



Review of Stalking Laws (HB 1453/SB 1297)

September 29, 2015

Overview



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Study Authorization



- Two bills were introduced during the Regular Session of the 2015 General Assembly that would have amended Va. Code § 18.2-60.3, which is Virginia's stalking statute.
- House Bill 1453 (HB 1453) was introduced by Delegate Jackson Miller and Senate Bill 1297 (SB 1297) was introduced by Senator Donald McEachin.
- Both bills were left in the House Courts of Justice Committee, and a letter was sent to the Crime Commission, asking for them to be reviewed.

Background



- As introduced, both HB 1453 and SB 1297 used practically identical language, expanding the crime of stalking.

Background



- Currently, the elements of stalking are:
 - “on more than one occasion engages in conduct directed at another person with the intent to place, or when he knows or reasonably should know that the conduct places, that other person in reasonable fear of death, criminal sexual assault, or bodily injury to that other person or to that other person’s family or household member.”

Background



- The two bills would have added:
 - “or who on more than one occasion engages in conduct directed at another person with the intent to coerce, intimidate or harass, or when he knows or reasonably should know that the conduct coerces, intimidates, or harasses, that other person or that other person’s family or household member.”

Background



- House Bill 1453 would have added this language in a new, separate subsection of Va. Code § 18.2-60.3.
 - As a result, existing language excluding law enforcement and registered private investigators is repeated at the start of the new subsection.
- Senate Bill 1297, as introduced, would have added this language into existing subsection A of Va. Code § 18.2-60.3.
 - Therefore, the exclusionary language does not need to be repeated.

Background



- Senate Bill 1297 was substantially amended in the nature of a substitute in the Senate Courts of Justice Committee, before it passed the Senate.

Background



- The substitute version replaced the language of “engage in conduct with the intent to coerce, intimidate, or harass” with “on more than one occasion **maliciously** engages in conduct directed at another person that would cause a reasonable person **to suffer severe emotional distress with the intent to coerce, intimidate or harass**, or when he knows or reasonably should know that the conduct coerces, intimidates, or harasses, that other person.”

Analysis of HB 1453



- The new language of HB 1453 is very broad in terms of the activities that would constitute a crime of stalking.
- Under existing law, the defendant must intend that the victim fear death, sexual assault or bodily injury.
- Under the language of the bill, the defendant must only intend that the victim feel coerced, intimidated or harassed.

Analysis of HB 1453



- The word “harass” is not defined in the Code of Virginia.
- However, the phrase “to coerce, intimidate, or harass” is used in four existing criminal statutes:
 - Va. Code § 18.2-427 (use of profane, threatening, or indecent language over telephone);
 - Va. Code § 18.2-152.7:1 (computer harassment);
 - Va. Code § 18.2-186.4 (publishing a person’s identifying information); and,
 - Va. Code § 18.2-386.2 (unlawfully disseminating nude photos).

Analysis of HB 1453



- In Va. Code § 18.2-427 (use of profane, threatening, or indecent language over telephone) and Va. Code § 18.2-152.7:1 (computer harassment), there is a requirement that the illegal speech be obscene, or that a threat be communicated.
- These statutes have been upheld because they involve more than just speech.
 - Perkins v. Commonwealth, 12 Va. App. 7 (1991).
 - Barson v. Commonwealth, 284 Va. 67 (2012).

Analysis of HB 1453



- In Va. Code § 18.2-152.7:1 (unlawfully disseminating nude photos), there is a mens rea requirement of malice.
- Va. Code § 18.2-186.4 does not involve either threats, obscenity, or malice, but it is limited to a strictly defined action—publishing identifying information or identifying a person’s residence, with the intent to coerce, intimidate or harass.
 - Similar to Va. Code § 18.2-429, causing a telephone to ring with the intent to annoy another.

Analysis of HB 1453



- In HB 1453, no specific actions are given; any activity undertaken with the intent to harass would become a crime.
- In light of the Barson and Perkins decisions, the proposed language of HB 1453 might survive vagueness and overbreadth constitutional challenges.
- However, in individual cases (“as applied”), if the statute were applied to speech or other First Amendment activities, it likely would not be upheld.

