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The Anti-Stalking Law of Ohio: Will It Pass Constitutional Muster?

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LEGISLATIVE NOTES

THE ANTI-STALKING LAW OF OHIO: WILL IT PASS CONSTITUTIONAL MUSTER?

I. INTRODUCTION

Cleveland resident Sherry Lockwood, a twenty-eight year old mother with a young daughter, was tracked and harassed for years by her ex-boyfriend, Carol Dean Pless.[1] Pless spied on Lockwood, tailed her in his car, and tossed a brick through her window.[2] On Christmas Eve, Pless attacked Lockwood's husband with a tire chain and stabbed him in the throat.[3] Sherry Lockwood's family said that Lockwood had repeatedly pleaded with authorities for protection from Pless.[4]

The police, did not, and in fact could not, act upon Lockwood's numerous complaints.[5] Ohio law at that time required physical harm to a victim before the police could make an arrest.[6] Unfortunately, Pless eventually carried out his threats. He fired two bullets into Lockwood's head and killed her on the front porch of her home on July 11, 1991.[7] After Lockwood was killed by her stalker, friends of the slain mother pleaded with Ohio State Representative Madeline A. Cain to effectuate a change in the status of the law.[8]

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1. Madeline A. Cain, Press Release, Ohio House of Representatives, April 1992, at 1 (on file with *University of Dayton Law Review*) [hereinafter Press Release].

2. Ronald Rutti & Harry Stainer, *Anti-Stalking Law Worked, Is Hailed; Cleveland Conviction First for County*, CLEV. PLAIN DEALER, May 20, 1993, at 1B.

3. *Spurned Lover is Sentenced to Die*, UPI, February 5, 1992, *available in* LEXIS, Nexis Library, UPI File.

4. *Id.*

5. Rutti & Stainer, *supra* note 2, at 1B.

6. See *infra* notes 20-25 for a discussion on the status of former Ohio law.

7. Rutti & Stainer, *supra* note 2, at 1B.

8. Rutti & Stainer, *supra* note 2, at 1B; State Rep. Madeline A. Cain, Floor Speech, April 8, 1992 (on file with *University of Dayton Law Review*) [hereinafter Floor Speech].

Representative Cain sponsored the legislation that became Ohio's new anti-stalking law.[9] On August 6, 1992, Governor George Voinovich signed into law Ohio's first anti-stalking measure. The law took effect on November 5, 1992.[10] Since California enacted the country's first anti-stalking measure in 1990,[11] forty-six states have enacted similar anti-stalking laws.[12] Additionally, two state legislatures are currently considering anti-stalking bills[13] and the United States Congress is considering a National Stalking Reduction Act.[14] Only Arizona remains a holdout state.[15] Furthermore, the National Criminal Justice Association recently completed a joint task force operation with the

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9. "I introduced [the anti-stalking legislation] after a young woman living in my community died violently at the hands of a person who had stalked and harassed her and her family for over two years." Floor Speech, *supra* note 8. Representative Cain further stated: "I was shocked and angered at how much the legal system failed Mrs. Lockwood. . . . Police officers often cannot do anything for a victim until an assault has taken place and in Sherry Lockwood's case that was too late." Press Release, *supra* note 1, at 1.

10. Bulletin, 119th General Assembly of the State of Ohio, Final Edition, 321; *see also* OHIO REV. CODE ANN. § 2903.21.1 (Anderson 1993).

11. CAL. PENAL CODE § 646.9 (West Supp. 1993). The California legislature drafted the stalking law mainly in response to the stalking murder of television actress Rebecca Shaefer. Rosalind Resnick, *State's Enact 'Stalking' Laws; California Takes Lead*, NAT'L L.J., May 11, 1992, at 27.

12. *See* ALA. CODE §§ 13A-6-90 to -6-92 (1993); ALASKA STAT. § 11.41.260 (Supp. 1993); ARK. CODE ANN. § 5-71-229 (Michie 1993); CAL. PENAL CODE § 646.9 (West Supp. 1993); COLO. REV. STAT. ANN. § 18-9-111 (West Supp. 1993); CONN. GEN. STAT. § 53a-181c (Supp. 1992); DEL. CODE ANN. tit. 11, § 1312A (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); GA. CODE ANN. § 16-5-90-93 (Michie Supp. 1993); HAW. REV. STAT. § 711-1106.5 (Supp. 1992); IDAHO CODE § 18-7905 (Supp. 1993); ILL. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993); IND. CODE ANN. § 35-45-10-1 (West Supp. 1993); IOWA CODE § 708.11 (Supp. 1993); 1993 Kan. Sess. Laws 291; KY. REV. STAT. ANN. §§ 508.130-.150 (Baldwin Supp. 1993); LA. CODE CRIM. PROC. ANN. art. 14:40.2 (West Supp. 1993); 1993 Me. Laws 475; 1993 Md. Laws 205; MASS. GEN. LAWS ANN. ch. 265, § 43 (West Supp. 1993); MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993); MINN. STAT. ANN. § 609.749 (West Supp. 1994); MISS. CODE ANN. § 97-3-107 (Supp. 1993); MONT. CODE ANN. § 45-5-220 (1993); NEB. REV. STAT. §§ 28-311.02-.05 (Supp. 1992); NEV. REV. STAT. ANN. § 200.575 (Michie Supp. 1993); N.H. REV. STAT. ANN. § 633.3-a (Supp. 1994); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); N.M. STAT. ANN. § 30-3A-1 (Michie 1993); N.Y. PENAL LAW § 240.25 (McKinney Supp. 1994); N.C. GEN. STAT. § 14-277.3 (Supp. 1993); N.D. CENT. CODE § 12.1-17-07.1 (Supp. 1993); OHIO REV. CODE ANN. § 2903.21.1 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1994); 18 PA. CONS. STAT. § 2709 (1993); R.I. GEN. LAWS § 11-59-2 (Supp. 1993); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. Supp. 1993); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1993); TENN. CODE ANN. § 39-17-315 (Supp. 1993); TEX. PENAL CODE ANN. § 42.07 (West Supp. 1994); UTAH CODE ANN. § 76-5-106.5 (Supp. 1993); VT. STAT. ANN. tit. 13, § 1061 (Supp. 1993); VA. CODE ANN. § 18.2-60.3 (Michie Supp. 1993); WASH. REV. CODE § 9A.46.020 (Supp. 1994); W. VA. CODE § 61-2-9a (1993); WIS. STAT. § 947.013 (Supp. 1993); WYO. STAT. § 6-2-506 (Supp. 1993).

13. *See* 1993 Mo. H.B. 60, 194, 234, 476; 1993 Or. H.B. 2407, 2412, 2579, 2617, 3010.

14. *See* H.R. REP. NO. 840, 103d Cong., 1st Sess. § 3 (1993) (establishing a national program to reduce the incidence of stalking).

15. Janet Cawley, *Law Review: Increased Awareness Aids Anti-Stalking Legislation*, CHI. TRIB., Oct. 24, 1993, at Womanews 1.

National Institute of Justice to develop a model state anti-stalking code.[16]

This Legislative Note examines the scope, application, and constitutionality of Ohio's new anti-stalking legislation. Part II of this Note examines the status of the law existing prior to enactment of the Ohio anti-stalking legislation and provides a background for the constitutional issues discussed in Part IV.[17] Part III outlines the general provisions of the new anti-stalking legislation.[18] Part IV of this Note analyzes the effectiveness of the new law and discusses possible constitutional challenges to the law.[19] Finally, this Note concludes that Ohio's anti-stalking legislation passes all constitutional challenges, including challenges based on excessive bail, vagueness, overbreadth, and unlawful seizure for lack of probable cause.

II. BACKGROUND

A criminal law expert has maintained that nearly "five percent of women in the general population will be harassed, the victim of unwanted pursuit, at some time in their lives."[20] Until the early 1990s, no civil or criminal state law existed to effectively curb stalking and harassment.[21] Law enforcement officials were often unable to police stalking because of the inadequate criminal statutes and civil remedies.[22]

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16. The goal of the task force is to provide each state with a complete package of facts and proposed statutory language with which to address the stalking topic. *Cooperative Agreement To Develop Model State Anti-Stalking Law*, U.S. Newswire, Dec. 23, 1992, *available in* LEXIS, Nexis Library, USNWR File [hereinafter *Cooperative Agreement*]. The joint task force recommends that states "sharpen laws" and increase penalties for first offenses to felonies. George Lardner, Jr., *Federal Task Force Suggests States Make Stalking a Felony Offense*, WASH. POST, Sept. 12, 1993, at A19. The task force believes that such an increase in penalties will "substantially increase criminal prosecutions in stalking cases." *Id.* The task force's proposal limits its definition of stalking to "repeatedly maintaining a visual proximity to someone, or repeatedly conveying threats by words or conduct, causing in either case 'reasonable fear' of bodily injury or death." *Id.* The task force also recommends revisions in bail laws and parole and probation policies to include greater safeguards for stalking victims. *Id.* The task force will submit its recommendations to the United States Attorney General, United States Congress, and state legislatures and attorneys general. *Id.*

17. *See infra* notes 20-91 and accompanying text.

18. *See infra* notes 92-158 and accompanying text.

19. *See infra* notes 159-280 and accompanying text.

20. Maria Puente, *Legislators Tackling the Terror of Stalking But Some Experts Say Measures Are Vague*, USA TODAY, July 21, 1992, at 9A.

21. *See, e.g.*, Robert A. Guy, Note, *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 997 (1993) ("the traditional legal tools available often have proven inadequate"); Wayne E. Bradburn, Jr., Comment, *Stalking Statutes: An Ineffective Legislative Remedy for Rectifying Problems with Today's Injunction System*, 19 OHIO N.U. L. REV. 271, 272 (1992) (the injunction system has proven inadequate).

22. "Current law is grossly inadequate in protecting those who are stalked and harassed. Police officers often cannot do anything for a victim until an assault has taken place . . . ." Press Release, *supra* note 1, at 1; *see also* Floor Speech, *supra* note 8 ("Death should no longer be the

Moreover, in Ohio, before the Ohio General Assembly enacted the anti-stalking law, offenders were free to stalk their victims with virtual impunity. Prior Ohio law required physical harm to a victim before authorizing the police to make an arrest.[23] The police told Sherry Lockwood that they could do little to help her "unless or until an assault on her person or property took place."[24] The Ohio General Assembly drafted the anti-stalking law to fill this major gap in the criminal law of Ohio.[25]

In filling this gap in the existing law, the Ohio General Assembly created a law that implicates several constitutional concerns. An understanding of the validity of the anti-stalking law requires a discussion of the implicated constitutional doctrines. This Section will thus provide a brief background on the constitutional constraints in the areas of bail, vagueness, overbreadth, and arrest and probable cause.

