Approved: 4-5-96
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Chairperson Tim Emert at 11:00 a.m. on March 20, 1996 in Room 313-S of the Capitol.

All members were present except: Senator Rock (excused)
Senator Brady (excused)

Committee staff present: Michael Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Janice Brasher, Committee Secretary

Conferees appearing before the committee: Betty Mick, Assistant Attorney General

Others attending: See attached list

The Chair called the meeting to order at 11:00 a.m.

Subcommittee reports:

HB 2838--Involuntary manslaughter while driving under the influence of alcohol or drugs.

Senator Bond explained that **HB 2838** adds the new crime of involuntary manslaughter while driving under the influence. Senator Bond stated that this bill would move that crime up on the grid from a severity level 5 person felony to a severity level 4 person felony. Senator Bond explained several provisions of **HB 2838** concerning restrictions on firearm possession, and how this bill will affect criminal history. Senator Bond stated that the subcommittee amended **SB 522** into **HB 2838**. Senator Bond stated that **SB 522** elevated the penalty for intentional second degree murder from a severity 1 person felony to an off-grid felony, which would make the second life in prison without good-time, no parole eligibility until after ten years.

A motion was made by Senator Bond, seconded by Senator Reynolds to recommend **HB 2838** favorably as amended by the subcommittee. The motion carried.

HB 3033--Docket fees

Senator Bond reported that the subcommittee considered amending **SB 707** into **HB 3033** with the new language presented by Elwaine Pomeroy of the Kansas Credit Attorneys Association. Senator Bond stated that OJA expressed opposition to the new language and the subcommittee determined not to include **SB 707** in **HB 3033.**

The Chair stated that **SB 594** will not be heard in the House due to time constraints, therefore, the Chair of the House has requested a docket fee bill.

A motion was made by Senator Bond, seconded by Senator Vancrum to amend **SB 594** and **SB 497** into **HB 3033**. The motion carried.

HB 2586--Amending the criminal defamation and stalking statutes; authorizing federal law enforcement officers to carry concealed weapons and make arrests.

Senator Bond reported that last year Kansas stalking bill was struck down, *State v. Bryan.* (Attachment 1) Senator Bond related that last year the Senate changed the definition of stalking to attempt to match the language in the court's decision in Georgia. A conferee from the floor stated that last year the stalking definition was amended to a two means test, one was following and the other was course of conduct. The court found that the course of conduct case had objective standards. Whereas, in the crime of stalking by following, there are no objective standards. The 1995 version, changed those two terms and changed the course of conduct to harassment.

Senator Bond reported that the subcommittee amended the bill to include a provision for federal law enforcement immunity. Senator Bond reported that the head of the FBI requested this provision because federal officers do not have immunity that is provided to local law enforcement officers. Immunity provisions provided for state officers would include federal law enforcement personnel.

Senator Bond stated that the second amendment adds enforcement powers only in Johnson County as requested by the Johnson County sheriff and all of the police departments in Johnson County that would permit multiple jurisdictions. This would give them full enforcement power in all jurisdictions.

Senator Bond reported that the third amendment would include prosecutors and county and district attorneys in the protective category with judges in term of defamation as provided in K.S.A. 21-3816.

A motion was made by Senator Bond, seconded by Senator Vancrum to amend **HB 2586** per subcommittee report. The motion carried.

A motion was made by Senator Reynolds to amend **HB 2586** to include elected officials. There was no second to this motion.

A motion was made by Senator Bond, seconded by Senator Parkinson to recommend **HB 2586** favorably as amended. The motion carried.

Report from Senator Parkinson's subcommittee

HB 3034--Amendments to the dispute resolution act.

Senator Vancrum referred to a definition of standards beyond mediation. Senator Vancrum related that there are definition and language changes in this bill. Senator Vancrum stated that additional processes are currently being used in mediation. The Senator related that the subcommittee agreed that a nineteen member council would be more appropriate than an eleven member council. Senator Vancrum reported that this bill allows the director to collect fees for registration. Senator Vancrum noted that this bill was modeled after the Nebraska statute.

