Virginia State Crime Commission

Stalking

2015

Stalking

Executive Summary

During the Regular Session of the 2015 General Assembly, House Bill 1453 (HB 1453)[1] and Senate Bill (SB 1297)[2] were introduced by Delegate Jackson Miller and Senator Donald McEachin, respectively. Both bills sought to expand the crime of stalking by amending Virginia Code § 18.2-60.3. As introduced, both bills used essentially identical language. Senate Bill 1297 was substantially amended in the nature of a substitute in the Senate Courts of Justice Committee before it passed the Senate. 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.

As presently codified in the Code of Virginia, in order to be guilty of the crime of stalking, the defendant must intend to place the victim, or know or reasonably should know that the victim would be placed in fear of death, sexual assault or bodily injury.[3] Under the proposed language of both HB 1453 and SB 1297, the defendant must only intend that the victim feel coerced, intimidated or harassed, and not necessarily fear death, sexual assault, or bodily injury. As amended, Senate Bill 1297 also adds a *mens rea* of malice to the new crime of making the victim feel coerced, intimidated or harassed, and requires that the conduct be such "that would cause a reasonable person to suffer severe emotional distress."

To examine how frequently the crime of stalking is charged in Virginia, and how often convictions occur, staff received data from the Virginia Criminal Sentencing Commission for the number of charges and convictions under subsections (A), (B) and (C) of Virginia Code § 18.2-60.3 for FY11 through FY15. Subsection (A) is the crime of misdemeanor stalking; subsection (B) is the crime of a second offense of stalking committed within five years of a previous conviction for stalking, if the defendant also has been convicted of (i) an assault offense involving the victim, (ii) domestic battery, or (iii) violation of a protective order; and, subsection (C) is the crime of a third or subsequent offense of stalking committed within five years of a previous conviction for stalking. The data revealed that there were few charges and convictions under subsections (B) and (C) during that time frame. Charges under subsection (A) were far more common during that time period; however, there was a significant difference between the number of charges and the number of convictions under this subsection at the district courts level, revealing that many misdemeanor stalking charges do not result in a criminal conviction.

All 50 states have enacted stalking laws, which criminalize otherwise lawful behavior, if it is done in such a manner as to cause fear of assault, or emotional distress, on the part of the victim. While all states have recognized the need to criminalize obsessive, repetitive behavior that results in a victim feeling legitimate feelings of terror, or even extreme stress, 20 states including Virginia have created their statutes in such a way that, at least according to their strict wording, the victim must feel they are at a reasonable risk of an actual assault. The other 30 states only require that the victim be placed in "emotional distress," or suffer "emotional harm."

In a review of the different statutory means of defining the crime of stalking, it was noted that three states include provisions related to the victim actually informing the stalker that further contact is not desired. In Maryland, in order to be convicted of the crime of harassment (a less serious charge

than stalking), the victim must have given the defendant a reasonable warning or request to stop. In North Dakota and Washington, contacting or following the victim after having been given notice that no further contact is desired, creates a *prima facie* inference that the defendant intended to stalk, or harass or intimidate, the victim. An approach similar to this was ultimately adopted as a recommendation by the Crime Commission.

At the September 2015 Crime Commission meeting, staff presented members of the Commission with five policy options in regard to amending the stalking statute. The options were not mutually exclusive and members were advised that a combination of the options could be incorporated into an amended statute. The members discussed the various options and directed staff to prepare draft legislation for the next meeting.

At the October 2015 Crime Commission meeting, staff presented members of the Commission with three draft versions of possible stalking legislation. The members of the Commission preferred the version that created this *prima facie* evidence concept: when the defendant receives actual notice that the victim does not wish to be contacted or followed, additional contact or following is evidence that the defendant intended to place the victim in reasonable fear of death, criminal sexual assault, or bodily injury. The members voted unanimously to include the phrase "or reasonably should have known that [the victim] was placed in reasonable fear of death, criminal sexual assault or bodily to himself or a family or household member." The Commission then voted unanimously to endorse this version with the amended language.

At the December 2015 Crime Commission meeting, staff presented members of the Commission with a single policy option based on the vote at the October 2015 Crime Commission meeting:

> **Policy Option 1:** Should a *prima facie* presumption be added to the stalking statute? If a defendant receives actual notice that the victim does not want to be contacted or followed, continued conduct means either that the defendant intended to place the victim, or reasonably should have known that the victim would be placed in, reasonable fear of death, sexual assault or bodily injury.