A. Bail

The Eighth Amendment to the Constitution of the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[26] The Eighth Amendment does not state that bail must be afforded in all circumstances,[27] but prohibits only the levying of excessive bail in those situations where bail is available.[28] Bail is excessive when a court sets the amount of bail at a level higher than that which is reasonably necessary to insure the defendant's appearance at trial.[29] Therefore, the un-

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only relief for victims of this terrible and frightening experience."); *Cooperative Agreement*, *supra* note 16 ("Existing laws against trespassing and harassing are helpful but frequently insufficient to completely protect potential victims until it is too late.").

23. Prior to the enactment of the stalking law, the victim of stalking had to rely on standard laws prohibiting assault or trespassing. These laws, of course, would not protect a victim from the initial harm, but only punished the offender after the harm was inflicted. *See, e.g.*, OHIO REV. CODE ANN. §§ 2903.11 (defining felonious assault as knowingly causing physical harm to another), 2903.12 (defining aggravated assault), 2903.13 (defining assault), 2911.21 (defining criminal trespass) (Anderson 1993); *see also* Don Bean, *Judge Puts Curbs On Alleged Stalker*, CLEV. PLAIN DEALER, June 26, 1993, at 6C.

24. Floor Speech, *supra* note 8.

25. Floor Speech, *supra* note 8. The anti-stalking law "will give law enforcement officials the ability to better respond to stalking and harassment situations and most importantly, to prevent the kind of extreme violence that took the life of Sherry Lockwood." Press Release, *supra* note 1, at 2.

26. U.S. CONST. amend. VIII.

27. United States v. Salerno, 481 U.S. 739, 754 (1987) (the Eighth Amendment does not grant an absolute right to bail); *see also* Carlson v. Landon, 342 U.S. 524, 544 (1952) (denial of bail and pretrial detention of dangerous aliens not violative of Eighth Amendment).

28. Stack v. Boyle, 342 U.S. 1 (1951) (where government produced no evidence relating to the individual defendants' propensity to jump bail, $50,000 found to be excessive for violation of statute prohibiting the advocation of the overthrow of the United States government).

29. *Id.* at 5.

derlying "purpose of bail is to insure that the defendant appears at all stages of the criminal proceedings."[30] Since bail insures appearance,[31] the conditions placed upon the bail must relate to appearance.[32] Courts consider those conditions that do not relate to appearance unreasonable and excessive.[33] The court, however, has discretion to determine the amount of bail necessary to insure the defendant's appearance,[34] provided the amount is reasonable.[35] At times, bail is revoked and the suspect incarcerated prior to trial.[36] Historically, pretrial detention has caused problems because it conflicts with our society's presumption of innocence until guilt is proven.[37]

Most recently, the Bail Reform Act of 1984[38] increased judicial authority and discretion for release and detention decisions.[39] In particular, the Bail Reform Act of 1984 allows federal courts to detain an arrestee pending trial.[40] The government, however, must demonstrate "by clear and convincing evidence after an adversary hearing that no release conditions 'will reasonably assure . . . the safety of any other person and the community.' "[41] The United States Supreme Court has upheld this provision in the face of constitutional challenges.[42] The Bail

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30. OHIO R. CRIM. P. 46(A).

31. State v. Troutman, 553 N.E.2d 1053, 1055-56 (Ohio 1990) (conditioning right to bail on the consent of an accused's surety to forfeit bail for fines or costs is not related to appearance).

32. *Id.* at 1056.

33. *Id.*

34. Bland v. Holden, 257 N.E.2d 397, 398 (Ohio 1970) (considering the character and past record of the accused, the seriousness and number of the crimes for which charged, and the penalties attached, $45,000 was not excessive for defendant accused of five rapes, five armed robberies, and who was facing potential life imprisonment).

35. *See, e.g.*, OHIO R. CRIM. P. 46(F). The rule states:

> In determining which conditions of release will reasonably assure appearance, the judge or magistrate shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or of failure to appear at court proceedings.

Id.; *see generally*, 26 OHIO JUR. 3d *Crim. Law* §§ 560, 561 (1981) ("It is a general principle governing the allowance of bail that the amount thereof shall be reasonable.").

36. *See* United States v. Salerno, 481 U.S. 739 (1987).

37. Stack v. Boyle, 342 U.S. 1, 4 (1951). *But see* Bell v. Wolfish, 441 U.S. 520, 531 (1979) (upholding practice of "double-bunking" pretrial detainees as not violative of Fifth Amendment Due Process Clause, nor in contravention of the rights associated with the presumption of innocence).

38. 18 U.S.C. §§ 3141-3150 (1988 & Supp. II 1990).

39. *See* S. REP. NO. 225, 98th Cong., 1st Sess. 5-6 *reprinted in* 1984 U.S.C.C.A.N. 3182, 3188 (allowing judges to weigh community safety in pretrial release decisions).

40. 18 U.S.C. §§ 3141-50 (1988 & Supp. II 1990).

41. United States v. Salerno, 481 U.S. 739, 741 (1987).

42. *Id.*

Reform Act, however, applies only to criminal proceedings brought in federal courts.[43]

The federal Constitution sets a minimum level of protection below which states may not legislate.[44] The federal constitution, however, entitles states to construct features in their own constitutions that are more protective than the minimum level of protection offered by the United States Constitution.[45] At the state level, therefore, provisions in each state's constitution will govern.[46] If a state constitution specifically provides for the right to bail, such a provision is not subject to legislative or judicial intermeddling.[47]

If a state constitution has broader protections, "the broader state protections would define the actual substantive rights possessed by a person living within that state."[48] Ohio's Constitution is more specific and protective of the right to bail than is the federal Constitution. Specifically, the Ohio Constitution provides that "[a]ll persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."[49] To deny pretrial release on bail, except in capital cases,[50] violates the Ohio Constitution.[51] Thus, even if Ohio's anti-stalking legislation is deemed constitutional at the federal level, it could still be subject to a constitutional attack under the Ohio Constitution.

B. Vagueness

Courts may invalidate a statute under the vagueness doctrine because the means adopted to suppress or regulate are impermissible,

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43. *See* Guti v. I.N.S., 908 F.2d 495, 496 (9th Cir. 1990) (person awaiting civil deportation hearing not entitled to bail hearing under the Act).

44. "The Federal Constitution define[s] only a minimum." Mills v. Rogers, 457 U.S. 291, 300 (1982).

45. "State law may recognize liberty interests more extensive than those independently protected by the Federal Constitution." *Id.*

46. *See* Arnold v. City of Cleveland, 616 N.E.2d 163, 168 (Ohio 1993) (Ohio's protection of the right to bear arms is more protective of individual rights than the federal version, even though Cleveland's ban on sales of "assault weapons" was a valid exercise of police power).

47. *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 461 (2d ed. 1986).

48. *Id.*

49. OHIO CONST. art. I, § 9.

50. A capital offense is one in which the court may impose the death penalty. *See* 26 OHIO JUR. 3d *Crim. Law* § 544 (1981).

51. Any person accused of a noncapital crime shall be bailable. "To deny bail before trial, except in capital offenses, is a violation of a sacred basic human right guaranteed by the Constitution of the United States and the Constitution of Ohio. This constitutional right transcends all other considerations of whatever kind or nature." *Ex parte* Berman, 87 N.E.2d 716, 718 (Ohio Ct. App. 1949).

even though it might be constitutional to restrict the particular offense at issue in another manner.[52] To determine vagueness, courts apply a three-pronged test. First, the statute must provide "adequate notice and fair warning" to persons so they can conform their conduct to the letter of the statute.[53] Second, the statute must not lend itself to arbitrary, capricious, or discriminatory enforcement.[54] Third, the statute must not unreasonably inhibit fundamental constitutionally protected freedoms.[55]

The Fourteenth Amendment's due process requirement demands that penal statutes give fair warning of precisely what they proscribe.[56] To withstand a vagueness challenge, a statute must fairly warn persons of ordinary intelligence as to what constitutes prohibited conduct.[57] State criminal statutes are void for vagueness under the Due Process Clause of the Fourteenth Amendment to the United States Constitution[58] if they fail to contain ascertainable standards of guilt.[59] Since everyone is entitled to know what the law prohibits,[60] the law must be clear to persons of common intelligence.[61] In construing a state penal statute, the United States Supreme Court will go beyond the statute as

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52. Upon invalidation for vagueness, a legislature may simply redraft the statute to make the vague terms clearer. *See generally* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1120 (2d ed. 1991).

53. State v. Hughes, No. 90-CA-54, 1992 Ohio App. LEXIS 1245, at *5 (Ohio Ct. App. 1992) (where petitioner appealed his conviction for engaging in a pattern of corrupt activity under the Ohio RICO statute); *see* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.3, at 128 (1986).

54. *Hughes*, 1992 Ohio App. LEXIS 1245, at *5; *see also* Kolender v. Lawson, 461 U.S. 352, 358 (1983) (California anti-loitering statute requiring persons to identify self and account for presence found void since authorities have virtually complete discretion to determine "credible and reliable" identification); *see generally* LAFAVE & SCOTT, *supra* note 53, at 128.

55. *Hughes*, 1992 Ohio App. LEXIS 1245, at *6; *see generally* LAFAVE & SCOTT, *supra* note 53, at 128.

56. RICHARD B. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE 11 (1982).

57. Ohio v. McDonald, 509 N.E.2d 57, 59 (Ohio 1987); *Hughes*, 1992 Ohio App. LEXIS 1245, at *4 ("The statute must be so unclear that an individual of ordinary intelligence could not reasonably understand that certain acts were prohibited under the statute.").

58. The Fourteenth Amendment states in part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV.

59. *McDonald*, 509 N.E.2d at 59 (citing Winters v. New York, 333 U.S. 507, 515 (1948)) (declaring New York's obscene publications statute void because it not only punished for indecent and obscene publications, but also made innocent acts criminal).

60. A court is more likely to declare a statute unconstitutionally vague when the statute is addressed to the general public than one which is addressed to a particular trade or business. LAFAVE & SCOTT, *supra* note 53, at 129.