The Committee discussed issues concerning increasing the council to nineteen. A conferee from the floor stated in answer to Committee members' questions that qualification for mediators includes stringent requirements to be sure they have adequate training in order to provide for consumer protection.

A motion was made by Senator Vancrum, seconded by Senator Reynolds to recommend **HB 3033** favorably. The motion carried.

Senator Harris discussed the subcommittee report on **HB 2012** and **SB 702** and referred to a balloon. (Attachment 2) This bill would allow the Attorney General to contract for services of collection debt owed to the court or restitution ordered under an order of restitution. Senator Harris related that the Attorney General testified during the subcommittee hearing on **HB 2012** and requested the inclusion of **SB 702**.

Committee members discussed the percentage of collection fee being charged the defendant.

Senator Harris stated that the percentage was 33%, and the subcommittee made it 40%, because these are debts that were not collectible. Senator Harris stated that it was the subcommittee's belief that anything under 40% would not make those debts collectible, as this type of debt requires significant effort on the part of the collectors.

A Committee member expressed opposition to the 40% collection fee. The Committee discussed using a bidding process in contracting of collection services.

Senator Harris referred to line 34, page 1 and stated that there are procedures set in place to depoliticize this process, and a procurement committee will be established to oversee potential abuse.

Betty Mick, Assistant Attorney General, stated that the fee is over and above the restitution order charged the defendant for failure to pay. Ms Mick stated that the entire 40% will not necessarily go to the collectors contracted by the Attorney General's office. Part of the fee, due to the amendment in line 25, 26 on the first page, will go the administrative cost of hiring an accountant to keep track of the money collected. The conferee stated that there is somewhere between 25 and 30 million dollars in Shawnee and Sedgwick counties alone that is outstanding. The conferee stated that 40% is a cap and that part of this legislation is to allow the Attorney General to set rules and regulations in the administration of this program. The conferee stated that there might a number of collection services in some regions and very few or none in other regions of Kansas. Ms Mick stated that it is important to have the capability of attracting people to work for the collection of these funds. The conferee stated that the procurement committee will decide who will collect.

Betty Mick stated that Judge Bullock of Shawnee County inquired as to whether the courts were authorized to go about collection of these funds themselves. Ms Mick continued by stating that unfortunately, the courts are not authorized to go about a collection contract themselves. The Attorney General will be the contractor on their behalf in the collection of outstanding debts owed to courts, court cost, fees, and penalties

Ms Mick stated that the procurement procedure was put in place because of the different areas in Kansas, and that a bidding process is possible.

Senator Feleciano stated that competitive bidding needs to be considered by the Committee.

Chair stated that Senator Feleciano's idea will be discussed with Senator Harris and staff. The Chair announced that the scheduled meeting at adjournment is cancelled.

The Chair adjourned the meeting at 12:00 noon.

The next meeting is scheduled for March 21, 1996.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-20-96

NAME	REPRESENTING
Wesley M Fedel	ACLU
Brian Vanier	SRS
Roger A. VanEtten	SRS-ERU
Tracy Graybill	KSC
Flore Ho	Dept of Adm.
Gene Johnson	Ks KSAP assn
Jill Jarvis	KDHE
Julene Maples	AG office
Jamie Corkhill	SRS-CSE
Dave Heberton	AG Office
Jim Clark	KCDAA
Teresa Nuckles	State Farm
Helen Stephens	KPOA/KSA
Dodie J Lacey	KCSL
Beth Gilbert	AG Office
Nancy Lindberg Bjm	AG Office
Kathy Beck	OJA
Mike Wilson	Ks. Court Services

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SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 3-20-96

NAME	REPRESENTING
Ed Wright	Farmers Ins Group
Paul Shelby	OJA
Janelle Heiniger	Hiawatha
Robert Carlton	
Kelley Kultala	KTLA
Katherine M. Miller	Hiawatha, KS
Julie Shannon	Hiawatha
Joseph Lockfeller	Topeka
GREG DEBACKER	F.A.T.H.E.R.S.
Heather Gray	Sen Kerr's Office
Kelly Kochi	Hiawatha
Amanda Wernberg	Hiawatha
Mary Douglass	KTLA

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ment is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on a *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.' "

K.S.A.1994 Supp. 21–3438 provides:

"(a) Stalking is an intentional and malicious following or course of conduct directed at a specific person when such following or course of conduct seriously alarms, annoys or harasses the person, and which serves no legitimate purpose.