The Commission voted unanimously to approve Policy Option 1. Based on this policy option, Senator Bryce E. Reeves introduced SB 339 and Delegate Robert B. Bell introduced HB 752 during the 2016 Regular Session of the General Assembly. House Bill 752 was also patroned by Delegates Jennifer McClellan, Jason S. Miyares and Margaret B. Ransone. The two bills were identical as introduced.

After being amended in the Senate, and then re-amended in the House, SB 339 was passed by the legislature as introduced, and was signed into law by the governor. House Bill 752 was amended in the Senate; the House accepted those amendments, and the bill was enrolled. The governor proposed amending the enrolled bill to make it identical to the version that was originally introduced; this amendment was accepted by both the House and the Senate on April 20, 2016. Ultimately, both bills were enacted into law as introduced.

Background

During the Regular Session of the 2015 General Assembly, House Bill 1453 (HB 1453) and Senate Bill (SB 1297) were introduced by Delegate Jackson Miller and Senator Donald McEachin,

respectively. Both bills sought to expand the crime of stalking by amending Virginia Code § 18.2-60.3. Currently, the elements of stalking require that a person "…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."[4]

As introduced, both bills used essentially identical language, which read: "…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." House Bill 1453 would have added this new language to the statute in the form of a new subsection, while SB 1297 would have incorporated this language into the statute's existing subsection A, which is the subsection that defines the actual crime of stalking.[5]

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

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.

Analysis of HB 1453 and SB 1297

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 this bill, the defendant must only intend that the victim feel coerced, intimidated or harassed.

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: use of profane, threatening, or indecent language over the telephone;[6] unlawfully disseminating nude photos,[7] computer harassment;[8] and, publishing a person's identifying information.[9] A review of these four statutes reveals that all of them are more narrowly focused than the broad language contemplated by HB 1453.

In the statutes criminalizing use of profane, threatening, or indecent language over the telephone[10] and computer harassment,[11] 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; i.e., they have been upheld as they also involve threats or harassment.[12] For example, in the case of Perkins v. Commonwealth, the Court of Appeals of Virginia upheld Va. Code § 18.2-427, the statute criminalizing profane, threatening, or indecent language over the telephone, stating that the statute "proscribes conduct and not speech….the legislature intended to address harassing conduct as the evil to be proscribed…[t]his construction is not strained and removes protected speech from

within the statute's sweep."[13] Similarly, in Barson v. Commonwealth, the Supreme Court of Virginia upheld Va. Code § 18.2-152.7:1, the statute making it a crime to harass someone through the use of a computer, holding that the statute required both harassment and the use of obscene language.[14]

For the crime of unlawful dissemination of nude photos, there is a specific *mens rea* requirement of malice.[15] The crime of publishing a person's identifying information does not involve threats, obscenity, or malice, but it is limited to the strictly defined action of publishing identifying information or identifying a person's residence, with the intent to coerce, intimidate or harass.[16] This requirement is similar to the Virginia statute prohibiting a person from causing a telephone to ring with the intent to annoy another;[17] in both statutes, the precisely defined actions of the defendant serve to prevent the statute from being unconstitutionally vague.

In contrast with those four existing statutes, HB 1453 does not list any specific actions that are prohibited. Under the bill, 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 non-threatening speech or other First Amendment activities, it likely would not be upheld.

It should further be noted that the General Assembly has implied in the Virginia Code that stalking and harassing are different activities. The General Assembly has banned an applicant from purchasing a firearm from a dealer if that applicant is "…subject to a court order restraining the applicant from harassing, stalking, or threatening the applicant's child or intimate partner…"[18] While there would not be a direct contradiction in the Virginia Code if HB 1453 were passed, it would be slightly awkward to have one statute that implies harassing and stalking are different actions, and another statute that defines "to harass" as an action of "stalking."

Like HB 1453, the substitute version of SB 1297 uses the phrase "coerce, intimidate, or harass." Senate Bill 1297 also adds a *mens rea* of malice and it requires that the conduct be such "that would cause a reasonable person to suffer severe emotional distress."