61. LAFAVE & SCOTT, *supra* note 53, at 128.

drafted and will examine the statute in light of any interpretation of the statute by the enacting state's highest court.[62]

C. *Overbreadth*

Overbreadth is a doctrine that is applied solely to statutes that impinge upon First Amendment[63] rights.[64] The Supreme Court has long recognized that "the First Amendment needs breathing space and statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn."[65] Courts have, however, applied the overbreadth doctrine sparingly and only as a last resort.[66] Such sparing use of the overbreadth doctrine is due to the consequence of a finding that a statute is unconstitutionally overbroad. A finding of overbreadth results in the entire relevant provision being stricken.[67]

In cases involving overbreadth issues, courts permit litigants to challenge a statute because of the danger or possibility "that the statute's very existence may cause others not before the court to refrain from [engaging in] constitutionally protected speech or expression."[68] An overbreadth attack challenges the statute on its face and is not based on the violation of the litigant's rights of free expression.[69] Courts entertain facial overbreadth claims in cases involving statutes

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62. Wainright v. Stone, 414 U.S. 21, 22-23 (1973) (the "abominable and detestable crime against nature" included oral and anal sex because Florida courts had already held so).

63. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

64. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (anti-noise ordinance prohibiting person near school from willfully making noise that disturbs the school not overbroad since expressive activity prohibited only if it "materially disrupts classwork").

65. Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973) (state employees contended section of State Merit System Act reached constitutionally protected activities); *Grayned*, 408 U.S. at 116; Shelton v. Tucker, 364 U.S. 479, 488 (1960) (Arkansas statute requiring teachers to list all organizations to which they belonged or contributed in past five years is void because it deprives teachers of freedom of association).

66. *Broadrick*, 413 U.S. at 613.

67. *Id.* at 614.

68. *Id.* at 612.

69. *Id.* Traditional rules of standing do not apply to challenges based on the overbreadth doctrine. *See* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (in Louisiana's Subversive Activities and Communist Control Law, the statutory definition of "subversive organization" results in an overly broad regulation of speech).

The traditional rule of "standing" is that a person may not challenge a statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court. *See* United States v. Raines, 362 U.S. 17, 21 (1960) (in a civil rights case of racial discrimination regarding Georgia's voter registration, complainant must articulate her specific harms and not general harms to the class to which she belongs); Hatch v. Reardon, 204 U.S. 152, 160 (1907) (holding constitutional New York's stock transfer law by requiring the party challenging the constitutionality of the state law belong to the class primarily protected).

that seek to regulate "only spoken words,"[70] cases involving statutes that allegedly regulate the "time, place, and manner" of expressions,[71] and cases involving statutes that allegedly burden the rights of association.[72]

Because of the extreme consequences of a finding of overbreadth, however, courts will not find facial overbreadth if a limiting construction can be placed on the challenged statute.[73] Even if a penal statute is capable of some unconstitutional applications, the statute will not necessarily fail in its entirety.[74] Rather, the Supreme Court has indicated that courts should cure statutes that are not "substantially overbroad"[75] on a case-by-case basis through analysis of each fact situation.[76] This case-by-case analysis is especially relevant where the prohibition involves conduct, and not merely speech.[77]

D. Arrest and Probable Cause

The Fourth Amendment to the Constitution guarantees the "right of the people to be secure in their persons . . . against unreasonable . . . seizures, . . . and [that] no Warrants shall issue, but upon probable cause . . . ."[78] An arrest[79] will be constitutionally acceptable only if the law enforcement officer, at the moment of apprehension, had probable

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70. *See Broadrick*, 413 U.S. at 612; Gooding v. Wilson, 405 U.S. 518, 520 (1972); Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ohio's criminal syndicalism statute unconstitutional because it violates freedom of speech by punishing the Ku Klux Klan's "mere advocacy" of restricted activity).

71. *See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Cameron v. Johnson, 390 U.S. 611, 617 (1968) (Mississippi anti-picketing law is a valid regulatory statute since it only prohibited picketing that obstructed entrance to the courthouse).

72. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967) (New York's teacher loyalty laws unconstitutional as violative of freedom of association since teachers forced to certify, on threat of termination, that they were not affiliated with Communist Party); United States v. Robel, 389 U.S. 258 (1967) (holding Subversive Activities Control Act unconstitutional as overbroad because it abridges rights of association).

73. *Broadrick*, 413 U.S. at 613.

74. Cantwell v. Connecticut, 310 U.S. 296, 308 (1940) (Connecticut statute violative of constitutional guarantees of religious liberty and freedom of speech by prohibiting man from playing religious records for pedestrians on street corner).

75. "[W]e believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

76. *Id.* at 615-16.

77. *Id.* at 615.

78. U.S. CONST. amend IV.

79. An arrest is a "serious personal intrusion, regardless of whether the person seized is guilty or innocent." United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (involving postal inspectors' valid warrantless arrest of suspect with stolen credit cards).

cause to believe that the suspect was guilty of a specific violation of the law.[80]

The Supreme Court has held that law enforcement agencies have probable cause when "the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent person in believing that the [suspect] had committed or was committing an offense."[81] The probable cause standard "does not require that the evidence at the time of arrest be sufficient to prove guilt beyond a reasonable doubt."[82] The probable cause standard is also thought by commentators to require something less than the preponderance of evidence standard associated with civil trials.[83] Mere "suspicion" of criminal activity, however, is insufficient to establish probable cause.[84] A finding of probable cause depends on "the cumulative effect of the facts in the totality of circumstances."[85] Probable cause requires courts to balance the individual's right to liberty with the state's duty to control crime and protect the public welfare.[86]

While the Supreme Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.[87] Thus, a police officer's "on-the-scene" assessment of probable cause provides limited legal justification for arresting a person suspected of a crime.[88] The absolute authority of a police officer's assessment ends once the suspect is in custody.[89] The Supreme Court has thus held that the Fourth Amendment requires "a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[90] Accordingly, the experience of the officer in deter-

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80. *See* Beck v. Ohio, 379 U.S. 89 (1964) (prosecution failed to show with specificity what the informers actually said and why the officer thought the information was credible); *see generally* WHITEBREAD & SLOBOGIN, *supra* note 47, at 70.

81. *Beck*, 379 U.S. at 91; *see also* Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

82. Bostic v. City of Chicago, 981 F.2d 965, 968 (7th Cir. 1992), *cert denied*, 113 S. Ct. 3038 (interim ed. 1993).

83. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 88 (1991).

84. *See Brinegar*, 338 U.S. at 175 (officer's knowledge that suspect was engaging in illicit liquor-running, based on personal knowledge and observation, was sufficient to warrant probable cause to stop the suspect and search the automobile); *Bostic*, 981 F.2d at 968; United States v. Everroad, 704 F.2d 403, 405 (8th Cir. 1983).

85. United States v. McGlynn, 671 F.2d 1140, 1143 (8th Cir. 1982) (suspected participation, removal of package, exchange of large amount of cash, and officer's experience, taken together, amounted to probable cause in the totality of the circumstances).

86. Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

87. *McGlynn*, 671 F.2d at 1143-44.

88. *Id.* at 1144.

89. *See Gersten*, 420 U.S. 103.

90. *Id.* at 114.

mining probable cause, confirmed by the judiciary's neutral and disinterested overview of the facts and circumstances that the officer relied upon in making the arrest, protect a suspect's Fourth Amendment rights.[91]

III. General Provisions of Ohio's Anti-Stalking Statute

Ohio's new anti-stalking legislation[92] achieves its goal of protecting victims of stalking in several ways. First, the legislation amends and enacts sections of the Ohio Revised Code to create the offenses of "aggravated trespass" and "menacing by stalking."[93] Second, the legislation permits police officers to make an arrest without a warrant if reasonable cause exists to believe that either aggravated trespass or menacing by stalking was committed.[94] Third, the legislation creates a mechanism for obtaining an anti-stalking protection order.[95] Finally, the legislation changes protection order law by allowing the court to order an evaluation of the mental condition of the defendant and also changes bail law relative to the new offenses.[96]

A. Menacing by Stalking

A defendant is guilty of menacing by stalking when that person engages in a pattern of conduct that knowingly[97] causes another to believe that physical harm or mental distress will occur.[98] For a first of-

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91. Essentially, when an officer makes a warrantless arrest based on an on-the-scene determination of probable cause, the court must determine whether the officer had probable cause. *See* Dressler, *supra* note 83, at 85.

92. Ohio Rev. Code Ann. § 2903.21.1 (Anderson 1993).

93. Memorandum from State Representative Madeline A. Cain on Sub. H.B. 536 (April 8, 1992) (on file with the *University of Dayton Law Review*) [hereinafter Memorandum]; *see infra* notes 97-108 and accompanying text. Depending on which offense the offender committed and the offender's prior convictions, there are a variety of available scaled penalties.

94. Memorandum, *supra* note 93; *see infra* notes 109-11 and accompanying text.

95. Memorandum, *supra* note 93; *see infra* notes 112-37 and accompanying text.

96. Memorandum, *supra* note 93; *see infra* notes 138-58 and accompanying text.

97. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." Ohio Rev. Code Ann. § 2901.22 (Anderson 1993).

98. *Id.* § 2903.21.1. The full text of § 2903.21.1 is:

(A) No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

(B) Whoever violates this section is guilty of menacing by stalking, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section involving the same person who is the victim of the current offense, menacing by stalking is a felony of the fourth degree.

(C) As used in this section;

(1) "Pattern of Conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

fense, the stalker commits a misdemeanor of the first degree.[99] The misdemeanor is punishable by imprisonment for not more than six months, or a fine of not more than one thousand dollars, or both.[100] If a stalker has a prior conviction for menacing by stalking, and is later convicted for the same offense against the same person the offender will be charged with a fourth-degree felony.[101] The fourth-degree felony offense carries a mandatory prison sentence of between six months and five years and a possible fine of up to two thousand, five hundred dollars.[102]

B. Aggravated Trespass

Ohio's anti-stalking statute creates a second offense called "aggravated trespass."[103] A defendant is guilty of aggravated trespass if that person enters or remains on the land or premises of another with the intent to commit a misdemeanor.[104] The elements of aggravated trespass include the causing of physical harm to another person or causing that other person to believe that the offender will cause physical harm to them.[105] A violation of aggravated trespass is a first-degree misdemeanor.[106] The offense carries a punishment of a maximum prison term of six months, or a fine of no more than one thousand dollars, or both.[107]

The punishments for aggravated trespass and first offenses of menacing by stalking are thus identical. Unlike menacing by stalking, however, there is no comparable provision to increase the punishment for a second offense of aggravated trespass. The court may only increase the punishment for aggravated trespass if the defendant violates an anti-stalking protection order.[108]

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(2) "Mental distress" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment.

Id.

