Is Georgia's Stalking Law Unconstitutionally Vague?

I. INTRODUCTION

In 1989 Robert Bardo, an obsessed fan, shot and killed actress Rebecca Schaefer after stalking her for two years.[1] As a result of this and several other stalking related deaths, the California Legislature, in 1990, created the first stalking law in the United States.[2] Now, forty-eight states and the District of Columbia have created laws that make stalking a crime.[3] Even though many states have made stalking a crime, "the laws have not been widely tested and are under constitutional challenge in several states."[4] For instance, Florida's stalking law[5] is one of the more recent statutes that state courts have held to be unconstitutional. Three Florida judges ruled that the state's stalking law is unconstitutional because "the statute is too loosely worded to clearly interpret what conduct is prohibited."[6] In her ruling, Judge Debra Behnke said that the Florida Legislature created a statute with the words "harass" and "emotional distress" and did not define the meaning of these words with particularity.[7]

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1. Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 992 (1993).

2. *Id.* at 992.

3. *A Stalking Statute*, WASH. POST, Sept. 17, 1993, at A20.

4. George Lardner Jr., *Anti-Stalking Laws Proliferate; Several Face Court Challenges*, WASH. POST, Apr. 30, 1993, at A2.

5. FLA. STAT. ANN. § 784.048 (West 1993).

6. Diane Hirth, *Stalking law trips—Several Florida judges decide statute is too vague to convict harassers*, CHI. TRIB., Sept. 5,1993, at 12.

7. *Id.*

> For now, the rulings that the law is unconstitutional apply only in the courtrooms of the judges who issued them. Other Florida judges continue trying and sentencing people for stalking crimes.
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> Controversy over the stalking law—and the uncertainty over how each judge will rule—is likely to fester until the subject comes before the Florida Supreme Court. Atty. Gen. Bob Butterworth's office is trying to expedite that process, but it could

Last session, Georgia's General Assembly passed a law making stalking a crime. Georgia's stalking law became effective on April 27, 1993.[8] According to Georgia's provision against stalking:

> (a) [a] person commits the offense of stalking when he or she follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person. For the purpose of this article, the term "place or places" shall include any public or private property occupied by the victim other than the residence of the defendant. For the purposes of this article, the term "harassing and intimidating" means a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose. This Code section shall not be construed to require that an overt threat of death or bodily injury has been made.
> (b) Except as provided in subsection (c) of this Code section, a person who commits the offense of stalking is guilty of a misdemeanor.
> (c) Upon the second conviction, and all subsequent convictions, for stalking, the defendant shall be guilty of a felony and shall be punished by imprisonment for not less than one year nor more than five years.[9]

Georgia's stalking law will most likely face a constitutional challenge on the basis that it is too vague. As the Georgia law made its way through the General Assembly, Senator Pam Glanton "passed out copies of a court ruling that she said voided similar Florida legislation as unconstitutionally vague" and said that Georgia's law was even more vague than Florida's.[10] This Comment will discuss whether Georgia's newly enacted stalking statute can survive a constitutional attack based on vagueness.

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be a year or more until the state's high court decides.

Id.

8. O.C.G.A. §§ 16-5-90 to -93 (Supp. 1993).

9. *Id.* § 16-5-90. *Id.* § 16-5-91 provides for the offense of aggravated stalking. Under *id.* § 16-5-92:

> The provisions of Code Sections 16-5-90 and 16-5-91 shall not apply to persons engaged in activities protected by the Constitution of the United States or of this state or to persons or employees of such persons lawfully engaged in bona fide business activity or lawfully engaged in the practice of a profession.

Id. § 16-5-93 recognizes the right of the victim to notification of the release or escape of the stalker.

10. David Pendered, *Georgia Legislature—Anti-stalking bill passes despite opposition from abortion foes*, ATLANTA JRL. AND CONST., Mar. 23, 1993, at D3.