The term "emotional distress" is used in civil cases, such as the tort of intentional infliction of emotional distress. However, this term is not used in Virginia in any criminal statute that defines a criminal act. The term "emotional distress" itself is not defined in Title 18.2 of the Code of Virginia. The term appears only once in Title 18.2, in the declaration of policy against the picketing of dwelling places, where it is noted that "…the practice of picketing before or about residences and dwelling places causes emotional disturbance and distress to the occupants…"[19]

The term "emotional distress" is used only two other times in the Code of Virginia. Both of these references appear in Title 38.2 (Insurance).[20] Likewise, the phrase "severe emotional trauma" is used five times throughout the Code of Virginia, but does not occur in Title 18.2.[21] It would be extremely problematic to create a new crime that involves the infliction of "emotional distress," without providing a clear definition of what that term specifically means.[22]

Virginia 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)—stalking 3rd conviction/subsequent conviction within 5 years of first conviction.

Analysis of the data found that there were few charges and convictions under Va. Code § 18.2-60.3(B). At the General District Court level there was one charge in FY14 and one charge in FY15 under this specific Code section. Neither of those charges resulted in a conviction. There were no charges or convictions under this specific Code section in the Circuit Court or the Juvenile and Domestic Relations District Court during FY14-FY15.

Data relating to charges and convictions for stalking under Va. Code § 18.2-60.3(A) and § 18.2-60.3(C) are detailed in Tables 1 and 2.

Table 1: 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.

Table 2: 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.

Legal Overview of Other States' Stalking Statutes

All 50 states have passed a law criminalizing stalking or stalking-like behavior. Some states refer to this crime as "harassment." In a few of those states, "stalking" is a separate and more severe crime than "harassment."

Upon review of the laws of the other 49 states, it was determined that 19 states are like Virginia, in that they require an intent that the victim fear an act of violence, such as a fear of death, bodily injury, bodily restraint or destruction of property.[23]

The other 30 states include some type of emotional harm or distress element as part of their stalking statutes, but allow a conviction even if the victim never felt physically threatened or was placed in fear of assault. Approximately 24 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."[24] The remaining six states use language that indicates that something more than "severe emotional distress" is necessary for a conviction, even though a specific fear of bodily harm is not required. For example, Alabama requires that the course of conduct "cause material harm to the mental or emotional health of the other person."[25] 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."[26] In all three of these states, "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;" in turn, "emotional distress" is defined as "significant mental suffering or distress."[27] The fifth state, Minnesota, defines stalking as conduct which causes the victim to feel "frightened, threatened, oppressed, persecuted, or intimidated."[28] Lastly, the sixth state, 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."[29] 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.[30]

As a general observation, even if a state, by statute, requires a "fear of bodily injury" for a stalking conviction, disturbing or egregious conduct can suffice, even though the facts of the case indicate there was never any direct or indirect threat made. For example, in an Iowa case, State v. Evans, the defendant's conviction was upheld after he repeatedly asked the victim if he could photograph her feet, discovered where she lived, made eight or nine phone calls to her residence, made three unannounced visits to her residence, and approached the victim several times in public.[31] This is similar to the case law in Virginia. In Frazier v. Commonwealth, a conviction for stalking was upheld even though the defendant never made any threats; the victim told the defendant she was married, was not interested in him, and was still forced to move to unpublished addresses on two occasions in an unsuccessful attempt to avoid his persistent following.[32]

The statutory requirements for a stalking or harassment conviction in some states are remarkably broad. For instance, 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."[33] In New York, a person is guilty of harassment in the second degree if he "repeatedly commits acts which alarm or seriously annoy such other person and serve no legitimate purpose."[34] 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."[35]

There are four general methods by which some states, which have broad definitions of "stalking" or "harassment," limit the scope of the crime:

(i) Eight states add a requirement that the activity "serve no legitimate purpose;"[36]
(ii) Five states specifically exempt picketing activities;[37]
(iii) Nine states exempt "constitutionally protected activities," or, in Illinois, "free speech or assembly that is otherwise lawful";[38] and,
(iv) Five states specifically list the activities which can be the basis of stalking.[39] Examples of specifically listed activities include: "repeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication;"[40] engage in a "course of conduct involving pursuit, surveillance or non-consensual contact…without legitimate purpose;"[41] engage in "repeated acts of nonconsensual contact;"[42] or threatens, "follows, monitors or pursues," "returns to the property of another," "repeatedly makes telephone calls, sends text messages," "repeatedly mails," or "knowingly makes a false allegation against a peace officer."[43] In North Dakota, the crime of harassment is specifically limited to communicating "in writing or by electronic communication a threat to inflict injury on any person, to any person's reputation, or to any property; "mak[ing] a telephone call anonymously or in offensively coarse language; mak[ing] repeated telephone calls or other electronic communication…with no purpose of legitimate conversation; or communicat[ing] a falsehood…and caus[ing] mental anguish."[44]

A number of other states similarly list examples of specific activities, but they are qualified by an expression such as "but not limited to," thus broadening the scope of the statute. For example, the crime of stalking in New Jersey is defined as "repeatedly committing harassment," a fairly broad term, or:

> repeatedly maintaining a visual or physical proximity to a person; directly, or indirectly through third parties, or by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about, a person, or interfering with a person's property; … repeatedly conveying...verbal or written threats.[45]

In Louisiana, stalking:

> shall include but not be limited to 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 to suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, sexual assault, kidnapping, or any other statutory criminal act…[46]

It also includes "the intentional and repeated following or harassing of another person," and "harassing" is defined as "the repeated pattern of verbal communications or nonverbal behavior without invitation which includes but is not limited to making telephone calls, transmitting electronic mail, sending messages via a third party, or sending letters or pictures."[47]

In New Hampshire, stalking involves engaging in a "course of conduct," that "may include, but not be limited to, any of the following acts or a combination thereof":

(i) Threatening the safety of the targeted person or an immediate family member.
(ii) Following, approaching, or confronting that person, or a member of that person's immediate family.
(iii) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found…
(iv) Causing damage to the person's residence or property…
(v) Placing an object on the person's property, either directly or through a third person, or that of an immediate family member.
(vi) Causing injury to that person's pet; or to a pet belonging to a member of that person's immediate family.
(vii) Any act of communication…[48]

Maine is unique among the states in that its stalking statute provides specific details in defining how the victim's life may have been affected. The victim must reasonably suffer emotional distress or serious inconvenience; "serious inconvenience" is defined as:

> that a 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. "Serious inconvenience" 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.[49]

It should be noted that three states include in their statutes either a requirement that the victim specifically tell the stalker or harasser that he or she wishes to be left alone, or allow a legal inference to be made if the stalker continues with his behavior after having received such a request. In Maryland, a conviction for harassment requires that the defendant first have received "a

reasonable warning or request to stop by or on behalf of" the victim.[50] 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.[51] In Washington, it is *prima facie* evidence that the defendant intended to intimidate or harass the victim if he continued to contact or follow after being given actual notice that the person did not want to be contacted or followed.[52]

Conclusion

All 50 states have enacted stalking laws, which criminalize otherwise lawful behavior, if it is done in such a manner as to cause fear of assault, or emotional distress, on the part of the victim. While all states have recognized the need to criminalize obsessive, repetitive behavior that results in a victim feeling legitimate feelings of terror, or even extreme stress, 20 states including Virginia have created their statutes in such a way that, at least according to their strict wording, the victim must feel they are at a reasonable risk of an actual assault. The other 30 states only require that the victim be placed in "emotional distress," or suffer "emotional harm."

Analyzing the 30 states which have a more expansive definition of what "stalking" is, it appears that there are four methods by which some of the states limit, by their statutes, the scope of what constitutes criminal behavior; i.e., make clear that stalking consists of more than causing embarrassment or mild distress due to social ineptness or awkward social interaction by the defendant. One way, utilized by eight states, is to simply state that the behavior of the defendant must "serve no legitimate purpose." Another five states exempt picketing activities from the crime of stalking. Nine states exempt "constitutionally protected activities." Five states specify, with fairly precise detail, the exact behaviors or activities that constitute stalking; e.g., following, communicating, repeatedly approaching at place of work or school, repeatedly calling or texting. Many states also use this concept of exactly defined behaviors, but then broaden it with verbiage so that stalking "includes, but is not limited to" a given list of activities.