99. *Id.* § 2903.21.1(B).
100. *Id.* § 2929.21.
101. *Id.* § 2903.21.1(B).
102. *Id.* § 2929.11.
103. *Id.* § 2911.21.1.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* § 2929.21.
108. *Id.* §§ 2903.21.3, 2903.21.4; see also *infra* notes 112-37 and accompanying text for a discussion of Ohio's anti-stalking protection order.

C. *Arrest without Warrant*

The Ohio anti-stalking law also gives police the authority to arrest suspected offenders without a warrant.[109] The statute states:

> When there are reasonable grounds for believing that an offense of menacing by stalking or an offense of aggravated trespass has been committed, a police officer may arrest without a warrant any person whom he has reasonable cause to believe is guilty of the violation and detain them until a warrant can be obtained.[110]

Furthermore, the statute provides a clear method of establishing reasonable cause:

> [T]he execution of a written statement by a person alleging that an alleged offender has committed the offense of domestic violence against the person or against a child of the person or has committed the offense of menacing by stalking or aggravated trespass constitutes reasonable grounds to believe that the offense was committed and reasonable cause to believe that the person alleged to have committed the offense is guilty of the violation.[111]

Thus, the Ohio legislature provides a method of arresting suspected stalkers without the delay of obtaining an arrest warrant.

C. Anti-Stalking Protection Order

Under sections 2903.21, 2903.21.1, 2903.22, or 2911.21.1 of the Ohio Revised Code, when the complainant alleges a violation of the anti-stalking law, the complainant may file a motion that requests the issuance of an anti-stalking protection order.[112] The motion, if sustained, makes the protection order a pretrial condition of release of the alleged offender.[113] This condition is imposed in addition to any bail that has been set under Criminal Rule 46.[114] A person who meets the

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109. OHIO REV. CODE ANN. § 2935.03.

110. *Id.*

111. *Id.* § 2935.03(B).

112. *Id.* § 2903.21.3. Family members who are involved, however, must seek a T.P.O. under § 2929.26 of the Ohio Revised Code. *Id.*

113. *Id.*

114. *Id.*; *see also* OHIO R. CRIM. P. 46. The pertinent portion of the rule states:

> A person arrested for a misdemeanor shall be released by the clerk of the court on his personal recognizance or upon the execution of an unsecured appearance bond in the amount specified in the bail schedule established by the court.
>
> A person need not be released on his own recognizance or upon the execution of an unsecured appearance bond if he has a history of failure to appear when required in judicial proceedings, or if his physical, mental, or emotional condition appears to be such that he may pose a danger to himself or others if released immediately.

criteria for bail under Criminal Rule 46,[115] and who posts bail, "shall not be held in custody pending a hearing before the court on a motion requesting an anti-stalking protection order."[116] The court[117] must conduct a hearing on the motion for an anti-stalking protection order "as soon as possible after the filing of a motion requesting an order."[118]

If the court finds that the continued presence of the alleged offender impairs the safety and protection of the complainant, the court may issue an anti-stalking protection order.[119] As a pretrial condition of release, the order contains terms designed to insure the safety and protection of the complainant.[120] Such terms may include requirements that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant.[121] If the court issues the order, the order is effective only through the disposition of the criminal proceeding that arose from the complaint.[122] A protection order "shall not be construed as a finding that the alleged offender is guilty."[123] Nor may the prosecutor introduce the protection order at trial as evidence of the commission of the alleged offense.[124]

A defendant is guilty of violating an anti-stalking protection order if that person recklessly[125] violates any terms of the order.[126] The level

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OHIO R. CRIM. P. 46. *But see* S.B. 31, 120th Gen. Assembly, 1993-94 Reg. Sess. (effective Sept. 27, 1993) (amending OHIO REV. CODE ANN. § 2903.21.3 (Anderson 1993) to permit a court to issue an anti-stalking protection order *sua sponte*).

115. OHIO R. CRIM. P. 46. For the text of the pertinent portion of the Rule, see *supra*, note 114.

116. OHIO REV. CODE ANN. § 2903.21.3(F).

117. County court judges have jurisdiction to hear actions concerning the issuance and enforcement of anti-stalking protection orders pursuant to Ohio Revised Code section 2903.21.3. *Id.* § 1907.18(A)(6) (1994). The legislation also empowers the police to enforce anti-stalking protection orders in accordance with the provisions of the order. *Id.* § 2903.21.3(G)(3); *see also id.* § 737.11 ("The police force shall . . . obey and enforce . . . all anti-stalking protection orders issued pursuant to § 2903.213[sic] of the Revised Code.").

Municipal courts and the housing and environmental divisions of such courts have jurisdiction to issue and enforce anti-stalking protection orders pursuant to § 2903.213 of the Ohio Revised Code. *Id.* §§ 1901.18(A)(9), 1901.19(A)(7).

118. *Id.* § 2903.21.3(C) (1993). The Code states that the hearing must not be "later than the next day that the court is in session after the filing of the motion." *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* § 2903.21.3(E)(2).

123. *Id.* § 2903.21.3(E)(3).

124. *Id.*

125. Section 2901.22(C) of the Ohio Revised Code states:

> A person acts recklessly when, with heedless indifference to the consequences, [the person] perversely disregards a known risk that [the person's] conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, [the person] perversely disregards a known risk that such circumstances are likely to exist.

of punishment imposed for violating an anti-stalking protection order will vary, depending upon prior stalking-related convictions of the offender.[127] If the offender has no previous convictions for violating an anti-stalking protection order,[128] menacing by stalking,[129] aggravated menacing,[130] or aggravated trespass,[131] then the first violation is a fourth-degree misdemeanor.[132] The penalty for such a crime is thirty days imprisonment, a fine of two hundred-fifty dollars, or both.[133] If the offender has been previously convicted of or pled guilty to violations of the above enumerated offenses that involved the complainant in the protection order, then violation of the order is a first-degree misdemeanor.[134] If the offender has previously been convicted of or pled guilty to two or more violations of the above enumerated offenses involving the protection-order complainant, then violating an anti-stalking protection order is a fourth-degree felony.[135]

There are, however, additional consequences for the violation of an anti-stalking protection order. Once the offender violates the protection order, the court may modify the terms of the old order and issue a new order.[136] Furthermore, violation of an anti-stalking protection order may result in one of the more unique factors of Ohio's anti-stalking law: Ohio courts have the authority to order a psychological evaluation of the defendant accused of stalking.[137]

Id. § 2901.22(C).

126. "No person shall recklessly violate any terms of an anti-stalking protection order issued pursuant to section 2903.213[sic] of the Revised Code." *Id.* § 2903.21.4(A).

127. *Id.* § 2903.21.4(B).

128. *Id.* § 2903.21.4.

129. *Id.* § 2903.21.1; *see also supra* notes 97-102 and accompanying text.

130. OHIO REV. CODE ANN. § 2903.21. The statute provides:

(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family.

(B) Whoever violates this section is guilty of aggravated menacing, a misdemeanor of the first degree.

Id.

131. *Id.* § 2911.21.1; *see also supra* notes 103-08 and accompanying text.

132. OHIO REV. CODE ANN. § 2903.21.4(B).

133. *Id.* §§ 2929.21(B)(4), 2929.21(C)(4), 2929.21(A).

134. *Id.* § 2903.21.4(B). The possible punishment is six months imprisonment, $1000, or both for such an offense. *Id.* §§ 2929.21(B)(1), 2929.21(C)(1). Therefore, a first-time offender found guilty of menacing by stalking will receive no greater punishment than if he had violated an anti-stalking protection order. Both offenses are first-degree misdemeanors.

135. OHIO REV. CODE ANN. § 2903.21.4; *see supra* note 101 and accompanying text.

136. OHIO REV. CODE ANN. § 2903.21.3.

137. *Id.* § 2903.21.5(A); *see infra* notes 138-48 and accompanying text.

D. *Evaluation of Mental Condition*

Ohio is one of the few states to allow its courts to order an evaluation of the mental health of the defendant.[138] In deciding whether to grant bail, the court must consider the mental health of the offender.[139] In Ohio, the court may order a psychological evaluation of the defendant in two situations. First, the court may order a psychological evaluation when a defendant is charged with violating an anti-stalking protection order, and the court determines that the defendant caused physical harm to the person, or property of the person, covered by the order.[140] Second, the court may order a psychological evaluation when a defendant is charged with violating an anti-stalking protection order, and the court determines that defendant's conduct caused the person covered by the order to believe that such physical harm to her person or property would occur.[141]

Any such evaluation must be completed within thirty days of the date the court entered the order for the mental evaluation.[142] The court may, however, order up to two additional evaluations if the court deems the evaluations necessary to supplement the primary evaluation.[143] Thus, a court-ordered evaluation has two prerequisites: (1) that the defendant violated an anti-stalking protection order; and (2) that the violation involved physical harm to the person or property of the protected person or a belief that such physical harm would occur.[144]

If the court releases the defendant on bail, the court may nonetheless order the alleged stalker-defendant to submit to an evaluation.[145] If the defendant refuses to cooperate, the court may enforce the order.[146] Enforcement may include amended conditions of bail or issuance of an order to the sheriff to take the defendant into custody for purposes of the examination.[147] Finally, the examiner must file a written report

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138. Two other states' anti-stalking legislation allow their courts to impose mental health evaluations and treatment, if necessary, as a condition of probation for violation of the anti-stalking laws. *See* GA. CODE ANN. § 42-8-35.3 (Michie Supp. 1993); MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993); *see generally*, Kathleen G. McAnaney et al., Note, *From Imprudence To Crime: Anti-Stalking Laws*, 68 NOTRE DAME L. REV. 819, 902 (1993) ("Ohio's anti-stalking law contains the most extensive and detailed provisions for mental evaluation.").

139. OHIO REV. CODE ANN. § 2903.21.2(A)(2); *see generally*, McAnaney, *supra* note 138, at 902.

140. OHIO REV. CODE ANN. § 2903.21.5(A).

141. *Id.*

142. *Id.*

143. These supplemental evaluations must be completed within thirty days of the entering of the applicable court orders. *Id.* § 2903.21.5(B).

144. *Id.* § 2903.21.5.