II. THE BASIC DOCTRINE OF VAGUENESS

"[No] State [shall] deprive any person of life, liberty, or property, without due process of law."[11] Under basic due process principles, if a legislature does not clearly define an enactment's prohibitions, the enactment is void for vagueness.[12] When people are required to live under a rule of law, they "'are entitled to be informed as to what the State commands or forbids.'"[13]

Federal courts, when hearing a facial challenge to a state law, must consider the limiting instructions that state courts or enforcement agencies have proffered.[14] In *Kolender v. Lawson*,[15] petitioner facially challenged a California statute requiring persons who loiter or wander to provide a "credible and reliable" identification when requested by a peace officer.[16] The California Court of Appeals defined credible and reliable identification as "'carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.'"[17] When determining whether the statutory language was unconstitutionally vague, the United States Supreme Court viewed the statute as it was drafted and construed by the state court.[18] The Supreme Court held that "the interpretation by [a state court] puts [those] words in the statute as definitely as if it had been so amended by the legislature."[19]

In order to survive a vagueness challenge, the statute must define the "offense with sufficient definiteness that ordinary people can understand what conduct is prohibited . . . ."[20] The Court usually upholds statutes as not unconstitutionally vague if the statute uses words having well known technical or special meanings or settled common law meanings, or if the text of the statute or the subject matter of the statute affords some standard.[21] In *Connally v. General Construction Co.*,[22] plaintiff

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11. U.S. CONST. amend. XIV, § 1.
12. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
13. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).
14. Kolender v. Lawson, 461 U.S. 352, 355 (1983) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)).
15. 461 U.S. 352 (1983).
16. *Id.* at 353.
17. *Id.* at 357 (quoting People v. Solomon, 33 Cal. App. 3d 429, 438 (1973)).
18. *Id.* at 358.
19. Winters v. New York, 333 U.S. 507, 514 (1948).
20. 461 U.S. at 357.
21. Connally v. General Constr. Co., 269 U.S. 385, 391-92 (1926).
22. *Id.* at 385.

brought suit to enjoin officers from enforcing an Oklahoma statute providing "'[t]hat not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers . . .'" on the basis that it was unconstitutionally vague.[23] The Court held that the statute was fatally uncertain because "the words 'current rate of wages' do not denote a specific or definite sum, but minimum, maximum, and intermediate amounts, indeterminately, varying from time to time and dependant upon the class and kind of work done, the efficiency of the workmen, etc . . . ."[24]

Although the lawmaking body must define the offense in a statute with reasonable certainty, this does not mean that it cannot use terms that are adequately interpreted by common usage and understanding.[25] The petitioner in *Boyce Motor Lines, Inc. v. United States*[26] was charged with violating the Interstate Commerce Commission's regulation that provided "'[d]rivers of motor vehicles transporting any explosive . . . shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares . . . .'"[27] In upholding the regulation as not unconstitutionally vague, the Supreme Court recognized that it was "the product of a long history of regulation of the transportation of explosives and inflammables" and that the trucking industry had participated in the drafting of the regulation.[28]

The statute must also define the criminal offense "in a manner that does not encourage arbitrary and discriminatory enforcement."[29] The vagueness doctrine's requirement that the lawmaking body, when drafting a law, provide guidelines for law enforcement is more important than the actual notice element of the doctrine.[30] "A vague law unpermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[31] Because the statute in *Kolender* contained no standard for an individual to use to determine what he or she could do to provide a reliable and credible identification, it gave complete discretion to the police in determining if

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23. *Id.* at 388 (quoting Okla. Stat. § 7255 (1921)).
24. *Id.* at 393.
25. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952).
26. *Id.* at 337.
27. *Id.* at 338-39 (quoting 18 U.S.C. § 835 (repealed Pub. L. No. 96-129, title II, § 216(b), Nov. 30, 1979, 93 Stat. 1015)).
28. *Id.* at 341-42.
29. Kolender v. Lawson, 461 U.S. 352, 357 (1983).
30. *Id.* at 357-58.
31. Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

the individual had met the requirements of the statute.[32] The Supreme Court held that since the statute encouraged arbitrary enforcement by not providing with sufficient particularity what an individual must do to comply with the law, it was unconstitutionally vague.[33]