In a review of the different statutory ways of defining the crime of stalking, it was noted that three states include provisions related to the victim actually informing the stalker that further contact is not desired. In Maryland, in order to be convicted of the crime of harassment (a less serious charge than stalking), the victim must have given the defendant a reasonable warning or request to stop. In North Dakota and Washington, contacting or following the victim after having been given notice that no further contact is desired, creates a *prima facie* inference that the defendant intended to stalk, or harass or intimidate, the victim. (An approach similar to this was ultimately adopted as a recommendation by the Crime Commission).

At the September 2015 Crime Commission meeting, staff presented members of the Commission with a variety of policy options in regard to amending the stalking statute. Staff suggested that if Virginia were to modify its stalking statute by adding the language contained in HB 1453 or SB 1297 as introduced, ("…engage in conduct with the intent to coerce, intimidate, or harass…"), the scope of the new language could be narrowed in a number of ways. Staff presented the following options to the Crime Commission, with the caveat that the options were not mutually exclusive and that a variety of the options could be incorporated into the amended 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?

Serious inconvenience could be 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?

Options could include: (i) "No legitimate purpose;" and/or, (ii) Constitutionally protected activity is excluded; and/or, (iii) Otherwise lawful picketing is excluded.

Policy Option 5: Should an element of "severe emotional distress" be added, with the term further being defined as: (i) "Significant harm to mental health;" and/or, (ii) "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.

Following the presentation of the Policy Options, Crime Commission members discussed and deliberated the various options. The Commission requested that staff prepare versions of draft legislation that encompassed their suggestions. One possibility was to utilize SB 1297 as introduced, and add a *prima facie* presumption; if the defendant contacted or followed the victim after having been given actual notice that no further contact was desired, there would be a *prima facie* presumption that the defendant intended to coerce, intimidate or harass the victim. Another possibility was a variation on this concept, but the presumption would only apply to coercion or intimidation, and if the basis for the offense was an allegation of harassment, the defendant must have been given actual notice that the victim desired no further contact in order for there to be a conviction. The third possibility was to not change the elements of stalking at all, but incorporate a *prima facie* presumption; if the defendant contacted or followed the victim after having been given actual notice that no further contact was desired, there would be a *prima facie* presumption that the defendant intended to place the victim in reasonable fear of death, criminal sexual assault, or bodily injury. The Commission requested that the possible draft legislation be presented at the next meeting.

At the October 2015 Crime Commission meeting, three draft versions of possible stalking legislation were presented to the members. The three versions were as follows:

> **Version 1:** Makes it a crime to, on more than one occasion, engage in any conduct with the intent to coerce, intimidate or harass another (SB 1297 as introduced). If the defendant attempts to contact or follow the victim, after having been given actual notice that the person did not want to be contacted or followed, his actions shall be *prima facie* evidence that he intended to coerce, intimidate or harass.
>
> **Version 2**: Makes it a crime to, on more than one occasion, engage in any conduct with the intent to coerce, or intimidate another. If the defendant attempts to contact or follow the victim, after having been given actual notice that the person did not want to be contacted or followed, his actions shall be *prima facie* evidence that he intended to coerce or intimidate. Also makes it a crime to, on more than one occasion, engage in any conduct with the intent to harass another. To be guilty, the defendant MUST have received actual notice that the victim did not wish to be contacted or followed.
>
> **Version 3:** The elements of stalking are not changed. However, if the defendant is given actual notice that the victim does not wish to be contacted or followed, and he does, it is *prima facie* evidence that he intended to place the person in reasonable fear of death, criminal sexual assault or bodily injury.

The members of the Crime Commission preferred Version 3 of the draft legislation. The Commission asked staff to include additional language in Version 3: (i) the *prima facie* evidence concept should include instances where the person reasonably should know that their behavior could place another person in reasonable fear of death, criminal sexual assault or bodily injury, and (ii) the *prima facie* evidence concept should apply to conduct toward the alleged victim or towards another member of the victim's family or household. The Commission voted unanimously to endorse Version 3 with the included language.

