) (ILL. REV. STAT. ch. 38, para. 112A-14(a) (1991)) (proof of abuse) and 750 ILCS 60/214(a) (1992) (ILL. REV. STAT. ch. 40, para. 2312-14 (1991)); 725 ILCS 5/112A-3(1) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(1) (1991)) ("abuse" includes "harassment") and 750 ILCS 60/103(1) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3 (1991)).

268. 725 ILCS 5/112A-3(4) (1992) (ILL. REV. STAT. ch. 38, para. 112-3(4) (1991)); 750 ILCS 60/103(7) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(7) (1991)).

269. 725 ILCS 5/112A-3(4)(iii) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(4) (1991)); 750 ILCS 60/103(7)(iii) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(7)(iii) (1991)).

270. 725 ILCS 5/112A-3(4)(iv) (1992) (ILL. REV. STAT. ch. 38, para. 112A-3(4)(iv) (1991)); 750 ILCS 60/103(7)(iv) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(7)(iv) (1991)).

271. 725 ILCS 5/112A-14(b)(1) (1992) (ILL. REV. STAT. ch. 38, para. 112A-14(b)(1) (1991)).

272. 720 ILCS 5/12-30 (1992) (ILL. REV. STAT. ch. 38, para. 12-30 (1991)). Persons who violate protective orders are also subject to contempt of court proceedings. *Id.* at 5/112A-23(b) (1992) (ILL. REV. STAT. ch. 38, para. 112A-23(b) (1991)); 750 ILCS 60/223(b) (1992) (ILL. REV. STAT. ch. 40, para. 2312-23.1 (1991)).

273. 725 ILCS 5/112A-3(4)(iii), (iv) (1992) (ILL. REV. STAT. ch. 38, para. 112-3(4)(iii)(iv) (1991)); 750 ILCS 60/103(7)(iii), (iv) (1992) (ILL. REV. STAT. ch. 40, para. 2311-3(7)(iii) (1991)).

sults.[274] For this reason, the Illinois Supreme Court's Patterned Jury Instruction Committee has found that these presumptions are almost certainly unconstitutional, and has therefore recommended that they not be used in Illinois criminal trials for violations of protective orders.[275] In order to prove that the offender harassed the victim in violation of the order, the prosecution would therefore have to prove that the offender caused the victim to suffer emotional distress by, for example, following the victim.

The penalty for violating a protective order is a Class A misdemeanor, punishable by at most one year in jail.[276] This section also contains language suggesting that courts should impose a jail term of at least 24 hours for a violation of a protective order.[277]

### 5. *Mental Health Commitment*

A stalker's behavior may sometimes be the product of mental illness, as illustrated by the Ralph Nau case and other cases in the psychiatric literature.[278] A court may civilly commit the stalker for mental health treatment only if it finds that his behavior is the result of a mental disease or defect and that the stalker "is reasonably expected to inflict serious physical harm upon himself or another in the near future . . . ."[279] The committed person is entitled to a court hearing every six months to determine if he remains a danger to himself or others.[280]

The court does not, however, have jurisdiction to civilly commit a stalker who has been charged with a felony, such as the offense of stalking.[281] The stalker must stand trial, or if mentally unfit for trial, must undergo mental health treatment to restore him to fitness.[282] If the stalker will never regain fitness, he could essentially end up civilly committed.[283] Stalkers found not guilty by reason of insanity would also be eligible for civil commitment.[284] If convicted, the court could sentence a stalker to prison and order that authorities consider requiring mental health treatment as a condition of the offender's parole.[285]

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274. Ulster County Court v. Allen, 442 U.S. 140 (1979).

275. IPI - CRIMINAL, *supra* note 20, No. 11.78E committee note (supp. 1993).

276. 720 ILCS 5/12-30(d) (1992) (ILL. REV. STAT. ch. 38, para. 12-30(d) (1991)).

277. *Id.*

278. *See supra* notes 126-133 and accompanying text.

279. 405 ILCS 5/1-119 (1992) (ILL. REV. STAT. ch. 38, para. 1-119 (1991)).

280. *Id.* at 5/813(a) (ILL. REV. STAT. ch. 91½, para. 1-813(a) (1991)).

281. *Id.* at 5/3-100 (ILL. REV. STAT. ch. 91½, para. 3-100 (1991)).

282. 725 ILCS 5/104-17 (1992) (ILL. REV. STAT. ch. 38, para. 104-17 (1991)).

283. *Id.* at 5/104-23 (ILL. REV. STAT. ch. 38, para. 104-23 (1991)); *Id.* at 91½ 5/104-25 (1992) (ILL. REV. STAT. ch. 38, para. 104-25 (1991)).

284. 405 ILCS 813(a) (1992) (ILL. REV. STAT. ch. 91½, para. 3-813(a) (1991)); 730 ILCS 5/2-4 (1992) (ILL. REV. STAT. ch. 38, para. 2-4 (1991)).

285. 730 ILCS 5/3-14-5 (1992) (not available in ILL. REV. STAT.).

### *B. Improving the Stalking Statute*

The General Assembly should amend the stalking statute by changing its mental state from knowledge to intent; by requiring a connection between the threat and the acts of following or surveillance; and by amending the statute to cover only threats of imminent harm and cases where the victim suffers a reasonable apprehension of harm.