. . . .

"(d) For the purposes of this section, 'course of conduct' means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose and which would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person. Constitutionally protected activity is not included within the meaning of 'course of conduct.' "

The defendant argues that the use of the terms "alarms," "annoys," and "harasses" in subsection (a) of the statute are subject to a wide range of different meanings dependent upon a potential victim's individual sensibilities. According to the defendant, the language used does not convey a sufficiently definite warning of the conduct proscribed, and persons of common intelligence must necessarily guess at its meaning and differ as to its application. The State, however contends that the terms used are not unconstitutionally vague.

The State argues that this court has held that the term "alarm" is not unconstitutionally vague, citing *State v. Huffman*, 228 Kan. 186, 193, 612 P.2d 630 (1980). *Huffman* involved a challenge to the constitutionality of K.S.A. 21–4101, which defined disorderly conduct using the words "alarm, anger or disturb." The court, consistent with its responsibility to uphold the constitutionality of state statutes whenever possible, narrowly construed the statute to apply only to fighting words. In addressing the vagueness attack, the court concluded that the "[n]arrow construction of 21–4101, to apply to fighting words, removes any possible vagueness residing in the *mens rea* portion of the statute." 228 Kan. at 193, 612 P.2d 630. Thus, the State's reliance upon this case for the proposition that "alarms" is sufficiently definite in and of itself to withstand a vagueness attack is misplaced.

The State, relying upon authority contained in an A.L.R. annotation, *Vagueness as Invalidating Statutes or Ordinances Dealing with Disorderly Persons or Conduct*, 12 A.L.R.3d 1448, 1452, argues that courts have consistently rejected the contention that words such as "annoy," "molest," "obstruct," and "interfere with" are unconstitutionally vague. While this may have been true of cases decided prior to 1967 when the cited A.L.R. article was written, many subsequent cases have found these terms to be unconstitutionally vague.

Four years after the A.L.R. annotation cited above was published, the United States Supreme Court decided *Coates v. City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). The Court examined a Cincinnati municipal ordinance prohibiting disorderly conduct to determine whether it was unconstitutionally vague. 402 U.S. 611, 91 S.Ct. 1686. The ordinance made it unlawful for three or more persons to assemble on public property and conduct themselves in a manner "annoying" to passersby. 402 U.S. 611 n. 1, 91 S.Ct. 1686 n. 1. In finding that the statute was impermissibly vague, the Court stated:

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' [Citation omitted]." 402 U.S. at 614, 91 S.Ct. at 1688.

Other courts have followed the holding in *Coates* in determining that statutes prohibiting annoying conduct are impermissibly

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Attach. 1

vague. In *Poole v. State*, 524 P.2d 286, 287–89 (Alaska 1974), the court examined a disorderly conduct statute prohibiting conduct which annoys or alarms another. *Poole* concluded that the term "annoys" was vague and that the term "alarms" was no more definite. In *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir.1983), the Fifth Circuit Court of Appeals, interpreting a Texas harassment statute prohibiting telephone conversations which annoy or alarm recipients, found that both "alarm" and "annoy" were inherently vague. *Kramer* concluded that the statute was vague because the crime depended upon the sensitivity of the complainant. *Kramer* was followed by *May v. State*, 765 S.W.2d 438 (Tex.Crim. 1989), in which the Texas Court of Criminal Appeals found a newer version of the same statute unconstitutionally vague notwithstanding the fact that it had been amended to require that the person charged must have intentionally alarmed or annoyed the recipient of the call. 765 S.W.2d at 440. The *May* court determined that the same infirmity still existed in the new statute because the crime depended upon the sensitivity of the complainant. 765 S.W.2d at 440.