At the December 2015 Crime Commission meeting, staff presented a single policy option to members based on the discussion and endorsement of Version 3 of the draft legislation from the previous meeting. The option presented was as follows:

> **Policy Option 1:** Should a *prima facie* presumption be added to the stalking statute if a defendant receives actual notice that the victim does not want to be contacted or followed? Such continued conduct means either that the defendant intended to place the victim, or reasonably should have known that the victim would be placed in, reasonable fear of death, sexual assault or bodily injury.

The Commission voted unanimously to approve Policy Option 1. Based on this policy option, Senator Bryce E. Reeves introduced SB 339 and Delegate Robert B. Bell introduced HB 752 during the 2016 Regular Session of the General Assembly. House Bill 752 was also patroned by Delegates Jennifer McClellan, Jason S. Miyares and Margaret B. Ransone. The two bills were identical as introduced.

After being amended in the Senate, and then re-amended in the House, SB 339 was passed by the legislature as introduced, and was signed into law by the governor on March 29, 2016.[53] House Bill

752 was amended in the Senate; the House accepted those amendments, and the bill was enrolled. The governor proposed amending the enrolled bill to make it identical to the version that was originally introduced; this amendment was accepted by both the House and the Senate on April 20, 2016.[54] Ultimately, both bills were enacted into law as introduced.

[1] H.B. 1453, 2015 Gen. Assem., Reg. Sess. (Va. 2015).
[2] S.B. 1297, 2015 Gen. Assem., Reg. Sess. (Va. 2015).
[3] VA. CODE ANN. § 18.2-60.3(A) (2015). If the defendant's actions place the victim in fear that a family or household member will be subject to death, criminal sexual assault, or bodily injury, that also suffices for a conviction.
[4] VA. CODE ANN. § 18.2-60.3(A) (2015).
5 Subsections (B) and (C) create heightened penalties if the offense is a second or subsequent offense, and the defendant has also been convicted of certain crimes within the previous five years, or the offense is a third or subsequent offense committed within five years.
[6] VA. CODE ANN. § 18.2-427 (2015).
[7] VA. CODE ANN. § 18.2-386.2(A) (2015).
[8] VA. CODE ANN. § 18.2-152.7:1 (2015).
[9] VA. CODE ANN. § 18.2-186.4 (2015).
[10] *Supra* note 6.
[11] *Supra* note 8.
[12] *See* Perkins v. Commonwealth, 12 Va. App. 7 (1991); *see also* Barson v. Commonwealth, 284 Va. 67 (2012).
[13] Perkins v. Commonwealth, 12 Va. App. 7, 14 (1991).
[14] Barson v. Commonwealth, 284 Va. 67 (2012).
[15] *Supra* note 7.
[16] *Supra* note 9. Arguably, any activity that is done with the intent to coerce, intimidate, or harass, is done with a degree of maliciousness, but the statute does not specify that a *mens rea* of malice must be proven.
[17] VA. CODE ANN.. § 18.2-429(A) (2015).
[18] VA. CODE ANN. § 18.2-308.2:2(A) (2015).
[19] VA. CODE ANN. § 18.2-418 (2015). Note that this declaration of public policy is a separate statute from the one where the actual crime of picketing a dwelling is delineated.
[20] VA. CODE ANN. §§ 38.2-508(7)(a), 38.2-5002(B) (2015).
[21] VA. CODE ANN. §§ 18.2-67.9(B)(3), 22.1-276.01(A), 63.2-1521(C)(3), 63.2-1522(B)(1)(g), 63.2-1523(B)(1)(g) (2015).
[22] Without a clear definition, the appellate courts would be forced to define the term, and along with that, the parameters of the new crime. With so many possible definitions possible—the regular dictionary definition, adopting the definition used in case law from the area of torts, a more technical psychiatric definition, etc.—it is difficult to know in advance how severe the victim's emotional injuries would have to be in order for the crime to have been committed.
[23] For purposes of this analysis, the "lowest" level of stalking was used when evaluating the states. If a state had a misdemeanor crime of stalking that did not involve a threat of bodily injury, and a felony crime of stalking that did require such a threat, that state was not counted. If a state had separate crimes of harassment and stalking, only the stalking statute was analyzed. The states are Alaska, ALASKA STAT. § 11.41.270 (2015); Arizona, ARIZ. REV. STAT. § 13-2923 (Lexis Advance 2015); Arkansas, ARK. CODE ANN. § 5-71-229 (2015); California, CAL. PENAL CODE § 646.9 (Deering 20015); Connecticut, CONN. GEN. STAT. § 53-a-181e (2015); Georgia, GA. CODE ANN. § 16-5-90 (2015); Indiana, IND. CODE ANN. § 35-45-10-1 (Lexis Advance 2015); Iowa, IOWA CODE § 708.11 (2015); Kansas, KAN. STAT. ANN. § 21-5427 (2015); Kentucky, KY. REV. STAT. ANN. § 508.150 (Lexis Advance 2015); Mississippi, MISS. CODE ANN. § 97-3-107 (2015); Nebraska, NEB. REV. STAT. ANN. § 28-311.03 (Lexis Advance 2015); Nevada, NEV. REV. STAT. ANN. § 200.575 (Lexis Advance 2015) (while the Nevada stalking statute allows for someone to be guilty if the victim feels "harassed," the separate crime of "harassment" clearly involves creating a fear of assault in the victim; NEV. REV. STAT. ANN. § 200.571 (Lexis Advance 2015)); New Hampshire, N.H. REV. STAT. ANN. § 633:3-a (Lexis Advance 2015); North Carolina, N.C. GEN. STAT. § 14-277.3A (2015); Oregon, OR. REV. STAT. § 163.732 (2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); Vermont, VT. STAT. ANN. tit. 13 § 1061 (2015); and Washington, WASH. REV. CODE § 9A.46.110 (Lexis Advance 2015).