Analysis of HB 1453



- It should also be noted that the General Assembly has, in Va. Code § 18.2-308.2:2, implied that stalking and harassing are different activities.
 - “subject to a court order restraining the applicant from harassing, stalking, or threatening...”
- It is slightly problematic to then have a Code section which says “stalking” means “to harass.”

Analysis of SB 1297



- The substitute version of SB 1297 also uses the phrase “coerce, intimidate, or harass.”
- It adds a mens rea of malice.
- It also requires that the conduct be such “that would cause a reasonable person to suffer severe emotional distress.”

Analysis of SB 1297



- The term “emotional distress” is used in civil cases; e.g., the tort of “intentional infliction of emotional distress.”
 - However, it is not used in criminal law in Virginia, in terms of defining a criminal act.
 - It is not defined in Title 18.2.
 - The phrase occurs there only once, in Va. Code § 18.2-419 (Declaration of policy against picketing dwelling places)—“the practice...causes emotional disturbance and distress to the occupants...”
- It is used only two other times in the Code of Virginia, in Title 38.2 (Insurance).
- The phrase “severe emotional trauma” is used twice in Title 63.2 (Welfare/Social Services).

Va. Charge and Conviction Data



- Staff requested data from the Virginia Criminal Sentencing Commission relating to the following charges and convictions:
 - Va. Code § 18.2-60.3 (A)- Stalking with intent to cause fear of death, assault or injury;
 - Va. Code § 18.2-60.3 (B)- Stalking, 2nd conviction within 5 years with a prior assault or protective order conviction; and,
 - Va. Code § 18.2-60.3 (C)- 3rd conviction/subsequent conviction within 5 years of first conviction.
- There were very few charges and convictions for Va. Code § 18.2-60.3(B):
 - General District Court: 1 charge in FY14 and 1 in FY15, but no convictions in FY14 or FY15.
 - Circuit and J&DR Courts: No charges or convictions in FY14-FY15.

Va. Charge and Conviction Data



Va. Code § 18.2-60.3(A) Stalking Data, FY11-FY15

Total Charges*	FY11	FY12	FY13	FY14	FY15**
General District Court	699	529	430	348	402
J&DR Court	316	271	254	213	217
Circuit Court	16	9	17	14	13
Total Convictions*	FY11	FY12	FY13	FY14	FY15**
General District Court	122	97	78	56	73
J&DR Court	59	53	60	34	37
Circuit Court	9	4	9	7	13

Source: Supreme Court of Virginia- General District, J&DR, and Circuit Court Case Management Systems data provided by Virginia Criminal Sentencing Commission. * Fiscal year in which charge was concluded.

** Data do not include charges that were still pending at the end of FY15. Note: J&DR data only includes adults whose charges were handled in J&DR.

Va. Charge and Conviction Data



Va. Code § 18.2-60.3(C) Stalking Data, FY11-FY15

Total Charges*	FY11	FY12	FY13	FY14	FY15**
General District Court	1	1	2	1	0
J&DR Court	0	0	0	0	0
Circuit Court	8	0	1	0	0
Total Convictions*	FY11	FY12	FY13	FY14	FY15**
General District Court	0	0	0	0	0
J&DR Court	0	0	0	0	0
Circuit Court	4	0	1	1	1

Source: Supreme Court of Virginia- General District, J&DR, and Circuit Court Case Management Systems data provided by Virginia Criminal Sentencing Commission. * Fiscal year in which charge was concluded.

** Data do not include charges that were still pending at the end of FY15. Note: J&DR data only includes adults whose charges were handled in J&DR.

Other States



- All fifty states have passed a law criminalizing stalking or stalking behavior.
 - Some states call this crime “harassment;” in a few of those states, “stalking” is a separate and more severe crime than harassment.
- Of the other 49 states, 19 are like Virginia in that they require an intent that the victim fear an act of violence; e.g., fear of death or bodily injury; fear of bodily restraint; fear of bodily injury or destruction of property.



- The remaining 30 states include some type of emotional harm or distress element:
 - Approximately 23 of these states allow a person to be found guilty of stalking if they engage in behavior that causes the victim to suffer “emotional harm” or “severe emotional distress.”
 - The remaining 7 states use language that indicates that more than “severe emotional distress” is required, even though a specific fear of bodily harm is not required.