In *People v. Norman*, 703 P.2d 1261, 1266 (Colo.1985), the Colorado Supreme Court determined that the Colorado harassment statute proscribing a course of conduct or repeated acts which alarm or seriously annoy a person was unconstitutionally vague. The court noted that under such a statute, an actor, clown, or writer could be subject to prosecution if his or her actions were considered annoying by another person. 703 P.2d at 1267. Likewise, in *Langford v. City of Omaha*, 755 F.Supp. 1460 (D.Neb.1989), the court concluded that the word "annoys" used in the statute was unconstitutionally vague because there was no standard for determining whose sensitivity would measure annoying conduct.

The main concern expressed in the above case with using words such as "alarms" or "annoys" is that the words are subject to a wide variety of interpretations, and unless an objective standard is incorporated into the governing statute, the words are entirely dependent upon the subjective feelings of the victim.

A recent law review article discussing stalking legislation provides some guidance as to when language such as "alarms," "annoys," and "harasses" becomes unconstitutionally vague. Boychuck, *Are Stalking Laws Unconstitutionally Vague or Overbroad?*, 88 Nw. U.L.Rev. 769 (1994). Boychuck discusses some of the problems associated with using the words "annoys" and "alarms" as well as the term "harasses" in stalking laws. 88 Nw. U.L.Rev. at 784–88. According to Boychuck, those stalking laws most capable of withstanding challenges of vagueness and overbreadth, based on the above terms, have three main components: (1) They require a credible threat along with the harassing conduct; (2) exempt constitutionally protected activity; and (3) *define the terms in relation to an objective standard.* (Emphasis added). 88 Nw. U.L.Rev. at 788–89.

[10] K.S.A.1994 Supp. 21–3438 prohibits an intentional and malicious following *or* course of conduct when such following *or* course of conduct seriously alarms, annoys, or harasses the person. The statute defines "course of conduct" in relation to an objective standard: "[C]ourse of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, *and which would cause a reasonable person to suffer substantial emotional distress* and must actually cause substantial emotional distress to the person. (Emphasis added.) K.S.A.1994 Supp. 21–3438(d).

However, K.S.A.1994 Supp. 21–3438 contains no guidelines to determine when a following becomes alarming, annoying, or harassing. There is no definition of the terms alarming, annoying, or harassing in relation to an objective standard when a charge of stalking is based upon "following." Thus, that portion of the statute proscribing the intentional and malicious following when such following seriously alarms, annoys, or harasses the person without defining those terms in relation to an objective standard raises the same question and calls for the same conclusion as expressed in *Coates v. City of Cincinnati:*

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"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' [Citation omitted]." 402 U.S. at 614, 91 S.Ct. at 1688.

The 1992 version of the Kansas stalking law incorporated an objective standard. As originally enacted, the statute prohibited the "willful, malicious and repeated following *and harassment* of another person." L.1992, ch. 298, § 95. (Emphasis added.) The term "harassment" was defined as a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, or harasses the person, and *which would cause a reasonable person to suffer substantial emotional distress* and actually causes that type of distress in the victim. See L.1992, ch. 298, § 95. Although the terms "alarms," "annoys," and "harasses" were used, they were defined by an objective standard in that the conduct must be such as would cause a reasonable person to suffer emotional distress and actually cause such distress.

However, the 1994 legislature amended the stalking law by replacing the term "harassment" with the phrase "course of conduct" and, more importantly, by splitting "following" and "course of conduct" with the conjunctive "or." The phrase "course of conduct" was then defined in relation to an objective standard, but the word "following" was neither defined nor was there an objective standard incorporated when considering whether the following seriously alarmed, annoyed, or harassed the victim. L.1994, ch. 348, § 13. The 1994 statute, primarily because of its use of the conjunction "or," provided that a person could be guilty of stalking if that person followed another in a manner that seriously alarmed, annoyed, or harassed the other person. The crime depends upon the sensitivity of the complainant.