145. *Id.*

146. *Id.*

147. *Id.*

with the court within thirty days after the entry of an order for the evaluation of the mental condition of the defendant.[148]

E. Bail

The court, in addition to any other circumstances and notwithstanding any provisions to the contrary contained in Criminal Rule 46,[149] must consider several factors before setting the amount and conditions of bail.[150] These factors include:

> (1) whether the person has a history of violence toward the complainant or a history of other violent acts; (2) the mental health of the person; (3) whether the person has a history of violating the orders of any court or government entity; (4) whether the person is potentially a threat to any other person; and (5) whether setting bail at a high level will interfere with any treatment or counseling that the person is undergoing.[151]

Thus, the Ohio anti-stalking law has special provisions for setting the amount and conditions of bail.[152]

The court will consider these additional factors in two instances when setting a bail schedule. First, two convictions for aggravated menacing,[153] menacing by stalking,[154] menacing,[155] or aggravated trespassing[156] that involve the same complainant will cause the court to examine the additional factors listed above.[157] Second, a single violation of the above enumerated offenses while the complainant was under the shelter of an anti-stalking protection order will have the same effect of causing the court to consider the additional factors.[158]

F. Summary

Ohio's anti-stalking law creates new offenses designed to protect potential victims from offenders who would otherwise terrorize and

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148. *Id.*
149. *See supra* notes 35 and 114 and accompanying texts.
150. OHIO REV. CODE ANN. § 2903.21.2(A).
151. *Id.* § 2903.21.2(A)(1)-(5).
152. *Id.* § 2903.21.2.
153. *Id.* § 2903.21.
154. *Id.* § 2903.21.1.
155. *Id.* § 2903.22. The statute provides:

> (A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of such other person or member of his immediate family.
>
> (B) Whoever violates this section is guilty of menacing, a misdemeanor of the fourth degree.

Id.
156. *Id.* § 2911.21.1.
157. *Id.*
158. *Id.*

stalk them with impunity. Ohio's legislature has created a framework that not only seeks to insulate the potential victim by the use of the protection order and bail provision, but also seeks to help the offender through the use of the mental evaluation. As created and enacted in 1992, the law is a comprehensive and integrated attempt to resolve a problem that has previously gone unaddressed.

IV. ANALYSIS

Ohio's anti-stalking law raises several issues of effectiveness and constitutionality. This Section will first analyze the effectiveness of Ohio's anti-stalking legislation, beginning with its capacity to fill the gap in existing law. Finally, this section will examine the constitutionality of the statute.

A. Problem Solving Effectiveness

Because of the complete absence of protection for stalking victims prior to the enactment of the anti-stalking law,[159] the law attempts to make protection available to victims of stalkers. To this end, Ohio's anti-stalking law gives law enforcement officials the authority to help victims before the victims are harmed.[160] For example, the psychological evaluation that courts can order may provide the court with a better overall evaluation of the stalker. The evaluation, in turn, may aid courts in determining whether bail should be set for the stalker, and if so, at what amount. Further, authorities may be able to use the psychological evaluation of the offender to detect any mental disorders, which if undiscovered, would leave the stalker free to repeat his actions.[161]

The Ohio legislation defines stalking as "engaging in a pattern of conduct [that] knowingly cause[s] another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person."[162] The definition reveals a legislative choice to use broad language and afford greater protection. By broadly defining the

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159. *See supra* notes 20-25 and accompanying text.

160. "[W]hen Ohio legislators enacted an anti-stalking law in November, police no longer needed to wait for physical harm to a victim before making an arrest." Alan Achkar, *First Stalking Charges in County; Wadsworth Man Jailed Under Law*, CLEV. PLAIN DEALER, May 30, 1993, at 1B.

161. A botched mental evaluation allowed the defendant to go free and later kill Barbara Kathleen Seibel. *See* Seibel v. Kemble, 631 P.2d 173 (Haw. 1981) (negligence claim against the doctor); *see, e.g.*, Alan Achkar, *Stalker To Spend Six Months in Jail*, CLEV. PLAIN DEALER, July 1, 1993, at 2B.

162. OHIO REV. CODE ANN. § 2903.21.1(A) (Anderson 1993).

offense of stalking, the Ohio General Assembly avoided passing a narrow statute that could allow some stalkers to avoid criminal liability.[163]

Since its inception, Ohio law enforcement officials have been using the anti-stalking statute.[164] Had law enforcement officials waited for victims to be injured before arresting the stalkers, serious injuries or deaths may have resulted.[165] Due to the increase in incidents of stalking[166] and an increase in attention paid to the stalking issue in the past three years,[167] the Ohio legislation addressed a spreading societal problem. The legislation has been effective in curbing stalking attacks and protecting potential stalking victims.[168] The question that remains is whether convictions under the anti-stalking law will be upheld on appeal in the face of constitutional challenges.

B. Constitutionality of the Bail Provision

The Constitution of the United States provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[169] The State of Ohio's Constitution has a similar, but more specific, provision. The Ohio Constitution provides: "All persons shall be bailable by sufficient sureties, except for capital offences [sic] where the proof is evident, or the presumption great. Ex-

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163. *Compare id. with* WASH. REV. CODE § 9A.46.020 (Supp. 1994). Washington's anti-stalking statute criminalizes the intimidation or frightening of a person by "intentional or repeated following." WASH. REV. CODE § 9A.46.020. Washington's law does not make it a crime to continually telephone a person, to sit outside of a person's home, or even to leave dead animals on a victim's porch. *See* Richard Seven, *Stalking Law Too Narrow, Lawyers, Victims Complain*, SEATTLE TIMES, July 6, 1993, at B1.

All of these activities, however, would likely be covered by the Ohio anti-stalking law if they caused mental distress in the victim and were part of a pattern of conduct. *See supra* note 98 (defining "menacing by stalking").

164. *See, e.g.*, Achkar, *supra* note 161, at 2B (stalker arrested in Wadsworth); Bean, *supra* note 23, at 6C (stalker arrested in Solon and ordered to refrain from telephoning or coming within one thousand feet of ex-girlfriend's home or business); Michael Drexler, *"I Wasn't Going to Hurt Her," Stalker Tells Court after Plea*, CLEV. PLAIN DEALER, Oct. 14, 1993, at 2B (stalker arrested in Cleveland Heights and ordered to Psychiatric Institute); Rutti & Stainer, *supra* note 2, at 1B (stalker convicted in Cleveland). *But see* Scott Stephens et al., *Slaying Leaves Officials Cautious*, CLEV. PLAIN DEALER, Jan. 28, 1994, at 1B (Lorain County woman slain by stalker; anti-stalking law not used to get restraining order).

165. *See* Resnick, *supra*, note 11, at 27; Stephens, *supra* note 164, at 1B (Lorain County woman slain by stalker).

166. "An increase in stalking incidents, with often tragic consequences, has spurred authorities to try new approaches." *Electronics Device Recruited In Battle On Stalker Attack*, L.A. TIMES, Sept. 20, 1992, at B3.

167. *See supra* notes 11-16 and accompanying text.

168. *See supra* note 164.

169. U.S. CONST. amend. VIII. See *supra* notes 26-51 and accompanying text for discussion of federal bail law.

cessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."[170]

The Ohio anti-stalking law does not specifically permit the judge to deny bail.[171] In fact, the statute could not deny all possibility of bail because the right to bail is absolute, with only one exception for capital offenses.[172] "There is no discretion in the trial court in such matters."[173] Although the right to bail is absolute, an Ohio appellate court, in *Ohio v. Naegele*,[174] has noted that additional conditions may be attached to the release of a person charged with a criminal offense.

In *Naegele*, a husband had severely beaten his wife following an argument.[175] In accordance with Ohio's domestic violence statute, the wife filed a complaint and a motion requesting a temporary protection order pursuant to section 2919.26.[176] The requirements for issuing a protection order in *Naegele*[177] were nearly identical to the requirements for issuing an anti-stalking protection order.[178] The husband appealed his conviction under the theory that the issuance of a temporary protec-

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170. OHIO CONST. art. I, § 9.

171. *See* OHIO REV. CODE ANN. § 2903.21.2 (Anderson 1993). Not all state anti-stalking codes are identical to Ohio's, and at least one state's statute permits a court to deny an alleged stalker's pretrial release on bail. *See* ILL. COMP. ANN. STAT. ch. 720, para. 5/12-7.3 (Smith-Hurd 1993). Specifically, the Illinois statute states that:

> All persons shall be bailable before conviction, except the following offenses where the proof is evident or the presumption great that the defendant is guilty of the offense: . . . stalking or aggravated stalking, where the court, after a hearing, determines that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim of the offense and denial of bail is necessary to prevent fulfillment of the threat upon which the charge is based.

Id.

Some critics and judges believe that such a no-bail provision violates the Eighth Amendment's prohibition against excessive bail. Gera-Lind Kolarik, *Stalking Laws Proliferate*, A.B.A. J., Nov. 1992, at 36 (describing Cook County Public Defender's argument that Chicago's bail provision violates Eighth Amendment prohibition against excessive bail). Most recently, a Cook County, Illinois, trial judge agreed with the American Civil Liberties Union's argument that the no-bond provision of the Illinois statute is unconstitutional. *See* Charles Mount, *Stalking Law Survives First Test*, CHI. TRIB., Northwest Edition, June 18, 1993, at 4 (describing a failed vagueness challenge but noting the unconstitutionality of the no-bond provision).

172. Locke v. Jenkins, 253 N.E.2d 757 (Ohio 1969) (defendant, held on charges of grand larceny and burglary, was entitled to have bail set in an amount reasonable under the facts and circumstances).

173. *Id.*

174. Ohio v. Naegele, No. 920, slip op. (Ohio Ct. App. Nov. 19, 1980) (LEXIS, Ohio library, Courts file). For example, the statute provides for a mandatory psychological evaluation and four additional factors required prior to the setting of bail. OHIO REV. CODE ANN. § 2903.21.2(A)(1)-(5) (Anderson 1993).

175. *Naegele*, No. 920, slip op. at 1.

176. *Id.*

177. The requirements for issuance of such an order can be found in OHIO REV. CODE ANN. § 2919.26(A).

178. See text accompanying notes 112-24 and 129-31 and accompanying text.

tion order as a pretrial condition of release constituted a denial of the right to bail under the Ohio Constitution.[179] While a procedural error kept the court from deciding the merits of the appeal, the court noted in dictum that it "fail[ed] to see how . . . [the absolute right to bail] necessarily precludes the attachment of additional conditions to the release of a person charged with a criminal offense."[180] The court may impose additional pretrial conditions to release, especially when the state has a substantial interest in protecting victims from further incidents of physical harm from the same attacker.[181]

The anti-stalking statute has substantially the same requirements as the statute at issue in *Naegele*. Additionally, the purpose of the anti-stalking statute is to protect victims from future physical harm inflicted by the same attacker.[182] Since the *Naegele* statute was assumed to be constitutional, the anti-stalking protection order will similarly not violate an offender's right to bail under the Ohio Constitution.[183]

The anti-stalking statute does not completely eliminate the right to bail; rather, it sets out factors that the court must take into consideration prior to setting the bail schedule.[184] At no point in the statute does the Ohio General Assembly give courts the authority to completely withhold the right to bail.[185] If, however, excessive pretrial bail is ordered, the defendant has the remedy of habeas corpus available to him.[186] Since Ohio's comprehensive anti-stalking statute does not au-

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179. *Naegele*, No. 920, slip op. at 2.