Other States



- Washington requires a threat of bodily injury, or “maliciously do any other act which is intended to substantially harm the person threatened...with respect to his or her physical or mental health or safety.”
- Alabama requires that the course of conduct “cause material harm to the mental or emotional health of the other person.”

Other States



- Statutes in Michigan, Oklahoma, and Tennessee all require “harassment” of another that would cause a reasonable person to feel “terrorized, frightened, intimidated, threatened, harassed, or molested,” and that actually causes the victim to feel “terrorized, frightened, intimidated, threatened, harassed, or molested.”
 - “Harassment” is defined as conduct that would cause a reasonable person to suffer “emotional distress,” and that actually causes the person to suffer “emotional distress.”
 - “Emotional distress” is defined as “significant mental suffering or distress.”



- Minnesota defines stalking as conduct which causes the victim to feel “frightened, threatened, oppressed, persecuted, or intimidated.”

Other States



- Ohio allows a person to be guilty of stalking if he causes the victim to believe “that the offender will cause physical harm...or cause mental distress to the other person.”
 - However, “mental distress” is defined as “any mental illness or condition that involves some temporary substantial incapacity; or any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services,” whether or not the victim received such services.
- By way of comparison, in Utah, a person is guilty of stalking if he engages in a course of conduct that would cause a reasonable person “to suffer other emotional distress;” emotional distress being defined as “significant mental or psychological suffering, whether or not...counseling is required.”

Other States



- As a general observation, even if a state, by statute, requires a “fear of bodily injury,” egregious conduct can suffice for a conviction, even if the facts of the case indicate there was never any direct or indirect threat made.
- Example: In an Iowa case, State v. Evans, 671 N.W.2d 720 (2003), the defendant’s conviction was upheld after he repeatedly asked the victim if he could photograph her feet, discovered where she lived, made 8 or 9 calls to her residence, made three unannounced visits to her residence, and approached the victim several times in public.
 - Compare with Frazier v. Commonwealth, 2007 Va. App. LEXIS 285 (July 31, 2007), where a stranger repeatedly followed victim for a year, even after she told him she was married and twice moved to unpublished addresses.

Other States



- The statutory requirements for a stalking conviction in some states is remarkably broad.
- Texas allows a conviction if the defendant, on more than one occasion and pursuant to the same scheme or course of conduct, knowingly engages in conduct that causes the other person to feel “harassed, annoyed...embarrassed, or offended.”
- In New York, a person is guilty of harassment if he “repeatedly commits acts which alarm or seriously annoy such other person and serve no legitimate purpose.”
- In South Carolina, the crime of harassment consists of “a pattern of intentional, substantial, and unreasonable intrusion into the private life...that serves no legitimate purpose.”

Other States



- There are 4 general methods by which some states, which have broad definitions of “stalking” or “harassment,” limit the scope of the crime:
 - 8 states add a requirement that the activity “serve no legitimate purpose.”
 - 5 states specifically exempt picketing activities.
 - 9 states exempt “constitutionally protected activities,” or, in Illinois, “free speech or assembly that is otherwise lawful.”
 - 5 states specifically list the activities which can be the basis of stalking.

Other States



- Examples of listed activities:
 - “repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication.”
(Colorado)
 - “course of conduct involving pursuit, surveillance or non-consensual contact...without legitimate purpose.”
(Hawaii)
 - “repeated acts of nonconsensual contact.” (Idaho)
 - Threaten, follow, monitor or pursue, return to the property of another, repeatedly call or mail, knowingly make a false allegation against a peace officer.
(Minnesota)



- Examples of listed activities, continued:
 - Communicates in writing or by electronic communication a threat to inflict injury on any person, to any person’s reputation, or to any property; makes a telephone call anonymously or in offensively coarse language; makes repeated telephone calls or other electronic communication, with no purpose of legitimate conversation; or communicates a falsehood...and causes mental anguish. (North Dakota, crime of harassment).
 - NOTE: North Dakota also has a crime of stalking, which includes “unauthorized tracking of...movements or location through the use of a global positioning device or other electronic means that would cause a reasonable person to be frightened, intimidated or harassed and which serves no legitimate purpose.”