[24] The 24 states are Colorado, COLO. REV. STAT. § 18-3-602 (2015); Delaware, DEL. CODE ANN. tit. 11, § 1312 (2015); Florida, FLA. STAT. ANN. § 784.048 (Lexis Advance 2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015); Louisiana, LA. REV. STAT. ANN. § 14:40.2 (2015); Maine, ME. REV. STAT. tit. 17-A, § 210-A (2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Massachusetts, MASS. GEN. LAWS ch. 265, § 43 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); Montana, MONT. CODE ANN. § 45-5-220 (2015); New Jersey, N.J. STAT. REV. STAT. § 2C:12-10 (2015); New Mexico, N.M. STAT. ANN. § 30-3A-3 (Lexis Advance 2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); North Dakota, N.D. CENT. CODE § 12.1-17-07.1 (2015); Pennsylvania, 18 PA. CONS. STAT. § 2709.1 (2015); Rhode Island, R.I. GEN. LAWS § 11-59-2 (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015); Texas, TEX. PENAL CODE ANN. § 42.072 (Lexis Advance 2015); Utah, UTAH CODE ANN. § 76-5-106.5 (Lexis Advance 2015); West Virginia, W. VA. CODE ANN. § 61-2-9a (Lexis Advance 2015); Wisconsin,WIS. STAT. § 940.32(2) (2015); and, Wyoming, WYO. STAT. ANN. § 6-2-506 (2015).

[25] ALA. CODE § 13A-6-90.1 (Lexis Advance 2018).

[26] MICH. COMP. LAWS SERV. § 750.411h(d) (Lexis Advance 2015); Okla. Stat. Ann. tit. 21, § 1173(A) (2015); TENN. CODE ANN. § 39-17-315(a)(4) (2015).

[27] MICH. COMP. LAWS SERV. § 750.411h(b), (c) (Lexis Advance 2015); OKLA. STAT. ANN. tit. 21, § 1173(F)(1), (F)(3) (2015); TENN. CODE ANN. § 39-17-315(a)(2), (a)(3) (2015). There is some degree of subjectivity in categorizing the 50 states' stalking laws in this manner. For example, Wisconsin also allows a person to be convicted of stalking if they engage in a course of conduct that causes the victim to "suffer serious emotional distress." WIS. STAT. § 940.32(2) (2015). However, "serious emotional distress" is defined as "to feel terrified, intimidated, threatened, harassed, or tormented." WIS. STAT. § 940.32(1)(a)(10)(d) (2015). While this definition appears to indicate extreme behavior is needed in order to allow for a conviction, the word "harassed" is a less serious adjective than the others, suggesting that mere annoyance or irritation could suffice. There is a crime of harassment in Wisconsin, but the elements of this offense similarly indicate that simple annoying behavior might be sufficient for a conviction: "engages in a course of conduct or repeatedly commits acts which harass…and which serve no legitimate purpose." WIS. STAT. § 947.013 (2015). This is why Wisconsin was not grouped with the six states that appear to require more than "emotional distress" in order for a conviction.