180. *Id.* at 3 n.1.

181. *Id.* at 3.

182. *See supra* notes 23-25 and accompanying text.

183. Although the pertinent language in *Naegele* is dicta and the case is unpublished, such unpublished opinions of the Courts of Appeals may be cited by any court or person subject to the following restrictions, limitations, and exceptions:

> . . .
>
> (2) In all other situations [other than when considered controlling authority between the parties in the original action], each . . . unpublished opinion shall be considered persuasive authority on a court, including the deciding court, in the judicial district in which the opinion was rendered.

OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS 2. "An appellate court has an institutional interest in doctrinal consistency . . . and will hesitate to change a previously adopted position on a particular issue." WILLIAM H. WOLFF, JR. & JAMES A. BROGAN, APPELLATE PRACTICE AND PROCEDURE IN OHIO 50 (1993).

184. See *supra* note 151 and accompanying text for an enumeration of the factors.

185. OHIO REV. CODE ANN. § 2903.21.2 (Anderson 1993).

186. State *ex rel.* Baker v. Troutman, 553 N.E.2d 1053, 1055 (Ohio 1990) (form requiring surety to pay fines assessed upon conviction and not satisfied by the defendant violated federal and state prohibitions against excessive bail). An action for habeas corpus is a procedural vehicle for a petitioner to assert a constitutional right to reasonable and nonexcessive bail. Lewis v. Telb, 497 N.E.2d 1376 (Ohio Ct. App. 1985).

thorize pretrial detention, it is not in violation of Ohio's more restrictive constitutional bail provision.[187]

C. *Vagueness Challenges*

The void for vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments[188] of the United States Constitution.[189] Courts will construe the challenged statutes in conformity with the Ohio and United States Constitutions if the courts can find a reasonable construction that is consistent with constitutional requirements.[190] Courts, therefore, afford legislative enactments a presumption of constitutionality.[191] The party bringing a constitutional challenge bears the burden of overcoming this presumption of constitutionality.[192] To determine vagueness, courts apply a three-pronged test.[193]

1. Notice and Fair Warning

To withstand a vagueness challenge, a statute must fairly warn persons of ordinary intelligence of what conduct the statute prohibits.[194] The Ohio legislature has not drafted the anti-stalking law to apply to a particular suspect class,[195] and since it may be applied to anyone in society who violates its provisions, it is more susceptible to a

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187. *See supra* notes 48-51 and accompanying text (discussing Ohio's bail provision).

188. Although there are two separate Due Process Clauses, Ohio's anti-stalking statute only implicates the Fourteenth Amendment's Due Process Clause. The Fifth Amendment's Due Process Clause, by express language, only constrains federal government actions. The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. For the text of the Fourteenth Amendment's Due Process Clause, see *supra* note 58.

189. LAFAVE & SCOTT, *supra* note 53, at 90-91.

190. State v. Hughes, No. 90-CA-54, 1992 Ohio App. LEXIS 1245, at *4 (Ohio Ct. App. 1992).

191. *Id.*

192. State *ex rel.* Rear Door Bookstore v. Tenth Dist. Court of Appeals, 588 N.E.2d 116, 122 (Ohio 1992) (adult bookstore attacked nuisance statute term of "lewdness" as unconstitutionally vague).

193. See *supra* notes 53-55 and accompanying text for a discussion of the three-pronged test that courts use to determine vagueness. The third prong of the void for vagueness test requires that the statute not unreasonably inhibit fundamentally protected freedoms. Because such a freedom is at issue in an overbreadth challenge, i.e. First Amendment issues, this prong will be discussed in the context of an overbreadth challenge, *infra* notes 257-72 and accompanying text.

194. Ohio v. McDonald, 509 N.E.2d 57, 59 (Ohio 1987); *Hughes*, 1992 Ohio App. LEXIS 1245, at *3 (1992) ("The statute must be so unclear that an individual of ordinary intelligence could not reasonably understand that certain acts were prohibited under the statute.").

195. See *supra* note 98 and accompanying text for the definition of "menacing by stalking."

vagueness challenge.[196] Additionally, a state criminal statute must contain ascertainable standards of guilt.[197]

The presence of a scienter[198] element in Ohio's anti-stalking statute weighs in favor of the statute passing the adequate notice and fair warning test.[199] The presence of a culpable intent requirement undermines the argument that application of the law "would be so unfair that it must be held invalid."[200] The United States Supreme Court has concluded that other statutes passed the notice test because a finding of scienter was a requirement.[201] Specifically, the Supreme Court has upheld statutes that proscribed certain conduct in which the actor "knowingly" engaged.[202] The Ohio anti-stalking provision that defines "menacing by stalking" uses "knowingly" to specify the type of conduct that is punishable.[203] Accordingly, an Ohio court will likely find that the anti-stalking statute does provide fair warning because the statute includes a scienter requirement.

Even though a statute must be understood by people of average intelligence in order to withstand a void-for-vagueness challenge, the proscribed conduct need not be defined with mathematical precision.[204] Courts do not require rigid phraseology because often the "conduct that is sought to be prohibited does not lend itself to concise specific

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196. LAFAVE & SCOTT, *supra* note 53, at 129.

197. *McDonald*, 509 N.E.2d at 59 (citing Winters v. New York, 333 U.S. 507, 515 (1948)) (declaring New York's obscene publications statute void because it not only punished for indecent and obscene publications, but also made innocent acts criminal).

198. Scienter is defined as "knowledge." BLACK'S LAW DICTIONARY 1345 (6th ed. 1990).

199. *See generally* Matthew J. Gilligan, Note, *Stalking The Stalker: Developing New Laws To Thwart Those Who Terrorize Others*, 27 GA. L. REV. 285 (1992). The presence of a scienter element, however, will not cure a statute that is vague. LAFAVE & SCOTT, *supra* note 53, at 130-31.

200. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) (upholding Interstate Commerce Commission regulation covering drivers of motor vehicles transporting flammables or explosives against vagueness challenge because regulation contained a culpable intent standard of "whoever knowingly violates").

201. *See* United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) (statutory language of Robinson-Putman Act prohibiting unreasonably low sale prices not void for vagueness since it was applied to sales made with the specific intent to destroy competition); *Boyce*, 342 U.S. 337 (culpable intent standard in regulation saves regulation from vagueness challenge); United States v. Ragen, 314 U.S. 513 (1942) (crime of willfully attempting to evade or defeat income taxes not unconstitutionally vague because of inclusion of "willful" requirement); *see generally* LAFAVE & SCOTT, *supra* note 53, at 130.

202. *See, e.g.*, *Boyce*, 342 U.S. at 342; *see generally* LAFAVE & SCOTT, *supra* note 53, at 130.

203. OHIO REV. CODE ANN. § 2903.21.1 (Anderson 1993).

204. *Criminal Law; Double Jeopardy - Multiplicitous Indictments - Vagueness*, MASS. L. WKLY., Oct. 5, 1992, at 1993

wording."[205] The language of Ohio's anti-stalking law could not be more specific because stalking can take many forms, from repeated telephoning,[206] to threatening, following,[207] or causing actual physical damage to person or property.[208] The behavior Ohio's anti-stalking law attempts to prohibit, therefore, cannot be concisely nor specifically defined.[209]

The anti-stalking statute sets out and defines a "pattern of conduct," which will lead to criminal liability.[210] The definition of pattern of conduct clearly states the minimum number of actions or incidents necessary to compose such a pattern.[211] The expression "pattern of conduct" has been upheld as constitutional in statutes with similar terminology in the face of vagueness challenges.[212]

The Wisconsin Supreme Court upheld similar language in the recent case of *Bachowski v. Salamone*.[213] The Wisconsin statute in question in *Bachowski* was the State's new harassment statute.[214] The statute criminalizes intentional harassment or intimidation when the actor "engages in a course of conduct or repeatedly commits acts which harass or intimidate [another] person and which serve no legitimate purpose."[215] The statute further defines a "course of conduct" to be "a

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205. State v. McDonald, 509 N.E.2d 57, 59 (Ohio 1987) ("The General Assembly cannot reasonably be required or expected to list every article or device and how it could be used in a criminal manner.").

206. *See, e.g.*, Rutti & Stainer, *supra* note 2, at 1B (Kent State University student charged with stalking after leaving harassing messages on his ex-girlfriend's door, placing harassing phone calls to her, and threatening her life).

207. Maureen M. Smith, *Four Abortion Rights Volunteers Arrested Under State's New Anti-Stalking Law*, MINN. STAR TRIB., July 12, 1993, at 5A (abortion rights volunteers arrested for following caravan of Operation Rescue recruits).

208. *See, e.g.*, Bean, *supra* note 23, at 6C (Ohio man charged with menacing by stalking after making threatening phone calls to ex-girlfriend, fighting with her, and kicking, denting, and crashing into her car in parking lots).

209. *See McDonald*, 509 N.E.2d at 59.

210. *See* OHIO REV. CODE ANN. § 2903.21.1 (Anderson 1993); *see also supra* note 98 and accompanying text.

211. "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. OHIO REV. CODE ANN. § 2903.21.1.

212. Upholding "pattern of corrupt activity" as not vague in the federal RICO statute, an Ohio court of appeals noted that since a pattern requires that predicate crimes must be related and pose a threat of continued criminal activity, an individual of ordinary intelligence would reasonably understand what is required of him under the law. State v. Hughes, No. 90-CA-54, 1992 Ohio App. LEXIS 1245, at *8 (Ohio Ct. App. 1992); *see also* United States v. Ashman, 979 F.2d 469, 487 (7th Cir. 1992) (upholding the use of "pattern of racketeering activity" in the federal RICO statute).

213. 407 N.W.2d 533 (Wis. 1987).