The type of statute involved may determine the amount of vagueness that the Constitution will permit.[34] "[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses . . . can be expected to consult relevant legislation in advance of action."[35] When a court hears a facial challenge on the vagueness of a business statute, its primary concern should be whether the law fairly warns of that which it proscribes.[36] In *United States v. National Dairy Products Corp.*,[37] the issue for resolution was whether the section of the Robinson-Patman Act[38] that made it a crime to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor was too vague.[39] The Supreme Court held that the vagueness analysis in this type of case differed from that in a case involving the First Amendment.[40] Here the Court may consider the statute not only on its face but also as applied to the facts of the case.[41]

The Court is also more tolerant of statutes with civil penalties.[42] The Court held in *Winters v. New York*[43] that "[t]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."[44]

The most important factor regarding the requisite constitutional clarity is whether the statute threatens to chill the exercise of constitutional rights.[45] "Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone'. . . than if the boundaries of the forbidden

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32. 461 U.S. at 358.
33. *Id.* at 361.
34. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).
35. *Id.* at 498 (footnotes omitted).
36. *Id.* at 503.
37. 372 U.S. 29 (1963).
38. 15 U.S.C. § 13(a) (1936).
39. 372 U.S. at 29.
40. *Id.* at 36.
41. *Id.*
42. *Village of Hoffman Estates*, 455 U.S. at 498-99.
43. 333 U.S. 507 (1948).
44. *Id.* at 515.
45. 455 U.S. at 499.

areas were clearly marked."[46] When a statute is capable of infringing on rights protected by the First Amendment, the vagueness doctrine requires a greater degree of certainty.[47] In cases arising under the First Amendment, the Court is concerned with the statute's facial vagueness because facial vagueness may "deter constitutionally protected and socially desirable conduct."[48]

III. ANALYSIS

In order for Georgia's stalking law to survive a constitutional challenge for vagueness, it must "'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute'" and must not encourage arbitrary and erratic enforcement.[49] Several arguments can be made that Georgia's stalking law will withstand a vagueness challenge.

A. *The Constitution Does Not Require Impossible Standards*

"The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards."[50] All the Constitution requires is that the statutory language convey a sufficiently definite warning of the required conduct when measured by common understanding and practices.[51] In *United States v. Petrillo*,[52] respondent was charged with violating the Communications Act of 1934[53] by trying to coerce and compel a radio station to employ people that it did not need.[54] The respondent challenged the words "number of employees needed by such licensee" as unconstitutionally vague.[55] The Supreme Court held that Congress' language provided sufficient warning as to what conduct was

46. Grayned v. City of Rockford, 408 U.S. 104, 109 (1972) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964)).

47. Smith v. Goguen, 415 U.S. 566, 573 (1974).

48. United States v. National Dairy Prod. Corp., 372 U.S. 29, 36 (1963) (citations omitted).

49. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

50. United States v. Petrillo, 332 U.S. 1, 7 (1947).

51. Roth v. United States, 354 U.S. 476, 491 (1957).

52. 332 U.S. 1 (1947).

53. 47 U.S.C. § 506.

54. 332 U.S. at 3-4.

55. *Id.* at 4-5.

prohibited and adequate guidelines for judges and juries to administer the law in accordance with Congress' intent.[56]

In *Constantino v. State*,[57] appellant was indicted for the offense of using a telephone for the purpose of harassment.[58] The pertinent statutes provided: "[a] person who commits any of the following acts is guilty of a misdemeanor: . . . (e) Telephones another repeatedly, whether or not conversation ensues, for the purpose of annoying, harassing or molesting another or his family, or uses over the telephone language threatening bodily harm . . ."[59] and "[w]hoever by means of telephone communication in this State: . . . (b) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number . . . ."[60] Appellant argued that the statutory language was unconstitutionally vague.[61] The Supreme Court of Georgia held that the statutes could be understood by ordinarily intelligent people who wanted to avoid the violation.[62]