The statute as proposed requires the mental state of intent to avoid covering innocent conduct. For instance, in *People v. Tolliver*, the Illinois Supreme Court avoided the creation of a felony for the innocent possession of an incomplete title by essentially changing the statute's mental state from knowledge to intent.[286] The court construed knowledge in a very narrow and particular manner contrary to the statute's language and the Criminal Code's definition of knowledge, which requires only the offender's conscious awareness. According to the court, in this offense "knowledge must be expanded to include criminal knowledge or knowledge with an intent to defraud or commit a crime."[287]

As *Tolliver* illustrates, statutes which cover conduct not criminal in itself should require proof of criminal intent to avoid covering innocent behavior. By failing to require criminal intent, the 1993 stalking statute could potentially cover innocent as well as criminal conduct. The General Assembly should remedy this problem by amending the statute's mental state to require intent. An example for such an amendment could be Prosser's definition of intent for the offense of assault which covers "conduct intended to result either in bodily harm or the apprehension of bodily harm, which conduct actually causes such apprehension."[288] Similar language would cover stalking incidents where the offender intends to harm the victim, as well as incidents where the offender intends only to frighten the victim.

The General Assembly should also amend the statute to specify that a connection must exist between the acts of following or surveilling and the threat to assure that innocent acts are not cov-

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For defendants found guilty of stalking or aggravated stalking and sentenced to the custody of the Department of Corrections, the court may order the Prisoner Review Board to consider requiring the defendant to undergo mental health treatment by a mental health professional or at a community mental health center, hospital, or facility of the Department of Mental Health and Developmental Disabilities as a condition of parole or mandatory supervised release.

*Id.*

286. 589 N.E.2d 527, 529-30 (Ill. 1992).

287. *Id.* at 529.

288. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 10 (5th ed. 1984).

ered. For example, the statute could require that the prohibited acts and the threat be part of a single course of conduct.

Illinois' 1993 stalking statute might be fatally flawed because it applies to threats which are neither imminent nor substantial. These First Amendment defects are likely to be tested, as government officials contemplate charging abortion protesters under the stalking statute.[289] By amending the statute, the General Assembly could head off constitutional challenges and avoid this potential abuse of the statute. Such an amendment should include a requirement that the offender's threats be of imminent lawlessness. The General Assembly should also follow the lead of a number of states such as California, and amend the statute to require that the threat cause the victim to suffer reasonable apprehension of harm.[290]

Incorporating these changes, the author proposes that the stalking statute read as follows:

(a) A person commits stalking when,
  (i) with the intent to cause another bodily harm, sexual assault, confinement or restraint, or
  (ii) with the intent to cause another person to suffer a reasonable apprehension of bodily harm, sexual assault, confinement or restraint, he or she:
(b) transmits a credible threat to that person; and
(c) as part of the same course of conduct, repeatedly and without lawful justification
  (i) follows that person, or
  (ii) places that person under surveillance; and
(d) as a consequence, that person suffers a reasonable apprehension of bodily harm, sexual assault, confinement or restraint.
(e) "credible threat" means a threat made without lawful justification to cause bodily harm, sexual assualt, confinement or restraint.

The current statute's pretrial detention provisions are probably unconstitutional. If upheld by the courts, however, provisions for the conduct of detention hearings should be amended to require that detention decisions not be based solely on hearsay, to ban the use of illegally obtained evidence, and to require that the rules of evidence are used.

## CONCLUSION

The Illinois stalking statute should be amended to meet the objectives of its sponsors and to provide fair treatment for the accused. The statute is too broad, covering conduct which is innocent as well as criminal. This could be remedied by changing the stat-

289. William Recktenwald, *Stalking Law May be Used on Abortion Protesters*, CHI. TRIB., Mar. 20, 1993, § 1, at 11.

290. *See supra* note 166 (discussing the requirement of reasonable apprehension of harm).

ute's mental state from knowledge to intent and by requiring a connection between the threat and the acts of following or surveillance. The statute also potentially covers conduct which is protected under the First Amendment. This could be remedied by amending the statute to cover only threats of imminent harm and to require that the victim suffer a reasonable apprehension of harm.

Even in the broad form of the 1993 legislation, the stalking statute's narrow aim at particular acts such as following and surveilling fails to cover some dangerous conduct. In many cases, especially those involving mental illness, other legal methods may prove more successful at controlling stalking.

The statute's pretrial detention provisions probably violate portions of the Illinois Constitution. Despite the statute's provisions to the contrary, stalking is a bailable offense because it carries a possible sentence of probation. While the courts' inherent power to detain the accused properly extends over situations which disturb the judicial process, it does not extend over areas covered by the statute — facts which arise before proceedings have begun and which do not directly affect court proceedings. The statute's detention scheme aims at preventing violence. It is preventative detention. It is not part of the courts' inherent power and must meet the restrictions of the Illinois Constitution. It also may constitute an unlawful encroachment upon the courts' inherent authority in violation of the separation of powers doctrine. Beyond these constitutional issues, the statute's provisions for the conduct of detention hearings should be amended to require that detention decisions not be based solely on hearsay, to ban the use of illegally obtained evidence, and to require that the rules of evidence are used. These amendments would discourage abuses and encourage procedural fairness.