While the district court did not specifically discuss the defendant's claim that the term "following" as used in the 1994 version of the Kansas stalking law was unconstitutionally vague, we do not find that term to be unconstitutionally vague. In spite of the fact that "following" encompasses a wide variety of meanings, courts examining the term within the context of stalking statutes have found it not vague. In *State v. Culmo*, 43 Conn.Supp. 46, 63, 642 A.2d 90 (1993), the Connecticut Superior Court declared that "[l]anguage has its limits" and determined that such vagueness as it exists in the term "follow" is not sufficient to render its meaning incomprehensible. 43 Conn.Supp. at 63, 642 A.2d 90. The Supreme Court of Illinois in *People v. Bailey*, 167 Ill.2d 210, 212 Ill.Dec. 608, 657 N.E.2d 953 (1995), recently held that the term "follow" as used in its stalking statute conveys a sufficiently definite warning to pass constitutional muster. The *Bailey* court stated:

"To commit the offense of stalking, the statute requires that in furtherance of a threat the defendant follow the victim or place the victim under surveillance on at least two separate occasions. The terms 'follows' is not defined in the statute. Bailey contends that 'follows' is susceptible to a variety of meanings and, therefore, the term is vague. In the absence of a statutory definition, courts will assume that statutory words have their ordinary and popularly understood meanings. [Citation omitted.]

"Webster's defines 'follow' to mean 'to go, proceed, or come after' and 'to go after in pursuit or in an effort to overtake.' (Webster's Third New International Dictionary 883 [1986].) Because the following must be in furtherance of a threat, the term 'following' must have an element of pursuit to it. Thus, it does not encompass aimless, unintentional, or accidental conduct. The term 'following' does imply a proximity in space as well as time. Whether a person has maintained sufficient visual or physical proximity to fall within the purview of the stalking statute will depend on a variety of factors in each case. These are appropriate issues for the trier of fact. [Citation omitted.] As this court has consistently held, impossible lev-

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els of specificity are not required. The only requirement is that the statute convey sufficiently definite warnings that can be understood when measured by common understanding and practices. [Citations omitted.]" 167 Ill.2d at 229, 212 Ill.Dec. 608, 657 N.E.2d 953.

[11] We agree with the Connecticut and Illinois courts' analysis. The word "following" as used in K.S.A.1994 Supp. 21–3438 is not sufficiently vague so as to render its meaning incomprehensible and, thus, its use does not make the statute unconstitutionally vague. Instead, the vagueness problem in K.S.A.1994 Supp. 21–3438 lies with its use of the terms "alarms", "annoys" and "harasses" without any sort of a definition or an objective standard to measure the prohibited conduct.

Other states have enacted stalking statutes which do not suffer with the same vagueness problems found in K.S.A.1994 Supp. 21–3438. A comparison of those statutes to the 1994 version of the Kansas stalking statute serves to highlight the vagueness problems in the Kansas statute.

The first stalking law in the United States was enacted January 1, 1991, by the California Legislature. Because it was the first, the California law served as a model for the 1992 Kansas law as well as for several other states across the country. See Miller, *"Stalk Talk": A First Look At Anti–Stalking Legislation*, 50 Wash. & Lee L.Rev. 1303, 1305 n. 18 (1993). Since the passage by California, an additional 48 states have passed stalking laws. See Miller, 50 Wash & Lee L.Rev. 1303.