Georgia's stalking statute provides a definition for the terms "harassing" and "intimidating."[63] This definition provides guidance in the determination of what conduct is prohibited. Arguably, Georgia's stalking statute could withstand a vagueness challenge even if the further definition of those terms was not provided. In *Constantino* the statutes in question used the term "harass" but failed to provide a definition for that term.[64] Nonetheless, the Supreme Court of Georgia held that people of ordinary intellect could understand the statute and, therefore, avoid violating it.[65] Since Georgia's Supreme Court has held that the term "harass" was not unconstitutionally vague when used, but not defined, in a statute prohibiting the use of the telephone for the purpose of harassment, one reasonably could argue that the term is not unconstitutionally vague in Georgia's stalking statute, especially when a further definition of the term is provided. "[C]ondemned to the use of

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56. *Id.* at 7.
57. 243 Ga. 595, 255 S.E.2d 710, *cert. denied*, 444 U.S. 940 (1979).
58. 243 Ga. at 596, 255 S.E.2d at 712.
59. *Id.* at 597, 255 S.E.2d at 713 (quoting GA. CODE ANN. § 26-2610 (Harrison 1933)) (current version at O.C.G.A. § 16-11-39 (1992)).
60. *Id.* (quoting Ga. Code Ann. § 104-9901 (Harrison 1933)) (current version at O.C.G.A. § 46-5-21 (1992)).
61. *Id.*
62. *Id.*
63. O.C.G.A. § 16-5-90(a) (Supp. 1993).
64. 243 Ga. at 597, 255 S.E.2d at 713 (1979).
65. *Id.* at 597, 255 S.E.2d at 713.

words, we can never expect mathematical certainty from our language."[66]

The plaintiffs in *CISPES (Committee in Solidarity with People of El Salvador) v. FBI*[67] challenged the constitutionality of a statute that made "it a crime to coerce, threaten, intimidate, harass, or obstruct or attempt to do the same to certain protected foreign officials."[68] The court held that the provisions are not unconstitutionally vague and that, since these terms are widely used and understood in statutes, a lawmaker does not need to define words of common usage so long as they are not used as terms of art.[69] Since the terms "harass" and "intimidate" in Georgia's stalking statute are not used as terms of art, a court could hold that the statute is not unconstitutionally vague on the grounds that the terms are widely used and understood in statutes.

In *Bachowski v. Salamone*,[70] appellant challenged the constitutionality of Wisconsin's "harassment injunction" statute.[71] Appellant contended that the statutory definition of harassment was unconstitutionally vague.[72] The Wisconsin statute defined harassment as "'[e]ngaging in a course of conduct or repeatedly committing acts which harass or intimidate another person and which serve no legitimate purpose.'"[73] The Wisconsin Supreme Court held that, although the statute did not expressly define "harass" and "intimidate," an ordinarily intelligent person could understand that "these words clearly connote more than mere bothersome or annoying behavior."[74] In upholding the statute, the court held that the statute's requirement that the harassing or intimidating acts must be a course of conduct or repeated acts further narrowed the meaning of "harass" and "intimidate." Georgia's stalking statute provides that the terms "harassing" and "intimidating" be a "course of conduct directed at a specific person."[75] The requirement in Georgia's legislation that a course of conduct exist may also further serve to narrow the meaning of "harassing" and "intimidating" thus enabling the statute to withstand a vagueness challenge.

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66. CISPES (Committee in Solidarity with People of El Salvador) v. FBI, 770 F.2d 468, 477 (5th Cir. 1985) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).
67. 770 F.2d 468.
68. *Id.* at 472.
69. *Id.* at 476-77.
70. 407 N.W.2d 533 (Wis. 1987).
71. *Id.* at 534; WIS. STAT. § 813.125 (1985).
72. 407 N.W.2d at 537.
73. *Id.* (quoting WIS. STAT. § 813.125(1)(b) (1985)).
74. *Id.*
75. O.C.G.A. § 16-5-90(a) (Supp. 1993).