Other States



- Other states list examples of specific activities, but they are qualified by an expression such as “but not limited to.”
- Examples:
 - Repeatedly maintain a visual or physical proximity to a person; directly, or indirectly through third parties, or by any action or device, follow, monitor, observe, surveille, threaten, or communicate to or about a person; interfere with property; repeatedly convey verbal or written threats; make communication anonymously or at extremely inconvenient hours, or in offensively coarse language; strike, kick, shove, or other offensive touching. (New Jersey)



- Examples of specific activities, continued:
 - Repeated following; repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, email, sending messages via third party, sending letters or pictures; the intentional and repeated uninvited presence of the perpetrator at another person's home, workplace, school, or any place which would cause a reasonable person to be alarmed; or suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, sexual assault, or kidnapping. (Louisiana)



- Examples of specific activities, continued:
 - Threaten safety; follow, approach, or confront that person or a family member; appear in close proximity to, or enter the person's residence, place of employment, school, or other place where the person can be found; cause damage to residence or property; place an object on the person's property, either directly or through a third person; cause injury to a person's pet; or any act of communication. (New Hampshire; must be done with intent to cause fear for personal safety).

Other States



- Maryland requires that the defendant first have received “a reasonable warning or request to stop by or on behalf of” the victim.
- In North Dakota, attempting to contact or follow the victim after being given actual notice that the victim does not want to be contacted or followed is prima facie evidence that the defendant intended to stalk the victim.
- In Washington, it is prima facie evidence that the defendant intended to intimidate or harass.

Other States



- Maine includes the concept that the victim must reasonably suffer emotional distress or serious inconvenience.
 - “Serious inconvenience” is defined as “that person significantly modifies that person’s actions or routines in an attempt to avoid the actor or because of the actor’s course of conduct....includes, but is not limited to, changing a phone number, changing an electronic mail address, moving from an established residence, changing daily routines, changing routes to and from work, changing employment or work schedule or losing time from work or a job.”

Other States



- Summary:
 - All 50 states have enacted stalking laws.
 - 20 states, including Virginia, require the victim be placed in fear of bodily injury.
 - 30 states require only that the victim be placed in “emotional distress” or suffer “emotional harm.”
 - There are four general ways states statutorily limit the scope of conduct if causing “emotional distress” is sufficient to be convicted of stalking:
 - Specify that “legitimate activities” are excluded;
 - Specify that picketing is excluded;
 - Exempt “constitutionally protected activities;” and,
 - Specifically list activities that may constitute stalking.

Policy Options



- If Virginia were to modify its stalking statute along the lines of HB 1453 or SB 1297 as introduced (i.e., add “engage in conduct with the intent to coerce, intimidate, or harass”), it could narrow the scope of the new language in a number of ways.
 - Note: These options are NOT exclusive; all of them could be incorporated into the new statute.



- **Policy Option 1:** Should a mens rea of malice be added?
 - This was done in the substitute version of SB 1297.



- **Policy Option 2**: Should specific activities that constitute coercion or harassment be listed?
 - For example: *follow, place under surveillance, communicate after being asked to cease all contact, repeatedly return to property where victim is likely to be found, mail or place letters or other items on victim's property, etc.*
 - If this Policy Option is chosen, should the list of activities be exclusive, or only be a list of examples? (“including, but not limited to, the following...”)



- **Policy Option 3**: Should a *serious inconvenience* element be added?
 - Defined as “resulting in the person significantly modifying their actions or routines, including but not limited to changing a phone number, changing an electronic mail address, moving from an established residence, changing daily routines, changing routes to and from work, changing employment or work schedule, or losing time from work or a job?”



- **Policy Option 4**: Should constitutionally protected or otherwise legitimate activity be specifically excluded?
 - (1) “No legitimate purpose;” and/or,
 - (2) Constitutionally protected activity is excluded; and/or,
 - (3) Otherwise lawful picketing is excluded.



- **Policy Option 5**: Should an element of “severe emotional distress” be added, with the term further being defined as:
 - (1) “Significant harm to mental health;” and/or,
 - (2) “Any mental illness or condition that would normally require psychiatric treatment or counseling, whether or not received?”
 - This is similar to what was done in the substitute version of SB 1297.



Discussion