214. WIS. STAT. § 947.013(1m)(b) (1986).

215. *Id.*

pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose."[216]

The *Bachowski* case involved an escalating feud between neighbors.[217] The feud degenerated into the trading of obscene gestures and phone calls, as well as one neighbor standing on the other's driveway and yelling harassing remarks at the other neighbor.[218] Salamone, the offending neighbor, was enjoined from "harassing the petitioner, having any contact with petitioner or coming upon petitioner's premises" for two years.[219] Salamone contended that the harassment statute was void for vagueness because the "definition of harassment fails to state with sufficient definiteness or certainty the specific conduct which is proscribed by law."[220]

In upholding the statute, the *Bachowski* court rejected Salamone's contention that the statute failed the vagueness test.[221] The court noted that key words such as "harass" and "intimidate" were left undefined in the statute.[222] The court, however, found that "persons of ordinary intelligence" would understand that such behavior was more than merely bothersome, and that the definitions could be readily ascertained by consulting a dictionary.[223] The court also found that the inclusion of a requirement of a "course of conduct" and a requirement of "intent" sufficiently narrowed the meaning of the phrases and the statute.[224] Emphasizing that scientific precision is not required nor always possible, and that the Constitution does not require impossible standards, the *Bachowski* court concluded that the legislature had defined the conduct with sufficient specificity.[225]

Although similar in form to the Wisconsin statute, Ohio's anti-stalking law is different in two important respects. First, the Ohio statute's use of the phrase "pattern of conduct" is more clearly defined than the Wisconsin statute's use of the phrase "course of conduct." Section 2903.21.1 of the Ohio Revised Code actually sets out a minimum number of incidents that are necessary to compose such a pat-

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216. *Id.* § 947.013(1)(a).
217. *Bachowski*, 407 N.W.2d at 535.
218. *Id.* at 535-36.
219. *Id.* at 536.
220. *Id.* at 537.
221. *Id.* at 537-38.
222. *Id.* at 537.
223. *Id.* Consulting Webster's Third New International Dictionary, the court found that the terms were clear enough to understand. *Id.*
224. *Id.* at 537-38. The court also used legislative history to shed light on the purpose and meaning of the statute. *Id.* at 538.
225. *Id.* at 538-39. *But cf.* People v. Norman, 703 P.2d 1261, 1266 (Colo. 1985) (striking down a statute that criminalized engaging "in conduct or repeatedly commit[ting] acts that alarm or seriously annoy another person and that serve no legitimate purpose").

tern.[226] Although the Wisconsin statute only states that a course of conduct is a "series of events,"[227] the Wisconsin Supreme Court upheld the statute.[228] Since Ohio's anti-stalking statute is more specific than Wisconsin's harassment statute, the Ohio statute should also pass a vagueness challenge.

Second, Ohio's version satisfies the requirement of scienter by the inclusion of "knowingly" within the definition of stalking.[229] The Wisconsin statute was upheld without the inclusion of a scienter requirement.[230] A requirement of scienter increases a chance that a court will not find a statute vague.[231] Since Ohio's stalking statute includes a scienter requirement, it will likely be upheld.

The Ohio anti-stalking statute passes the notice and fair warning test since individuals of ordinary intelligence will be able to understand what conduct or activity is proscribed. Although the provision of notice and fair warning is an important aspect of the vagueness doctrine, in recent years the concern that law enforcement officials will arbitrarily enforce the law has grown.

2. Arbitrary Enforcement

Courts may also find a statute void for vagueness if the statute lends itself to arbitrary or discriminatory enforcement.[232] This aspect of the vagueness doctrine rests on the premise that the language of the statute may be so uncertain that arbitrariness in enforcement might not be detected.[233] Courts may, however, accept some arbitrariness so long as it is not pervasive and the judicial process is able to discover and rectify the arbitrary enforcement.[234]

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226. See *supra* note 211 for the statutory definition of "pattern of conduct."

227. WIS. STAT. ANN. § 947.013(1)(a) (West Supp. 1993).

228. *Bachowski*, 407 N.W.2d 533.

229. "No person by engaging in a pattern of conduct shall *knowingly* cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." OHIO REV. CODE ANN. § 2903.21.1(A) (Anderson 1993) (emphasis added).

230. *Bachowski*, 407 N.W.2d 533.

231. *See supra* notes 198-203 and accompanying text.

232. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (Florida vagrancy ordinance unconstitutionally vague since it encourages arbitrary and erratic arrests and convictions); Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) (Florida statute requiring teachers to swear in writing, upon threats of termination, that they never supported the Communist Party held void for vagueness); Jordan v. DeGeorge, 341 U.S. 223 (1951) (upholding a distilled spirits tax statute against vagueness challenge because "crime involving moral turpitude" did not lack sufficiently definite standards).

233. LAFAVE & SCOTT, *supra* note 53, at 132.

234. *See* Village of Hoffman Estates v. The Flipside, Hoffman Estates, 455 U.S. 489, 503 (1982) (in a failed vagueness challenge to an economic regulation, confusion over whether the ordinance applied to certain items was not a sufficient risk to jeopardize the entire ordinance); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971) (criminal provision is vague "because no

The risk of arbitrary enforcement is present in two possible situations. The first possibility of arbitrary enforcement is the risk of arbitrary application of the law by the police and prosecution.[235] Penal statues, however, are not void for vagueness merely because they grant some discretion to those who administer the law.[236] The Supreme Court has recently held that the most important aspect of the vagueness doctrine is the requirement that a legislature establish minimal guidelines to govern law enforcement.[237] The legislature can vest the responsibility of determining the exact boundaries of the law in those who administer the law.[238] Courts have struck down for vagueness, however, statutes that encouraged arbitrary enforcement by failing to describe with sufficient particularity what acts fall within a statute's prohibitions.[239]

Although the Ohio anti-stalking law does not lend itself to arbitrary enforcement, no statute is ever totally free of this danger. Ohio's statute could allow an innocent person to be arrested based on the signed statement of a jilted lover[240] or on the purposeful misinformation of a witness.[241] Yet the possibility for mistake will not likely render the Ohio statute unconstitutionally vague if the enforcement is at all reasonable and not arbitrary. Arbitrary enforcement will only arise if the police have unlimited discretion under the wording of the statute.[242] Unlimited police discretion is not present in Ohio's anti-stalking statute. The statute requires a "pattern of conduct," includes a scienter element, and requires a threat of physical harm or mental distress.[243]

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standard of conduct is specified at all"); *see generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 69 (1960).

235. LAFAVE & SCOTT, *supra* note 53, at 132.

236. LAFAVE & SCOTT, *supra* note 53, at 133.

237. Kolender v. Lawson, 461 U.S. 352, 358 (1983). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)).

238. *See* United States v. Petrillo, 332 U.S. 1, 6 (1947) (allowing the courts to determine the number of employees needed to perform radio broadcasting services); *see generally* LAFAVE & SCOTT, *supra* note 53, at 133.

239. *See Kolender*, 461 U.S. at 361 (loitering statute failed to clarify what was a "credible and reliable" identification).

240. In one instance, a neighbor, following an indelicate breakup, filed a complaint when the ex-lover rode down a shared driveway to retrieve mail. Seven, *supra* note 163, at B1.

241. The Ohio statute allows for the possible arrest of a person based solely on one person's allegations:

> [T]he execution of a written statement by a person alleging that an alleged offender . . . has committed the offense of menacing by stalking or aggravated trespass, constitutes reasonable ground to believe that the offense was committed and reasonable cause to believe that the person alleged to have committed the offense is guilty of the violation.

OHIO REV. CODE ANN. § 2935.03(B) (Anderson 1993); *see also* Seven *supra* note 163, at B1.

242. *Kolender*, 461 U.S. at 356.

243. OHIO REV. CODE ANN. § 2903.21.1.

Furthermore, the requirements of probable cause for an arrest under the anti-stalking statute also serve to constrain the actions of the authorities.[244]

The second possibility of arbitrary enforcement arises when the law is so ambiguous that a judge cannot give proper instructions to the jury.[245] When judges have no guidelines by which to sentence or instruct a jury, the law will likely fail a constitutional test.[246] Such a failure occurs because the threat of arbitrary enforcement rises to levels that are incompatible with the requirements of due process.[247] A court, therefore, may find a statute unconstitutionally vague when it "leaves judges and juries free to decide . . . what is prohibited and what is not prohibited in each particular case."[248]

The Ohio anti-stalking law has fixed standards in place to negate such a possibility of arbitrariness.[249] Although the inclusion of a scienter element may not be sufficient to save a statute from vagueness,[250] the Ohio statute's scienter element[251] mitigates against the conviction of people for innocent misconduct. If a statute is riddled with loosely defined terms, it will likely fail a vagueness challenge. Although the Ohio anti-stalking statute does contain some imprecise language,[252] the subject matter of the statute does not lend itself to more specific and exact wording.[253] A more narrowly drawn statute could create loopholes through which offenders could stalk their victims and go unpunished. The real losers in such a situation would be the victims who would be without means of effectively complaining or protecting themselves. The courts have upheld uncertain statutory language when greater specificity in language interferes with the practical administration of the law.[254]

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244. See *infra* notes 273-80 for discussion of probable cause and arrest.

245. *See* LAFAVE & SCOTT, *supra* note 53, at 133.

246. A Georgia magistrate expressed concern about the state's anti-stalking law because "we don't have any guidelines to interpret the law." Macon Morehouse, *New Anti-Stalking Law Questioned By Judge For Lack of Guidelines*, ATLANTA J. AND CONST., June 4, 1993, at G3.

247. *See* LAFAVE & SCOTT, *supra* note 53, at 132-33.

248. *See* Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966) (holding a statute that called for juries "to determine costs" as vague and violative of the Due Process Clause).

249. *See supra* text accompanying notes 243-44.

250. *See supra* notes 198-203 and accompanying text.

251. See *supra* notes 198-203 for a discussion of the scienter element.

252. For instance, no one really knows every type of activity that would constitute "stalking." As with the determination of what is "reasonable" under other statutes, it will be left to the courts to flesh out this definition over time.

253. *See supra* notes 204-12 and accompanying text.

254. *See, e.g.*, United States v. Kahriger, 345 U.S. 22, 34 (1953) (upholding constitutional validity of tax statute even though some wagering activities were excluded by interpretation); United States v. Petrillo, 332 U.S. 1, 6 (1947) (allowing court to determine how many employees are needed to perform "actual service" in broadcasting).

While some legal scholars believe that the language of the various state anti-stalking laws is too ambiguous and vague,[255] at least two state trial courts have rejected vagueness claims of their states' anti-stalking statutes.[256] To date, no stalking laws have been tested in the appellate courts of any of the forty-seven states that have enacted such laws.

D. Overbreadth

The overbreadth doctrine applies to cases in which the challenged law impedes on "sensitive areas of basic First Amendment freedoms,"[257] such as freedom of speech or expression.[258] The overbreadth of "a statute must not only be real, but be substantial as well, judged in relation to the statute's plainly legitimate sweep."[259] "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden area were marked.' "[260] Over-

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255. "The language of all these laws popping up from state to state is too ambiguous and vague." Kolarik, *supra* note 171, at 35 (quoting Professor Jonathon Turley); Debbie Salamone, *Anti-Stalking Law Violates Constitution, Attorney Claims*, ORLANDO SENTINEL TRIB., April 27, 1993, at B1.