B. *The Knowledge Element of the Statute Provides Further Definition of the Conduct*

> [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of the law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.[76]

An element of intent provides further definition of conduct.[77] In *National Dairy*, defendants were charged with violating section three of the Robinson-Patman Act,[78] which makes it a crime to sell goods at "'unreasonably low prices for the purpose of destroying competition or eliminating a competitor.'"[79] The Court held that the Act listed as elements not only the intent to achieve a result but also the intent to do the act.[80] Therefore, the statute afforded a sufficiently specific warning.[81]

In his vagueness challenge against Georgia's statutes that made it a crime to use the telephone for the purpose of harassment, appellant in *Constantino* argued that "a defendant telephoning someone could never know if he is harassing that person since what may be harassing to that person might not be harassing to another, i.e. the defendant will never know if he is committing a crime or not."[82] The court rejected the defendant's argument because the victim's subjective view on harassment was not the point in issue.[83] The court held that "the point is that the defendant telephones intending to harass and the defendant certainly knows if he is doing that."[84]

In *United States v. Lampley*,[85] appellant challenged the constitutionality of a federal statute that made it a crime to "make a telephone call . . . with intent to annoy, abuse, threaten, or harass any person at the

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76. Screws v. United States, 325 U.S. 91, 102 (1945).
77. United States v. National Dairy Prod. Corp., 372 U.S. 29, 35 (1963).
78. 15 U.S.C. § 13(a) (1973).
79. 372 U.S. at 29 (quoting 15 U.S.C. § 13(a) (1973)).
80. *Id.* at 35.
81. *Id.*
82. 243 Ga. 595, 598, 255 S.E.2d 710, 713 (1979).
83. *Id.* at 598, 255 S.E.2d at 713.
84. *Id.*
85. 573 F.2d 783 (3d. Cir. 1978).

called number."[86] The court rejected this challenge because of the intent requirement in the statute.[87] The court recognized that a specific intent requirement "'may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.'"[88] "The appellant cannot claim confusion about the conduct proscribed where, as here, the statute precisely specifies that the actor must intend to perform acts of harassment in order to be culpable."[89]

Georgia's stalking statute contains a scienter element. The statute requires that the acts be done for the purpose of harassing and intimidating the other person.[90] The statute also defines "harassing and intimidating" as "a knowing and willful course of conduct directed at a specific person which causes emotional distress by placing such person in reasonable fear of death or bodily harm to himself or herself or to a member of his or her immediate family, and which serves no legitimate purpose."[91] Since the Georgia statute requires that the course of conduct be knowing and willful, a defendant cannot argue that the statute is unconstitutionally vague because it failed to warn him or her of what conduct was proscribed. It is unlikely the defendant will be able to argue with any merit that he or she did not understand what the statute prohibited when, as an element of the offense, the defendant must have acted willfully and with knowledge.

IV. CONCLUSION

Since the effective date of Georgia's stalking statute was April 27, 1993, and officials have begun to enforce it,[92] the statute will likely face a constitutional challenge in the near future on the basis that it is too vague. In order for the statute to survive this challenge, the courts must hold that the statute gives an ordinarily intelligent person fair notice of what the statute proscribes and that it does not encourage arbitrary and erratic enforcement.[93] Since the Constitution does not require impossible standards when legislatures draft statutes,[94] Georgia's statute may pass constitutional muster. Legislatures commonly use terms such as

86. *Id.* at 785 n.2 (quoting 47 U.S.C. § 223 (1991)).
87. *Id.* at 787.
88. *Id.* (quoting Screws v. United States, 325 U.S. 91, 101 (1945)).
89. *Id.*
90. O.C.G.A. § 16-5-90(a) (Supp. 1993).
91. *Id.*
92. *Id.* §§ 16-5-90 to -93.
93. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972).
94. United States v. Petrillo, 332 U.S. 1, 7 (1947).

"harass" in statutes, and they are commonly understood.[95] Also, Georgia's Supreme Court felt that people of ordinary intelligence could understand statutes that contained the word "harass" in the context of a prohibition against the use of the telephone for harassment.[96] Georgia's stalking statute provides that the acts constitute a course of conduct and that the course of conduct be carried out knowingly and willfully.[97] These two requirements provide further definition of the prohibited conduct and may assist Georgia's stalking statute in surviving a constitutional challenge for vagueness.

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95. CISPES (Committee in Solidarity with the People of El Salvadore) v. FBI, 770 F.2d 468, 476-77 (1985).

96. Constantino v. Georgia, 243 Ga. 595, 597, 255 S.E.2d 710, 713 (1979).

97. O.C.G.A. § 16-5-90(a) (Supp. 1993).