California's stalking statute has been the model for many other states. It provides that any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking. Cal.Code § 646.9(a) (West 1996 Supp.). It then describes the term "harasses" in terms similar to those used in the Kansas statute to define "course of conduct." Cal.Code § 646.9(e) (West 1996 Supp.). Unlike California, Kansas in its 1994 statute fails to define the terms of "alarms, annoys, or harasses" in relation to an objective standard. Other states using substantially similar legislation include Alabama, Delaware, Idaho, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and, prior to the changes in 1994, Kansas. See Ala.Code § 13A–6–90 to –94 (1994); Del.Code Ann. tit. 11, § 1312A (1995); Idaho Code § 18–7905 (Supp.1995); Ky.Rev.Stat.Ann. § 508.130 to 150 (Michie/Bobbs–Merrill 1994 Supp.); La. Rev.Stat. § 14:40.2 (West 1995 Supp.); Miss. Code Ann. § 97–3–107 (1994); Neb.Rev.Stat. § 28–311.02 to .03 (1994 Supp.); N.J.Stat. Ann. § 2C:12–10 (West 1995); Okla.Stat. tit. 21, § 1173 (1996 Supp.); R.I.Gen.Laws § 11–59–1 to –3 (1994); S.D.Codified Laws Ann. § 22–19A–1 to –6 (1995 Supp.); Tenn.Code Ann. § 39–17–315 (1995 Supp.); Utah Code Ann. § 76–5–106.5 (1995). Many states that follow the California model do not include the requirement that the stalker make a credible threat, as this makes the statute more difficult to enforce. See Boychuck, 88 Nw.U.L.Rev. at 779.

Connecticut's statute provides that a person is guilty of stalking when, with the intent to cause another person to fear for his or her physical safety, he or she willfully follows or lies in wait and does cause the other person to reasonably fear for his or her physical safety. Conn.Gen.Stat. § 53a–181d(a). As can be seen, the Connecticut statute, although not requiring a credible threat, does require that the person intend to cause fear and reasonably cause that fear. This is in direct contrast to K.S.A.1994 Supp. 21–3438, which requires only the intent to follow and uses a subjective test to determine when conduct alarms, annoys, or harasses.

Georgia's statute requires that the person follow or contact the victim for the purpose of harassing or intimidating the victim. Harassing and intimidating are defined by the statute to mean a willful course of conduct 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. Ga. Code Ann. § 16–5–90 (1995 Supp.). Once again, differences between this law and

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K.S.A.1994 Supp. 21–3438 are obvious. Georgia's law defines conduct in terms of a reasonable person, unlike the 1994 law in Kansas.

Michigan's stalking law defines stalking as a willful course of conduct involving repeated or continued harassment that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and which actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. Mich. Comp.Laws § 750.411h(1)(d) (1996 Supp.). The difference between this statute and the more vague Kansas statute is obvious.

Many of the above-mentioned stalking laws have withstood challenges for vagueness. See *People v. Heilman*, 25 Cal.App.4th 391, 30 Cal.Rptr.2d 422 (1994); *State v. Culmo*, 43 Conn.Supp. 46, 642 A.2d 90; *Johnson v. State*, 264 Ga. 590, 449 S.E.2d 94 (1994); *People v. White*, 212 Mich.App. 298, 536 N.W.2d 876 (1995); *State v. Saunders*, 886 P.2d 496 (Okla.Crim.App.1994). However, the above statutes are fundamentally different from K.S.A.1994 Supp. 21–3438 in that they set an objective standard for determining when conduct is harassing, rather than the vague, subjective standard found in the Kansas statute. These statutes eliminate the problems associated with the use of subjective terms such as "alarms" and "annoys" that the United States Supreme Court found so problematic in *Coates*.

Under the Kansas statute, the accused may follow another, and the act of following itself may be willful and wrongful without just cause or excuse. Whether a crime is committed depends upon whether the following "seriously alarms, annoys or harasses" the other person. One must therefore ask: Will this person whom I intend to follow be seriously alarmed, annoyed, or harassed by my act? If so, then a crime will be committed. If, however, the "following" will not seriously alarm, annoy, or harass the other person, no crime will be committed.

The facts of this particular case are not contained in the record. From the comments of the attorneys at oral argument, it appears that the charge in this case arose from the defendant's following of another student at the University of Kansas. Apparently, the following occurred after a relationship between the two had failed. Assume, for the sake of argument, that the defendant, after the relationship had terminated, had been told by the victim in this case to stay away and to leave her alone in the future. The next day, the defendant sees the victim on campus and wishing to talk to her one last time about their relationship, follows her to one of her classes. This act of following is certainly intentional and may be malicious as she has specifically advised him to stay away. Assume further that the victim discovers him following her and calls the campus police before entering her next class. Whether the crime of stalking has been committed under the 1994 statute will depend upon whether the State can prove beyond a reasonable doubt that the victim was seriously annoyed, alarmed, or harassed by the defendant's willful and malicious following. If the finder of fact is convinced that the victim was seriously annoyed, alarmed, or harassed, the defendant is guilty.