[28] MINN. STAT. § 6.09-749 (1) (2015).

[29] OHIO REV. CODE ANN. § 2903.211(A)(1) (Lexis Advance 2015).

[30] OHIO REV. CODE ANN. § 2903.211(D)(2) (Lexis Advance 2015). 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." UTAH CODE ANN. §§ 76-5-106.5(2); 76-5-106.5(1)(d) (Lexis Advance 2015). Because Utah does not require incapacity, or that the mental stress be of a sort that would normally require psychiatric or psychological treatment, it was not included with the six states that require more than "emotional distress" for a conviction, in this informal classification.

[31] State v. Evans, 671 N.W.2d 720 (Iowa 2003).

[32] Frazier v. Commonwealth, 2007 Va. App. LEXIS 285 (July 31, 2007).

[33] TEX. PENAL CODE ANN. § 42.072 (Lexis Advance 2015).

[34] N.Y. PENAL LAW § 240.26 (Consol. 2015).

[35] S.C. CODE ANN. § 16-3-1700(A) (2015).

[36] Florida, FLA. STAT. ANN. §784.048 (Lexis Advance 2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); New Mexico, N.M. STAT. ANN. § 30-3A-3 (Lexis Advance 2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015).

[37] Delaware, DEL. CODE ANN. tit. 11, § 1312 (2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015); New Jersey, N.J. STAT. REV. STAT. § 2C:12-10 (2015); New York, N.Y. PENAL LAW § 120.45 (Consol. 2015); Wyoming, WYO. STAT. ANN. § 6-2-506 (2015).

[38] Florida, FLA. STAT. ANN. § 784.048 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Maryland, MD. CODE ANN., CRIM. LAW § 3-802 (Lexis Advance 2015); Missouri, MO. REV. STAT. § 565.225 (2015); North Dakota, N.D. CENT. CODE § 12.1-17-07.1 (2015); South Carolina, S.C. CODE ANN. § 16-3-1700(C) (2015); South Dakota, S.D. CODIFIED LAWS § 22-19A-1 (2015); West Virginia, W. VA. CODE ANN. § 61-2-9a (Lexis Advance 2015); Illinois, 720 ILL. COMP. STAT. 5/12-7.3 (Lexis Advance 2015).

[39] Colorado, COLO. REV. STAT. § 18-3-602 (2015); Hawaii, HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015); Idaho, IDAHO CODE ANN. § 18-7906 (2015); Minnesota, MINN. STAT. § 6.09-749 (1) (2015); North Dakota, N.D. CENT. CODE § 12.1-17-07 (2015).
[40] COLO. REV. STAT. § 18-3-602 (2015).
[41] HAW. REV. STAT. ANN. 711-1106.5 (Lexis Advance 2015).
[42] IDAHO CODE ANN. § 18-7906 (2015). This is the broadest of the "specific activities" states, although any form of stalking that did not involve contact would not be covered by the statute.
[43] MINN. STAT. § 6.09-749 (1) (2015).
[44] N.D. CENT. CODE § 12.1-17-07 (2015). Interestingly, North Dakota also has a separate crime of stalking, which while broadly defined ("an intentional course of conduct… which frightens,") specifically includes "the 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." N.D. CENT. CODE § 12.1-17-07.1 (2015).
[45] N.J. STAT. REV. STAT. § 2C:12-10 (2015).
[46] LA. REV. STAT. ANN. § 14:40.2 (2015).
[47] Id.
[48] N.H. REV. STAT. ANN. § 633:3-a (Lexis Advance 2015).
[49] ME. REV. STAT. tit. 17-A, § 210-A(2)(E) (2015).
[50] MD. CODE ANN., CRIM. LAW § 3-803 (Lexis Advance 2015);
[51] N.D. CENT. CODE § 12.1-17-07.1(1)(c)((2))(3) (2015).
[52] WASH. REV. CODE § 9A.46.110(4) (Lexis Advance 2015).
[53] 2016 Va. Acts ch. 545.
[54] 2016 Va. Acts ch. 745.