256. *See, e.g.*, Charles Mount, *Stalking Law Survives First Test, Wording Isn't Too Vague*, CHI. TRIB., June 18, 1993, Northwest Sports Final Edition, at 4 (McHenry County Circuit Court finding the Illinois law adequately defines "following" and "surveillance"); *Criminal Law; Double Jeopardy - Multiplictious Indictments - Vagueness*, MASS. LAW. WKLY., July 5, 1993, at 23 (Superior Court of Norfolk, Massachusetts, finding that the anti-stalking law sufficiently warns reasonable persons of what conduct is illegal).

257. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (involving an anti-noise ordinance which was not overbroad since activity was only prohibited if it "materially disrupts classwork"). The third prong of the void for vagueness test requires that the statute not unreasonably inhibit fundamentally protected freedoms. Because such a freedom is at issue in an overbreadth challenge, i.e., First Amendment issues, this prong will be discussed in the context of an overbreadth challenge, *infra* notes 258-72 and accompanying text.

258. State *ex rel.* Rear Door Bookstore v. Tenth Dist. Court of Appeals, 588 N.E.2d 116, 124 (Ohio 1992) (involving adult bookstore adjudged as a "nuisance" and bookstore's failed attempt to claim that the nuisance statute materially impinged on rights of free expression); see *supra* note 63 for text of First Amendment.

259. Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

260. *Grayned*, 408 U.S. at 109 (quoting Baggett v. Bullitt, 372 U.S. 360, 372 (1964)). In the "sensitive First Amendment field," relatively minor restraints may have a chilling effect on an important constitutional right. Missouri Portland Cement Co. v. Cargill, Inc., 418 U.S. 919, 919-20 (1974) (Douglas, J., dissenting). "The essential vice of an overbroad law is that by sweeping protected activity within its reach it deters citizens from exercising their protected constitutional freedoms . . . ." Bachowski v. Salamone, 407 N.W.2d 533, 539 (Wis. 1987).

breadth challenges have been raised against Florida's[261] and Washington's[262] anti-stalking laws.[263]

Most recently, the stalking laws of several states have been used, or have been proposed for use, against abortion activists and protestors.[264] Florida, for instance, has altered its anti-stalking law so that the law can be used against abortion clinic blockaders.[265] Such controversial applications of anti-stalking statutes will be a prime target for First Amendment attacks on the laws.

The overbreadth doctrine will not be used to nullify a statute because it could possibly be used in some situations to restrict First Amendment rights.[266] Rather, the court must find a statute to be substantially overbroad prior to nullifying a statute.[267] Thus, courts will not invoke overbreadth when a limiting construction has been placed, or could be placed, on the challenged statute.[268]

Doubtless, abortion activists and protestors may use Ohio's anti-stalking law as a weapon in the abortion conflict, just as other states' anti-stalking or harassment laws have been used in the past. Indeed, no provision exists under the definition of "menacing by stalking" that prohibits the statute from being wielded against any type of protestors, demonstrators, or labor strikers.[269] The Ohio statute, however, does not explicitly set out to limit the exercise of speech or association, nor does it attempt to regulate "time, place, or manner" of expressions.[270] As such, a limiting construction could be placed on the statute, thereby saving it from an overbreadth challenge.

A provision preventing use of the Ohio statute against "constitutionally protected activities"[271] would serve as a valid limiting condition

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261. Defense attorneys in Florida have argued that the Florida anti-stalking law, FLA. STAT. ANN. § 784.048 (West Supp. 1993), has a "chilling effect" on First Amendment rights. Salamone, *supra* note 255, at B1 (referring to abortion protestors, a Seminole County Public Defender argued that the law has such a chilling effect since it could turn innocent behavior into a crime).

262. WASH. REV. CODE § 9A.46.020 (Supp. 1993); *see* Seven, *supra* note 163, at B1.

263. *See* FLA. STAT. ANN. § 784.048 (West Supp. 1993); WASH. REV. CODE § 9A.46.020 (Supp. 1993).

264. *See, e.g.*, Smith, *supra* note 207, at 5A (abortion rights volunteers charged under Minnesota's stalking statute for tracking an Operation Rescue group).

265. Rorie Sherman, *Focus of Abortion War Shifts to the States*, NAT'L. L.J., Apr. 19, 1993, at 10.

266. *See supra* notes 63-77 and accompanying text.

267. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

268. *Id.* at 613.

269. See *supra* note 98 for the definition of "menacing by stalking."

270. These regulations limit the time, place, or manner of speech irrespective of the content of the speech. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 288 (1984).

271. CAL. PENAL CODE § 646.9 (West Supp. 1993) ("constitutionally protected activity is not included within the meaning of 'course of conduct'").

on the statute's application.[272] Such a limiting condition would presumptively satisfy the requirements for imposition of the alternative remedy of the overbreadth doctrine. Thus, any use of the statute against such protected activity could be cured on a case-by-case basis.

E. Warrantless Arrest

The Ohio anti-stalking law gives police the authority to arrest suspected offenders without a warrant.[273] Such an arrest is constitutionally valid when the officers had probable cause at the moment of the arrest.[274]

> Probable cause needed to make a warrantless arrest constitutionally valid, requires that the arresting officer, at the moment of the arrest, have sufficient information, based on the facts and circumstances within his knowledge or derived from a reasonably trustworthy source, to warrant a prudent individual in believing that an offense had been committed by the accused.[275]

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272. Other than California, sixteen other state statutes contain terminology limiting the application of the anti-stalking laws. *See* ALA. CODE § 13A-6-92(c) (Supp. 1993); ARK. CODE ANN. § 5-71-229 (Michie 1993); DEL. CODE ANN. tit. 11, § 1312A(b)(2) (Supp. 1992); FLA. STAT. ANN. § 784.048 (West Supp. 1993); IDAHO CODE § 18-7905 (Supp. 1993); 1993 Kan. Sess. Laws 291; KY. REV. STAT. ANN. § 508.130 (Baldwin Supp. 1993); LA. CODE CRIM. PROC. ANN. art. 14:40.2 (West Supp. 1992); MICH. COMP. LAWS ANN. § 750.411h (West Supp. 1993); MISS. CODE ANN. § 97-3-107 (Supp. 1993); NEB. REV. STAT. § 28-311.03 (Supp. 1992); N.J. STAT. ANN. § 2C:12-10 (West Supp. 1993); OKLA. STAT. ANN. tit. 21, § 1173 (West Supp. 1994); R.I. GEN. LAWS § 11-59-2 (Supp. 1993); S.C. CODE ANN. § 16-3-1070 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 22-19A-1 (Supp. 1993).

273. "When there are reasonable grounds [for believing] that an offense of . . . menacing by stalking . . . or an offense of aggravated trespass . . . has been committed, . . . a police officer . . . may arrest without a warrant any person whom he has reasonable cause to believe is guilty of the violation and detain them until a warrant can be obtained." OHIO REV. CODE ANN. § 2935.03(B) (Anderson 1993).

Ohio is not the only state with such a provision in its anti-stalking law. The Florida anti-stalking law also contains a provision that allows police to arrest a suspected stalker without either obtaining a warrant or apprehending the alleged offender in the act of committing the offense. "Any law enforcement officer may arrest, without a warrant, any person he or she has probable cause to believe has violated the provisions of this section." FLA. STAT. ANN. § 784.048(5) (West Supp. 1993); *see also* Resnick, *supra* note 11, at 3 (noting the controversial provision has raised objections among the Florida criminal defense bar).

274. Beck v. Ohio, 379 U.S. 89, 91 (1964) (probable cause not present because the prosecution failed to show with specificity what the informers actually said and why the officer thought the information was credible); see *supra* notes 78-91 for discussion of probable cause.

275. State v. Strickland, No. 58032, 1991 Ohio App. LEXIS 308, at *5 (Ohio Ct. App. Jan. 24, 1991) (citations omitted).

Although, this is an objective test,[276] the Ohio General Assembly has provided a mechanism by which law enforcement officers are statutorily given reasonable cause to arrest an alleged stalker.[277]

An important concern that arises is that police officers have significant discretion in determining whether or not to arrest a suspect.[278] Provided police use common sense and make reasonable efforts to corroborate the complaint prior to taking action, the statute will survive a challenge alleging that it is arbitrary.[279] If law enforcement officials place absolute reliance on statements of biased parties who may file fraudulent complaints, the application of the statute becomes suspect. The warrantless arrest provision, however, can be taken as a remedy for situations in which the police must act quickly to keep the stalker from further harming or traumatizing the victim. Delays in procuring a court-ordered warrant could prove fatal to the victim. In such cases, sufficient probable cause would allow authorities to move quickly to intervene, take the stalker into custody, and protect the potential victim from harm. As a final check on arbitrariness, the courts would be available as a decisive restraint on the police to determine if all of the proper procedures were followed.[280]

V. CONCLUSION

Ohio State Representative Madeline Cain sponsored the legislation which is now Ohio's anti-stalking law in an attempt provide a comprehensive system for protecting the victims of stalking and harassment. Since there have been a number of arrests and convictions under the anti-stalking statute, it is likely that Representative Cain has been successful. The statute appears to be working and death is no longer the only relief for victims of stalking. Additionally, although the statute may be subject to constitutional challenges based on excessive bail, vagueness, overbreadth, and unlawful seizure for lack of probable cause (or warrantless arrest), the statute still passes constitutional muster.

With the minor addition of the limiting condition within the definition of stalking so that it cannot be used against "constitutionally protected activities," the Ohio anti-stalking law can serve competently for years to come. Not only is the law protective of victims through the

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276. State v. Kuehne, Nos. C-910454, C-910455, 1992 Ohio App. LEXIS 2128, at *9 (Ohio Ct. App. Apr. 22, 1992).

277. OHIO REV. CODE ANN. § 2935.03(B) (Anderson 1993); *see also supra* text accompanying note 111.

278. *See* Gilligan, *supra* note 199, at 325-28.

279. This would prevent situations such as that which happened to David Patrick Hague, who was mistakenly charged with stalking in Florida because the authorities failed to validate the allegations of the complainant. *See* Seven, *supra* note 163, at B1.

280. *See supra* notes 87-91 and accompanying text.

use of the anti-stalking protection orders and the graduated punishment scheme, it is also helpful in solving the problems of the stalker through the use of mental examinations and treatment.

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