The danger in this situation is obvious. In the absence of an objective standard, the terms "annoys," "alarms" and "harasses" subject the defendant to the particular sensibilities of the individual victim. Different persons have different sensibilities, and conduct which annoys or alarms one person may not annoy or alarm another. The victim may be of such a state of mind that conduct which would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass this victim. In such a case, the defendant would be guilty of stalking, a felony offense, under the 1994 statute, even though a reasonable person in the same situation would not be alarmed, annoyed, or harassed by the defendant's conduct.

[12] Contrast this statutory language with language requiring that the following must be such that it would cause "a reasonable person to suffer substantial emotional distress" or place such person in reasonable fear for such person's safety. At the very least, under this language the finder of fact would not be left with the subjective state of mind of the victim as the determining factor but instead would have an objective reason-

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able person standard by which to determine whether the defendant committed the crime. Similarly, just as the finder of fact would be provided with an objective standard, so too would anyone subject to this law be provided with an objective standard to determine what conduct would constitute the crime of stalking. In the stalking statute's 1994 form, persons of common intelligence must necessarily guess at its meaning and differ as to its application. See *State v. Dunn*, 233 Kan. 411, 418, 662 P.2d 1286 (1983). K.S.A.1994 Supp. 21-3438 is unconstitutionally vague on its face.

As a final argument, the State argues that stalking under K.S.A.1994 Supp. 21-3438 is a specific intent crime and, therefore, should be upheld in the face of a vagueness challenge. In support, the State cites *State v. Rose*, 234 Kan. 1044, 1046, 677 P.2d 1011 (1984), wherein this court stated "[a] statute is ... more readily upheld against a charge of vagueness if the offense is one which requires a specific intent." The State argues that because K.S.A.1994 Supp. 21-3438 requires an intentional following, it is a specific intent crime.

The State's argument is not well taken. Although K.S.A.1994 Supp. 21-3438 does require an intentional following, it does not require that the person specifically intend to alarm, annoy, or harass the victim. As such, the mere intent to follow does little to ameliorate the statute's vagueness.

Affirmed.

In the Matter of Richard Alan KROGH, Respondent.

No. 74,818.

Supreme Court of Kansas.

Jan. 26, 1996.

In an original proceeding in discipline, the Supreme Court held that published censure was appropriate punishment for attorney who failed to advise client of right to review fees in settlement statement, failed to properly and promptly reimburse personal injury protection (PIP) carrier following settlement of personal injury action, and who failed to maintain proper trust account.

Published censure ordered.

Attorney and Client ⇨58

Published censure was appropriate punishment for attorney who failed to keep proper trust account, failed to promptly and properly reimburse PIP carrier following settlement of personal injury action, and whose settlement statement in connection with personal injury claim did not properly advise client of right to have fee reviewed where attorney had personal problems involving his health, his wife's health and problems with his teenage son, he accepted full responsibility, and had taken appropriate remedial action and began utilizing properly established trust account. Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rules 1.3, 1.5(d), 1.15, 5.3, 8.4.

Original proceeding in discipline. Published censure.

Marty M. Snyder, Deputy Disciplinary Administrator, argued the cause, and Mark F. Anderson, Disciplinary Administrator, and Stanton A. Hazlett, Deputy Disciplinary Administrator, were with her on the formal complaint for the petitioner.

Louis F. Eisenbarth, of Sloan, Listrom, Eisenbarth, Sloan & Glassman, L.L.C., of Topeka, argued the cause for the respondent.

PER CURIAM:

This is an original proceeding in discipline filed by the Disciplinary Administrator's office against Richard Alan Krogh, of Lawrence, an attorney admitted to the practice of law in Kansas.

A formal complaint was filed against respondent on August 25, 1995. Count I alleged violations of MRPC 1.3 (1995

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